

THE FORUM-DEFENDANT RULE, THE MISCHIEF RULE,
AND SNAP REMOVAL

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ABSTRACT

Samuel Bray's The Mischief Rule reconceptualizes and revitalizes that venerable canon of statutory interpretation. Bray's new approach to the mischief rule offers a textual solution to an ongoing civil procedure puzzle—forum defendants and “snap removal.” The forum-defendant rule provides that a diversity case is not removable from state to federal court when a properly joined and served defendant is a citizen of the forum state. Snap removal occurs when a defendant removes before the forum defendant has been properly served, “snapping” the case into federal court. Three courts of appeals and a majority of district courts have endorsed this practice, concluding that it is consistent with the unambiguous text of 28 U.S.C. § 1441(b)(2) and does not produce an absurd result, despite contravening congressional intent that such cases remain in state court. Bray's reconstruction of the mischief rule offers a textual solution—by focusing on the mischief Congress targeted with the “properly served” language of § 1441(b)(2), courts can broadly interpret existing statutory text to prohibit snap removal as a clever evasion of the forum-defendant rule.

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INTRODUCTION

The “mischief rule” is a venerable canon of statutory interpretation, purportedly dating to Elizabethan times.¹ It instructs an interpreter to consider the problem or evil—the mischief—to which a statute was addressed, as well as the way in which the statute remedies that problem or evil.² Samuel Bray’s *The Mischief Rule* reconceptualizes and revitalizes a rule that purposivist defenders and textualist critics misunderstand, creating a tool for all interpretive methodologies that allows courts to consider the targeted mischief as a way to give meaning to specific textual language.³

Bray does not have civil procedure in mind. He focuses on statutes involving discriminatory state taxes on railroads,⁴ fish as “tangible objects” that cannot be destroyed,⁵ and the meaning of “sex” under Title VII of the Civil Rights Act of 1964.⁶

But his new approach to the mischief rule offers a textual solution to an ongoing civil procedure puzzle—forum defendants and “snap removal.”⁷

1. See Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. (forthcoming 2021) (manuscript at 13 n.52) (on file with authors).

2. *Id.* (manuscript at 3).

3. *Id.*

4. See *id.* (manuscript at 6) (discussing the Supreme Court’s reading of a provision of the Railroad Revitalization and Regulatory Reform Act of 1976 in *CSX Transportation, Inc. v. Alabama Department of Revenue*, 562 U.S. 277 (2011), and *Alabama Department of Revenue v. CSX Transportation, Inc.*, 575 U.S. 21 (2015)); see also *CSX Transp., Inc.*, 562 U.S. at 280.

5. See Bray, *supra* note 1 (manuscript at 6-7) (describing the Supreme Court’s interpretation of “tangible object” in a provision of the Sarbanes-Oxley Act in *Yates v. United States*, 574 U.S. 528 (2015)); see also *Yates*, 574 U.S. at 532.

6. See Bray, *supra* note 1 (manuscript at 7) (arguing that Judge Lynch’s interpretation of the word “sex” in *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), *aff’d*, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) aligned more closely with the mischief rule than the Second Circuit majority’s reading). *But see Bostock*, 140 S. Ct. at 1737-38.

7. See Arthur Hellman, Lonny Hoffman, Thomas D. Rowe, Jr., Joan Steinman & Georgene Vairo, *Neutralizing the Stratagem of “Snap Removal”: A Proposed Amendment to the Judicial Code*, 9 FED. CTS. L. REV. 103, 103-04 (2016); Valerie M. Nannery, *Closing the Snap Removal Loophole*, 86 CIN. L. REV. 541, 544-45 (2018); Jeffrey W. Stempel, Thomas O. Main & David McClure, *Snap Removal: Concept; Cause; Cacophony; and Cure 3-4* (May 23, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3602978 [<https://perma.cc/C2JT-DSHB>]; see also *Texas Brine Co. v. Am. Arb. Ass’n*, 955 F.3d 482, 485 (5th Cir. 2020); *Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 153-54 (3d Cir. 2018).

In diversity actions (those between “citizens of different States”),⁸ an action is not removable from state court to federal court if any defendant “properly joined and served” is a citizen of the forum state.⁹ Defendants have circumvented this limitation through “snap removal,” where a defendant (whether forum-based or not) removes before the forum defendant has been served.¹⁰ Three courts of appeals¹¹ and a majority of district courts¹² have approved of the practice. Whether approving or rejecting the move, courts adopt the same mode of statutory interpretation. Everyone agrees snap removal is contrary to congressional intent but consistent with and permissible under current text.¹³ The language of 28 U.S.C. § 1441(b)(2) is clear and unambiguous in allowing removal if the forum defendant has not been served; the point of departure is whether that result is so unreasonable or outrageous as to trigger the “absurdity” canon as a basis to ignore the plain language of the statute.¹⁴

Bray’s reframing of the mischief rule offers a textualist solution, a way for courts to use mischief to understand, and thus adhere to, the text. By focusing on the mischief Congress targeted with the “properly joined and served” language, a court could read and interpret the statutory language broadly to prohibit snap removal as a clever evasion of the forum-defendant rule. The court could rely on the text of § 1441(b)(2) to reject snap removal, without resorting

8. 28 U.S.C. § 1332(a)(1).

