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TILA: The Textualist-Intentionalist Litmus Act?

Caroline Hatton*

*Statutory interpretation is the Cinderella of legal scholarship. Once scorned and neglected, confined to the kitchen, it now dances in the ballroom.*¹

I. Introduction

The Truth in Lending Act (TILA)² is a broad, consumer-protective statute that requires lenders to disclose their terms to consumers and governs the manner and timing of this disclosure in a range of commercial transactions. TILA's rescission provision³ allows consumers to annul contracts made without the disclosure TILA requires, and its codification as Regulation Z⁴ prescribes the manner in which rescission may be accomplished.

Courts have found Regulation Z's prescription to be as clear as doctor's-pad scribble and have employed different interpretive methodologies to decipher exactly what steps consumers must take to rescind. The Ninth and Tenth Circuits determined via intentionalist analysis that consumers must file a complaint with the court to effectuate rescission.⁵ The Third and Fourth Circuits, on the other hand, concluded from textualist readings of the statute that borrowers can rescind by notifying lenders.⁶ As district courts around the country enter decisions on the matter, the rift created by adherence to these two interpretive schools is growing ever deeper.

The Supreme Court will undoubtedly determine the procedural requirement for rescission under TILA. The Court will likely address the true nature of the Circuit split surrounding the rescission requirement. Is the provision headed for a textualist-intentionalist showdown?

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¹ WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 1 (1994).

² 15 U.S.C. §§ 1601–1667f (2013).

³ 15 U.S.C. § 1635 (2013).

⁴ 12 C.F.R. Part 1026 (formerly Part 226).

⁵ *McOmie-Gray v. Bank of Am. Homes*, 667 F.3d 1325 (9th Cir. 2012); *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1184 (10th Cir. 2012).

⁶ *See generally* *Gilbert v. Residential Funding LLC*, 678 F.3d 271 (4th Cir. 2012); *Sherzer v. Homestar Mortg. Servs.*, ___ F.3d ___ (3d Cir. 2013).

Not necessarily, because this central conflict masks two less conspicuous but potentially dispositive questions: first, should lower courts be bound by conjectural Court dicta; second, should the Court defer to the agency that now holds regulatory authority over TILA, although that agency did not exist when TILA was codified? To see how what appears to be a textualist-intentionalist clash holds dramatic consequences both for the scope of precedent and for administrative law, it is necessary to trace the history of TILA and recent TILA litigation.

Congress enacted TILA in 1968 to combat deceptive practices by predatory lenders that left consumers unaware of the nature of the credit obligations they undertook and unable to conduct meaningful comparison of offers.⁷ “Joseph Barr, then Under Secretary of the Treasury, noted in testifying before a Senate subcommittee that such blind economic activity is inconsistent with the efficient functioning of a free economic system such as ours”⁸

TILA, an intended remedy for these commercial ills, is accordingly broad in scope. As Senator Paul Douglas announced in proposing TILA, “this bill does not provide for judgment solely on the basis of the . . . annual interest rate or the total finance charges. It also provides that there shall be a statement of the cash price or delivery price of the property or service to be acquired.”⁹ By requiring lenders to disclose both total price and finance charges, “the judgment of the consumer can be on the basis of both of these factors, not merely on one alone.”¹⁰

TILA’s introductory provision adopts these broad goals of enhanced economic stabilization and strengthened “competition among the various financial institutions . . . engaged in the extension of consumer credit.”¹¹ TILA aims “to assure a meaningful disclosure of credit

⁷ See *Mourning v. Family Publ’ns Serv.*, 411 U.S. 356, 363–364 (1973).

⁸ *Id.* at 363–64.

⁹ *Id.* at 367–68 (quoting *Hearings on S. 1740 before the Subcomm. on Production and Stabilization of the S. Comm. on Banking and Currency*, 87th Cong., 1st Sess., 447–48 (1961) (statement of Sen. Douglas)).

¹⁰ *Id.* at 368 (quoting *Hearings on S. 1740* (statement of Sen. Douglas)).

¹¹ 15 U.S.C. § 1601 (2013).

terms so that the consumer will be able to compare more readily the various credit terms available to him.”¹² This “awareness of the cost” of credit will lead to “the informed use of credit” by consumers, which, in turn, will strengthen the American economy.¹³

Congress framed TILA in general terms to leave room for the Federal Reserve Board (the “Board”) to adapt TILA enforcement to creditor schemes. “Congress was clearly aware that merchants could evade the reporting requirements of the Act by concealing credit charges. In delegating rulemaking authority to the Board, Congress emphasized the Board’s authority to prevent such evasion.”¹⁴ The Board exercised its sweeping power “by promulgating Regulation Z, 12 [C.F.R.] Part 226 (1979), which at least partly fills the statutory gaps.”¹⁵

Although Regulation Z addresses many modes of consumer manipulation, “[e]ven Regulation Z . . . cannot speak explicitly to every credit disclosure issue.”¹⁶ The Court issued an interpretive directive for when neither TILA itself, nor Regulation Z, speaks directly to a new strain of consumer deception: “consider the implicit character of the statutory scheme.”¹⁷ In construing TILA-derived causes of action, in other words, courts must be guided by TILA’s consumer-protective purpose.

In furtherance of its consumer-protective purpose, TILA gives borrowers the right to rescind loan agreements that do not comply with TILA. The relevant section provides that “[a]n obligor’s right of rescission shall expire three years after the date of consummation of the

¹² *Id.*

¹³ *Id.*

¹⁴ *Mourning*, 411 U.S. at 371. In fact, the Court observed, “[t]o hold that Congress did not intend the Board to take action against this type of manipulation would require us to believe that, despite this emphasis, Congress intended the obligations established by the Act to be open to evasion by subterfuges of which it was fully aware.” *Id.* The Court then firmly rejected this possibility: “[T]he language of the enabling provision precludes us from accepting so narrow an interpretation of the Board’s power.” *Id.*

¹⁵ *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 560 (1980).

¹⁶ *Id.*

¹⁷ *Id.*

transaction or upon the sale of the property, whichever occurs first.”¹⁸ Regulation Z, in turn, sets forth specific manners in which borrowers may notify lenders of their intent to rescind:

(2) To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram, or other means of written communication. Notice is considered given when mailed, or when filed for telegraphic transmission, or, if sent by other means, when delivered to the creditor’s designated place of business. (3) . . . If the required notice and material disclosures are not delivered, the right to rescind shall expire 3 years after the occurrence giving rise to the right of rescission, or upon transfer of all of the consumer’s interest in the property, or upon sale of the property, whichever occurs first.¹⁹

As detailed as this provision appears, courts are now grappling with its scope with some frequency. In order to trigger rescission within the three year limit, what must a consumer do?

Neither TILA nor Regulation Z answers this question directly. Indeed, a key sentence in 12 C.F.R. § 15(a)(2)—“To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram, or other means of written communication.”—is subject to two irreconcilable interpretations: either notice is a sufficient condition (as soon as the consumer notifies that creditor, the right to rescind has been exercised), or it is merely a necessary one (the right to rescind cannot be exercised without providing notice to the creditor).

Courts have tied the necessary-or-sufficient-condition determination to a choice of interpretive methodologies, with the intentionalists reading the notice as necessary and the textualists reading it to be sufficient. Curiously, those courts that stress Congressional intent are the same courts that limit consumer rescission to preserve clarity of title,²⁰ a stance seemingly at odds with TILA’s self-proclaimed pro-consumer purpose.²¹ The textualists, on the other hand,

¹⁸ 15 U.S.C. § 1635(f) (2013).

¹⁹ 12 C.F.R. § 226.15(a)(2)–(3) (2013).

²⁰ This can be seen in recent decisions from the Ninth and Tenth Circuits. *See infra* Part III.

²¹ *See supra*, text accompanying notes 8 and 9.

who strive to apply Congress’s words without heed to what Congress might have meant to say, read the regulation as requiring only notice.²²

The Consumer Financial Protection Bureau (CFPB) has filed multiple amicus briefs urging a strict textualist interpretation of this statute and regulation, such as the approach adopted by the conservative Fourth Circuit.²³ Created in 2010²⁴ and operational as of 2011,²⁵ the CFPB was not even a gleam in the eye of the executive branch when the Board promulgated Regulation Z back in 1969.²⁶ Now, however, the CFPB has taken over the reins of TILA. As the Supreme Court has recognized, “[t]he Consumer Financial Protection Bureau is ‘the primary source for interpretation and application of truth-in-lending law.’”²⁷ Consequently, the CFPB’s interpretation of TILA regulations warrants judicial deference, and its strong policy arguments support the notice-as-sufficient reading of TILA’s rescission provision.

²² See *infra* Part III. It is tempting to look for a reflection of politics in this split, but it has become increasingly difficult to associate interpretive methodologies with political leanings. See *infra* notes 18, 23. For an excellent discussion of the correlation between political affiliation and panel voting, see CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY, 17–40 (2006).

²³ See Robert Bostrom, *CFPB Files Amicus Brief in TILA Case, Says More to Come* (Apr. 16, 2012, 2:10 PM), <http://mondaq-business.vlex.com/vid/cfpb-files-amicus-in-tila-case-more-365470614>. Could this be another sign that the Fourth Circuit has begun to shift to the left? For a concise discussion of the Fourth Circuit’s conservative past and recent ideological movement, see David Stout, *4th Circuit Turns Left, Leaving ‘Most Conservative’ Label Behind* (Nov. 23, 2011, 11:47 AM), <http://www.mainjustice.com/2011/11/23/4th-circuit-turns-left-leaving-most-conservative-label-behind/>.

²⁴ See The Consumer Financial Protection Bureau, <http://www.consumerfinance.gov/the-bureau/> (last visited Oct. 24, 2012) (“The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) established the consumer bureau. In January of 2012, President Obama appointed Rich Cordray to be the first Director of the CFPB.”).

²⁵ See Wally Adeyemo, *September 2010: Transfer Date Announced*, CFPB BLOG (Feb. 18, 2011), <http://www.consumerfinance.gov/blog/2011/02/> (“Less than two months after President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act into law, Treasury Secretary Tim Geithner announced that the one-year anniversary of the law—July 21, 2011—will serve as the ‘designated transfer date’ . . . when consumer financial protection functions of seven federal agencies will transfer to the CFPB.”).

²⁶ See *Gambardella v. G. Fox & Co.*, 716 F.2d 104, 112 (2d Cir. 1983) (“The FRB promulgated Regulation Z in 1969.”).

²⁷ *Id.* at 7–8, (quoting *Household Credit Servs. v. Pfennig*, 541 U.S. 232, 238 (2004)).

