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Technology & Textualism: A Case Study on the Challenges a Rapidly Evolving World Poses to the Ascendant Theory

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I. INTRODUCTION

We live in a world of rapid technological change. Phones and computers are replaced every few years. Companies work frantically to stay one step ahead of hackers. Big data has proliferated. Yet the legal industry is notoriously resistant to change. This is understandable. At its core, this most conservative of professions resists the ever-quickening pace of innovation. The law is meant to be stable: a bastion of tradition and the foundation of a properly functioning society. But inevitably, technology has seeped into every corner of the law, from the sterile, cavernous conference rooms of big law firms to the hallowed halls of judges' chambers. Some have embraced this change more readily than others.

Over the past twenty years, legal scholars have filled academic and professional journals with examples of technology's impact on various areas of the law.[1] Attorneys and judges have been forced to grapple with the legal implications of the Internet, email, social media, and artificial intelligence.[2] Discovery now involves scouring vast quantities of elec-

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[1] *See, e.g.*, Jeffrey M. Hirsch, *Future Work*, 2020 U. Ill. L. Rev. 889 (2020); Jenna Charlotte Spatz, *Scheduled Skyping with Mom or Dad: Communicative Technology's Impact on California Family Law*, 31 Loy. L.A. Ent. L. Rev. 143 (2011); Mark S. Kende, *Technology's Future Impact on State Constitutional Law: The Montana Example*, 64 Mont. L. Rev. 273 (2003).

[2] *See, e.g.*, *United States v. Tome*, 611 F.3d 1371 (11th Cir. 2010) (considering imposition of Internet ban as condition of supervised release for sex offender); *United States v. Am. Library Ass'n,*

tronically stored information, often leading to ballooning scope and cost of discovery in cases.[3] Law firms use artificial intelligence and other programs to help manage litigation, identify issues in contracts, maintain adequate records, and protect their clients' sensitive information.[4] The practice of the law has certainly changed, but has legal philosophy—the underlying principles of the law and how to interpret and apply it—kept apace? There are worrying signs that it has not.

One area of the law where the rapid advance of technology has been felt in recent years is civil procedure. In *Encompass Insurance Co. v. Stone Mansion Restaurant Inc.*, the Third Circuit relied on a technical reading of the statute and a strict textualist analysis to conclude that the stratagem known as "snap removal" was permitted under the plain language of 28 U.S.C. § 1441(b)(2).[5] This provision codifies the so-called "forum defendant rule," providing that "[a] civil action otherwise removable solely on the basis of . . . [diversity] jurisdiction . . . may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[6] The Third Circuit ruled that under the plain language of the statute, forum defendants could, in fact, remove to federal court under certain circumstances.[7] Using this little-known technique, a defendant sued in a state court in its home state may circumvent the forum defendant rule and remove the matter to federal court so long as they file the notice of removal before they are "properly joined and served."[8] In modern litigation, a diligent counsel can easily become notified via courts' electronic filing systems if a complaint has been filed against their client.[9] They can

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Inc., 539 U.S. 194 (2003) (holding Children Internet Protection Act did not violate the First Amendment free speech clause); *United States v. Microsoft Corp.*, 138 S.Ct. 1186 (2018) (discussing extraterritorial application of Stored Communications Act to e-mail accounts); *Wynmoor Community Council, Inc. v. QBE Ins. Corp.*, 280 F.R.D. 681 (S.D. Fla. 2012) (considering whether forensic examination of non-profit's computer by independent computer expert was warranted); *Thaler v. Hirshfeld*, —-F.Supp.3d—-, 2021 WL 3934803 (E.D. Va. 2021) (appeal pending) (determining whether artificial intelligence can be an "inventor" under the Patent Act); *Scarborough v. Frederick Cty. Sch. Bd.*, 517 F. Supp. 3d 569 (W.D. Va. 2021) (holding parent of student failed to state equal protection claim based on being blocked from county schools' social networking platforms).

[3] Karel Mazanec, *Capping E-Discovery Costs: A Hybrid Solution to E-Discovery Abuse*, 56 Wm. & Mary L. Rev. 631, 632 (2014).

[4] Polly Jean Harrison, *Technological Innovation in Law: The Recent Trends in Legal Firm Adoption*, THE FINTECH TIMES (Nov. 25, 2020), https://thefintechtimes.com/technological-innovation-in-law-the-recent-trends-in-legal-firm-adoption/.

[5] *Encompass Ins. Co. v. Stone Mansion Restaurant Inc.*, 902 F.3d 147 (3rd. Cir. 2018).

[6] 28 U.S.C. § 1441(b)(2).

[7] *Encompass Ins. Co.*, 902 F.3d at 152-54.

[8] 28 U.S.C. § 1441(b)(2); *see* § 12:12.50. Snap removal, 1 Bus. & Com. Litig. Fed. Cts. § 12:12.50 (4th ed.).

[9] *See generally, e.g.*, *E-mail Notification Index*, ECF, https://ecf.cand.uscourts.gov/cand/tutor/current/email/index.html (last visited Oct. 11, 2021); Michael Lissner, *Announcing PACER Docket*

then quickly remove the matter to federal court by drafting a brief notice of removal and filing it with the court's electronic filing system, well before their client is officially served with the state lawsuit.[10]

The Third Circuit acknowledged this dilemma: "We are aware of the concern that technological advances since enactment of the forum defendant rule now permit litigants to monitor dockets electronically, potentially giving defendants an advantage in a race-to-the-courthouse removal scenario."[11] The Court concluded, however, that while "[r]easonable minds might conclude that the procedural result demonstrates a need for a change in the law; . . . if such change is required, it is Congress—not the Judiciary—that must act."[12] The court's reasoning here is in line with the general principles of textualism.[13]

While there is much to commend in this judicial philosophy, and indeed it has become a dominant approach to jurisprudence in the past thirty years for good reason, there is a bittersweet irony in its application in this case. By attempting to enforce the plain meaning of the statute, defer to the legislature, and kneel before the sacred cow of the text, the Third Circuit in practice eviscerated the very statute it was trying to uphold. Any attentive litigator can now get around the requirements of § 1441(b)(2) and remove to federal court, even where the forum defendant rule would otherwise prevent such removal. A panel made up of a majority of conservative judges[14] applied textualism to a dispute over the meaning of a statute, and in doing so, rendered that statute toothless due to the realities of the modern world. Section 1441(b)(2) prevented in-state defendants from gaining access to the federal courts? Not so, according to the Third Circuit. Thus, the forum defendant rule is, in effect, dead—at least in the Third Circuit. The Second and Fifth Circuits, the only other Circuit Courts to consider the issue to date, have followed the Third Circuit's reasoning.[15] Concerned with this trend, the House of Representatives introduced a bill in February 2020 that would curb snap

Alerts for Jounralists, Lawyers, Researchers, and the Public, FREE LAW PROJECT (Aug. 21, 2018), https://free.law/2018/08/21/announcing-pacer-docket-alerts-for-journalists-lawyers-researchers-and-the-public; *Create an alert*, GOOGLE, https://support.google.com/websearch/answer/4815696?hl=EN (last visited Oct. 11, 2021).

[10] *See* Notice of Removal, Practical Law Standard Document 9-507-0210.

[11] *Encompass Ins.*, 902 F.3d at 154, fn. 4.

[12] *Id.* at 154.

[13] *See generally* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at xxi–46, Thomson/West (2012).

[14] The Hon. Michael Chagares (who authored the opinion in *Encompass*) was appointed by President George W. Bush in 2004; the Hon. Kent Jordan was appointed by President George W. Bush in 2006; and the Hon. Julio Fuentes was appointed by President Bill Clinton in 2000.

[15] *See Texas Brine Company, L.L.C. v. American Arbitration Association, Inc.*, 955 F.3d 482, 486-87 (5th Cir. 2020); *Gibbons v. Bristol-Myers Squibb Company*, 919 F.3d 699, 705-06 (2d Cir. 2019).

removal by allowing plaintiffs to serve in-state defendants after removal and require federal courts, in that instance, to remand to state court.[16] Maybe that is how it should be. But until the law is amended, snap removal remains a viable litigation tactic for defendants.

This article will explore the tensions between textualism and the realities of modern litigation as revealed in *Encompass* and its progeny. *Section II* explains the underpinnings of textualism. *Section III* provides a brief discussion on the basics of removal and the forum defendant rule, while *Section IV* then provides an overview of the concept of snap removal. *Section V* then analyzes the various district court decisions that have grappled with this issue. *Section VI* discusses *Encompass* in detail, and *Section VII* provides the reader some with thoughts on the conflict between textualist philosophy and the impact that applying that philosophy has in practice when considering *Encompass* and its progeny. *Section VIII* then asks questions that, the author hopes, will spark further contemplation and discussion.