9. 28 U.S.C. § 1441(b)(2); see Hellman et al., *supra* note 7, at 104; Nannery, *supra* note 7, at 549; Stempel et al., *supra* note 7, at 12-14.

10. See Hellman et al., *supra* note 7, at 104.

11. See *Texas Brine Co.*, 955 F.3d at 487; *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 707 (2d Cir. 2019); *Encompass Ins. Co.*, 902 F.3d at 154.

12. In a study exploring a range of variables, including aspects of the identity of the federal judges to whom cases were removed and the subject matter of the removed cases, researchers found that courts allowed removal (that is, declined to remand the case) in 53 percent of 193 snap removal cases sampled over 30 years. Thomas O. Main, Jeffrey W. Stempel & David McClure, *The Elasticity of Snap Removal: An Empirical Case Study of Textualism* 15 (2020), <https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=2333&context=facpub> [<https://perma.cc/DJ2B-EMQD>].

13. See, e.g., *Texas Brine Co.*, 955 F.3d at 486-87; Stempel et al., *supra* note 7, at 3-4.

14. Compare *Texas Brine Co.*, 955 F.3d at 486-87, and *Gibbons*, 919 F.3d at 707, and *Encompass Ins. Co.*, 902 F.3d at 154, with *Delaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372, 1379 (N.D. Ga. 2018), and *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 643 (D.N.J. 2008).

to atextual interpretive modes, such as legislative purpose or absurdity.

I. THE MISCHIEF RULE

The conventional narrative situates the mischief rule within four historical jurisprudential moments. The first stop is *Heydon's Case*, a 1584 decision of the Court of Exchequer.¹⁵ The second is Blackstone's *Commentaries on the Laws of England*.¹⁶ The third is Hart & Sacks' *The Legal Process*.¹⁷ And the fourth is Justice Scalia's rejection of the rule¹⁸ in his book *Reading Law*¹⁹ and in his opinion for the Court in *Oncale v. Sundowner Offshore Services*.²⁰

Bray argues that each moment misunderstood the mischief rule. *Heydon's Case* is not a “manifesto for purposivism” but an instruction to not read and interpret statutes in a vacuum.²¹ Blackstone did not fully separate mischief from other interpretive considerations.²² Hart and Sacks “conflate[d] the mischief rule and purposivism.”²³ And working from that conflation, Scalia rejected the mischief rule because he rejected purposivism.²⁴ Courts and scholars “slide” between a statute's mischief and a statute's purpose, using them synonymously and interchangeably.²⁵

But there is “daylight” between mischief and purpose.²⁶ Mischief or evil functions “logically prior” and external to the enactment of the statute and its legislative purpose.²⁷ Mischief is the preexisting social problem that persists because existing law is insufficient to resolve it; mischief prompts legislative action; the purpose of which

15. See Bray, *supra* note 1 (manuscript at 12-16).

16. *Id.* (manuscript at 16-19).

17. *Id.* (manuscript at 19-20).

18. *Id.* (manuscript at 21-24).

19. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

20. See 523 U.S. 75, 79-80 (1998).

21. See Bray, *supra* note 1 (manuscript at 14-15).

22. See *id.* (manuscript at 18-19).

23. *Id.* (manuscript at 19-20).

24. See *id.* (manuscript at 21-24).

25. See *id.* (manuscript at 26).

26. *Id.* (manuscript at 26).

27. *Id.* (manuscript at 28-29).

is to address the mischief.²⁸ Bray frames it as a logical progression of mischief to legislative action to purpose: “Because of *a*, the action *b*, so that *c*.”²⁹ The mischief is *a*, the first logical step, an existing social problem for which current law is deficient and to which the statute responds.³⁰ The legislative action is *b*, the response to the mischief and to the inadequacy in existing law.³¹ The legislature’s purpose or goal going forward is *c*.³² Whether one believes the third step should matter (the point on which Scalia departs from Hart and Sacks),³³ pre-existing mischief represents a distinct concept and a distinct step from statutory purpose.