Although it is somewhat surprising that the CFPB, the product of a liberal administration, advocates a textualist construction of section 1635(f),²⁸ it comes as no surprise that TILA rescission has become a textualist-intentionalist battleground: TILA has hosted such wars in the past. In *Koons Buick*, a divided Court explored both the meaning and the proper manner of interpreting TILA's Damages-Ceiling Provision.²⁹ In *Beach*, a unanimous Court held that TILA's rescission provision fully extinguishes the right to rescind unlike a statute of limitations, which would extinguish only the right to file a cause of action.³⁰ Though the Court employed a textual analysis in reaching this decision, its conclusion stressed importance of legislative intent.

Courts involved in the current circuit split have been deciding not only whether notice suffices to trigger TILA rescission, but also the relevance of the Court's decision in *Beach*.³¹ Because *Beach* is not exactly on point, it would govern only to the extent that the interpretive mechanism it employs should be extended to other TILA provisions. The question thus becomes whether methodological precedent can be set, and, if so, what it exactly it would impose upon lower courts. The applicability of *Beach* is polarizing, with the intentionalists declaring *Beach* to control and the textualists rejecting *Beach* as unrelated.

This comment will argue that, in determining how TILA rescission is accomplished, the Court should also find that *Beach* does not control and should instead defer to the CFPB's interpretation. Although the circuits present these issues in textualist and intentionalist terms, the Court need not—and should not—name either interpretive methodology victorious. Both

²⁸ The CFPB's textualism corresponds with the rise of "New Textualism." For a discussion of the important trend among liberals to perform textualist analysis, see, e.g., Paul Horwitz, *Rosen on the "New Textualism"*, PRAWFSBLAWG (June 13, 2012, 12:32 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2012/06/rosen-on-the-new-textualism.html>.

²⁹ *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50 (2004); see *infra* Part II.A.

³⁰ *Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998); see *infra* Part II.B.

³¹ See *infra* Part II.

schools are fundamentally positivistic. By allowing them to coexist, the Court has created an epistemological friction that transcends the rigidity either method would impose on its own.

Part II of this comment explores the textualist-intentionalist clash in the Court's *Koons Buick* decision. The many opinions written in this case offer a glimpse of what a decision regarding the rescission mechanism might, and should, look like. Part II next explores *Beach*—and its limits. *Beach* incarnates the other great interpretive clash in TILA's history.

Part III moves forward to the current circuit split, which continues to expand as new decisions are handed down. Subpart A focuses on the Ninth and Tenth Circuits' intentionalist view of rescission. Subpart B explores the Third and Fourth Circuits' textualist readings of Regulation Z.

Part IV.A argues that the Court should declare *Beach* inapposite; Part IV.B, that the Court should defer to the CFPB's interpretation of Regulation Z. Part V, the conclusion, revisits the background and stakes of the current circuit split. Despite the textualist-intentionalist lines along which the Circuits examine TILA rescission, the Court should resolve the issue without favoring either interpretive school.

II. Past TILA battles

A. A Subparagraph by Any Other Name: The Damages-Ceiling Dispute

Until 1995, the provision³² that sets guidelines for TILA damages awards, read:

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of— . . . (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total monthly payments under the lease, except that the liability

³² 15 U.S.C. § 1640(a) (2012).

under this subparagraph shall not be less than \$100 nor greater than \$1000³³

Courts widely held that the \$100–\$1000 limit applied both to subpart (i) and to subpart (ii), which were viewed as parts of the same “subparagraph.”³⁴ Thus, the range of \$100–\$1000 was applied to all damage awards set forth in § 1640(a)(2).

The statute remained unaltered from 1976 to 1995, when obfuscation struck: in its Act of September 30, 1995, Congress amended subsection (a)(2) by “substitut[ing] ‘(ii)’ for ‘or (ii)’ and inserting]” a third subpart.³⁵ As a result, 15 USC § 1640(a)(2)(A)(i)–(iii) now reads:

. . . any person is liable to such person in an amount equal to the sum of – . . . (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than \$200 or greater than \$2000³⁶

Could “under this subparagraph” continue to apply to both parts (i) and (ii) when it manifestly could not apply to (iii), or did the 1995 iteration of the statute effectively detach the first part from the second, such that the ceiling could now apply only to part (ii)? Did Congress, without any change to the signifier employed, alter that which it signified?

The Seventh Circuit was the first to take aim at the moving target created by Congress’s 1995 amendment. After affirming that the statute was clear and unambiguous until the 1995

³³ 15 U.S.C. § 1640 (1980).

³⁴ See *Koons Buick*, 543 U.S. at 55–56 (2004) (“Following the insertion of the consumer lease provision, courts consistently held that the \$100/\$1,000 limitation remained applicable to all consumer financing transactions, whether lease or loan.”) (citing *Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996); *Cowen v. Bank United of Tex., FSB*, 70 F.3d 937, 941 (7th Cir. 1995); *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983); *Dryden v. Lou Budke's Arrow Fin. Co.*, 661 F.2d 1186, 1191 n. 7 (8th Cir. 1981) (per curiam); *Williams v. Pub. Fin. Corp.*, 598 F.2d 349, 358, 359 n.17 (5th Cir. 1979)).

³⁵ 15 U.S.C. § 1640 (2013).

³⁶ *Id.*

addition,³⁷ the *Strange* court announced that the addendum “was *designed* simply to establish a more generous minimum and maximum for certain secured transactions [i.e. those secured by real estate], without changing the rule on minimum and maximum damage awards for the other two parts of § 1640(a)(2)(A).”³⁸

With its connotations of draftsmanship seasoned with hints of intent,³⁹ “designed” is a succinct masterstroke of evasion. Indeed, the court matched the statutory ambiguity of which it complains with an exegetical ambiguity no less notable. The structural aspect of “designed”—design as draftsmanship—evokes textualism; the purpose-driven, plotting aspect implicates intentionalism. Without offering any further insight into its reasoning, the *Strange* court simply concluded that “the ‘subparagraph’ mentioned in § 1640(a)(2)(A)(ii) continues to encompass what is now codified as subparts (A)(i) and (A)(ii), not just subpart (A)(ii).”⁴⁰

The Fourth Circuit took a more direct and explicit approach in *Nigh*.⁴¹ Judge Gregory’s dissent lauds “the Seventh Circuit’s well-reasoned analysis,”⁴² and even the *Nigh* majority remarked that “[i]t could well be . . . that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995.”⁴³ The majority, however, emphatically refused to meander down what-if street, asserting that “the critical point of law—and it is critical—is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent.”⁴⁴ Noting staunchly that “[i]t is the statute, not any inferential intent, that constitutes the law,” the majority held that “Congress

³⁷ *Strange v. Monogram Credit Card Bank of Ga.*, 129 F.3d 943 (7th Cir. 1997).

³⁸ *Id.* (emphasis added).

³⁹ See THE NEW OXFORD AMERICAN DICTIONARY 459 (2d ed. 2005) (offering as a second definition: “do or plan (something) with a specific purpose or intention in mind”).

⁴⁰ *Strange*, 129 F.3d at 947.

⁴¹ *Nigh v. Koons Buick Pontiac GMC*, 319 F.3d 119 (4th Cir. 2003).

⁴² *Id.* at 132 (Gregory, J., dissenting).

⁴³ *Id.* at 128 (majority opinion).

⁴⁴ *Id.*

did alter the statutory cap regardless of its intent” and observed that Congress was free to amend the statute if it “enacted into law something different from what it intended.”⁴⁵ The majority anchored its textualist approach to the separation of powers, affirming that “[i]n this way, and in this way only, are the constitutional roles of the legislature and the courts respected.”⁴⁶

The Fourth Circuit majority found that, “by striking the ‘or’ preceding (ii), and inserting (iii) after the ‘under this subparagraph’ phrase,” Congress “rendered [the application of the limit set forth in (ii) to the entirety of § 1640(a)(2)(A)] defunct.”⁴⁷ Thus, “Congress’s amendment requires that the reference point of the ‘under this subparagraph’ clause be the subparagraph of § 1640 (a)(2)(A)(ii), and not the subparagraph of § 1640 (a)(2)(A)(i).”⁴⁸ The *Nigh* majority read the word “subparagraph” as having a reduced scope of reference rather than a new meaning.⁴⁹

A divided Supreme Court weighed in to resolve the split that the Fourth Circuit created with respect to the Ninth and Tenth Circuits in its *Koons Buick* decision.⁵⁰ The several concurrences and lone dissenting opinion question this approach. The Court’s fractured response gives some insight into how the current rescission-provision split may fare when it goes up. *Koons Buick* provides a full spectrum of approaches ranging from extreme intentionalism to radical textualism. In between, the Justices offer possible models of coexistence for the two interpretive methodologies.

The Court ultimately held that the Seventh Circuit had the right of it and, in so doing, adopted a moderately intentionalist approach. Justice Ginsburg notes in her plurality opinion that Congress’s “[l]ess-than-meticulous drafting of the 1995 amendment [(to 15 U.S.C. §

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Nigh*, 319 F.3d at 126.

⁴⁸ *Id.* at 127.

⁴⁹ One may wonder at this point whether “subparagraph” should ever have been understood to encompass § (A)(i) as well as (A)(ii). An abundance of circuit decisions applied the ceiling to both provisions. *See supra* note 34. The lack of legislative backlash in response to these decisions might suggest legislative ratification of this interpretation.

⁵⁰ *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50 (2004).

1640(a)(2)(A))] created an ambiguity,”⁵¹ but that the ambiguity was solely textual in nature. “The purpose of the 1995 amendment,” the Justice stresses, “is not in doubt: Congress meant to raise the minimum and maximum recoveries for closed-end loans secured by real property.”⁵² Guided by this purpose and finding “scant indication that Congress simultaneously sought to remove the \$1,000 cap on loans secured by personal property,”⁵³ the Court declined to interpret the textual ambiguity as requiring removal,⁵⁴ concluding instead that ““this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle’s ‘dog that didn’t bark,’ that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.””⁵⁵

Although the majority attributes great significance to Congressional intent, or the absence thereof, it frames its intentionalist inquiry as a “step two” that can only follow a preliminary finding of textual ambiguity.⁵⁶ Thus, though Justice Ginsburg applies a strong form of intentionalism—the determination of what was meant as a function of what was *not* said—the Justice simultaneously subordinates intentionalist analysis to an initial textual inquiry.⁵⁷ Justice Ginsburg’s textualist-intentionalist compromise garnered the signatures of a plurality of the

⁵¹ *Id.* at 53.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *See id.* at 63–64 (“[T]he text does not dictate this result [(i.e. removing the limit)]; the statutory history suggests otherwise; and there is scant indication Congress meant to change the well-established meaning of clause (i).”).