II. BASIC PRINCIPLES OF TEXTUALISM

The foundational principle of textualism is that the plain meaning of the text of a statute at the time that statute was written is the law.[17] A judge's job is to interpret the text as it is written, no more. The textualist's "basic presumption [is] legislators enact; judges interpret. And interpret is a transitive verb: judges interpret texts."[18] Justice Antonin Scalia, one of the key figures in the evolution of textualist thought in the past 50 years, described it this way: "The text is the law, and it is the text that must be observed."[19] Put another way, "[t]he words of the statute, and not the intent of the drafters, are the law."[20]

Textualists argue that a statute's passage through the constitutional process—the passage of the same statutory text by the House of Repre-

[16] *See* The Removal Jurisdiction Clarification Act of 2020, H.R. 5801, 116th Congress (February 7, 2020).

[17] Scalia & Garner, *supra* n. 13 at xxvii, "Both your authors are textualists: We look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences"; at 3 "In an age when democratically prescribed texts (such as statutes, ordinances, and regulations) are the rule, the judge's principal function is to give those texts their fair meaning"; at 16 "Textualism, in its purest form, begins and ends with what the text says and fairly implies."

[18] *Id.* at xxx.

[19] Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in A Matter of Interpretation: Federal Courts and the Law 3, 22 (Amy Gutmann ed., 1997) (emphasis added).

[20] Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol'y 59, 60 (1988).

sentatives and the Senate and either its signature by the President or the overriding of the President's veto—provides the only mechanism through which our Constitution permits the passage of new laws.[21] What one individual legislator, or even one of the two houses of Congress may say about the law is irrelevant. Only the words that have gone through the constitutional process have legal force, and it is only those words that judges are empowered to interpret.[22] As Justice Holmes famously quipped, "[w]e do not inquire what the legislature meant; we ask only what the statute means."[23] Indeed, many textualists contend that judges are required to uphold statutes even where upholding those statutes lead to absurd results. As one commentator noted, "Even if a duly enacted statutory text leads to such [absurd] outcomes, it has still passed through the procedural requirements mandated by the Constitution and is therefore still law as textualists define it."[24]

Further, some judges and legal scholars have opined that relying on the intent of the legislature is undemocratic.[25] As Professor Siegel explained, "[t]extualists grounded these reasons in their appraisal of the realities of the legislative process."[26] Unelected judges, the argument goes, may construe the purpose or intent of the law as they see it to create a result contrary to the actual text of the statute, which was drafted and passed by democratically elected officials who can be held accountable at the ballot box.[27] Furthermore, a federal judge has life tenure, and so it is challenging (and depending on the judge, nearly impossible), to hold them accountable to the voters' will.[28] In other words, the people can hold a democratically elected legislature accountable for an unpopular or poorly written law, but that same electorate is powerless to influence federal judges with life tenure if those judges decide to modify laws

[21] Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. Pa. L. Rev. 117, 131 (2009); *see also* Scalia & Garner, *supra* n. 13 at 3–46.

[22] *See* Scalia & Garner, *supra* n. 13 at xxx.

[23] Siegel, *supra* n. 21 at 123 (quoting Scalia, *supra* n. 20 at 23).

[24] Ilya Somin, *Is Textualism Doomed?*, 158 U. Pa. L. Rev. (Online) 235, 238 (2010).

[25] *See Siegel*, *supra* n. 22

[26] *Id.* at 131.

[27] William N. Eskridge, Jr., *Reading Law: The Interpretation of Legal Texts*, by Antonin Scalia and Bryan A. Garner, 113 Colum. L. Rev. 531, 567 (2013) ("In cases like Sweet Home, unelected, life-tenured federal judges are making important policy choices and trying to impose them upon statutes without regard to congressional goals and compromises and often without due deference to the longstanding policies followed by executive agencies and ratified by Congress. Elected representatives are accountable to the voters, who not only put them into office based on their policy positions but can remove them from office if they favor policies out of sync with their electorates. Although neither elected nor removable by voters, agencies accountable to the President have a modest accountability advantage over Article III judges, because the President is attentive to voters' preferences and because agency heads do rotate with the electoral cycles.").

[28] *Id.*

based on what they perceive as the underlying purpose or intent of the statute.

Textualists use these basic ideas to attack their ideological opponents and have done so quite successfully.[29] For example, textualists disapprove of attempts to find "legislative intent" beyond the text of the statute itself.[30] Textualists counter that this position does not reflect the realities of the legislative process. As Professor Siegel noted, "Textualists observed that because a legislature is a multimember body, it may be unrealistic to assume that it has a collective 'intent' on any particular issue. Such an assumption, textualists observed, inappropriately anthropomorphizes the legislature and ignores its true nature."[31] Focusing on "intent" allows judges to pick and choose pieces of evidence, and use them to come to outcomes they favor, regardless of what the text of the statute itself may say, which runs counter to the general principle that we are "a government of laws, not of men."[32] Justice Scalia denounced considering "purpose, independent of the language in a statute,"[33] and Judge Easterbrook condemned the "[t]he invocation of disembodied purposes, reasons cut loose from the language" of the text.[34] Legislative intent, according to textualists, is one such tool beyond the text that judges should avoid, lest the unsuspecting judge begin applying their own personal preferences and beliefs in their decisions over those of the enacting legislature.

Textualists criticize reliance on legislative history on similar grounds. They argue that any piece of legislative history "at most shows the views of a particular committee or individual member of Congress and may not reflect the views of the whole, multimember Congress."[35] Textualists also criticize legislative history as being "indeterminate, multifarious, and endlessly manipulable, thus making it just as likely in prac-

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[29] Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 Harv. L. Rev. 1298, 1303 (2018) ("[N]o judge would proclaim him or herself a 'purposivist'—Justice Scalia and the textualists have too successfully denigrated that term for most to embrace it.").

[30] John F. Manning, *Textualism and Legislative Intent*, 91 Va. L. Rev. 419, 419–20 (2005)

[31] Siegel, at 132.

[32] Scalia & Garner, *supra* n. 13 at 375; *see* Siegel, *supra* n. 21 at 132 (legislative history gives "judges a ready tool with which to enforce their own personal preferences by plucking out those snippets of legislative history that favor them"); Gluck & Posner, *supra* n. 21 at 1314 (Recording one appellate judge as saying some judges looks for tools beyond the text because they "want no more than to find fellow travelers to support the desired result that their 'priors' (to use Dick [Posner]'s word) lead them, much as a drunk uses a lamppost more for support than illumination").

[33] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part) (emphasis added).

[34] *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986).

[35] Siegel, *supra* n. 21 at 132; *see also* Scalia, *supra* n. 21 at 32.

tice to confuse as to help judges."[36] It is easy for any one member of a legislature to enter language into the legislative history describing what they see the purpose of a statute to be, or what they believe the intent of the legislature was when they passed a statute.[37] But that does not mean the rest of the legislature agrees with that interpretation, and there is no way for a judge to find that out. Justice Scalia and Bryan Garner provided a detailed summary of the Founders' views on legislative history, finding that "[t]here was, in short, agreement on the importance of disregarding legislative history."[38] This is because there is no mechanism whereby the legislature as a whole can affirm or deny statements of individual members, short of voting on the actual text of the statute itself. Therefore, textualists argue that the better approach is to rely on the language that was agreed to by the whole legislative body, rather than the statements of one or a few legislators with their own agendas.[39] Indeed, today significant portions of DC law firms' books of business comes from artfully crafting legislative history for Congressmen or corporate clients.[40] Beyond that, the use of legislative history, according to textualists, is problematic at a theoretical level because "[i]t assumes what we are looking for is the intent of the legislature rather than the meaning of the text."[41] Justice Scalia put it in direct terms when he concluded, "[the] use of legislative history is not just wrong; it violates constitutional requirements of nondelegability, bicameralism, presidential participation, and the supremacy of judicial interpretation in deciding the case presented."[42]

This attack on legislative history has been particularly persuasive; even Justice Kagan has declared that "we are all textualists now."[43] As

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[36] Siegel, *supra* n. 21 at 132.

[37] *See id.* at 131–32.

[38] Scalia & Garner, *supra* n. 13 at 370.

[39] *See Manning*, *supra* n. 30 at 430 ("Like classical intentionalists, textualists work within the faithful agent framework; they believe that in our system of government, federal judges have a duty to ascertain and implement as accurately as possible the instructions set down by Congress (within constitutional bounds) . . . But textualists deny that a legislature has any shared intention that lies behind but differs from the reasonable import of the words adopted; that is, they think it impossible to tell how the body as a whole actually intended (or, more accurately, would have intended) to resolve a policy question not clearly or satisfactorily settled by the text. Building upon the realist tradition, textualists do not believe that the premises governing an individual's intended meaning translate well to a complex, multi-member legislative process.")

[40] *See* Scalia & Garner, *supra* n. 13 at 366–90 (discussing rise of lobbyists drafting legislative history); *Top Lobbying Firms*, OpenSecrets.org, https://www.opensecrets.org/federal-lobbying/top-lobbying-firms?cycle=A (last visited Nov. 3, 2021) ("Many lobbying shops are just a small part of a larger law firm . . .").

[41] Scalia & Garner, *supra* n. 13 at 375.

[42] *Id.* at 388.