So conceptualized, the mischief rule performs two textual functions. First, it provides a rational stopping point in defining the scope of a statutory term.³⁴ This does not run one way; it can prompt a court to broaden a statute or to narrow a statute.³⁵ Either way, mischief guides the interpreter, focuses her attention, and expresses an intuition about what the statute should mean.³⁶ Thus, slugs and squirrels are not “animals” on railroad tracks for which trains must stop, where the preexisting mischief was large livestock, such as cows, derailing trains and causing farmers to lose valuable stock.³⁷

Second, mischief allows courts to thwart “clever evasions” of statutory text that perpetuate the original mischief or create new mischief.³⁸ Thus, “cattle” includes not only cows but other, smaller livestock, such as sheep; this prevents ranchers from grazing animals other than cows on Indian land without tribal consent and from perpetuating the evil of non-permitted grazing.³⁹

28. *Id.*

29. *Id.* (manuscript at 7).

30. *Id.* (manuscript at 34-35).

31. *Id.*

32. *Id.*

33. *Id.* (manuscript at 3-4).

34. *Id.* (manuscript at 36-38).

35. *Id.* (manuscript at 37-38).

36. *See id.* (manuscript at 28, 37-38).

37. *See id.* (manuscript at 3, 40).

38. *Id.* (manuscript at 43).

39. *Id.* (manuscript at 43-44).

II. FORUM DEFENDANTS AND SNAP REMOVAL

A. *Forum Defendants*

The canonical understanding is that diversity jurisdiction in federal court—original jurisdiction over civil actions between citizens of different states⁴⁰—exists to prevent bias in favor of local parties and against out-of-state parties.⁴¹ By placing these cases before Article III judges with life tenure and guaranteed salary,⁴² Congress insulated litigation from localized passions and prejudices that advantage insiders and disadvantage outsiders.⁴³ Congress further recognized that outsiders need that federal option regardless of their position in civil litigation. It thus allows plaintiffs to avoid bias by filing diversity cases in federal court in the first instance⁴⁴ and allows defendants to avoid bias by removing diversity cases to federal court when the plaintiff files in state court.⁴⁵

But the policy and logic of diversity jurisdiction gives rise to a limitation on removal in diversity cases—the forum-defendant rule.⁴⁶ If an out-of-state plaintiff sues a defendant in a state court of that defendant’s state, removal is unnecessary to further the purposes of diversity jurisdiction. The forum defendant does not

40. 28 U.S.C. § 1332(a)(1).

41. See Scott Dodson, *Beyond Bias in Diversity Jurisdiction*, 69 DUKE L.J. 267, 283-84, 287 (2019); Richard D. Freer, *The Political Reality of Diversity Jurisdiction*, 94 S. CAL. L. REV. (forthcoming 2021) (manuscript at 4-6) (on file with author); Stempel et al., *supra* note 7, at 6-7; Howard M. Wasserman, *A Jurisdictional Perspective on New York Times v. Sullivan*, 107 NW. U. L. REV. 901, 906 (2013); see also *Hertz Corp. v. Friend*, 559 U.S. 77, 85 (2010); *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 706 (2d Cir. 2019).

42. U.S. CONST. art. III, § 1.

43. Freer, *supra* note 41 (manuscript at 5-6, 9-10); Wasserman, *supra* note 41, at 906. *But see* Dodson, *supra* note 41, at 296-97.

44. 28 U.S.C. § 1332(a)(1).

45. 28 U.S.C. §§ 1441(a), 1446(a).

46. See Hellman et al., *supra* note 7, at 104; Main et al., *supra* note 12, at 4-5; Stempel et al., *supra* note 7, at 12; see also *Texas Brine Co. v. Am. Arb. Ass’n*, 955 F.3d 482, 485 (5th Cir. 2020); *Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 152 (3d Cir. 2018). Chief Justice William Rehnquist supported an unsuccessful proposal for a forum-plaintiff rule that would have limited diversity jurisdiction by prohibiting plaintiffs from filing diversity actions in federal court in their home states. William H. Rehnquist, *Chief Justice’s 1991 Year-End Report on the Federal Judiciary*, 24 THIRD BRANCH 1, 3 (1992).

need the protections of the federal forum to avoid being “home-towned,”⁴⁷ as any state-court bias runs in her favor.⁴⁸ If a nonforum plaintiff wants to take her chances litigating on the defendant’s home court, that is her choice. This intersection with anti-bias concerns explains why Congress limited the forum-defendant rule to diversity actions, while federal question cases are removable by any party.⁴⁹ Federal jurisdiction over federal claims serves distinct purposes of ensuring uniformity, expertise, and solicitude in resolving questions of federal law;⁵⁰ those interests require a federal forum for all defendants who want one, regardless of citizenship.

