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## Removal to Federal Courts from State Administrative Agencies: Reevaluating the Functional Test

Erica B. Haggard

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# Removal to Federal Courts from State Administrative Agencies: Reevaluating the Functional Test

Erica B. Haggard\*

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### I. Introduction

"[T]here is no other phase of American jurisprudence with so many refinements and subtleties, as relate to removal proceedings, [that] is known by all who have to deal with them."<sup>1</sup> Removal jurisdiction is by its nature a peculiar creation;<sup>2</sup> it has no predecessor in English common law and is not mentioned in the Constitution, yet it has been an important component of federal court jurisdiction since its creation in the Judiciary Act of 1789.<sup>3</sup> In fact, in 2006, approximately 11% of all cases pending in federal court were removed cases.<sup>4</sup>

Since 1789, one of the more troublesome refinements presented by the statute has tasked federal courts with determining whether a civil action brought originally in a *state agency* complies with the removal requirement that a civil action be brought originally in a *state court*.<sup>5</sup> Beginning in the late nineteenth century, federal courts began to encounter this interpretative problem as states began using commissions and primitive agency-like tribunals to fulfill a number of state regulatory functions, including ratemaking, property appraisal, and condemnation proceedings.<sup>6</sup> Savvy defendants, often corporations, attempted to use the statute to remove actions filed in these state bodies to federal court.<sup>7</sup> During this period, the Supreme Court of the United

1. *Hagerla v. Miss. River Power Co.*, 202 F. 771, 773 (S.D. Iowa 1912).

2. See 16 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 107.03 (3d ed. 2008) ("Removal is a peculiar procedure in that it permits defendants to remove an action properly brought in one system of courts, our state courts, into another set of courts, our federal district courts.").

3. See 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3721 (3d ed. 1998) ("There was no procedure comparable to removal at English common law, nor is removal jurisdiction mentioned in the Constitution.").

4. MOORE ET AL., *supra* note 2, § 107.23.

5. See *infra* note 17 for the text of the Judiciary Act of 1789 providing for removal.

6. See MOORE ET AL., *supra* note 2, § 107App.101(3)-(4) (discussing early Supreme Court cases addressing removal from administrative or other nonjudicial tribunals).

7. *Id.*

States authored numerous opinions attempting to solve the removal problems presented by proceedings in these tribunals, but never authoritatively provided a standard delineating the requirements for a "state court."<sup>8</sup>

Exacerbating the issue, in the twentieth century, states increasingly began to create agencies to regulate and to legislate in many more areas of substantive law, presenting more opportunities for the federal removal statute to clash with proceedings brought in state agencies.<sup>9</sup> In 1959, the United States District Court for the Eastern District of Wisconsin fashioned a new test, one that focused on whether the state agency "functioned" as a court in adjudicating a particular proceeding.<sup>10</sup> The district court, and subsequent courts that have adopted its reasoning, argued that an 1890 Supreme Court case, *Upshur County v. Rich*,<sup>11</sup> endorsed such a standard.<sup>12</sup> Almost seven years later, a different district court disagreed, citing the plain language of the phrase "state court," thus commencing a split in the lower federal courts that continues to this day.<sup>13</sup>

As state agencies continue to occupy a significant, and continually increasing, role in states' legislative and executive regulatory systems, the opportunity for the federal interests in removal to collide with state interests continues to escalate, producing a judicial headache for federal judges attempting to resolve the problem.<sup>14</sup> While judges faced with the problem can resort to the use of the factually intensive functional test, this Note argues that federal courts should interpret "state court" according to its plain language, which, generally, does not apply to state agency proceedings.

8. *Id.*

9. By 1965, a conservative estimate placed the number of state agencies at over 2,000. FRANK E. COOPER, *STATE ADMINISTRATIVE LAW* 2 (1965).