⁵⁵ *Id.* at 61 (quoting *Church of Scientology of Cal. v. I.R.S.*, 484 U.S. 9, 17–18 (1987)).

⁵⁶ Justice Ginsburg makes the secondary nature of the Court’s inquiry into congressional intent clear, observing that “[t]he statutory history resolves any ambiguity whether the \$100/\$1,000 brackets apply to recoveries under clause (i).” *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 62 (2004). Justice Ginsburg’s textualist inquiry is notable in another respect as well: it marks the first time a Justice invoked the legislative drafting manuals used by Congress as interpretive authority. For an excellent discussion of this jurisprudential landmark, see B. J. Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Construction*, 120 YALE L.J. 185, 186–89 (2012).

⁵⁷ In finding significance in Justice Ginsburg’s granting of primacy to the textualist inquiry, I disagree with Jonathan T. Molot, who finds that when “two interpreters use the same interpretive tools to reach the same interpretive result, [it doesn’t] really matter that one (the textualist) purports to use context to decide on a textual meaning while the other (the purposivist) admits that he is adjusting the text’s meaning to reconcile it with the context.” Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 4 (2006).

Justices, and may indicate how the current circuit split will fall.⁵⁸ The many other opinions proffered in *Koons Buick*, of course, offer possible alternatives.

Justice Stevens, joined by Justice Breyer, concurred to assert a stronger form of intentionalism.⁵⁹ Rather than “only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities,” Justice Stevens admonishes, “[i]t would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’[s] true intent when interpreting its work product,”⁶⁰ because “[c]ommon sense is often more reliable than rote repetition of canons of statutory construction.”⁶¹ Decrying “wooden reliance on those canons,”⁶² the Justice asserts that “an unambiguous text describing a plausible policy decision” is *not* “a sufficient basis for determining the meaning of a statute.”⁶³ Noting that the Court “cannot escape [the] unambiguous statutory command by proclaiming that it would produce an absurd result,” Justice Stevens notes that it “can, however, escape by using common sense.”⁶⁴ To apply common sense to the present matter involves contemplating the provision’s history, which reveals that “a busy Congress is fully capable of enacting a scrivener’s error into law.”⁶⁵ This willingness to find statutory error based on conclusions regarding Congressional intent rather than agrammaticality or implausibility is intentionalism at its most extreme.⁶⁶

⁵⁸ Not all Justices agree that the text is truly ambiguous. Some suggest, rather, that the Court imputed ambiguity to the text in order to justify extratextual analysis. See discussion of Justice Thomas’s concurring opinion and Justice Scalia’s dissent on pages 15–16.

⁵⁹ Justice Stevens has been described as “the Court’s leading intentionalist.” Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 325 (1998) (citing Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 357 (1994)); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1135 (1992).

⁶⁰ *Koons Buick*, 543 U.S. at 66 (Stevens, J., concurring).

⁶¹ *Id.* at 66–67 (Stevens, J., concurring).

⁶² *Id.* at 67 (Stevens, J., concurring).

⁶³ *Id.* at 65 (Stevens, J., concurring).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ One scholar describes Justice Stevens as “the leader of the intentionalist camp,” holding the pole opposite the one held by Justice Scalia in the “textualist-intentionalist divide.” See TODD GARVEY, CONG. RESEARCH SERV., R41260, THE JURISPRUDENCE OF JUSTICE JOHN PAUL STEVENS: THE *CHEVRON* DOCTRINE 9–11 (2012).

Justice Kennedy’s concurrence, joined by the Chief Justice, advocates a more guarded form of intentionalism. It approves the consultation of “extratextual sources”⁶⁷ in the present matter because “the text is not altogether clear. That means that examination of other interpretive resources, including predecessor statutes, is necessary for a full and complete understanding of the congressional intent.”⁶⁸ Justice Kennedy describes intent as a tie-breaker to determine which of two equally plausible readings of the word “subparagraph” should govern.⁶⁹ Textualism is the default rule in statutory interpretation; intentionalism, a failsafe to be applied on an as-needed basis, where need is determined not by notions of common sense but by the words of the statute. Whereas Justice Ginsburg’s intentionalism gets the final word and thus eclipses her textual analysis,⁷⁰ Justice Kennedy establishes a strict text–intent hierarchy.⁷¹

Justice Thomas concurred to voice agreement with the results—though not with the analytical method—of the majority. Justice Thomas advocates a textualist approach,⁷² noting that “[i]f the text in this case were clear, resort to anything else would be unwarranted.”⁷³

⁶⁷ *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 67 (2004). (Kennedy, J., concurring).

⁶⁸ *Id.* at 66–67 (Kennedy, J., concurring).

⁶⁹ *See id.* at 67 (Kennedy, J., concurring) (arguing that looking outward when faced with an ambiguous text is “fully consistent with cases in which, because the statutory provision had only one plausible textual reading, we did not rely on such sources”).

⁷⁰ In this shift, Justice Ginsburg’s *Koons Buick* opinion is consonant with what one scholar has noted to be generally true of the Justice’s “labor and anti-discrimination opinions—although they begin with textual analysis[, they] rely heavily on legislative history and purpose as well as on agency deference.” James J. Brudney, *The Supreme Court as Interstitial Actor: Justice Ginsburg’s Eclectic Approach to Statutory Interpretation*, 70 OHIO ST. L.J. 889, 892 (2009).

⁷¹ *See* R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 25 Pepp. L. Rev. 37, 39 (discussing supporters of Justice Scalia’s textualism and quoting Justice Kennedy’s comment that “it does not foster a democratic exegesis for this Court to rummage through unauthoritative materials to consult the spirit of the legislation in order to discover an alternative interpretation of the statute with which the Court is more comfortable” (Pub. Citizen v. U.S. Dep’t of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring))).

⁷² In discussing Justice Thomas’s jurisprudence, one scholar has written that, “[s]ince his appointment to the Supreme Court in 1991, Justice Thomas’ judicial fidelity to textualism has served, like a lighthouse on the shore, as a powerful beacon to the Rehnquist Court, constantly returning it safely to the original intent of the Framers.” Nancie G. Marzulla, *The Textualism of Clarence Thomas: Anchoring the Supreme Court’s Property Rights Jurisprudence to the Constitution*, 10 AM. U. J. GENDER SOC. POL’Y & L. 351, 351–52 (2002).

⁷³ *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 67 (2004) (Thomas, J., concurring).

Because, however, the statute “is not a model of the best practices in legislative drafting,”⁷⁴ the Justice finds it necessary to look beyond the letter of the text. Although Justice Thomas does look outward, the “anything else” that the Justice consults is limited to the fact that parts (i) and (ii) had been read in a particular way until 1995 and that the 1995 amendment added a part (iii) without altering the extant parts.⁷⁵ Absent any affirmative change, suggests Justice Thomas, no interpretive change should take place.⁷⁶

Alone in his dissent, Justice Scalia adopts an extreme textualist approach,⁷⁷ asserting that Congress *did* effect an affirmative change in the text when it amended the statute: by adding a part (iii) to which part (ii) could not possibly apply, Justice Scalia argues, Congress made it textually impossible for part (ii) to continue to be interpreted to govern part (i). Observing that “[t]he ultimate question here is not the meaning of ‘subparagraph,’ but the scope of the exception which contains that term,”⁷⁸ Justice Scalia determines that a corollary of adding part (iii) to § 1640 (a)(2)(A) was to free part (i) of the \$100–\$1000 window that had been applied to it. Where the majority found an accident—an unfortunate side effect that resulted, intention-free, from the one deliberate change Congress made—Justice Scalia finds potential legislative economy, a transformation made by absence of change. Justice Scalia faults the majority for employing the

⁷⁴ *Id.* at 68 (Thomas, J., concurring).

⁷⁵ *See id.* at 67 (Thomas, J., concurring). This approach is consistent with Justice Thomas’s usual interpretive practices. *See* Judge H. Brent McKnight, *The Emerging Contours of Justice Thomas’s Textualism*, 12 REGENT U. L. REV. 365, 366 (1999-2000) (quotation marks omitted) (“Assisted by canons and dictionaries, Justice Thomas asks whether the statutory text admits of plain interpretation, and if so, then judicial inquiry is complete; or if there is irreducible ambiguity, and if so looks guardedly beyond.”).

⁷⁶ *Koons Buick*, 543 U.S. at 69 (Thomas, J., concurring) (“The only substantive change that amendment wrought was the creation of clause (iii) By so structuring the amendment, Congress evinced its intent to address only the creation of a different limit for a specific set of transactions.”).

⁷⁷ One scholar suggests “deferential textualism” as best suited to describe Justice Scalia’s brand of textualist inquiry in order to distinguish the Justice’s distinct goal of deferring to the legislature from traditional “strict textualism.” *See* Aprill, *supra* note 59, at 279–80. For the purposes of highlighting the spectrum of approaches advocated in *Koons Buick*, I use “extreme” to mark Justice Scalia’s dissent as the antipode of Justice Kennedy’s concurrence.

⁷⁸ *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 70 (2004) (Scalia, J., dissenting).

“Canon of Canine Silence”⁷⁹ to treat a change wrought by inaction as a non-change and argues that the statute should be construed as it now reads, rather than as it once read. The results of uncapping part (i) would not be catastrophic because the high-amount loans likely to yield large damages are treated in parts (ii) and (iii), which do have fixed limits.⁸⁰

Justice Scalia argues, further, that the Court should respect its limits: “It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think is the preferred result.”⁸¹ While Justice Kennedy describes such absolute adherence to the letter of the law “wooden,” Justice Scalia argues it to be a means of avoiding the “ventriloquism” to which the Court falls prey when “[t]he Congressional Record or committee reports are used to make words appear to come from Congress’s mouth which were spoken or written by others.”⁸²

Both pure textualism and pure intentionalism yield an unhealthy automatism.⁸³ The majority’s compromise gives hope that the Court’s determination of the current notice-of-rescission debate will be equally circumspect with respect to interpretive methodology.

⁷⁹ *Id.* at 73 (Scalia, J., dissenting).

⁸⁰ *See id.* at 75–76 (Scalia, J., dissenting).

⁸¹ *Id.* at 76 (Scalia, J., dissenting) (quoting *Lamie v. U.S. Trustee*, 540 U.S. 536, 542 (2004)).

⁸² *Id.* at 74 (Scalia, J., dissenting).

⁸³ The potential for automatism inherent in the monist inquiry of both the textualist and intentionalist schools is concisely encapsulated in Michel Rosenfeld’s discussion of Ronald Dworkin’s legal philosophy:

[S]ince Dworkin is neither a strict textualist (i.e., he does not believe that the meaning of a legal text derives exclusively from the “plain meaning” of the words and phrases contained in it) nor an intentionalist (i.e., he does not believe that the meaning of a text can be established by ascertaining its author’s intention), it follows that he must be able to rely on a hermeneutic approach subject to intersubjective verification or approval.