In 1948, Congress established the framework for the forum-defendant rule. A diversity action “shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”⁵¹ In 2011, Congress amended the statute to provide that a diversity action “may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State which such action is brought.”⁵² The amendment shifts the starting point—from “removable only if something is not true” to “not removable if something is true.”⁵³ But the basic textual point remains—removal is barred only if the forum defendant has been properly served.

Congress has not explained the addition or retention of the proper service requirement, but scholars and lower courts have developed an explanatory history. In 1939, the Supreme Court in *Pullman Co. v. Jenkins* remanded an action that had been removed by an unserved Doe defendant, later identified as a forum citizen, who destroyed complete diversity.⁵⁴ *Pullman* handed plaintiffs a tool to stop removal. A plaintiff in an action targeting nonforum defendants could include as a nominal defendant a diverse “strawman” forum

47. See *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 706 (2d Cir. 2019); Dodson, *supra* note 41, at 287; Stempel et al., *supra* note 7, at 12.

48. *Gentile v. Biogen Idec, Inc.*, 934 F. Supp. 2d 313, 319 (D. Mass. 2013); Stempel et al., *supra* note 7, at 12.

49. See 28 U.S.C. § 1331, 1441(b)(2).

50. Gil Seinfeld, *The Federal Courts as Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 97 (2009).

51. 28 U.S.C. § 1441(b)(2) (1948) (amended 2002).

52. 28 U.S.C. § 1441(b)(2) (2011).

53. Compare § 1441(b)(2) (1948), with § 1441(b)(2) (2011).

54. See 305 U.S. 534, 541 (1939); Stempel et al., *supra* note 7, at 15.

citizen against whom the plaintiff did not intend to proceed and whom she did not bother serving, keeping that defendant in the action solely to prevent removal.⁵⁵

The “properly served” language blocks that gamesmanship, limiting the forum-defendant rule to cases in which the plaintiff serves the forum defendant, thereby demonstrating some intent to pursue that party. If the forum defendant is not served, the forum-defendant limitation does not apply and the action is removable. Through this text, Congress prevents a plaintiff from frustrating the statutory removal rights of the nonforum defendants—the real targets of the litigation—by adding an unserved forum defendant who remains a nominal-but-not-practical part of the litigation.

B. Snap Removal

But halting plaintiff gamesmanship enabled defendant gamesmanship via “snap removal.”⁵⁶ Snap removal occurs when a defendant removes the action before the plaintiff has served the forum defendant or even had a meaningful opportunity to serve the forum defendant.⁵⁷ Jeffrey Stempel, Thomas Main, and David McClure identify two snap-removal scenarios.⁵⁸ In the first, a resourced repeat player defendant monitors state court dockets, identifies lawsuits when they are filed against it, and immediately removes before any service occurs.⁵⁹ In the second (which they label “snap-pish” removal), a plaintiff serves at least one nonforum defendant and removal occurs before the plaintiff can complete service on any forum defendant.⁶⁰ The second category includes a Third Circuit case in which a plaintiff requested a service waiver from the sole defendant, a forum citizen; tipped to the lawsuit, that defendant declined to waive service and removed.⁶¹ In either scenario, the

55. Hellman et al., *supra* note 7, at 108; Stempel et al., *supra* note 7, at 15-16; *see also* Sullivan v. Novartis Pharm. Corp., 575 F. Supp. 2d 640, 644-45 (D.N.J. 2008).

56. Other terms for the practice include “pre-service removal,” “early removal,” “jack rabbit removal,” “race to remove,” “preemptive removal,” “snatch and remove,” and “wrinkle removal.” Main et al., *supra* note 12, at 6 n.20.

57. *Id.* at 5-6.

58. Stempel et al., *supra* note 7, at 17-19.

59. *Id.* at 17-18.

60. *Id.* at 18-19.

61. *See, e.g.*, Encompass Ins. Co. v. Stone Mansion Rest., Inc., 902 F.3d 147, 150 (3d Cir.

defendant snaps the case into federal court before the forum defendant can be served.