[43] Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/

Richard Posner described, "Textualists advanced the canons, in particular, as a more objective and coordinating set of tools for resolving statutory disputes than alternatives like legislative history, and now Justices of all interpretive stripes use them in most statutory cases."[44] Textualists' success has prompted most law schools to now offer courses on statutory interpretation and canons of interpretation, some even during the first year.[45]

Textualists attack the underpinnings of purposivism on similar grounds. Professors Henry Hart and Albert Sacks, known as "the canonical expositors of purposivism,"[46] ask courts to assume that statutes are the work of "reasonable men pursuing reasonable purposes reasonably, unless the contrary is made unmistakably to appear."[47] But this assumption is problematic, according to textualists. The "cumbersome legislative process," at both the state and federal levels, with its various "veto gates," the threat of a Senate filibuster, and countless other procedural devices that temper unchecked majoritarianism usually means that any underlying purposes are not "seamlessly translat[ed]" into legislation.[48] What's more, interest groups exert pressure, individual legislators compromise (many such compromises of the unprincipled variety to obtain funding or favors for their districts), and wealthy individuals, corporations, and media companies try their best to shape bills to their own ends.[49] Those compromises and negotiations usually take place in private, and the public (and judges) have no way of divining those influ-

watch?v=DPEtszFT0Tg; *see also* Siegel, *supra* n. 21 at 133 ("Intentionalists and purposivists have absorbed the valuable lesson that textualism's realism offered: they recognize that judicial reliance on legislative history, enforcement of legislative intent, or enforcement of statutory purpose can be fraught with peril for the reasons the textualists offered.").

[44] Gluck & Posner, *supra* n. 29 at 1304–05.

[45] Gluck & Posner, at 1305.

[46] Siegel, *supra* n. 21 at 132.

[47] *Id.* (quoting Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1374, 1124-25 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

[48] *Id.* at 132–33 (citing John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2390, 2416-17 (2003)).

[49] *See id.* ("Interest-group politics and the give and take of the legislative process produce compromises, including potentially unprincipled compromises, and even statutes that pursue no reasonable purpose but simply transfer wealth to powerful groups. Unprincipled interest-group compromises may also take place out of sight and may leave no mark on the legislative record. Assuming that statutes are the work of reasonable men pursuing reasonable purposes reasonably may therefore lead courts to reach incorrect conclusions about statutory meaning." (quotations and citations omitted)). *See generally* Robert A. Caro, *The Years of Lyndon Johnson: Master of the Senate* (Vintage Books 2002); *cf. The Room Where It Happens*, Hamilton (2015) ("No one really knows how the game is played; the art of the trade; how the sausage gets made; we just assume that it happens . . .").

ences (i.e. purposes) of the statute.[50] Much better to just rely on the statute's text and leave it to the legislature to make changes if the courts are not applying a statute in a way the legislature intended.[51]

Textualism has gained popularity in recent decades, thanks in part to the efforts of leading jurists like Justices Scalia, Neil Gorsuch, Brett Kavanaugh, and Judge Frank Easterbrook.[52] It is now widely considered to be the dominant judicial philosophy.[53] But some scholars, even in the textualist camp believe "textualism is unlikely to win a decisive victory in the longstanding debate over interpretation."[54] That said, with a conservative 6-3 majority on the Supreme Court, it appears textualism will remain a powerful force in the development of the law for the foreseeable future.[55] Indeed, Richard Posner and Abbe Gluck recently commented that "most Justices [are] now unabashedly of the 'text-first' persuasion, opting for dictionaries, interpretive presumptions, and, only after those materials, a much stingier approach to legislative history."[56]

III. REMOVAL AND THE FORUM DEFENDANT RULE

A brief discussion of diversity jurisdiction and removal will help guide the following discussion and ground the implications of this issue. Federal courts are courts of limited jurisdiction.[57] To hear a case, they require specific authority, either from Article III of the Constitution or from statute.[58] One of the most prominent types of federal subject-matter jurisdiction is diversity jurisdiction, which is codified at 28 U.S.C. § 1332.[59] Under diversity jurisdiction, a federal court has subject-matter jurisdiction over matters where none of the plaintiffs are citizens of the same state as any of the defendants, and the amount in controversy ex-

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[50] Siegel, n. 21 at 132 (citing Manning, *supra* n. 30 at 2411–12).

[51] *See* Scalia & Garner, *supra* n. 13 at xxx, 391–96.

[52] *See* NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT (2019); Brett Kavanaugh, *Fixing Statutory Interpretation, Judging Statutes* 129 Harv. L. Rev. 2118 (2016); Frank Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983).

[53] *See* A Dialogue with Justice Elena Kagan, supra n. 16.

[54] Somin, *supra* n. 24 at 235.

[55] For a discussion on the interplay between textualism and conservatism, *see* Eliot T. Tracz, *Words and Their Meanings: The Role of Textualism in the Progressive Toolbox*, 45 Seton Hall Legis. J. 355, 367-69 (2021) (citations and quotations omitted).

[56] Gluck & Posner, *supra* n. 29 at 1301 (but also noting that "[t]his does not seem to be the state of affairs in the courts of appeals").

[57] *Vulupala v. Barr*, 438 F. Supp. 3d 93, 97 (D.D.C. 2020) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction and the law presumes that 'a cause lies outside this limited jurisdiction.'"); *see also Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) ("As a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction.").

[58] *See, e.g.*, *Tobin v. United States*, 170 F. Supp. 2d 472, 475 (D.N.J. 2001).

[59] 28 U.S.C. § 1332.

ceeds $75,000.[60] The requirement that all defendants are citizens of states different from all plaintiffs is known as complete diversity.[61] However, it is well-established that the plaintiff is the "master of the complaint"[62] and can choose whether to bring an action in federal or state court where concurrent jurisdiction exists, as is the case where the sole source of federal subject matter jurisdiction is diversity jurisdiction.[63]

Although the plaintiff is the master of the complaint, a defendant is not left helpless in determining the forum where an action will ultimately be litigated. A defendant to a civil action in state court may remove the matter to federal court under certain circumstances prescribed by statute.[64] This process is known as removal and is a statutory right.[65] Under 28 U.S.C. § 1441(a), "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."[66] Therefore, both parties have important tools in determining where a lawsuit ultimately will be contested. And determining where a lawsuit will ultimately be contested matters, because where a lawsuit is fought (either in state or federal court) can impact the outcome.[67] For example, corporate defendants have higher success rates in federal court and so try to remove state court cases.[68]

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[60] *Id.* § 1332(a).

[61] *Grynberg v. Kinder Morgan Energy Partners, L.P.*, 805 F.3d 901, 905 (10th Cir. 2015) (citing *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806) ("Diversity jurisdiction requires complete diversity—no plaintiff may be a citizen of the same state as any defendant.").

[62] *See, e.g.*, *N. Dakota ex rel. Stenehjem v. United States*, 418 F. Supp. 3d 427, 438 (D.N.D. 2019) ("The Court first notes that the plaintiff is the master of his complaint and may choose to limit his claims.").

[63] *Bowman v. PHH Mortg. Corp.*, 423 F. Supp. 3d 1286, 1291 (N.D. Ala. 2019), appeal dismissed, No. 19-14041-HH, 2020 WL 1847512 (11th Cir. Feb. 26, 2020) ("[A]s 'the master of his own claim,' the law gives greater weight to the plaintiff's choice of forum. In this way, a '[d]efendant's right to remove and [a] plaintiff's right to choose his forum are not on equal footing.'" (internal citations omitted)).

[64] *See* 28 U.S.C. § 1441.

[65] *See Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).

[66] 28 U.S.C. § 1441(a).

[67] *See* Thomas O. Main, Jeffrey W. Stempel, David McClure, *The Elastics of Snap Removal: An Empirical Case Study of Textualism*, 69 Clev. St. L. Rev. 289, 293 (2021) (citing Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 Cornell L. Rev. 581, 593 (1998) (noting overall plaintiff win rate of fifty-eight percent for cases initially filed in federal court compared to win rate of 37 percent for removed cases)).

[68] *Id.*

However, where removal is based on diversity jurisdiction, this basic instruction is modified by subsection (b)(2) of the statute.[69] It provides that "[a] civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title [i.e., diversity jurisdiction] may not be removed if any of the parties in interest *properly joined and served* as defendants is a citizen of the State in which such action is brought."[70] This is known as the forum defendant rule.[71] As the Second Circuit noted, "In the usual case, application of the forum defendant rule is straightforward: a defendant is sued in a diversity action in the state courts of its home state, is served in accordance with state law, attempts to remove the case, and is rebuffed by a district court applying Section 1441(b)(2)."[72]

Congress amended this statute in 1948 to include the "properly joined and served" language to subsection (b)(2).[73] Under the revised language, a defendant can remove a diversity case "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."[74] Scholars[75] and judges[76] have found that the legislative history does not indicate any clear purpose behind this language, but most agree that the intent was to prevent gamesmanship by plaintiffs trying to manipulate the forum of a case.[77]

The logic of the forum defendant rule is tied to the rationale of diversity jurisdiction more generally, which is to say, "to protect out-of-state litigants from potential bias in state courts against nonresidents by providing those litigants with a neutral forum in federal court."[78] In other words, diversity jurisdiction was intended to prevent state courts from favoring citizens of their own states and to protect out-of-state parties

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[69] 28 U.S.C. § 1441(b)(2).