10. See *Tool & Die Makers Lodge No. 78 Int'l Ass'n of Machinists v. Gen. Elec. Co. X-Ray Dep't*, 170 F. Supp. 945, 950 (E.D. Wis. 1959) (holding proper removal of a proceeding before the Wisconsin Employment Relations Board because it "meets the test of a judicial proceeding within the meaning of the Federal Judicial Code").

11. See *Upshur County v. Rich*, 135 U.S. 467, 477 (1890) (holding appeal of property appraisal in Upshur county court did not constitute a "suit at law" because the appeal was not an action *inter partes* and the county court had no judicial powers, thus making removal improper).

12. *Infra* note 49 and accompanying text.

13. See *Cal. Packing Corp. v. I.L.W.U. Local 142*, 253 F. Supp. 597, 598-99 (D. Haw. 1966) (holding that the removal of action from Hawaii Employment Relations Board was improper).

14. The issue was addressed by two separate courts in 2008. See *Johnson v. Albertson's LLC*, No. 3:08cv236/MCR/MD, 2008 WL 3286988, at \*1 (N.D. Fla. Aug. 6, 2008) (addressing the split in the lower federal courts over the use of the functional test); *Civil Rights Div. v. Asplundh Tree Expert Co.*, No. 08-60493-CIV, 2008 WL 2616154, at \*5 (S.D. Fla. May 15, 2008) (rejecting the "functional test" as going "beyond the language of [§] 1441, which does not authorize removal of proceedings from administrative agencies").

The discussion below proceeds as follows: Part II briefly chronicles the development of the removal statute from 1789 to the Supreme Court's 1890 opinion in *Upshur County*. In order to evaluate the reasoning of courts adopting the functional test, Part III analyzes the facts and principles of *Upshur County*. Parts IV and V present the arguments in favor of and against the use of the functional test. Part VI argues that *Upshur County* did not endorse a functional test, but did provide insight into the qualifications an agency must exhibit to be a "court." Finally, Part VII reevaluates the functional test, focusing on statutory interpretative doctrines and policy implications that the functional test inflicts on both states' and plaintiffs' interests in the uninterrupted utilization of state agency proceedings. Reevaluating the functional test leads to the conclusion that courts must stop utilizing the test to determine the viability of removal from state agencies. Instead, courts must adhere to the plain language of the removal statute, which this Note argues should require a determination of whether a state constitution has vested judicial power in the specific agency. However, in order to account for the substantial federal interest in removal for state claims completely preempted by Section 301(a) of the Labor Management Relations Act (LMRA),<sup>15</sup> this Note argues that Congress must amend the LMRA to allow for removal of these actions. Such an amendment is the key linchpin in the careful balancing act of state, federal, and litigant interests.

## II. *The Early History of the Removal Statute*

Generally, there are two ways of removing a case from a state to a federal court: first, by Supreme Court review after the state court action has become final; and second, by transfer from a state court to a federal district court for original adjudication.<sup>16</sup> The Judiciary Act of 1789 created this latter path to removal, but premised it upon the satisfaction of certain requirements.<sup>17</sup> The

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15. Labor Management Relations Act, ch. 120, § 301(a), 61 Stat. 136, 156 (1947) (codified as amended at 29 U.S.C. § 185(a) (2006)).

16. PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1767 (3d ed. 1988).

17. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80. The statute states:

That if a suit be commenced in any *state court* against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds . . . five hundred dollars, . . . the defendant shall . . . file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending . . . . And if in any action commenced in a *state court*, the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds . . . five hundred dollars, . . . the party

act granted removal to cases "commenced in any *state court*" with more than \$500 in dispute to three types of parties: (1) a defendant who was an alien; (2) a citizen of the state in which the suit is brought against a citizen of another state; and (3) either party, where title to land was in dispute under conflicting grants of land of different states and the non-removing party claimed it under a grant of the forum state.<sup>18</sup>