For a time, a different piece of plaintiff gamesmanship arguably justified snap removal—what Valerie Nannery calls the “courtesy copy trap.”⁶² A plaintiff would provide a defendant with an informal courtesy copy of the complaint but would not serve (perhaps in anticipation of settlement negotiations); she then would argue that the thirty-day period for removal⁶³ had lapsed thirty days from the plaintiff’s receipt of the courtesy copy, regardless of whether or when the defendant had been served.⁶⁴ Snap removal emerged as a necessary counter to that strategy. The defendant must be able to remove prior to service, lest the plaintiff provide a courtesy copy but delay service for thirty days, effectively denying any defendant the right to remove. The Supreme Court stopped this game, holding that the thirty-day removal period runs from formal service, not from other, informal receipt of the complaint.⁶⁵

With no thirty-day clock running prior to service, defendants are not in that bind and have no defensive reason to snap-remove. Nevertheless, pre-service snap removal continues, converted to an offensive strategy to jump to federal court despite the presence of a forum defendant. Courts of appeals have approved the strategy, whether executed by a nonforum defendant⁶⁶ or by a forum defendant that is the lone target of the action.⁶⁷ District courts are divided on this issue, but the majority allow removal.⁶⁸

Courts follow the same analytical path to either conclusion. The text of § 1441(b)(2) is clear and unambiguous. An action “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

2018); *see also* Nannery, *supra* note 7, at 550 (arguing that the earliest example of snap removal came in response to service of courtesy copies).

62. Nannery, *supra* note 7, at 550 n.48, 584.

63. 28 U.S.C. § 1446(b)(1).

64. *See* Nannery, *supra* note 7, at 550-51, 550 n.48, 551 n.54; *see also* Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 348-49 (1999).

65. *See* Murphy Bros., 526 U.S. at 352-53, 356.

66. *See, e.g.*, Texas Brine Co. v. Am. Arb. Ass’n, 955 F.3d 482, 484-85 (5th Cir. 2020).

67. *See, e.g.*, Encompass Ins. Co. v. Stone Mansion Rest., Inc., 902 F.3d 147, 149-50, 153-54 (3d Cir. 2018).

68. *See supra* note 12.

brought,”⁶⁹ which means the action may be removed so long as the forum defendant has not been properly joined and served.⁷⁰ This clear and unambiguous language must control and must be read to mean what it says.

Plaintiffs resort to the “absurdity canon,” under which a court can ignore unambiguous language to avoid an absurd result.⁷¹ An absurd result is one that is “preposterous” or that “no reasonable person could intend,”⁷² or that “defies rationality or renders the statute nonsensical and superfluous.”⁷³ A court can find absurdity “where it is quite impossible that Congress could have intended the result and where the alleged absurdity is so clear as to be obvious to most anyone.”⁷⁴ A mere oddity is not sufficient.⁷⁵ Courts approving snap removal characterize the practice as peculiar but not irrational or without purpose—that is, not absurd. According to the Second Circuit, the “properly joined and served” language provides an administrable bright-line rule, saving the court from the difficult inquiry into the plaintiff’s intent to serve the forum defendant.⁷⁶ According to the Third Circuit, the text expands defendants’ removal rights only in limited circumstances, so it is not inconsistent with Congress’s underlying goal of not allowing removal in forum-defendant cases.⁷⁷

C. Solving Snap Removal

Snap removal runs contrary to congressional intent, a work-around that undermines the statutory forum-defendant rule.⁷⁸ The

69. 28 U.S.C. § 1441(b)(2).

70. See *Texas Brine Co.*, 955 F.3d at 486; *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699, 705 (2d Cir. 2019); *Encompass Ins. Co.*, 902 F.3d at 152; see also *Hellman et al.*, *supra* note 7, at 105-06.

71. See, e.g., *Delaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372, 1379-81 (N.D. Ga. 2018).

72. *Texas Brine Co.*, 955 F.3d at 486 (quoting SCALIA & GARNER, *supra* note 19, at 237).

73. *Encompass Ins. Co.*, 902 F.3d at 152 (quoting *United States v. Moreno*, 727 F.3d 255, 259 (3d Cir. 2013)).

74. *Gibbons*, 919 F.3d at 705-06 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Env’t. Prot. Agency*, 846 F.3d 492, 517 (2d Cir. 2017)).

75. See *Texas Brine Co.*, 955 F.3d at 486.

76. See *Gibbons*, 919 F.3d at 706.

77. See *Encompass Ins. Co.*, 902 F.3d at 153-54.

78. See, e.g., *Hellman et al.*, *supra* note 7, at 107-08; *Main et al.*, *supra* note 12, at 6;

“and served” language is the “tail ... wag[ging] the larger dog,” with no indication Congress wanted it to do such work.⁷⁹ Congress in 1948 wanted to strip plaintiffs of a strategy to defeat removal, but it wanted to maintain—rather than undermine—the limitation on removal in forum-defendant cases.⁸⁰

But the clarity and unambiguity of § 1441(b)(2) (at least according to the courts) mean judicial interpretation or construction cannot offer the solution. Congress must solve the problem by amending the removal statutes.⁸¹

Commentators have proposed three legislative solutions. All seek to restore the balance, and all make sense as a policy matter—an action with a forum defendant should not be easily or quickly removable unless it is clear that the forum defendant is a strawman against whom the plaintiff does not intend to pursue claims.