[70] *Id.* (emphasis added).

[71] Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 U. Cin. L. Rev. 541, 548 (2018).

[72] *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705 (2d Cir. 2019).

[73] Nannery, *supra* n. 71 at 548.

[74] 28 U.S.C. § 1441(b)(2).

[75] *See, e.g.*, Nannery, *supra* n. 71 at 548; Main, Stempel, & McClure, *supra* n. 67 at 294 (noting "there is no legislative history directly on point . . .").

[76] *See, e.g.*, *Hawkins v. Cottrell, Inc.*, 785 F. Supp. 2d 1361, 1375–78 (N.D. Ga. 2011) ("The reason behind the addition of the joined and served language is not clear from the legislative history."); *Bowman v. PHH Mortg. Corp.*, 423 F. Supp. 3d 1286, 1291 (N.D. Ala. 2019), appeal dismissed, No. 19-14041-HH, 2020 WL 1847512 (11th Cir. Feb. 26, 2020).

[77] *See, e.g.*, Main, Stempel, & McClure, *supra* n. 67 at 294 ("[T]he obvious purpose of the 'joined and served' language was to prevent gamesmanship by plaintiffs."); Nannery, *supra* n. 71 at 548–49.

[78] *Bowman*, 423 F. Supp. 3d at 1291.

from local state court bias.[79] But, as the district court in *Bowman* noted, "there is no need to protect in-state defendants from prejudice against nonresidents. . . . For this reason, beginning with the original removal statute found in the Judiciary Act of 1789, Congress has always limited the right to remove diverse cases to out-of-state defendants."[80] In that situation, there is no need to protect a defendant from being subjected to the judicial power of another state, obviating the need for federal intervention.

But in 1939 the Supreme Court opened a loophole in removal and the forum defendant rule with its decision in *Pullman Co. v.* Jenkins.[81] Without delving deeply into this case, the Court basically created a situation where an enterprising plaintiff could defeat removal by naming, but not serving, an in-state defendant.[82] Through this fraudulent joinder process, plaintiffs could keep otherwise removable cases in state court, despite the wishes of the defendants.[83] Theoretically, a defendant could combat this by arguing to a court that the joinder was fraudulent.[84] But after ten years under this scheme, Congress, in 1948, amended the removal statute and added the "properly joined and served" language to the forum defendant rule in subsection (b)(2) to limit the right of removal articulated in subsection (a).[85] "In this way, the purpose of the 'properly joined and served' addition was 'to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom the plaintiff does not intend to proceed.' "[86]

Under textualist theory this is how the process is supposed to work.[87] The statute as written leads to an unforeseen or unfavorable outcome; the courts apply the law as written regardless of that outcome; and the legislature responds by amending the law, in this case with the 1948 amendment. For many years, that is how courts interpreted the statute: a defendant that was a citizen of the state where a state lawsuit was brought could not remove the matter to federal court, even if the parties

[79] Nannery, *supra* n. 71 at 547 (citing THE FEDERALIST NO. 80 (Alexander Hamilton) (explaining that federal courts in diversity matters have no local attachments and "will be likely to be impartial between the different States and their citizens.").

[80] *Bowman*, 423 F. Supp. 3d at 1291 (internal citations omitted); *see also Hawkins v. Cottrell, Inc.*, 785 F. Supp. 2d 1361, 1377 (N.D. Ga. 2011) (concluding, after an exhaustive review of removal statutes and the relevant legislative history, that "from the inception of the removal statute, a forum defendant has never been allowed to remove a diversity action.")

[81] 305 U.S. 534 (1939).

[82] *See id.*; *accord Bowman*, 423 F. Supp. 3d at 1291.

[83] Nannery, *supra* n. 71 at 547.

[84] *Pullman*, 305 U.S. at 541.

[85] Nannery, *supra* n. 71 at 547–48.

[86] *Bowman*, 423 F. Supp. 3d at 1291–92 (quoting *Goodwin v. Reynolds*, 757 F.3d 1216, 1221 (11th Cir. 2014)).

[87] *See generally* Scalia & Garner n. 13 at xxvii–xxx.

are otherwise diverse.[88] But then the pendulum swung back, and enterprising defendants began to exploit a different loophole in the statute.

IV. SNAP REMOVAL

Recently, some courts have started accepting the use of a stratagem known as "snap removal" to circumvent the forum defendant rule as it was understood after the 1948 amendment.[89] Defendants have seized upon the "properly joined and served" language in § 1441(b)(2) to argue that they may remove a matter to federal court even where one of the defendants is a citizen of the state where the initial state action was brought.[90] Such industrious defendants have reasoned that the forum defendant rule only applies where the forum defendant has been properly joined and served, which, to be fair, is what the plain language of the statute says.[91] Where that condition has not been met, the forum defendant rule would seem not to apply, according to this reading of the statute, and the defendants may avoid the forum defendant rule and remove to federal court, even where the rule would otherwise prevent such removal if the forum defendant had been served.[92]

Courts tried to skirt this issue for years. In 1992, for example, a court in the District of South Carolina in *Wensil v. E.I. Dupont De Nemours & Co.*, considered the "properly joined and served" language of Section 1441(b), and concluded, "The presence of unserved resident defendants does not defeat removal where complete diversity exists."[93] The *Wensil* court noted, "Courts have routinely held that Section 1441(b) does not permit a non-resident defendant to remove an action to federal court before the resident defendant is served, if joinder of the resident defendant defeats diversity jurisdiction."[94] But that court ultimately noted that in that case "complete diversity between all plaintiffs and all defendants" existed and so permitted non-resident defendants to remove

[88] *See* Nannery, *supra* n. 71 at 548–49.

[89] *Id.* at 550. Although the term "snap removal" appears to have become the most popular term for this procedural device, others have referred to the practice by different names such as "pre-service removal," "early removal," "jack rabbit removal," and "race to remove." Main, Stempel, & McClure at 294 n. 67 (citing to cases using various names). This article uses the most commonly accepted name of "snap removal."

[90] *See* Nannery, *supra* n. 13 at 548–49.

[91] *Id.* at 550–51.

[92] Main, Stempel, & McClure, *supra* n. 67 at 295.

[93] *Wensil v. E.I. Dupont De Nemours & Co.*, 792 F. Supp. 447, 449 (D.S.C. 1992) ("The Court recognizes that the plaintiffs are being deprived of their original choice of forum merely because the South Carolina defendants are served after the non-resident defendants. However, this fortuitous result could have been prevented by serving a South Carolina resident defendant first.").

[94] *Id.* (citing *Workman v. National Supaflu Systems, Inc.*, 676 F. Supp. 690 (D.S.C. 1987)).

to federal court in South Carolina before the South Carolina defendants had been served, effectively avoiding the issue head on.[95]

The Northern District of Texas tried to tackle this issue in 1998 in *Recognition Communications, Inc.*[96] where the judge mused that "neither party has cited a case and the Court has been unable to locate a decision where the precise procedural facts of this case were present."[97] In that case, a Nevada plaintiff filed breach contract claims against four defendants, including one Texas defendant in Texas state court.[98] The plaintiff alerted the defendants to the lawsuit before serving them, and the three non-Texas defendants then removed the case to the Northern District of Texas before receiving service, under the snap removal theory.[99] The court was unconvinced and remanded the case to state court.[100] But since then, lawyers in hundreds of cases, all seeming adherents to textualism—at least where it will best serve their clients—have advanced this argument in an attempt to gain access to federal court.[101]

Before the proliferation of the Internet and electronic filing systems, this quirky procedure was little known, little used, and mainly of interest only to civil procedure professors. However, with the advance of technology, this textual interpretation has become more relevant, and more useful to practitioners.[102] Sharp-eyed lawyers with clients prone to litigation can easily set an electronic alert for any filing against them.[103] Before the filing party can hope to serve them, those lawyers can file for removal to the local federal district where venue is proper. Alternatively, attorneys who engage in the practice of providing courtesy copies of complaints to defendants now run the risk of a race to the courthouse and potential removal to federal court.

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[95] *Id.*

[96] *Recognition Commc'ns., Inc. v. American Auto. Ass'n, Inc.*, No. Civ.A. 3:97-CV-0945-P, 1998 WL 119528, at *1 (N.D. Tex. Mar. 5, 1998).

[97] *Id.* at n.3.

[98] *Id.*

[99] *Id.*

[100] *See id.*

[101] Nannery, *supra* n. 71 at 550–51.

[102] *See, e.g.*, *id.* at 545; Main, Stempel, & McClure, *supra* n. 67; Jeffrey W. Stempel et al., *Snap Removal: Concept; Cause; Cacophony; and Cure*, 72 Baylor L. Rev. 423 (2020); *Snap Removal After Texas Brine: Considerations for Forum Defendants in the Fifth Circuit*, Jones Day (Aug. 2020). https://www.jonesday.com/en/insights/2020/08/snap-removal-after-texas-brine-considerations-for-forum-defendants-in-the-fifth-circuit.