MICHEL ROSENFELD, *LAW, JUSTICE, DEMOCRACY AND THE CLASH OF CULTURES: A PLURALIST ACCOUNT* 188 (2011). For a discussion of how such pluralism may be achieved through collaboration and compromise among Justices, see CHRISTOPHER E. SMITH, *JUSTICE ANTONIN SCALIA AND THE SUPREME COURT’S CONSERVATIVE MOMENT* 55–61(1993). For a fascinating parallel between jurisprudential method and musical interpretation, see *Groh’s Liszt: How “Originalist” is Originalism, Anyway?*, CHAMBER MUSIC TODAY (Oct. 20, 2007, 1:55 PM), <http://chambermusictoday.blogspot.com/2007/10/grohs-liszt-how-originalist-is.html> (describing textualism and intentionalism as subsets of conservative originalism in both music and the law, and juxtaposing both interpretive schools with the pragmatist theory of the living score/Constitution).

B. TILA's Rescission Provision: A Statute of Limitation or Repose?

The Court's ruling on another provision may make such circumspection difficult. Whereas the damages-ceiling debate⁸⁴ may anticipate the drama to unfold when the Court decides the mechanics of TILA rescission, some circuits argue that Court's decision in *Beach*,⁸⁵ which addresses TILA's rescission provision itself, bears directly upon the current circuit split.⁸⁶

In *Beach* the Court reviewed a decision by Florida's Supreme Court that conflicted with decisions other courts had reached in interpreting the three-year limit set by § 1635(f).⁸⁷ Florida held that a borrower could rescind by affirmative defense in a suit filed after the three years had elapsed.⁸⁸ The Court considered—but rejected—the possibility that § 1635 is a classic “statute of limitation governing only the institution of suit and accordingly has no effect when a borrower claims a § 1635 right of rescission as a ‘defense in recoupment’ to a collection action.”⁸⁹

The Court agreed that “as a general matter a defendant's right to plead ‘recoupment’ . . . survives the expiration of the period provided by a statute of limitation”⁹⁰ “So long as the plaintiff's action is timely,” the Court noted, “a defendant may raise a claim in recoupment even if he could no longer bring it independently, absent ‘the clearest congressional language’ to the contrary.”⁹¹ Nevertheless, the Court found that “[t]he issue here is not whether limitation statutes affect recoupment rights, but whether § 1635(f) is a statute of limitation.”⁹²

The Court thus examined “‘whether [the three-year limit] operates, with the lapse of time, to extinguish the right which is the foundation for the claim,’ or ‘merely to bar the remedy for its

⁸⁴ See *supra* Part II.A.

⁸⁵ *Beach v. Ocwen Fed. Bank*, 532 U.S. 410, 411–19 (1998).

⁸⁶ See *infra* Part III.

⁸⁷ See *supra* Part I.B. for text of statute.

⁸⁸ *Beach*, 532 U.S. at 414.

⁸⁹ *Id.* at 415.

⁹⁰ *Id.* (internal quotation and citations omitted).

⁹¹ *Id.* (quotation and citations omitted).

⁹² *Id.* at 416.

enforcement.”⁹³ The latter interpretation would be consistent with a statute of limitations and would permit borrowers to assert rescission as an affirmative defense; the former interpretation, in keeping with a statute of repose, would eliminate the possibility of rescinding, for any reason, beyond the three-year window.⁹⁴ The Court held that TILA’s rescission provision extinguishes the borrower’s right to rescind and makes no allowance for reviving the right once expired.⁹⁵

The *Beach* Court’s method of analysis is striking: the Court employs both textualism and intentionalism in a unanimous opinion. The Court begins by noting that, unlike “a typical statute of limitation[, which provides] that a cause of action may or must be brought within a certain period of time,”⁹⁶ § 1635(f) “says nothing in terms of bringing an action.”⁹⁷ “[In]stead,” the Court observes, “[§ 1635(f)] provides that the ‘right of rescission [under the Act] shall expire’ at the end of the time period.”⁹⁸ The Court stresses that the rescission provision establishes for how long the right to rescind lasts rather than the deadline for filing suit, and this in eminently direct terms.⁹⁹ Indeed, the Court finds the provision so clear that “[t]here is no reason . . . to resort to the canons of construction that we use to resolve doubtful cases.”¹⁰⁰

At this point, the Court’s logic begins to shift. Until now, the decision clung to the statute’s actual words. After finding § 1635’s words clear, however, the Court looks elsewhere in TILA and finds that Congress *did* insert words to mark other TILA provisions as statutes of

⁹³ *Id.* (quoting *Midstate Horticultural Co. v. Pa. R.R. Co.*, 320 U.S. 356, 358–359 (1943)).

⁹⁴ The Court’s determination that § 1635(f) is not a statute of limitations has been equated by some circuits with a finding that TILA is a statute of repose. See BLACK’S LAW DICTIONARY 1546 (9th ed. 2009) (quoting 54 C.J.S. *Limitations of Actions* § 4, at 20–21 (1987) (“Unlike an ordinary statute of limitations . . . the period contained in a statute of repose begins when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted.”)); see *infra*, Parts III.A. and IV.A., discussing the circuit decisions.

⁹⁵ See *Beach v. Ocwen Fed. Bank*, 532 U.S. 410, 414–15 (1998).

⁹⁶ *Id.* at 416.

⁹⁷ *Id.* at 417.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

limitation.¹⁰¹ Thus, the Court reasons, Congress chose not to include similar limitations language in § 1635(f).¹⁰² Applying what Justice Scalia has branded the “Canon of Canine Silence,”¹⁰³ the *Beach* Court remarks: “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”¹⁰⁴

The Court then moves further from the text of § 1635, suggesting that, “[s]ince a statutory right of rescission *could* cloud a bank’s title on foreclosure, Congress *may well have* chosen to circumscribe that risk, while permitting recoupment damages regardless of the date a collection action may be brought.”¹⁰⁵ The Court thus posits a guess—suitably adorned in the conditional mood—at what Congressional aim might underlie § 1635(f)’s structure and function.

In closing, the Court declares that it has chosen to “respect Congress’s *manifest intent* by concluding that the Act permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run. Accordingly, we affirm the judgment of the Supreme Court of Florida.”¹⁰⁶ This emphatic conclusion is slippery, because Congressional intent is linked in the opinion both to the absence of limitations language and to the choice to circumscribe the risk of clouding title.¹⁰⁷ The first of these reflects analytical inquiry; the second, clearly speculative dicta.¹⁰⁸

¹⁰¹ See *Beach v. Ocwen Fed. Bank*, 532 U.S. 410, 416 (1998) (noting that “[t]he terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time,” and providing examples of such language).

¹⁰² See *id.* at 417–18.

¹⁰³ See *supra* Part II.A. Interpreting absence, though common to moderate textualist inquiries, marks a deviation from the pure textualism with which the Court begins. See, e.g., ANTONIN SCALIA AND BRIAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* xi–xvii (2012) (listing the fifty-seven canons of interpretation, which do not include the analysis of unused words).

¹⁰⁴ *Beach v. Ocwen Fed. Bank*, 532 U.S. 410, 418 (1998) (quotation marks omitted) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

¹⁰⁵ *Id.* at 418–19 (emphasis added) (citations omitted).

¹⁰⁶ *Id.* at 418.

¹⁰⁷ The Court’s *Beach* conclusion thus risks participating in a phenomenon that Judge Pierre N. Laval laments, namely the fact that “more and more, dicta flex muscle to which . . . they are not entitled by constitutional right.”

As we turn to the rescission-mechanism split, we will see courts clash over the weight due the *Beach* dicta. In theory, *Beach* is off-topic: whether § 1635(f) extinguishes a right or a cause of action is not germane to whether notice must be sent or a suit must be filed. The *Beach* conclusion, however, is broad enough to suggest that timely notice coupled with late filing would subvert Congress’s “manifest intent” to render the three-year period a sacrosanct outer limit. Is the Court’s hypothesis regarding Congressional intent binding precedent upon lower courts?

III. The Current Circuit Split: How Does One Rescind under TILA?

When the Court interprets the rescission provision,¹⁰⁹ it will necessarily either apply or decline to apply *Beach*. If the Court finds *Beach* inapplicable, we may expect a fiery array of interpretations similar to those we analyzed in *Koons Buick*.¹¹⁰ If the Court holds that *Beach* applies, however, the conclusion that it is Congress’s “manifest intent” to terminate the right to rescind after three years would force a finding that a complaint is necessary to trigger rescission. To anticipate which way the Court may hold—and to assess whether the answer is bound to a choice between textualism and intentionalism—we turn to the relevant Circuit decisions.

Pierre N. Laval, James Madison Lecture, *Judging under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006). Laval explains the danger posed by overstated dicta:

We judges regularly undertake to promulgate law through utterance of dictum made to look like a holding-in disguise, so to speak. When we do so, we seek to exercise a lawmaking power that we do not rightfully possess. Also, we accept dictum uttered in a previous opinion as if it were binding law, which governs our subsequent adjudication. When we do so, we fail to discharge our responsibility to deliberate on and decide the question which needs to be decided.

Id.

¹⁰⁸ See *id.* at 1258-59 (noting that though it can be difficult to distinguish dicta from holdings, this distinction is vital in a system of *stare decisis*).

¹⁰⁹ See *supra* Part I.B. for the text of the relevant statutory provision, 15 U.S.C. § 1635(f).

¹¹⁰ See *supra* Part II.A.

A. Intentionalist Decisions

In *McOmie* the Ninth Circuit declared itself bound to treat § 1635(f) as a statute of repose.¹¹¹ “Were we writing on a blank slate,” the court declared, “we might consider whether notification within three years of the transaction could extend the time limit imposed by § 1635(f).”¹¹² The Circuit promptly added a big “but,” stating that, “under the case law of this court¹¹³ and the Supreme Court,¹¹⁴ rescission suits must be brought within three years from the consummation of the loan, regardless whether notice of rescission is delivered within that three-year period.”¹¹⁵ Wistfully, the *McOmie* court bows before what it deems to be precedent and blames *stare decisis* for its holding that a formal filing is necessary to trigger TILA rescission.