1. More Time to Serve

Stempel, Main, and McClure propose two changes to § 1441(b)(2). First, they eliminate the “and served” language, so the bar to removal attaches when the forum defendant is “properly joined” in the lawsuit.⁸² Second, they add a sentence at the end of the subsection: “If no defendant who is a citizen of the forum state is served within 120 days of commencement of the action, removal may be sought within the time period provided by Section 1446.”⁸³

This change gives the plaintiff a period certain to serve the forum defendant, during which time the action is not removable.⁸⁴ It establishes a “controlling presumption” that a plaintiff who intends to pursue a defendant will serve within 120 days; if she has not done so, the logical inference is that the unserved forum defendant is not a real target of the litigation.⁸⁵ The action becomes removable

Nannery, *supra* note 7, at 574-75; Stempel et al., *supra* note 7, at 32-33.

79. Stempel et al., *supra* note 7, at 41.

80. *See id.* at 40.

81. *Encompass Ins. Co.*, 902 F.3d at 154; Hellman et al., *supra* note 7, at 108.

82. Stempel et al., *supra* note 7, at 52.

83. *Id.* at 52-53.

84. *See id.* at 52.

85. *Id.*

because that forum defendant's presence in the action should not defeat non-forum defendants' removal rights.

Both elements of the proposal are necessary to resolve the problem of snap removal. Repealing "and served" returns to the pre-1948 status quo, in which plaintiffs could undermine removal by naming, but not serving, a non-target forum defendant.⁸⁶ Allowing removal if service does not occur by a fixed time is necessary to protect nonforum defendants' removal rights.⁸⁷

2. Post-Removal Service and Remand

Arthur Hellman and his co-authors attack the problem by amending § 1447, which establishes the process for plaintiffs to remand following removal. Following removal, the plaintiff can move to remand the action to state court within thirty days of removal for procedural defects and any time if the district court lacks subject matter jurisdiction.⁸⁸ Hellman's proposal allows defendants to continue the practice of snap-removing before the forum defendant has been served.⁸⁹ But it allows the plaintiff to continue attempting to serve the forum defendant after removal.⁹⁰ If the plaintiff serves the forum defendant within the service period under the Federal Rules of Civil Procedure (currently ninety days),⁹¹ the plaintiff can move to remand, citing the presence of a now properly served forum defendant as the reason the case was not removable and must be remanded.⁹²

Hellman and his co-authors argue that this process will deter snap removal. Defendants will recognize the futility of yanking the case into federal court only to have it remanded once the plaintiff takes its time and effects service.⁹³ Moreover, a Notice of Removal is subject to Rule 11 of the Federal Rules of Civil Procedure;⁹⁴ a

86. *See id.* at 53.

87. *See id.*

88. 28 U.S.C. § 1447(c).

89. *See Hellman et al., supra note 7, at 108.*

90. *See id.* at 108-09.

91. FED. R. CIV. P. 4(m).

92. *See Hellman et al., supra note 7, at 108-10.*

93. *Id.* at 109.

94. 28 U.S.C. § 1446(a).

defendant could face sanctions for improper removal for snapping the case to federal court knowing the case includes a forum defendant who the plaintiff has additional time to serve. The threat of sanctions might further deter removal.

3. *Limiting Removal to Served Defendants*

James Pfander and Kevin Clermont offer the “cleanest” solution by targeting the beginning of the removal process. Currently, § 1446(a) allows removal by “[a] defendant or defendants.”⁹⁵ Pfander and Clermont propose that Congress limit removal to a “properly served defendant or defendants,”⁹⁶ meaning only a served defendant could remove the action.⁹⁷

This proposal targets the first category of snap removal,⁹⁸ in which a defendant monitors state court dockets and removes as soon as it sees an action filed against it, prior to service.⁹⁹ That lurking defendant cannot remove because it has not been served. This proposal also resolves that anomalous case in which the sole defendant was a forum citizen who learned of the lawsuit via email communications with plaintiff’s counsel, refused to waive service, and removed before the plaintiff could take the next steps of service.¹⁰⁰ Prohibiting preservice removal renders the action nonremovable before the lone defendant is served, even if it knows of the lawsuit; the forum-defendant rule renders the action nonremovable once that lone forum-citizen defendant has been served.