[103] *See generally, e.g.*, *E-mail Notification Index*, ECF, https://ecf.cand.uscourts.gov/cand/tutor/current/email/index.html (last visited Oct. 11, 2021); Michael Lissner, *Announcing PACER Docket Alerts for Jounralists, Lawyers, Researchers, and the Public*, FREE LAW PROJECT (Aug. 21, 2018), https://free.law/2018/08/21/announcing-pacer-docket-alerts-for-journalists-lawyers-researchers-and-the-public; *Create an alert*, GOOGLE, https://support.google.com/websearch/answer/4815696?hl=EN (last visited Oct. 11, 2021).

V. DISTRICT COURTS SPLIT

District courts have been split on how to handle this phenomenon.[104] That split, and the implications of either permitting or denying snap removal, have forced judges into "fairly extreme versions of textualism and purposivism."[105] Indeed, some scholars have commented, "this statute has an unusual quality that forces judges into one interpretive camp or the other."[106] Generally, these two camps can be described thus: on one hand are judges who, when faced with the plain language of § 1441(b), balk at the implications of applying that plain language, and focus on the intent and purpose of the statute to reject attempts at snap removal; and on the other hand are judges who rely on textualist principles to apply that plain language, regardless of its practical implications, and allow snap removal.

A recent study concluded that before 2006, snap removal had not gained much traction in the federal courts.[107] On the one hand are courts that have rejected snap removal arguments. But within that universe of cases, judges have adopted a variety of reasonings to justify the decision to remand cases. *Recognition* hued a narrow road, emphasizing the fact that none of the defendants had yet been served, and so "[g]iven this scenario, the removal was improper because it excluded [a resident defendant], and the Court does not need to determine whether the consent of [a resident defendant], after being issued service of process, was timely or proper."[108] The *Recognition* Court stressed, "if Plaintiff had served one of the non-resident Defendants, this case could have been properly removed by the served Defendant under Section 1441(b), regardless of the presence of a resident defendant."[109] But because none of the defendants had been served at the time of removal, the citizenship of all of the defendants had to be considered.[110] The court emphasized the "limited scope of this decision."[111] This limited holding and reasoning received support from another case in the Northern District of Texas three years later.[112]

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[104] *See* Nannery, *supra* n. 71 at 552–56.

[105] Main, Stempel, & McClure, *supra* n. 67 at 289.

[106] *Id.* at 296.

[107] Nannery, *supra* n. 71 at 552–54.

[108] *Recognition*, 1998 WL 119528, at *3.

[109] *Id.*

[110] *See id.*

[111] *Id.* at n. 2.

[112] *See Davis v. Cash*, 2001 WL 1149355, at *3 (N.D. Tex. Sept. 27, 2001) ("This result is supported by Judge Solis' opinion in *Recognition* . . . where the Court noted that service of a resident Defendant would constitute proper grounds for removal where the non-resident Defendants had not been served and complete diversity existed between the parties."). *But see Maitra v. Mitsub-*

Other courts stressed the perceived injustice of basing removal on a race to the courthouse. A court in the District of Maryland drew on tangentially analogous cases from the Supreme Court[113] and the Eighth Circuit[114] to lend support to its conclusion that a defendant should not be rewarded for winning a race to the courthouse, and that snap removal would ultimately expand the scope of removal, rather than act as a restriction on it as Congress intended.[115] The court in *Oxendine* concluded that "removability can not [sic] rationally turn on the timing or sequence of service of process."[116] This reasoning garnered support from several other district courts.[117]

Still other courts have focused on the policy implications of snap removal in a modern world with easy access to electronic dockets and attempted to emphasize the purpose of the statute to get around its plain meaning. In *Laugelle v. Bell Helicopter Textron, Inc.*, the court reasoned rejecting a snap removal request "makes particular sense today given the shift to electronic docketing and the increased potential for gamesmanship by savvy defendants who may monitor State Court dockets."[118] In *Fields v. Organon USA Inc.*, the court worried, "blindly applying the plain 'properly joined and served' language of § 1441(b) . . . eviscerate[s] the purpose of the forum defendant rule" and "creates an opportunity for gamesmanship by the defendants, which could not have been the intent of the legislature in drafting the 'properly joined and served' language."[119] A court in the Northern District of Illinois went one step further and decided the "joined and served" language does not "make[ ] sense" and may even be "wholly unnecessary" in the context of snap

ishi Heavy Indus., Ltd., No. CIV.A.SA01CA0209FBNN, 2002 WL 1491855, at *2 (W.D. Tex. Mar. 29, 2002) (declining to adopt reasoning of *Recognition*).

[113] *Pullman Co. v. Jenkins*, 305 U.S. 534, 59 S.Ct. 347, 83 L.Ed. 334 (1939) (holding where a non-separable controversy involves a resident defendant, the fact that the resident defendant has not been served with process does not justify removal by the non-resident defendant).

[114] *Pecherski v. General Motors Corp.,* 636 F.2d 1156, 1160–61 (8th Cir. 1981) (holding the enactment of § 1441(b) did not qualify the requirement of complete diversity; rather, it "further limited jurisdiction based on diversity of citizenship by requiring that no joined and served defendants be a citizen of the state in which the action was initially brought").

[115] *Oxendine v. Merck & Co., Inc.*, 236 F. Supp. 2d 517, 524 (D. Md. 2002).

[116] *Id.* at 526.

[117] *See, e.g.*, *Khashan v. Ghasemi*, 2010 WL 1444884, *2, (C.D. Cal. Apr. 5, 2010); *Nottebohm v. Am. Home Mortg. Corp.*, No. C 11-01838 SI, 2011 WL 3678841, at *2 (N.D. Cal. Aug. 22, 2011); *Carpenter v. Apotex Corp.*, No. 08-60526-CIV, 2008 WL 11332029, at *3 (S.D. Fla. Aug. 8, 2008); *Laugelle v. Bell Helicopter Textron, Inc.*, No. CIV.A. 10-1080 GMS, 2012 WL 368220, at *3 (D. Del. Feb. 2, 2012).

[118] 2012 WL 368220, at *3 (citing *Vivas v. Boeing Co.*, 486 F.Supp.2d 726, 734–35 (N.D. Ill. 2007).

[119] *Fields v. Organon USA Inc.,* 2007 WL 4365312 at *4 (D.N.J. Dec.12, 2007).

removal.[120] Unnecessary as the language may be, it is still the language of the statute.

But other courts came to different conclusions, holding that snap removal may be acceptable in certain situations. The first example of this seems to be *Wensil*, where the District of South Carolina concluded that non-resident defendants could theoretically remove to federal court in South Carolina before the South Carolina defendants had been served.[121] Other early adopters of this strategy included a court in the Southern District of Indiana, which held that if the in-state defendants had not been served at the time of removal, an out-of-state defendant may remove where there is complete diversity.[122]

Several judges favored a textualist interpretation of § 1441(b)(2).[123] The Northern District of California emphasized that just because the outcome may be "unfair" that did not give the court a "compelling reason to depart from the plain text of section 1441(b)."[124] The Southern District of Illinois relied on this same interpretation in *Massey v. Cassens & Sons, Inc.*[125] holding, "While an argument can be made that the likely policy underlying the 'joined-and-served' requirement is not implicated by the current facts, the Court is constrained by the language of 28 U.S.C. § 1441. That language is clear and unambiguous: where complete diversity is present—as it is in this case—only the presence of a 'joined-and-served' resident defendant defeats removal."[126] Some judges in the District of New Jersey were also critical of the purposivist approach taken by other courts.[127] These courts, by and large, admitted to differing extents that their holdings led to problematic or "unfair" outcomes, but

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[120] *Holmstrom v. Harad*, 2005 WL 1950672, at *1–2 (N.D. Ill. Aug. 11, 2005).

[121] *Wensil*, 792 F. Supp. at 449 ("The Court recognizes that the plaintiffs are being deprived of their original choice of forum merely because the South Carolina defendants are served after the non-resident defendants. However, this fortuitous result could have been prevented by serving a South Carolina resident defendant first.").

[122] In re Bridgestone/Firestone, Inc., 184 F. Supp. 2d 826, 828 (S.D. Ind. 2002).

[123] *See* Nannery, *supra* n. 71 at 552–53 (discussing several early cases focusing on the plain language of § 1441(b)).

[124] *Waldon v. Novartis Pharms. Corp.*, No. C07-01988 MJJ, 2007 WL 1747128, at *3 (N.D. Cal. June 18, 2007); *see also City of Ann Arbor Employees' Ret. Sys. v. Gecht*, No. C-06-7453EMC, 2007 WL 760568, at *9 (N.D. Cal. Mar. 9, 2007) ("[I]f Congress had wanted to ensure that removal would not be appropriate until it was clear that Plaintiff was trying to prevent removal by speciously naming resident defendants, Congress could have provided that no removal petition could be filed until one or more nonresident defendant had been joined and served. The statute also could have been written to give a plaintiff, e.g., 30 or 60 days to effect service before permitting a defendant to remove. In any event, Plaintiff has not cited anything in the legislative history of § 1441(b) to support its assertion that the plain language of the statute should be disregarded.").