The Ninth Circuit’s reading of the *Beach* holding, however, is overly expansive: *Beach* did not state the rule that the *McOmie* court attributes to it. The circuit court extrapolates the *Beach* “rule” from the Court’s conclusion that “[t]he plain meaning of the Act . . . ‘permits no federal right to rescind, defensively or otherwise, after the 3-year period of 1635(f) has run.’”¹¹⁶ The Ninth Circuit’s focus on “or otherwise”—which it over-reads—causes it to lose sight of the question before it, namely whether notice constitutes an exercise of the right to rescind. By treating *Beach* as precedent, the Ninth Circuit adopts the Court’s divination of Congressional intention as binding. Because the Court’s position is not exactly on point, however, taking its divination as an unassailable starting point is a second degree of abstraction. This second level

¹¹¹ *McOmie-Gray v. Bank of Am. Homes*, 667 F.3d 1325, 1328 (9th Cir. 2012).

¹¹² *Id.*

¹¹³ The case law to which the court refers was set forth in *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1163 (9th Cir. 2002). See *infra* note 117.

¹¹⁴ This is a reference to the *Beach* decision, discussed *supra* Part II.B.

¹¹⁵ *McOmie*, 667 F.3d at 1328.

¹¹⁶ *Id.* (alteration in the original) (quoting *Beach v. Ocwen Fed. Bank*, 532 U.S. 410, 419 (1998)).

of removal, in turn, leads the Ninth Circuit to use intent to change the meaning of clear language, not just to construe unclear language.¹¹⁷

In *Rosenfield*,¹¹⁸ the Tenth Circuit agreed with the Ninth Circuit’s holding that consumers must file a complaint in order to trigger TILA’s rescission provision¹¹⁹ and that *Beach* controls.¹²⁰ The *Rosenfield* court begins by noting that “an examination of the structure of the right conferred in this case—that is, rescission—supports [its] conclusion.”¹²¹ The court stresses that the equitable remedy of rescission “is not . . . appropriate . . . in circumstances where its application would lead to prohibitively difficult (or impossible) enforcement.”¹²² The muddying of title that would flow from accepting notice as sufficient to trigger rescission rises to the level of prohibitive difficulty.¹²³ Accordingly, the *Rosenfield* court states, “we ascertain no basis for concluding that the TILA rescission remedy differs in any material respect from the general form of rescission available in . . . analogous contexts.”¹²⁴ The *Rosenfield* court acknowledges the CFPB’s contrary position but dismisses the CFPB’s evidence as “mostly concerning matters of state law.”¹²⁵ The Tenth Circuit affirms that, as a statute of repose, 15 U.S.C. § 1635(f)

¹¹⁷ The Circuit performs a similarly flag-raising abstraction with respect to its earlier decision in *Miguel*. In that case, the Ninth Circuit held that the borrowers had failed to exercise their right to rescind in a timely manner when they notified and filed suit against the wrong party during the three-year period and attempted to initiate action against the proper party only after the three years had passed. *See McOmie*, 667 F.3d at 1329 (discussing *Miguel*, 309 F.3d at 1162–63).

¹¹⁸ *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172 (10th Cir. 2012).

¹¹⁹ *See id.* at 1187.

¹²⁰ *See id.* at 1188.

¹²¹ *Id.* at 1183.

¹²² *Id.* at 1184.

¹²³ *See id.* at 1185 (chronicling a number of difficulties and burdens that would flow from allowing rescission-by-notice).

¹²⁴ *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1184 (10th Cir. 2012).

¹²⁵ *Id.* at 1186 n.10. *See infra* Parts III.B. and IV.B. for a discussion of the CFPB’s amicus brief.

“operates to *completely* extinguish the right being claimed *after it lapses.*”¹²⁶ The *Rosenfield* court, in other words, treats *Beach* as controlling.¹²⁷

B. Textualist Decisions

In *Gilbert v. Residential Funding LLC*,¹²⁸ the Fourth Circuit arrives at the opposite result. The *Gilbert* first considers “the plain meaning of the statute,” because ““courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.””¹²⁹ The Fourth Circuit finds the grail of “plain meaning” within the actual words of § 1635(f) and therefore declines to supplant or even gloss those words: “Simply stated, neither 15 U.S.C. § 1635(f) nor Regulation Z says anything about the filing of a lawsuit, and we refuse to graft such a requirement upon them.”¹³⁰

After confining itself to reading the lines—as opposed to between the lines—of Section 1635(f), the *Gilbert* court warns that “[w]e must not conflate the issue of whether a borrower has exercised her right to rescind with the issue of whether the rescission has, in fact, been completed

¹²⁶ *Id.* at 1182 (alteration in the original).

¹²⁷ In an unpublished opinion carrying no precedential weight, the Third Circuit similarly held *Beach* to control and, consequently, also held that rescission requires the plaintiff to file a complaint within the three-year window. The *Williams* court framed its holding in an interesting way, observing that

[i]t may be that an obligor may invoke the right to rescission by mere notice. Mere invocation without more, however, will not preserve the right beyond the three-year period. Rather, consistent with § 1635(f), a legal action to enforce the right must be filed within the three-year period or the right will be “completely extinguishe[d].”

Williams v. Wells Fargo Home Mortg., Inc., 410 F. App’x 495, 499 (3d Cir. 2011) (quoting *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998)). The Third Circuit’s opinion creates a distinction between “invocation of the right to rescind” with non-extinguishment of that right, presumably by exercising it. *See id.* It is not clear what it might mean to “invoke” a right when such invocation is not tantamount to exercising a right. *See id.*

In its precedential decision of February 5, 2013, however, the Third Circuit arrived at the opposite conclusion concerning both the applicability of *Beach* and the requirements for rescission. *See generally* *Sherzer v. Homestar Mortg. Servs.*, _____ F.3d _____ (3d Cir. 2013); *infra* Part III.B.

¹²⁸ 678 F.3d 271 (4th Cir. 2012).

¹²⁹ *Id.* at 276 (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1981) (citations and quotation omitted)).

¹³⁰ *Id.* at 277.

and the contract voided.”¹³¹ The Fourth Circuit thus draws a practical distinction between exercising a right to rescind and actual rescission.¹³² “The former,” the *Gilbert* court insists, “is the concern of § 1635(f) and Regulation Z, and a borrower exercises her right of rescission by merely communicating in writing to her creditor her intent to rescind,”¹³³ even though the borrower must then take additional steps “[t]o complete the rescission and void the contract.”¹³⁴ Like its sister circuits, the Fourth Circuit requires either that “the creditor . . . acknowledge that the right of rescission is available and the parties . . . unwind the transaction amongst themselves, or [that] the borrower . . . file a lawsuit so that the court may enforce the right to rescind.”¹³⁵ The *Gilbert* court applies § 1635(f)’s three-year limit to the *right* to rescind, which can be exercised by notice, rather than to rescission itself.

The Fourth Circuit was able to strike out on its own largely because it shrugged off the interpretive shackles of *Beach*. *Gilbert* holds that *Beach* carries no precedential weight vis-à-vis the rescission deadline. “Appellees’ reliance on [*Beach*] is misplaced,” the *Gilbert* court holds, because “[t]he *Beach* Court did not address the proper method of exercising a right to rescind or the timely exercise of that right.”¹³⁶ Just as the Fourth Circuit adheres to the letter of the statute, it also adheres to the letter of *Beach*, refusing to embroider meaning upon the Court’s words.

The Third Circuit took a similar stance in its February 2013 *Sherzer* decision, announcing that, “[i]n resolving the question at issue here, we rely on the statutory language, not on the debatable implications of dicta.”¹³⁷ In determining what is required to trigger rescission under TILA, the Third Circuit stressed that “nowhere in *Beach* does the Court address *how* an obligor

¹³¹ *Id.*

¹³² The Fourth Circuit’s reasoning stands in contrast to the Third Circuit’s invoke-exercise dichotomy in its unpublished *Williams* opinion. See *supra* note 127.

¹³³ *Gilbert*, 678 F.3d at 277.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 278.

¹³⁷ *Sherzer v. Homestar Mortg. Servs.*, _____ F.3d, _____ (3d. Cir. 2013).

must exercise his right of rescission within that three-year period,¹³⁸ which the Circuit described as the key question raised by the appeal.¹³⁹ Though the *Sherzer* court does note that “*Beach* is consistent with [its] view” that notice suffices to rescind, its more definitive assertions concerning the inapplicability of *Beach* dicta make it clear that “consistency” was not the court’s paramount analytical objective.¹⁴⁰

Nor does the Third Circuit rely on legislative history in its analysis. The *Sherzer* court refers in passing to a 1988 addition to TILA¹⁴¹ but otherwise steers clear of the inquiry into Congressional intent that informs the decisions of the Ninth and Tenth Circuits. Though the Third Circuit never explicitly rejects intentionalism, it cements its textualist stance by relegating the policy concerns raised by the lenders—concerns similar to those raised by the Ninth and Tenth Circuits in expounding Congressional intent—to for-the-sake-of-completion analysis, observing that, “[w]hile the Lenders and their *amici* raise several concerns worthy of our careful attention, we find them unpersuasive for the reasons that follow.”¹⁴² This statement establishes a clear line between the textual analysis that led to the court’s decision and the policy-rich analysis that simply bolsters it.

Indeed, the Third Circuit frames its decision in purely textualist terms. The *Sherzer* court “begin[s] with the statutory text,”¹⁴³ and, after scrutinizing § 1635 as a whole,¹⁴⁴ states that “the answer to the question presented by this appeal is not pellucid, although we do think it is

¹³⁸ *Id.* at ____ (emphasis in the original).

¹³⁹ *Id.* at ____ (“The question presented by this appeal is simple: does an obligor exercise his right to rescind a loan subject to TILA by so notifying the creditor in writing, or must the obligor file suit before the three-year period expires?”).

¹⁴⁰ *Id.* at _____. A more felicitous choice of phrase, given the *Sherzer* court’s adamant rejection of *Beach* dicta quoted above, would have been to say that *Beach* is not inconsistent with the court’s view of TILA rescission.

¹⁴¹ *Sherzer v. Homestar Mortg. Servs.*, ____ F.3d ____, ____ (3d Cir. 2013).

¹⁴² *Id.* at _____.

¹⁴³ *Id.* at _____.

¹⁴⁴ *See id.* at _____–_____.

controlled by the statutory language.”¹⁴⁵ The Circuit musters both affirmative evidence indicating that notice constitutes rescission and negative evidence that “nothing in the text of the statute supports the view that [filing a complaint is necessary]”¹⁴⁶ to support its determination that “the text of § 1635 and its implementing regulation . . . supports the view that to timely rescind a loan agreement, an obligor need only send a valid notice of rescission.”¹⁴⁷ Ultimately, the Third Circuit rejects the view that rescission is triggered only by filing a complaint because that view “would require us to infer that the statute contains additional, unwritten requirements with which obligors must comply—an inference that seems particularly inappropriate in light of the fact that TILA is a remedial statute that we must construe liberally.”¹⁴⁸ The Third Circuit thus finds support for its strict, text-based analysis in consumer-protective purpose of the statute.