Snap (or at least snappish) removal might remain possible in an action involving one forum defendant (D1) and one nonforum defendant (D2). If the plaintiff serves D2, D2 could remove as a properly served defendant under amended § 1446(b)(2); the forum-

95. *Id.*

96. See *Examining the Use of “Snap” Removals to Circumvent the Forum Defendant Rule: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 116th Cong. 11-12 (2019) (statement of James E. Pfander, Professor of Law, Northwestern Pritzker School of Law) [hereinafter *Pfander Testimony*].

97. See *id.*; see also Nannery, *supra* note 7, at 580-81.

98. Stempel et al., *supra* note 7, at 17-18.

99. See *Pfander Testimony*, *supra* note 96, at 3-4.

100. *Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 149-50 (3d Cir. 2018).

defendant rule of § 1441(b)(2) imposes no barrier because the forum defendant has not been properly served.¹⁰¹ But the plaintiff controls the timing and order of service. A plaintiff wanting to keep the case in state court can serve D1 first, rendering the action nonremovable under the forum-defendant rule, regardless of when D2 is served.¹⁰²

III. MISCHIEF RULE AS A SOLUTION TO SNAP REMOVAL

Bray’s reconceptualization of the mischief rule offers a unique and elegant solution to the problem of snap removal. Importantly, it resolves the problem under the current text of § 1441(b)(2), without pressing courts to look beyond unambiguous statutory text and without requiring congressional action to amend statutory text.

Prior to 1948 and with the Court’s decision in *Pullman*, plaintiffs took advantage of the forum-defendant rule by suing strawman forum defendants to undermine nonforum defendants’ rights to remove.¹⁰³ Congress responded to that evil by adding the “properly ... served” language.¹⁰⁴ As amended in 2011, § 1441(b)(2) forbids removal “if any of the parties in interest properly joined and served as defendants” are citizens of the forum state.¹⁰⁵

Recall Bray’s logical progression of mischief—“Because of *a*, the action *b*, so that *c*.”¹⁰⁶ Because plaintiffs included unserved strawman forum defendants and existing law did not stop the practice (*a*), Congress limited the bar on removal to forum defendants properly joined and served (*b*), so that plaintiffs could not frustrate non-forum defendants’ right to remove by adding a forum defendant for show (*c*). But that mischief (*a*) is not implicated where the forum defendant is not a strawman—that is, where the plaintiff intends to serve and proceed against the forum defendant— but where the plaintiff has neither had a full opportunity to serve nor run out of time to do so. The original forum-defendant rule and the policy underlying diversity jurisdiction demonstrate that Congress

101. See *Pfander Testimony*, *supra* note 96, at 11-12.

102. See *id.*; see also *Nannery*, *supra* note 7, at 583.

103. See *Stempel et al.*, *supra* note 7, at 15.

104. *Id.*

105. 28 U.S.C. § 1441(b)(2).

106. Bray, *supra* note 1 (manuscript at 7).

wanted this case to remain in state court.¹⁰⁷ The legislative action (b) thus should not apply in a case with a genuine forum defendant because the action would not address or cure the targeted evil.

Bray's mischief rule thwarts clever evasions of legal rules by focusing judicial analysis on the preexisting underlying evil and interpreting statutory text in light of and as a response to that evil.¹⁰⁸ Snap removal represents such a clever evasion of the general prohibition on removal in forum-defendant cases. By focusing on the preexisting evil of strawman forum defendants, courts use the mischief rule to understand § 1441(b)(2) as a response to that evil, inapplicable where the evil does not come into play.

A court might apply the mischief rule to interpret "properly joined and served as defendants" to mean properly served or with time remaining to properly serve. This interpretation modestly broadens § 1441(b)(2) to preclude removal not only when the plaintiff has properly served the forum defendant but also as long as time remains for the plaintiff to properly serve the forum defendant. That is, removal of the action is barred until it becomes legally impossible for the forum defendant to be properly served.

By modestly broadening "properly" to grant the plaintiff the entire service period, a court focuses the statute on the unique mischief to which Congress responded—plaintiffs naming strawman forum defendants with no intent to serve—while eliminating snap removal as a clever evasion of the forum-defendant rule. Where there is no doubt the plaintiff intends to pursue the forum defendant (such as where the forum citizen is the lone defendant)¹⁰⁹ but the plaintiff needs time to serve, the evil against which Congress legislated is not implicated, so the "properly served" language should not apply to allow removal. If the plaintiff serves the forum defendant within the time allowed, it shows she was not engaged in the targeted mischief, so the "properly served" language should not apply to allow removal. If the plaintiff fails to serve within the allotted period, it suggests she was engaged in the targeted

107. Stempel et al., *supra* note 7, at 8, 17; *see supra* notes 40-45 and accompanying text.

108. *See* Bray, *supra* note 1 (manuscript at 43-44).