[125] *Massey v. Cassens & Sons, Inc.*, 2006 WL 381943, at *3 (S.D. Ill. Feb. 16, 2006).

[126] *Id.*

[127] *See, e.g.*, *Frick v. Novartis Pharms. Corp.*, No. Civ. 05-5429(DRD), 2006 WL 454360, at *2-3 (D.N.J. Feb. 23, 2006); *Ripley v. Eon Labs Inc.*, 622 F. Supp. 2d 137, 140-41 (D.N.J. 2007).

determined to apply a textualist approach to these cases. Under this rationale, whether it was the forum or non-forum defendant who removed was immaterial.[128] By 2010, decisions permitting snap removal were becoming prevalent in district courts across the country.[129] Indeed, a recent survey found that "more than half of judges [today] allow" snap removal.[130]

This approach has an obvious appeal to textualist judges. It is simple. It is elegant. The language is clear. Where that is the case, textualists reasoned, it is the judge's job to enforce the statute. It did not matter if that outcome expanded federal diversity jurisdiction. It did not matter if the outcome meant overriding the limited purpose of diversity jurisdiction, turning diversity jurisdiction into a race to the courthouse rather than a venue to protect out-of-state parties from the prejudices of a state court. Leave it to the legislature to fix those problems. How could the underlying rationale and philosophical underpinnings of a statute hope to contend with the plain text? Afterall, "it is the text's meaning, and not the content of anyone's expectations or intentions, that binds us as law."[131]

Despite this upsurge in snap removal, not all courts became convinced the procedure was permissible, and the controversy continues in the absence of controlling case law from the courts of appeals.[132] Courts have employed a wide variety of legal reasoning and interpretive canons to lead to divergent results. This has led to a deep split among the district courts and a conflicting series of cases, differing as much in reasoning as in outcome. But at bottom, some courts relied on purpose and intent, while others relied on the plain meaning of the text. Given the unique features of snap removal, the courts were forced to pick a side. Depending on what approach those courts took, they ended up with very different results.

VI. THIRD CIRCUIT IN *Encompass*

In 2018, the Third Circuit took up the issue of snap removal in *Encompass Insurance Co. v. Stone Mansion Restaurant, Inc.*[133] The *En-*

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[128] *See, e.g.*, *Hutchins v. Bayer Corp.*, No. 08-640-JJF-LPS, 2009 WL 192468, at *8 (D. Del. Jan. 23, 2009).

[129] *See* Nannery, *supra* n. 71 at 554, n.72.

[130] Main, Stempel, & McClure, *supra* n. 67 at 295.

[131] Laurence H. Tribe, "Comment," in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 65, 65 (1997).

[132] *See* Nannery, *supra* n. 71 at 552–56 (detailing push back from some district courts after other district courts began permitting snap removal).

[133] Encompass Ins. Co. v. Stone Mansion Rest. Inc., 902 F.3d 147 (3d Cir. 2018).

compass court used a variety of canons of interpretation in its analysis, trying to reconcile the conflicting positions of the district courts. On the one hand, those courts that held that the unambiguous text of the statute was clear and so must be applied as written,[134] and on the other hand, those courts that reasoned such an interpretation would defeat the purpose of diversity jurisdiction and go against congressional intent.[135] Ultimately, the court determined the plain language of the statute permitted snap removal, and that such an outcome was not so absurd as to prevent that result.

A summary of the facts of the case is helpful. Encompass, a citizen of Illinois, brought an action against Stone Mansion Restaurant, a Pennsylvania corporation, in Pennsylvania state court.[136] Over email between the parties' counsel, Stone Mansion's counsel agreed to accept electronic service of process instead of requiring formal service.[137] Stone Mansion's counsel told Encompass's counsel that "[i]n the event your client chooses to file suit in this matter, I will be authorized to accept service of process" and that "if and when you do file, provide your Complaint to me along with an Acceptance form."[138] Counsel for Encompass replied a few minutes later, noting, "[t]hank you . . . for agreeing to accept service."[139] On January 23, 2017, Encompass sent Stone Mansion a copy of the filed complaint and a service acceptance form via email.[140] Counsel for Stone Mansion replied, "I will hold the acceptance of service until I get the docket n[umber]."[141] Later that day, Encompass's counsel provided the docket number; however, Stone Mansion did not return the acceptance form.[142] Three days later, counsel for Stone Mansion responded:

> Thank you for your patience in this regard. . . . I want to explain why I have not yet returned the Acceptance of Service form. Noting that there is diversity of citizenship, and an amount in controversy in excess of $75,000, we are considering removing this action to federal court. While 28 USC [sic] § 1441(b) generally prevents a resident defendant from removing an action to federal court in its own state, the language of the statute precludes such removal when a resident defendant has been "properly joined and served". We are aware of an opin-

[134] *See, e.g.*, *Gecht*, No. C-06-7453EMC, 2007 WL 760568, at *9.
[135] *See, e.g.*, *Holmstrom*, 2005 WL 1950672, at *1–2.
[136] *Encompass*, 902 F.3d at 149.
[137] *Id.* at 150.
[138] *Id*.
[139] *Id*.
[140] *Id.*
[141] *Id*.
[142] *Id.*

> ion from Chief Judge Conti in the Western District of PA, interpreting this to mean that a resident defendant can remove prior to being served. I fully acknowledge having agreed prior to your filing suit that we will accept service. I maintain that agreement, but because it may affect our client's procedural ability to remove the case, I have to hold off doing so until after the Notice of Removal is filed. I expect this will happen in the next one or two days. Happy to discuss this with you over the phone if you desire.[143]

Before Stone Mansion formerly accepted service, it filed for removal in the Western District of Pennsylvania.[144] Encompass filed a motion to remand to the state trial court, arguing that removal was improper pursuant to the forum defendant rule; however, the District Court denied the motion.[145] The District Court instead held that the forum defendant rule did not apply because it precludes removal only "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which [the] action is brought" and because Stone Mansion's counsel "did not accept service of [Encompass'] Complaint until after [it] filed a Notice of Removal."[146]

Encompass Insurance appealed the district court's decision denying their motion to remand.[147] On appeal, Encompass argued that the district court's interpretation ignored the intent of the statute and construed it "in a manner that necessarily would create a nonsensical result that Congress could not have intended."[148] The Court of Appeals began its analysis by noting that, where there is an applicable statute, it must begin with the text of that statute.[149] The court concluded that where the text of the statute is unambiguous, "the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language."[150] However, the Third Circuit recognized the basic principle of statutory interpretation that the courts should interpret a law in a way that avoids "absurd or bizarre results."[151] However, the Third Circuit cautioned that an absurd result had a narrow definition, and was only one that "defies rationality or renders the statute nonsensical and superfluous."[152]

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[143] *Id*.
[144] *Id*.
[145] *Id.*
[146] *Id*.
[147] *Id.* at 151.
[148] *Id*. at 152.
[149] *Id.*
[150] *Id*. (citing *McMaster v. E. Armored Servs., Inc.*, 780 F.3d 167, 170 (3d Cir. 2015)).
[151] *Id*. (citing *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 338 (3d Cir. 2006)).
[152] *Id*. (citing *United States v. Moreno*, 727 F.3d 255, 259 (3d Cir. 2013)).

With these tools of statutory construction laid out, the Court began dissecting the statute's text. The Court quickly held that the language of the statute was unambiguous.[153] Its plain meaning precluded removal only where the in-state defendant had been properly joined and served.[154] Where the language was clear, only the most compelling contrary evidence could permit the court to depart from that plain meaning.[155] The question then became whether the legislative history had a "most extraordinary showing of contrary intentions" or whether the literal interpretation of the statute would lead to "absurd or bizarre results."[156] The Court was constructing an escape hatch, but a narrow one. Ultimately, it refused to use that door.

Addressing the purpose of the statute, the Third Circuit noted that the forum defendant rule was made "in part" to prevent a state court from favoring an in-state defendant and to prevent discrimination against out-of-state litigants.[157] However, the Court differentiated this general purpose with the specific purpose of the "properly joined and served" language in the statute.[158] The purpose of this language was, in the Court's mind, "less obvious."[159] It concluded that the legislative history was inconclusive, but noted that other courts and some commentators had theorized that Congress enacted the rule "to prevent a plaintiff from blocking removal by joining as a defendant a resident party against whom it does not intend to proceed, and whom it does not even serve."[160] Encompass argued this fraudulent joinder rationale meant that Congress would not have intended to allow an in-state defendant to circumvent the rule by delaying formal service of process.