IV. How Should the Supreme Court Resolve the Split?

The Court should also heed TILA’s stated purpose—to inform and protect consumers—before honing in on the text of § 1635 itself when it resolves the present split.¹⁴⁹ The Act’s umbrella introduction states that TILA aims “to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing.”¹⁵⁰ The Court should choose an interpretation that best reflects the goals set forth by TILA’s introductory provision, in keeping with its own policy.¹⁵¹

Ironically, the textualist interpretation appears more in keeping with TILA objectives. The Third and Fourth Circuits hold that borrowers may exercise their right to rescind by

¹⁴⁵ *Id.* at _____. Curiously, despite noting a lack of pellucidity, the Third Circuit did not discuss the possibility of deferring to the CFPB’s interpretation of Regulation Z. *See infra*, Part IV.B.

¹⁴⁶ *Id.* at _____.

¹⁴⁷ *Sherzer v. Homestar Mortg. Servs.*, _____ F.3d _____, _____ (3d Cir. 2013).

¹⁴⁸ *Id.* at _____.

¹⁴⁹ No petitions for certiorari have been filed as of the time of writing.

¹⁵⁰ 15 U.S.C. § 1601(a) (2012).

¹⁵¹ *See supra* note 17 and accompanying text.

notifying the lender of their intent to do so within that three-year window.¹⁵² The Ninth and Tenth Circuits, on the other hand, require that borrowers sue their lenders within three years of entering into a loan agreement or forever lose the right to rescind.¹⁵³ This intentionalist position demands a level of awareness on the part of borrowers that seems incongruous with TILA's objectives.¹⁵⁴ Nevertheless, it is not impossible that an intentionalist interpretation will carry the day, given the Court's past decisions.¹⁵⁵ The Court reached a textualist-intentionalist compromise in *Koons Buick*¹⁵⁶ and shifted from textualism to intentionalism in *Beach*.¹⁵⁷

Whatever its conclusion, the Court should begin by declaring *Beach* inapposite.¹⁵⁸ Relevant only through its dicta, *Beach* should not be stretched to apply to rescission mechanics.¹⁵⁹ Rather than expand the influence of its reasoning, the Court should defer to the CFPB, the agency now charged with TILA regulation.¹⁶⁰ Deference is important in an abstract sense as a means of maintaining the boundaries of the different branches of government.¹⁶¹ With

¹⁵² See *supra* Part III.A.

¹⁵³ See *supra* Part III.B.; see also O'Melveny & Myers, LLP, *TILA Rescission Rights* (June 20, 2012), <http://www.omm.com/tila-rescission-rights-06-18-2012/> (offering a concise summary of the split).

¹⁵⁴ See Brief of the Consumer Financial Protection Bureau as Amicus Curiae in Support of Plaintiffs-Appellants at 23–24, *Rosenfield v. HSBC Bank*, 681 F.3d 1172 (2012) (No. 10-1442), 2012 WL 1074082, at *18–19.

¹⁵⁵ Note that, with respect to its emphasis on legislative intent, the limited TILA jurisprudence explored above—see *supra* Part II.—stands at odds with a statistically-confirmed Court trend: “[The Court’s] practice after 1986 (when Scalia joined the Court) has reflected the influence of new textualism. . . . the Court has been somewhat more willing to find statutory plain meaning and less willing to consult legislative history, either to confirm or rebut that plain meaning. . . .” Eskridge, *supra* note 1, at 227.

¹⁵⁶ See *supra* Parts II.A. and III.

¹⁵⁷ See *supra* Part II.B.

¹⁵⁸ See CFPB Amicus Brief, *supra* note 154, at 15, 2012 WL 1074082, at *11 (“*Beach* is not directly on point. . .”).

¹⁵⁹ “When [courts] make law in dictum, the likelihood is high that it will be bad law.” Laval, *supra* note 107, at 1260. See *generally id.* at 1258–62 (stressing that over-reading dicta is particularly pernicious in a system based on *stare decisis*).

¹⁶⁰ See *generally* Letter from Elizabeth Renuart, Assistant Professor of L. at Albany L. Sch., to Jennifer J. Johnson, Sec’y of Bd. of Governors of Fed. Reserve Sys. (Oct. 21, 2010), *available at* http://www.federalreserve.gov/SECRS/2010/October/20101025/R-1390/R-1390_102110_54026_556309269172_1.pdf (arguing the importance of allowing the CFPB to formulate a coherent regulatory scheme).

¹⁶¹ See Aaron R. Cooper, *Sidestepping Chevron: Reframing Agency Deference for an Era of Private Governance*, 99 GEO. L.J. 1454–55 (2010–11) (describing judicial review of agency determinations as a means of making sure that the agency is not taking an impermissible amount of legislative power, not as an opportunity for the Court to “substitute its own judgment for that of the political branch” when that political branch is acting within the scope of its authority).

respect to TILA rescission, moreover, the CFPB’s analysis is compelling and appropriately consumer-protective.¹⁶²

What the Court should not do is resolve the textualist-intentionalist debate that has colored TILA litigation in general, and the rescission-provision split in particular.¹⁶³ The manner in which the Circuits have articulated their decisions invites the Court to choose a victorious methodology.¹⁶⁴ By resolving the less conspicuous issues surrounding dicta and deference, however, the Court can reach a decision without accepting the Circuits’ implicit invitations to side with a particular interpretive school.¹⁶⁵

A. The Scope and Applicability of *Beach*

The holdings of the Supreme Court are binding upon all the courts of the land. Dicta, however, are not considered binding.¹⁶⁶ The two can be difficult to distinguish, as the pragmatic Judge Posner has noted:¹⁶⁷ “A dictum is a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding.”¹⁶⁸ It stands apart from the opinion’s binding core because it “may not have received the full and careful

¹⁶² The CFPB’s fidelity to TILA’s purposes, *see supra* Part I., argue strongly in favor of granting deference, because it is precisely “[w]here an agency’s decision or interpretation of a statute violates a canon of statutory construction, or where the agency’s interpretation is inconsistent with the public interest patina of the original statute, or where a court deems the agency’s action ‘unreasonable,’ [that] the agency’s decisions will be accorded no deference.” Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 *Geo. L.J.* 671, 684 (1991–92).

¹⁶³ *See supra* Parts II. and III.

¹⁶⁴ *See generally* Jonathan R. Siegel, “The Inexorable Radicalization of Textualism, 157 *U. PA. L. REV.* 117, 119–31 (arguing that textualism can brook no compromise with intentionalist or purposivist interpretive imperatives, such that any choice other than pure textualism is a choice against textualism).

¹⁶⁵ *See infra* Parts IV.A. and IV.B.

¹⁶⁶ *See, e.g.*, *Howes v. Fields*, 132 S. Ct. 1181, 1187 (2012) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)) (noting that, “[i]n [the] context [of a petition for a writ of habeas corpus pursuant to AEDPA, “clearly established law” signifies “the holdings, as opposed to the dicta, of this Court’s decisions.”).

¹⁶⁷ Posner is far from the only dicta-theorist, but a full exploration of the hazy, even fluid, dictum-holding boundary is beyond the scope of the present study. As a notable counterpart to Posner’s proposed workmanlike explanation of dicta is the gemologist-inspired approach that its creators “call the ‘Judicial Four Cs.’ Jewelers evaluate carat, cut, color, and clarity in assessing diamonds; we evaluate constraint, consideration, clarity, and candor in forming understandings of what to treat as holding and dicta within judicial opinions.” Michael Abramovicz & Maxwell Stearns, *Defining Dicta*, 57 *STAN. L. REV.* 953, 1017 (2005).

¹⁶⁸ *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986).

consideration of the court that uttered it.”¹⁶⁹ For Judge Posner—and the Seventh Circuit— “[w]hat is at stake in distinguishing holding from dictum is that a dictum is not authoritative. It is the part of an opinion that a later court, even if it is an inferior court, is free to reject.”¹⁷⁰ Posner thus invites us to “ask what reasons there are against a court’s giving weight to a passage found in a previous opinion.”¹⁷¹ As Judge Posner notes, there are many potential reasons for disregarding dicta; “reasons for thinking that a particular passage was not a fully measured judicial pronouncement, that it was not likely to be relied on by readers, and indeed that it may not have been part of the decision that resolved the case or controversy on which [a federal] court’s jurisdiction depended.”¹⁷² Posner’s know-a-dictum-by-its-stakes argument ties “dictumitude,” for lack of a better word, to reader response.¹⁷³

Not all circuits are as willing to risk jettisoning a holding along with the bathwater of dicta as is the Seventh Circuit.¹⁷⁴ The Third Circuit explained that “[e]ven if what we read as the holdings . . . could be characterized as dicta and therefore not binding on us, such dicta are highly persuasive. Indeed, with regard to statements made by the Supreme Court in dicta, ‘we

¹⁶⁹ *Id.*

¹⁷⁰ *United States v. Crawley*, 837 F.2d 291, 292 (7th Cir.1988).

¹⁷¹ *Id.*

¹⁷² *Id.* at 293.

¹⁷³ Fascinatingly, the Ninth Circuit glossed Posner’s stakes-based definition in a parenthetical citation as one that “adopt[s] a pragmatic definition of dictum based upon whether the previous panel fully considered the issue and *intended* for future interpreters to rely on it.” *United States v. Johnson*, 256 F.3d 895, 916 (9th Cir. 2001) (emphasis added). This is a mischaracterization and, as subtle a misstatement as it may seem, it is significant inasmuch as it paints Posner’s statement with an intentionalist brush when, in fact, his working definition of dicta corresponds to a textualist approach. See Morrell E. Mullins, Sr., *Tools, not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 20 (2003) (“[T]extualism . . . employs a reader-centered strategy . . . for attributing meaning to a statutory text Intentionalism . . . employs a writer-centered strategy for attributing meaning to statutory text, emphasizing ‘meaning(s)’ ‘intended’ by the writer”). Here, as with respect to the TILA rescission provision, the Ninth Circuit focuses on intent. See *infra* Part IV.