109. *See, e.g.,* *Encompass Ins. Co. v. Stone Mansion Rest., Inc.*, 902 F.3d 147, 149-50 (3d Cir. 2018).

mischief; that forum defendant has not been “properly served” and the statute should apply to allow removal.

The mischief interpretation reaches the same conclusion as Stempel, Main, and McClure.¹¹⁰ An action with a forum defendant remains nonremovable upon service of the forum defendant or prior to expiration of some period during with the plaintiff can serve the forum defendant. That action becomes removable when that time lapses without service on the forum defendant.

But the mischief rule gets there through a mode of textual analysis, guiding the court in interpreting text without resort to extra-textual considerations. Main, Stempel, and McClure argue that snap removal presents a pure choice between textualism and purposivism, because “applications of this statute require either a hyper-literal reading that flouts Congressional intent or a purposive reading that evades crystal-clear text,” with no middle ground.¹¹¹ And only an extreme form of purposivism can avoid the plain text of § 1441(b)(2)—“there is not even a strained reading of the text for the purposivist to use as a fig leaf to hide behind.”¹¹² Courts agree that clear text compels snap removal; the dispute is whether purpose or absurdity can or should override that clear text, with some courts concluding it does and remanding¹¹³ while most courts conclude it does not.¹¹⁴

Bray’s mischief rule offers that nonstrained textual reading. By balancing the preexisting unremedied evil that Congress targeted with the “properly served” language with the legislative goal of keeping forum-defendant diversity cases out of federal court (because they present no threat of anti-outsider bias), a court can resolve the snap-removal problem under the current text of § 1441(b)(2). The unadorned language of § 1441(b)(2) produces an incoherent result,¹¹⁵ demonstrating that it is “hard—too hard in our view—to displace even unintended or unwise application of

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

111. Main, et al., *supra* note 12, at 6.

112. *Id.* at 6-7.

113. See *Delaughder v. Colonial Pipeline Co.*, 360 F. Supp. 3d 1372, 1379 (N.D. Ga. 2018); *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 643 (D.N.J. 2008).

114. See *supra* notes 11-13 and accompanying text.

115. See Main et al., *supra* note 12, at 7.

statutory language.”¹¹⁶ By adding preexisting mischief to the textual analysis, Bray offers a textualist path out of the snap-removal absurdity. Courts can reach the outcome most consistent with obvious congressional intent, while relying on plain text justified by a venerable interpretive canon properly reframed and understood. This approach thus satisfies even the most committed (or rigid)¹¹⁷ textualists.¹¹⁸

This approach also gets there without congressional intervention. It avoids the risk of “legislative inertia”—the difficulty of initiating and sustaining the legislative machinery to enact new laws, even when there is no opposition or resistance to the proposed legal changes.¹¹⁹ It avoids the specific difficulty of getting Congress to legislate to override judicial decisions.¹²⁰ And it avoids the more specific congressional reluctance to legislate on civil procedure and jurisdiction, where past efforts to clarify the law have produced new confusion and triggered new criticism.¹²¹ Inertia presents a special burden in this area; the complexity, nuance, and moving pieces of the removal puzzle may frustrate legislators forced to choose among competing solutions and fearing unintended consequences. Applying Bray’s mischief rule to § 1441(b)(2) allows courts and current text to do the work, solving the snap-removal problem while obviating the need for legislative action.

116. Stempel et al., *supra* note 7, at 35.

117. See Main et al., *supra* note 12, at 6-7.

118. See Bray, *supra* note 1 (manuscript at 50).

119. Mirit Eyal-Cohen, Unintended Legislative Inertia 11 (May 29, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3574126 [<https://perma.cc/D4XP-3YDQ>].

120. See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1319-20 (2014); Deborah A. Widiss, *Identifying Congressional Overrides Should Not Be This Hard*, 92 TEX. L. REV. *SEE ALSO* 145, 146-47 (2014).

121. See, e.g., William Baude, *Clarification Needed: Fixing the Jurisdiction and Venue Clarification Act*, 110 MICH. L. REV. FIRST IMPRESSIONS 33, 35-36 (2012); Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life After Finley and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445, 446 (1991); James E. Pfander, *The Simmering Debate Over Supplemental Jurisdiction*, 2002 U. ILL. L. REV. 1209, 1209-10.

CONCLUSION

Samuel Bray argues that his reframed mischief rule has “something to offer to a wide array of interpreters,”¹²² textualist and non-textualist. It thus has something to offer as a judicial solution to the problem of snap removal, an absurd-if-clever legal evasion running contrary to congressional intent reflected in the forum-defendant rule. Bray’s approach awaits judicial adoption but need not await congressional engagement.

122. Bray, *supra* note 1 (manuscript at 51).