The Third Circuit found this argument unavailing. It reasoned that Congress included the fraudulent joinder language to prevent the specific problem of fraudulent joinder by a plaintiff.[161] Under this reading of the purpose of the "properly joined and served" language, permitting an in-state defendant to remove before being served would not contravene Congress's intent.[162] The Court provided three reasons why this interpretation did not lead to an absurd result. First, it adhered to the plain mean-

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[153] *Id.*

[154] *Id*.

[155] *Id.*

[156] *Id*.

[157] *Id*. at 153.

[158] *Id.*

[159] *Id*.

[160] *Id*. (quoting Arthur Hellman, et al., *Neutralizing the Strategem of "Snap Removal": A Proposed Amendment to the Judicial Code*, 9 Fed. Cts. L. Rev. 103, 108 (2016)).

[161] *Id.*

[162] *Id*.

ing of the text.[163] Second, it only expands the right to removal in the uncommon circumstance where a defendant is aware of a lawsuit before being served.[164] Third, it protects the purpose of the statute without rendering any language superfluous.[165]

The Third Circuit admitted that "this result may be peculiar" but concluded that the outcome was not "so outlandish as to constitute an absurd or bizarre result."[166] The Court also acknowledged that technological advances had made the electronic monitoring of dockets easier since the forum defendant rule was written.[167] However, it was satisfied that it did not need to address those concerns because that issue was not briefed by the parties and because the legislature could deal with those changing circumstances if it wanted.[168] The court finished by noting that "[r]easonable minds might conclude that the procedural result demonstrates a need for a change in the law; however, if such change is required, it is Congress — not the Judiciary—that must act."[169] Shrug.

The Second and Fifth Circuits have heavily relied on the Third Circuit's reasoning to reach the same conclusions on snap removal.[170] Both Courts began with the statute's text,[171] and found the statute's plain language to be unambiguous.[172] The Second Circuit in *Gibbons* concluded that "[b]y its text . . . Section 1441(b)(2) is inapplicable until a home-state defendant has been served in accordance with state law; until then, a state court lawsuit is removable under Section 1441(a) so long as a federal district court can assume jurisdiction over the action."[173] The Second Circuit in *Gibbons* explained that, "[t]he statute plainly provides that an action may not be removed to federal court on the basis of diversity of citizenship once a home-state defendant has been 'properly joined and served.'"[174] The Fifth Circuit in *Texas Brine Co.* also held that "the statute's plain language allows snap removal."[175] Therefore, unless the

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[163] *Id.*

[164] *Id.*

[165] *Id*.

[166] *Id*. at 154.

[167] *Id.*

[168] *Id.* at 153, n. 3.

[169] Encompass, 902 F.3d at 154.

[170] *See Texas Brine Company, L.L.C. v. American Arbitration Association, Inc.*, 955 F.3d 482, 486-87 (5th Cir. 2020); *Gibbons v. Bristol-Myers Squibb Company*, 919 F.3d 699, 705-06 (2d Cir. 2019).

[171] *Gibbons*, 919 F.3d at 705 ("Every exercise in statutory construction must begin with the words of the text.") (quoting *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003)); *Texas Brine Co., LLC*, 955 F.3d at 486.

[172] *Id.*

[173] *Gibbons*, 919 F.3d at 705.

[174] *Id.*

[175] *Texas Brine Co., LLC*, 955 F.3d at 486.

statute's plain language led to an absurd result, both Circuits held they were bound by the text of the statute.[176]

The Fifth Circuit stressed the "high bar" of the absurd result doctrine, favorably citing Justice Scalia's statement that "[t]he result must be preposterous, one that 'no reasonable person could intend.' "[177] The Fifth Circuit went on to note that snap removal was "at least rational" and so the absurd result doctrine should not apply.[178] The Second Circuit agreed, noting that "while it might seem anomalous to permit a defendant sued in its home state to remove a diversity action, . . . the language of the statute cannot be simply brushed aside. Allowing a defendant that has not been served to remove a lawsuit to federal court 'does not contravene' Congress's intent to combat fraudulent joinder."[179] In fact, there could have been multiple reasons why the Congress wrote the statute the way it did: "Congress may well have adopted the 'properly joined and served' requirement in an attempt to both limit gamesmanship and provide a bright-line rule keyed on service, which is clearly more easily administered than a fact-specific inquiry into a plaintiff's intent or opportunity to actually serve a home-state defendant."[180] In other words, there were at least some rational reasons why Congress would write the statute the way it did, and the Second Circuit would not question those rationales under the absurd results doctrine.

Both circuits settled on the plain language, concluding that it was the role of the legislature to amend the statute if the statute's current language led to an undesirable result. The Fifth Circuit concluded that "[t]he plain-language reading of the forum-defendant rule as applied in this case does not justify a court's attempt to revise the statute."[181] Even though courts typically construe removal narrowly and favor remand, "we do not have 'any doubt about the propriety of removal' because, as discussed, the text is unambiguous."[182] The Second Circuit was likewise satisfied that the outcome was "authorized by the text."[183] The Fifth Circuit ended its opinion with language similar to that of the Third Circuit, warning that "[w]e are not the final editors of statutes, modifying lan-

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[176] *See Gibbons*, 919 F.3d at 705; *Texas Brine Co., LLC*, 955 F.3d at 486.

[177] *Texas Brine Co., LLC*, 955 F.3d at 486 (quoting Scalia & Garner, *supra* n. 13 at 237).

[178] *Id.*

[179] *Gibbons*, 919 F.3d at 706 (quoting *Encompass Ins.*, 902 F.3d at 153).

[180] *Id.*

[181] *Texas Brine Co., LLC*, 955 F.3d at 487.

[182] *Id.* (quoting *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281-82 (5th Cir. 2007)).

[183] *Gibbons*, 919 F.3d at 707.

guage when we perceive some oversight."[184] That role is reserved for the legislature, the Fifth Circuit concluded.[185]

Thus, all three Circuits to have considered the issue of snap removal have relied on a textualist approach to conclude (1) that the plain language of the statute is unambiguous, (2) the absurd results doctrine is inapplicable because there are rational reasons Congress might have written the statute the way it did, and (3) it is for Congress, and not the courts to address this situation. As a result of these opinions, the scope of removal has significantly broadened in these three Circuits.

VII. CONFLICTS IN TEXTUALISM: THEORY V. REALITY

Encompass and its progeny are well-reasoned, and clearly and correctly apply the textualist's tools of statutory interpretation to the forum defendant rule. One can almost hear Justice Scalia's approval echoing from his 1997 Tanner Lecture: "It is the law that governs, not the intent of the lawgiver."[186] *Encompass* is an exemplary opinion in the textualist model and has many redeeming qualities. A law student and, indeed, a practitioner or academic, could learn a great deal from the succinct style and crisp reasoning.

But take a step back from the granular analysis of canons of interpretation. See the forest, not just the trees. *Encompass* rendered the forum defendant rule virtually meaningless in modern litigation. It is all well and good for a court to hold that a result adheres to the plain text and does not lead to an absurd result when narrowly defined to the clause at issue. The *Encompass* Court abided by the underlying philosophy of textualism and used the text as their anchor.[187] The Court then limited the efficacy of its other tools by emphasizing how narrowly defined the absurd result and extraordinary showing of contrary intentions exceptions were.[188] Some commentators have identified this growing tendency among textualists to adhere too much to the text.[189] These commentators worry that the underlying rationale of textualism will lead the courts to rely on safety valves, like the absurd result canon less and less.[190] Others have responded that this "may be a strength of textualism rather than a

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[184] *Texas Brine Co., LLC*, 955 F.3d at 486.

[185] Interestingly, although somewhat tangential to this article, the Fifth Circuit did not limit its holding to non-forum defendants, but noted that it was "[o]f some importance" that "the removing party" was "not a forum defendant." *Id.* at 487.

[186] Scalia, *supra* n. 19 at 92.

[187] *See supra* Section VI.

[188] *See supra* Section VI.

[189] *See* Siegel, *supra* n. 21.

[190] *See id.*

weakness in a society with deep ideological disagreements over what counts as 'absurd.'"[191] Whether or not this narrowing of the absurdity doctrine is a good idea, this seems to be what happened in *Encompass*, and could quite possibly continue to happen in other circumstances moving forward. In effect, the court had a small life raft of exceptions that it punched with holes, and then dragged it to the bottom of the ocean with a heavy anchor of text. And the result was the forum defendant rule itself, clinging for dear life in the turbulent seas of modern litigation and electronic docket monitoring, drowned.

Today, any attorney can electronically monitor dockets.[192] They can even set alerts if a client is mentioned in a recently filed complaint.[193] Additionally, it is common practice for a plaintiff's counsel to email defendant's counsel and ask the counsel to accept electronic service.[194] This practice makes sense, as it streamlines the service of process and allows the parties to get to work faster on the merits of the case. But under the reasoning of *Encompass*, any of those defendants can remove the case to federal court, regardless of citizenship of the defendant, so long as they can file a notice of removal before being physically served.[195] This will almost always be the case.