¹⁷⁴ The Seventh Circuit has a strong—and generalized—predilection for straight-shooting and has stated its preference for streamlining in eminently quotable terms. See, e.g., *DeShields v. Int’l Resort Props.*, 463 Fed. App’x 117, 120 (3d Cir. 2012) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (“Judges are not like pigs, hunting for truffles buried in briefs.”)); see also *Encyclopaedia Britannica, Inc. v. Comm’r*, 685 F.2d 212, 217 (7th Cir. 1982) (“We deprecate decision by metaphor.”).

do not view [them] lightly.”¹⁷⁵ Indeed, the Circuit noted, “[b]ecause the Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket . . . [t]o ignore what we perceive as persuasive statements by the Supreme Court is to place our rulings, and the analysis that underlays them, in peril.”¹⁷⁶ The Ninth Circuit has also noted the predictive potential and resultant premium borne by Court dicta, remarking that “dicta of the Supreme Court have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold. We should not blandly shrug them off because they were not a holding.”¹⁷⁷ The Tenth Circuit has adopted an even more deferential posture with respect to Supreme Court dicta: “we are bound by Supreme Court dicta almost as firmly as by the Court’s outright holdings, particularly when the dicta [are] recent and not enfeebled by later statements.”¹⁷⁸

Here, however—even for those who favor expansive readings of, and according considerable deference to, Supreme Court dicta—it is problematic to find the *Beach* Court’s hypothesis as to Congressional intent authoritative. Although the *Beach* Court did declare that it was respecting the “manifest intent” of Congress, it was less confident about Congressional intent just a few lines earlier, where it discussed what “Congress *may well have* chosen.”¹⁷⁹ The Court had already reached its holding based on a textual analysis before offering intentionalist “evidence” as supplementary support for its decision;¹⁸⁰ the intentionalist argument is a tack-on. Having reached its decision on other grounds, the Court indulges in somewhat conflicted

¹⁷⁵ *Galli v. N.J. Meadowlands Comm’n*, 490 F.3d 265, 274 (3d Cir. 2007) (quoting Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 561 (3d Cir. 2003)).

¹⁷⁶ *Id.* (internal quotation marks omitted).

¹⁷⁷ *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992).

¹⁷⁸ *United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007) (quotation marks and citations omitted).

¹⁷⁹ *Beach v. Ocwen Fed. Bank*, 532 U.S. 410, 419 (1998) (emphasis added).

¹⁸⁰ The Court even marks this supplement with a revelatory introductory sentence: “The Act, however, has left even less to chance (if that is possible) than its ‘expire’ provision would allow, standing alone.” *Id.* Though the provision is enough “standing alone,” in other words, the Court will offer even more support of its conclusion. *See id.*

speculation regarding Congress's intent, creating dicta.¹⁸¹ And, because the Court's first statement impugns the confidence of its second, these dicta should be treated with caution.¹⁸²

The Tenth Circuit did not display the requisite caution with respect to *Beach* dicta. Although it purports to reach a conclusion "consistent with *Beach*," the *Rosenfield* court's holding that "TILA establishes a *right of action* that is *generally* redressable only when a party seeks recognition of it by invoking the power of the courts"¹⁸³ is clearly beyond the scope of the *Beach* Court's discussion of affirmative defenses.

The Ninth Circuit similarly distorted dicta in reading *Beach* to hold that "rescission suits must be brought within three years from the consummation of the loan, regardless whether notice of rescission is delivered within that three-year period."¹⁸⁴ The Ninth Circuit adds one and one and gets three, with the missing addend coming from its assumption that when the Court said "completely extinguished" in one context, it *intended* that the extinguishment be universal because (1) § 1635(f) is a statute of repose and (2) statutes of repose mean sue or see the right extinguished.¹⁸⁵ Not only does *Beach* never mention statutes of repose, but there are many statutes of repose that do not require filing suit.¹⁸⁶ The Ninth Circuit's syllogism is thus flawed.

¹⁸¹ Why the dicta are present is an interesting question. They could have been included by compromise, to accommodate the Justices' different perspectives. They could also serve the function of keeping the textualist-intentionalist debate alive and thriving. Or, of course, they could have been included to suggest that, even in the face of a clear text, an intentionalist inquiry into Congressional reasoning should be conducted. *See Defining Dicta*, *supra* note 167, at 971–2.

¹⁸² Stanley Fish has written that "[f]iguring out what a multiple-authored text means is in principle no different from figuring out what a single-authored text means; both require the same 'necessary construction' of an intention that the words alone won't yield up." Stanley Fish, *Intention and the Canons of Legal Interpretation*, THE N.Y. TIMES OPINIONATOR (July 16, 2012, 9:00 PM), <http://opinionator.blogs.nytimes.com/2012/07/16/intention-and-the-canons-of-legal-interpretation/>. The idea of intention as a construction, of something substantial that is built and that can take on a presence of its own, independent of the words from which it was crafted, is a helpful way to understand how the Ninth and Tenth Circuits are able to arrive at conclusions that exceed the scope of *Beach* while purporting to flow necessarily from *Beach*.

¹⁸³ *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1183 (10th Cir. 2012) (emphasis in the original).

¹⁸⁴ *McOmie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325, 1328 (9th Cir. 2012).

¹⁸⁵ *See id.*

¹⁸⁶ *See* the CFPB's excellent discussion of statutes of repose, CFPB Amicus Brief, *supra* note 154, at 25–29, 2012 WL 1074082, at *20–24. The CFPB's analysis is discussed *infra* Part IV.B.

The two circuits that have read *Beach* to be controlling have done so by guessing what the Court intended to say and by applying what the Court did say on one topic to a discrete issue. The Court should declare *Beach* inapposite even if it agrees that borrowers must file to rescind.¹⁸⁷ A determination that filing is necessary should be reached through case-specific analysis; it should not be the child of chance, the results of a fortuitous misapplication of dicta.¹⁸⁸ If the Court holds that *Beach* applies, it would implicitly condone using perceptions of its own intent as a proxy for legislative intent.¹⁸⁹ As Michael Sabet notes, “[i]n a dire economic atmosphere where predatory lending has contributed to widespread home foreclosures, courts should not take it upon themselves to speculate on alternative theories of congressional intent, especially when the purpose, history, and letter of the law are so clear.”¹⁹⁰

B. An Alternative: Look to the CFPB

Even without heeding Sabet’s exhortation to look solely to the letter of the law, however, the Court need not resort to mangling the square *Beach* peg until it fits into the round hole of TILA rescission mechanics. There is highly persuasive authority available to aid in interpreting § 1635(f) and Regulation Z: the CFPB.

¹⁸⁷ Thomas L. Fowler’s astute analysis of the risks posed by overstated dicta in an unrelated case captures general principles of jurisprudence that should guide the Court in its ultimate resolution of TILA rescission:

The analysis and the language chosen by the Court in *Fly* obscure the normal guideposts that lower courts use to make this holding versus dictum determination. As a result, the lower courts will be encouraged to abandon the difficult determination of what the law is and instead substitute the determination of what the law will be based upon the various statements found in the opinion without regard to whether such statements are holding or dictum.

Thomas L. Fowler, *Of Moons, Thongs, Holdings and Dicta: State v. Fly and the Rule of Law*, 22 CAMPBELL L. REV. 253, 258 (2000).

¹⁸⁸ See generally *id.* at 296–302 (discussing why it is important to maintain clear boundaries between dicta and holdings).

¹⁸⁹ *Beach v. Ocwen Fed. Bank*, 532 U.S. 410, 418–19 (1998) (emphasis added). For an excellent cautionary tale regarding the perils and pitfalls of trying to divine the Court’s intent, see Brian J. Dunne, 74 U. CHI. L. REV. 991, 1003–12 (2007) (studying the methodological conflicts in the wake of the Court’s decision in *Gonzaga University v. Doe*, 536 U.S. 273 (2002)). As Dunne notes, “While *Gonzaga* no doubt commands a text-focused analysis in determining § 1983 enforceability of Medicaid Act provisions, lower courts have divided into two distinct camps regarding the proper ‘type’ of textual analysis.” *Id.* at 1003.

¹⁹⁰ Sabet, *supra* note 208, at 21.

The CFPB's responsibilities include "[c]onduct[ing] rule-making, supervision, and enforcement for Federal consumer financial protection laws."¹⁹¹ "Congress granted the [CFPB] the authority to interpret and promulgate rules regarding TILA."¹⁹² "With the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, [it] transferred this authority from the Board of Governors of the Federal Reserve System to the Bureau on July 21, 2011."¹⁹³

Aggressively asserting its authority over TILA, the CFPB "welcome[s] . . . suggestions of pending cases that might make good candidates for the amicus program."¹⁹⁴ The Bureau's amicus program has filed briefs in each rescission case.¹⁹⁵ The CFPB's interventionist policy matches the latitude Congress explicitly granted to the executive branch, the branch it tasked with determining how to enforce the Act.¹⁹⁶ Congress has passed the baton of TILA regulation from the Federal Reserve Board to the CFPB and, with it, this regulatory latitude.

In its amicus briefs,¹⁹⁷ the CFPB argues that "[t]he language of § 1635 is plain: Within three years of loan consummation, consumers must *exercise* their right of rescission by *notifying* their lender that they are doing so."¹⁹⁸ The CFPB adds that, "[i]f there were any ambiguity in that mandate, Regulation Z resolves it by also specifying that consumers exercise the right to

¹⁹¹ CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/the-bureau/> (last visited Dec. 23, 2012).

¹⁹² CFPB Amicus Brief, *supra* note 154 at 7 (citing 12 U.S.C. §§ 5481(12)(O), 5512(b)(1), 5581(b)(1)).

¹⁹³ *Id.* (citing Pub L. No. 111-243, §§ 1061(b)(1), (d), 2010), *codified at* 12 U.S.C. §§ 5581(b)(1), (d); *Designated Transfer Date*, 75 Fed. Reg. 57, 252 (Sept. 20, 2010).

¹⁹⁴ CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/amicus/> (last visited Oct. 23, 2012).

¹⁹⁵ See Robert Bostrom, *CFPB Files Amicus Brief in TILA Case, Says More To Come*, LEXOLOGY (Apr. 12, 2012, 2:10 PM), http://www.credit.net/report_news.asp?si=5846146485212&VendorID=200000&docid=AMX_MONDAQNEWS_147757036 ("The Bureau sees the filing of amicus briefs as an important way to ensure that the statutes it oversees are correctly and consistently interpreted by the courts, even in cases in which the CFPB is not itself a named party.").

¹⁹⁶ See *supra* Part I, discussing how Congress has transferred TILA regulation from the Federal Reserve Board to the CFPB. It is only logical that the same regulatory leeway transfers as well. The question of whether judicial deference passes is more complex. See *infra* pp. 34–35.

¹⁹⁷ The CFPB's amicus briefs feature identical standards sections and differ only in applying the standards to the particular facts of each case. See CONSUMER FIN. PROTECTION BUREAU, *supra* note 191 (collecting the CFPB amicus briefs).

¹⁹⁸ CFPB Amicus Brief, *supra* note 154, at 15, 2012 WL 1074082, at *10.

rescind by providing written notice to the lender.”¹⁹⁹ Because there is no room for confusion, in other words, inquiry should begin and end with the text.