The Judiciary Act of 1789 did not grant removal to those cases arising under the laws of the United States—what we know today as federal question removal.<sup>19</sup> Instead, Congress contented itself between 1789 and 1875 to provide for a series of "relatively specific removal statutes . . . designed to give added protection to federal officers or federal law."<sup>20</sup> Almost a century later, in the Judiciary Act of 1875,<sup>21</sup> Congress enormously expanded the federal courts' removal and original jurisdiction.<sup>22</sup> While the Act allowed removal of an action by either party and provided for federal question removal, it still required that the original "suit of a civil nature" be "pending or hereafter brought in any *State court*."<sup>23</sup> The Supreme Court broadly construed the new removal statute's grant of federal question removal,<sup>24</sup> leading to the "classes of removable cases cover[ing] substantially the entire gamut authorized by Article III."<sup>25</sup>

claiming under the grant first mentioned may then, on motion, remove the cause for trial . . . .

*Id.* (emphasis added).

18. *Id.*

19. See Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 720 (1986) (noting that "[e]xcept for the short-lived Judiciary Act of 1801, Congress did not vest general federal question jurisdiction in the lower federal courts until 1875"). Collins attributed this change in removal to its part in the larger substantive law and "jurisdictional revolution" that was an outgrowth of the Civil War and Reconstruction. *Id.*

20. *Id.* The current federal officer removal statute is found at 28 U.S.C. § 1442 (2006).

21. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470–71.

22. See Collins, *supra* note 19, at 722 (explaining that "[l]ower federal court jurisdiction probably reached its high-water mark when Congress passed the 1875 Judiciary Act").

23. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470–71 (emphasis added). The statute provides:

That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any *State court* where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties . . . or in which there shall be a controversy between citizens of different States, . . . either party may remove said suit into the circuit court of the United States for the proper district.

*Id.* (emphasis added).

24. See Collins, *supra* note 19, at 724–30 (discussing the Supreme Court's expansive interpretation of the removal statute enacted in 1875).

25. BATOR ET AL., *supra* note 16, at 1767.

The current removal statute, 28 U.S.C. § 1441,<sup>26</sup> is based on the Judiciary Act of 1887, which amended the Judiciary Act of 1875.<sup>27</sup> The Judiciary Act of 1887 substantially curtailed removal in response to the swelling of federal court dockets, at both the trial and appellate levels, following the Judiciary Act of 1875.<sup>28</sup> For one thing, Congress restricted the privilege of removal to defendants only, citing to the fact that plaintiffs should have to abide by their choice of forum.<sup>29</sup> The removal provision also explicitly referenced the preceding provision granting original jurisdiction to federal courts, thus for the first time stating the well-known modern requirement that a federal court must have original jurisdiction of a removed action.<sup>30</sup> Citing to this requirement, the Supreme Court further restricted the defendant's right of removal in federal question cases only to those cases which the plaintiff could have filed originally in federal court, a precursor to

26. See 28 U.S.C. § 1441(a)–(b) (2006) (providing removal based upon diversity between parties or upon the presence of a federal question). The statute's full text states:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a *State court* of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . .

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties . . . .

*Id.* (emphasis added).

27. See Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553. The statute provides:

That any suit of a civil nature, . . . arising under the Constitution or laws of the United States, . . . of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending . . . in any *State court*, may be removed by the defendant . . . ; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, . . . then either one or more of the defendants . . . may remove said suit into the circuit court of the United States for the proper district.

*Id.* (emphasis added). The statute was amended by Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 433–36.

28. See Collins, *supra* note 19, at 738–42 (chronicling the legislative history of the Judicial Act of 1887). Interestingly, there were "at least a half a dozen proposals to amend the 1875 Act within a short time after its passage." *Id.* at 738 n.109. It is believed that the swelling of courts' dockets post-Reconstruction was due in large part to the increased removal of diversity cases as a result of a boom in interstate commercial activity, although federal question cases can be blamed as well for part of the burden. *Id.* at 744.