The forum defendant rule held that an in-state defendant could not remove an otherwise diverse case to federal court.[196] *Encompass* concluded the forum defendant rule meant that an in-state defendant could remove, so long as it did so before being served.[197] With today's technology, that equates to the proposition that an in-state defendant can remove a diverse case. In two logical steps, the combination of textualism and modern technology rendered a statute meaningless.

Encompass, then, provides us with a stark example of the dangers of textualist formalism as many judges apply it today. As Justice Kagan acknowledged, the basic principles of textualism make sense.[198] Judges would do well to adhere to the text of the statute where it is clear. It is where any good judge should begin their analysis. It provides notice to litigants of what the law is, and it respects the democratic process. But there have to be some mechanisms in place—safety valves, life rafts, or

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[191] Somin, *supra* n. 24 at 236.

[192] *See* PACER Homepage, https://pacer.uscourts.gov/ (last visited Oct. 11, 2021).

[193] *See supra* n. 10.

[194] *Cf. Encompass*, 902 F.3d at 150.

[195] *See supra* Section VI.

[196] *See supra* Section III.

[197] *See supra* Section VI.

[198] *See* Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=DPEtszFT0Tg.

whatever analogy one would like to use—to ensure that judges do not go too far and render the statute they are attempting to enforce meaningless.

Perhaps the answer, as it is in so many parts of life, is moderation and pragmatism. As one legal scholar noted, "[e]ven if Siegel is correct about the radicalizing logic of textualism, textualist judges may not follow it to its limits. Unlike legal scholars, judges are chosen by a political process that does not emphasize adherence to broad theories of interpretation. Few judges feel a strong imperative to push logical consistency to its limits. They may well be content to make use of textualist methodology without acting on all the logical implications of doing so."[199] Maybe this debate over differing interpretations has become "boring" and judges can and will use all the tools at their disposal to come to the "right" result.[200] As one commentator recently concluded, "There may be an emerging consensus that most judges fulfill their judicial role pragmatically, drawing sensibly from legislative history and other indicia of intent—with some judges invoking interpretive tools more frequently and liberally than others."[201] Richard Posner, in a recent survey of 42 federal courts of appeals judges concluded:

> The approach that emerged most clearly from our interviews is not a single approach at all but rather what might be described as intentional eclecticism. As we elaborate in the next Part of the Article, most of the judges we spoke to are willing to consider many different kinds of material. They told us it was "defensible to gather as much information as you can to make the best-informed decision you can" and that they eschewed an "ecclesiastical" ideology. Many acknowledged the need for pragmatism— judging with common sense and an eye on consequences. Some judges offered a frank acknowledgment that sometimes the work of statutory interpretation is "quasi-legislative."[202]

Perhaps these courts of appeals judges have the right idea. Perhaps a flexible textualism is possible and preferable in the face of rapid technological change.

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[199] Somin, *supra* n. 24 at 236.

[200] *See* Gluck & Posner, *supra* n. 29 at 1300-01 (referring to the debate between textualism and purposivism as "boring").

[201] Main, Stempel, & McClure, *supra* n. 67 at 291 (citing various recent academic articles).

[202] Gluck & Posner, *supra* n. 29 at 1302-03.

VIII. TEXTUALISM AND TECHNOLOGY

Judges need these tools of interpretation and the flexibility they provide more than ever today because of the pace of technological advance, and its continued implementation in the legal profession. How will textualism adapt to a world of rapid technological change? How can it avoid the outcome of *Encompass* and its progeny? Or is it better to put the onus on the legislature to amend statutes where a reading of the text, combined with modern technology, renders the statute meaningless? Deferring to the legislature seems particularly troubling today, where the pace of change is ever increasing, and Congress seems less able than ever to pass meaningful legislation. It seems unlikely the bill in the House of Representatives meant to address this issue will become law anytime soon.[203]

The intent of this article was not to criticize textualism as a theory. It has been an important contribution to legal thought and jurisprudence, and has more benefits than drawbacks. Rather, this article hoped to highlight an example of the problems inherent in applying a textualist approach to a statute today. The legal world has been criticized at times for failing to evolve in the face of ever-quickening change.[204] Textualists face a unique challenge, in that their jurisprudential philosophy is perhaps the most uncompromising and the least capable of flexibility and adaptation in the face of change.[205] A court must adhere to the plain text of the statute unless some narrow exception applies. How do judges determine what an absurd result would be from a purely practical standpoint? More often, their analysis focuses on an absurd legal result, not a practical one. *Encompass* provides such an example. The result, while strange, was not so absurd as to require judicial intervention. Justice Scalia and Bryan Garner define the absurd results doctrine narrowly, in order to avoid "a slippery slope" towards judicial activism.[206] They limit the doctrine to cases where "(1) [t]he absurdity must consist of a disposition that no reasonable person could intend . . ."[207] In their fear of purposivism, they have restricted an otherwise powerful tool for the modern judge to combat the worst effects of technology on making stat-

[203] *See* The Removal Jurisdiction Clarification Act of 2020, H.R. 5801, 116th Congress (February 7, 2020).

[204] *See e.g.*, Reid Trautz, *If Times They Are a-Changing, Why Aren't Lawyers Too?*, LAW PRACTICE TODAY (Dec. 14, 2016), https://www.lawpracticetoday.org/article/times-are-changing-why-arent-lawyers/; *Overcoming lawyers' resistance to change*, Thomson Reuters, https://legal.thomsonreuters.com/en/insights/articles/overcoming-lawyers-resistance-to-change (last visited Oct. 11, 2021).

[205] *See* Tracz, *supra* n. 55 at 367–69 (discussing textualism as a conservative doctrine).

[206] *See* Scalia & Garner, *supra* n. 13 at 237.

[207] *Id.*

utes redundant, as in the case of snap removal. Only "where the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in reject the application" may the judge apply this otherwise useful canon.[208] There appears to be little, if any, room for practical considerations in such a strict application of this canon. And judges appear to be using these canonical tools less and less and relying solely on the text more and more.[209]

This article has shown how a sound textualist application to a statute opens the door for technological advances to render that statute meaningless. The very statute the textualist judge reveres becomes useless when that judge fails to act to address the shifting technological landscape. But how can textualism account for technological change while remaining true to the text? The text is, after all, the only thing imbued with the legal force provided by the procedures laid out in the Constitution. Perhaps textualists can glean lessons from Lawrence Lessig's work on fidelity in translation,[210] and find a way to allow for changes in constitutional reading even when there has been no change in the constitutional text. If meaning is a function of both text and context, then even textualists will have to contend with changes in the world and their impact on the law and the text.

Ultimately, there are no easy answers to the questions facing textualism today. Can a judge go outside the words of the statute? Should they? Are judges really the people best to predict how modern technology may impact a situation, and how best to address the resulting issues? More importantly, how should a judge balance and weigh these competing concerns? Does this not just reopen many of the problems inherent in intentionalism and purposivism? How can a textualist judge hope to keep the bigger picture in mind? How can he look up from the page and see the wider world when the text is all that matters? How can he see the forest as well as the trees?

CONCLUSION

The forum defendant rule had an underlying purpose: to prevent favoritism to in-state defendants and to prevent discrimination against out-

[208] 1 Joseph Story, *Commentaries on the Constitution of the United States* § 427, at 303.

[209] *See generally* Siegel, *supra* n. 21.

[210] *See* Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165, 1166 (1993) ("[T]his essay argues that any complete account of interpretive fidelity must allow—indeed require—changes in constitutional readings even when there has been no change in the constitutional text. If meaning is a function of both text and context, the claim made here is that fidelity in interpretation must accommodate changes in both.").

of-state defendants.[211] But enterprising lawyers studied the statute and reasoned that they could avoid removal by naming an in-state defendant and then failing to serve them or otherwise pursue the claim against them.[212] In a possible attempt to counter this tactic, Congress amended the statute to say that only defendants "properly joined and served" could not be removed.[213] In response, creative lawyers developed the novel strategy of snap removal.[214] District courts continue to be split on whether this is permitted under the statute.[215] But the Third Circuit, the first appellate court to take on this thorny issue, held that the statute allowed this strategy.[216] The Second and Fifth Circuits then relied on this decision to reach the same conclusion.[217] When combined with modern technology, such as electronic docket monitoring, this textualist opinion rendered the statute toothless. Any in-state defendant with an alert attorney can now side-step the forum defendant rule and remove to federal court so long as they do so before service is properly effectuated.

Encompass is an excellent opinion on the page, but it exposes a problem for textualism moving forward. The combination of an inflexible doctrine that hesitates to consider factors beyond the text, along with rapidly evolving technology, will likely lead to more situations like *Encompass*: situations where a well-intentioned application of a well-reasoned philosophy can render the statute the judge was trying to uphold meaningless. It is yet to be seen how textualism will respond, or whether it will or even can. If it cannot respond to the rapid pace of technological change, perhaps some other jurisprudential philosophy will supplant it. What that alternative may be, and whether such an alternative would be advisable or referable cannot yet be determined. Only time will tell.

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[211] *See supra* Section III.
[212] *See id.*
[213] *See id.*
[214] *See supra* Section IV.
[215] *Id.*
[216] *See supra* Section V.
[217] *Id.*