Ironically, if the CFPB is correct that regulation is unambiguous, there is less reason for the Court to defer to it. If the Court finds Regulation Z unclear, it will have to address whether and to what extent administrative deference has shifted from the Board to the Bureau²⁰⁰ just as it will need to discuss the deference due a position expounded in an amicus brief.²⁰¹ These complicated treks through the murky waters of deference rules will only be necessary if the Court determines that the regulation is ambiguous.²⁰² If the regulation is clear, the Court will apply it without consulting the regulatory agency.²⁰³

¹⁹⁹ *Id.*

²⁰⁰ See TROUTMAN SANDERS, <http://www.troutmansanders.com/judicial-deference-to-agencys-interpretation-of-tila-reaches-new-high-water-mark-02-01-2011/> (last visited Dec. 23, 2012) (“When authority over TILA interpretation transfers to the new CFPB, presumably this judicial deference to the agency interpretation will follow. For this and other reasons, there should be no wonder why the struggle over the creation of, and the new leadership for, and the role of Congressional oversight over, the CFPB was and is such a hot topic in Washington.”). See also Melanie E. Walker, Comment, *Congressional Intent and Deference to Agency Interpretations of Regulations*, 66 U. CHI. L. REV. 1341, 1361–66 (1999) (exploring the implications for judicial deference when Congress transfers authority from one agency to another).

²⁰¹ Particularly relevant to determining the level of deference due the CFPB in this matter is “*Skidmore* deference,” which recognizes that “the rulings, interpretations and opinions of the [relevant federal agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). “The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Id.* According to *Skidmore*, the fact that the agency’s determination is presented not through the adversarial system but, rather, through an amicus brief is no reason to discount it as persuasive authority. See *id.* at 139–140.

²⁰² As the Court recently stated,

[w]e need not decide which party's interpretation is more persuasive, however; both are plausible, and the text alone does not permit a more definitive reading. Accordingly, we find Regulation Z to be ambiguous as to the question presented, and must therefore look to the Board's own interpretation of the regulation for guidance in deciding this case.

Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 880 (2011). When *Chase* was decided, the CFPB had not yet assumed control of regulating TILA.

²⁰³ The CFPB filed its first rescission-provision brief in *Rosenfield*. The Tenth Circuit’s only reference to the CFPB’s brief is relegated to a footnote and does not address agency deference. See *Rosenfield v. HSBC Bank, USA*, 681 F.3d 1172, 1178 n.4 (10th Cir. 2012) (“We acknowledge receipt of two amicus curiae briefs, one filed by the [CFPB] a federal regulatory agency Although these briefs largely cover the same terrain as the parties’ arguments, they are helpful. We do exercise appropriate care, however, to keep our primary focus on the parties’ arguments.” (citations omitted)). The Third Circuit barely gave the CFPB a passing nod in *Sherzer*; it certainly did not raise the question of deference. See *Sherzer v. Homestar Mortg. Servs.*, ____ F.3d ____, ____ (3d Cir. 2013)

Even without the benefit of formal deference, however, the CFPB’s arguments are persuasive because they advance both TILA’s consumer-protective purpose and public policy. “Congress enacted § 1635,” the Bureau notes, “in response to fraudulent home-improvement schemes in which ‘homeowners, particularly the poor,’ were ‘trick[ed] . . . into signing contracts at exorbitant rates, which turn out to be liens on the family residences.’”²⁰⁴ To require that borrowers sue “is contrary to the plain language of the provision and contravenes the purpose of the statutory scheme to provide consumers a private, non-judicial mechanism to rescind mortgage loans.”²⁰⁵ Indeed, the CFPB regards rescission as a means of avoiding litigation and conserving “valuable judicial resources.”²⁰⁶ If a lender wishes to challenge a borrower’s rescission, then the lender can sue to determine “whether rescission was *accomplished* because the party was entitled to rescind in the first instance.”²⁰⁷ The CFPB’s interpretation places the onus of filing a complaint on the lender, who is presumably more sophisticated and better able to assess the wisdom of litigation than the borrower. This is a more socially responsible position than the suit requirement, which would reward inaction on the part of lenders and force borrowers into court, discouraging private settlement and rendering notice superfluous.²⁰⁸

The Court should apply the CFPB’s sound interpretation of TILA’s rescission provision. In this way, the Court would respect both the plain language enacted by the legislature, to which

(“The Sherzers and their amicus, the [CFPB] argue that [notice suffices].”). The CFPB also filed an amicus brief with the Eighth Circuit, so it will be interesting to see whether it addresses deference. To keep track of CFPB amicus filings, see CONSUMER FIN. PROTECTION BUREAU, *supra* note 197.

²⁰⁴ CFPB Amicus Brief, *supra* note 186, at 9, 2012 WL 1074082, at *4 (quoting 90 CONG. REC. H14384 (daily ed. May 22, 1968) (statement of Rep. Sullivan)) (citing 90 CONG. REC. H14384 (statement of Rep. Patman)).

²⁰⁵ *Id.* at 30, 2012 WL 1074082, at *25.

²⁰⁶ *Id.* at 10, 2012 WL 1074082, at *5.

²⁰⁷ *Id.* at 21, 2012 WL 1074082, at *16.

²⁰⁸ See Michael Sabet, Comment, *Slamming the Door in the Consumer’s Face: Courts’ Inadequate Enforcement of TILA Disclosure Violations and the False Hope of a Foreclosure Defense*, 115 PENN ST. L. REV. 183, 20–21 (2010). If the consumers’ right to sue expires after three years, then there is a perverse incentive for lenders to ignore borrowers’ notices of rescission or, perhaps worse, to respond to them in a misleading, string-a-long manner, so that borrowers miss the three-year filing limit. See generally *id.*; see also CFPB Amicus Brief, *supra* note 154, at 23–24, 2012 WL 1074082, at *19.

the CFPB adheres, and Congress's intent to allow the executive branch to fill TILA's broad outlines with the details of enforcement. It could well be that the policy advocated by the CFPB will prove disastrous,²⁰⁹ but this is not a foregone conclusion.²¹⁰ This politicized matter is best left to the executive and, thus, at least theoretically, to the collective will of the voting public.²¹¹ By respecting the regulatory power that Congress conferred upon the executive, moreover, the Court would satisfy the mandates of both textualism and intentionalism in a way that holding its decision in *Beach* to govern would not.²¹²

²⁰⁹ The fear of the dangers of cloudy title underlies the Tenth Circuit's decision, *see supra* Part III.A. It is also of great concern to the three vast banking organizations that banded together to file an amicus brief in the *Rosenfield* case. Brief of the Amici Curiae Am. Bankers Assoc., Consumer Bankers Assoc., and Consumer Mortgage Coalition in Support of Appellees at 9, *Rosenfield v. HSBC Bank*, 681 F.3d 1172 (No. 10-1442), 2012 WL 1656043, at *2 (arguing that allowing mere notice to trigger rescission "would cast a long shadow of uncertainty over the housing finance market, a market that depends on certainty and predictability. The price for that uncertainty would fall squarely on the very individuals that TILA was meant to benefit—borrowers."). The banking associations' brief also points to potential injustice that rescission-by-notice could work upon lenders: notice-triggered rescission "would allow a borrower to strip a lender who complied with TILA of its security interest instantaneously and unilaterally." *Id.* Aaron B. Millar paints the potential consequences to lenders in vivid detail: "Imagine this scenario: Hours before the foreclosure sale, the mortgage lender receives a fax from the defaulting borrower's lawyer stating that the borrower rescinds the loan . . . because the finance charge in the loan disclosures was understated by \$ 36." Aaron B. Millar, *The Mortgage Lender's Primer on a TILA Rescission Claim*, 25 UTAH BAR J. 40, 40 (2012).

²¹⁰ *See* CFPB Amicus Brief, *supra* note 186, at 23–24 & n.4, 2012 WL 1074082, at *18–19 (countering the objections raised by the Bankers' Associations—*see supra* note 209—by stressing that requiring notice within the three-year period alerts the lender to the customer's rescission and allows the lender to contest the rescission, at which point the borrower would have a finite period of time—that the courts will have to determine—to file suit); *see also* *Sherzer v. Homestar Mortg. Servs.*, ____ F.3d ____, ____–____ (3d Cir. 2013) (analyzing the policy implications of rescission-by-notice at length and concluding that, though this method of rescission could create some complications, these complications did not constitute a "reason to disregard the text of the statute" and that "it is for Congress—not the courts—to determine" such policy matters).

²¹¹ One scholar argues that the judiciary should only make determinations with regard to policy choice in the absence of statutory clarity and any indicia of legislative and political preferences and that, even under those circumstances, "the judiciary should exclude those policy preferences it is confident could not get enacted in the current political process." EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 234 (2008). Given that the CFPB is a creature of the current political regime, the Court should hesitate to adopt an interpretation diametrically opposed to the one that the CFPB proposes. *See also* GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 163–66 (1982) (arguing that the formerly antimajoritarian role formerly played by courts as makers of the common law should be restricted to matters of constitutional adjudication in light of the proliferation of statutes and the resultant change in the nature of law-making in this country).

²¹² *See* Mullins, *supra* note 145, at 31 (suggesting that modern theoretical approaches to statutory construction "recognize that neither 'textualism' nor 'intentionalism' provide, by themselves, a satisfactory theory").

V. Conclusion

Resolution of TILA's rescission requirements is but a cert-seeking petition away. Because (1) TILA's stated aim is one of consumer protection, (2) Congress built room into TILA to allow the government to adapt Regulation Z to the deceptive practices of creditors, and (3) the plain language of Regulation Z suggests that notice triggers rescission, the Court should hold that borrowers may rescind by notifying lenders of their intent to do so.

In reaching this determination, the Court will not need to defer to the CFPB's interpretation of the statute. The CFPB's policy arguments are compelling on their own terms. While the textualist courts, true to the methodology they espouse, declined to season their analyses with sociopolitical considerations, the CFPB showed no such reluctance. The CFPB explained in convincing detail how the notice-only requirement fits both TILA's stated purpose and the hardships borrowers are currently facing.

Even if the Court should determine that one must sue to rescind, however, it should decline to massage the boundaries of precedent. The Court should declare *Beach* inapplicable to rescission mechanics. By analyzing the provision independently of its earlier decision, the Court should confirm that its intent cannot be substituted for inquiry into Congressional intent.

Although the Court should take the intentionalist Circuits to task for misrepresenting dicta as precedent, the Court should not frame its correction as a condemnation of intentionalism. The current split appears to be a textualist-intentionalist tussle, but victory need not and should not be tied to a mode of analysis. The multiplicity of methodologies that led to the feisty *Koons Buick* opinion keeps statutory construction lively and staves off wooden positivism. Ideally, analytical sparks will fly again when the Court decides the rescission-provision split.