29. See *id.* at 743 (observing that "a consistent string of House Reports suggests that the purpose of the 1887 amendments of the 1875 Act's removal provision was simply to eliminate the possibility of plaintiff removal" because it was thought proper to require the plaintiff to abide by his selection of a forum).

30. BATOR ET AL., *supra* note 16, at 1768.

the well-pleaded complaint rule.<sup>31</sup> In a later decision, the Supreme Court, reflecting upon the successive changes to the removal statute wrought by the Judiciary Acts of 1875 and 1887, stated: "[T]he language of the Act of 1887 evidence[s] the Congressional purpose to restrict the jurisdiction of the federal courts on removal," and "the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation."<sup>32</sup> Thus, by the time the Supreme Court decided *Upshur County* a mere three years after passage of the Judiciary Act of 1887, it must have been aware of Congress's intent to restrict the availability of removal, not to expand it to litigants in proceedings before state boards or commissions.

### III. Supreme Court Precedent?

The dispute in *Upshur County v. Rich* focused on the 1883 appraisal of the owners' land in Upshur County, West Virginia.<sup>33</sup> Finding the appraisal to be prohibitively high, the owners concurrently filed a petition of appeal in the county court of Upshur County protesting the valuation and a petition for removal of the appeal from the county court to the Federal Circuit Court for the District of West Virginia.<sup>34</sup> The circuit court exercised jurisdiction over the case, denied appellants' motion to remand, and eventually issued a decree reducing both the quantity and value per acre of land.<sup>35</sup> Upshur County appealed the decree to the Supreme Court, arguing that the original petition of appeal filed in the county court was not removable to the federal circuit court because the appeal was not a *suit* at law within the meaning of the removal statute.<sup>36</sup>

The Supreme Court agreed.<sup>37</sup> After explaining that most states allow taxpayers to appeal property assessments to a tribunal whose purpose is to hear such appeals—often called a board of commissioners—the Court observed:

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31. See Collins, *supra* note 19, at 718 ("Linking defendant removal to the well-pleaded complaint rule began with an early Supreme Court construction of the 1887 ancestor of the modern removal statute in *Tennessee v. Union & Planters' Bank*.").

32. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941).

33. *Upshur County v. Rich*, 135 U.S. 467, 467–68 (1890).

34. *Id.* at 468. The removal petition stated that the defendants were citizens of Pennsylvania, that West Virginia and Upshur County were indispensable parties to the case, and that prejudice and local influence would prohibit their obtaining justice in the state court. *Id.*

35. *Id.* at 468–69.

36. *Id.* at 470 (emphasis added).

37. *Id.* at 471.



But whatever called, it is not usually a court, nor is the proceeding a suit between parties; it is a matter of administration, and the duties of the tribunal are administrative, and not judicial in the ordinary sense of that term, though often involving the exercise of *quasi* judicial functions. Such appeals are not embraced in the removal act.<sup>38</sup>

In making this statement, the Court focused on the nonexistence of the West Virginia county courts' judicial powers, except in matters of probate, which had been stripped by an amendment to the West Virginia Constitution.<sup>39</sup> The West Virginia legislature, however, had granted property owners the right to appeal property appraisals to the county courts under the West Virginia Constitution's provision that the county courts "may exercise such other powers and perform such other duties, *not of a judicial nature*, as may be prescribed by law."<sup>40</sup>

Thus, according to the Court, both the original property appraisal and the appeal were *assessments* or administrative acts, and not *suits* at law.<sup>41</sup> Of course, there were certain circumstances—an action "against the collecting officer, . . . a bill for injunction, [a petition for] *certiorari*, and . . . other modes of proceeding"—when "suits" could arise challenging the legality of taxes and assessments, which then may become a "suit," and thus removable.<sup>42</sup> The ordinary acts of appraisers and property appeal boards, however, "belong to a different class of governmental functions, executive and administrative in their character, and not appertaining to the judicial department."<sup>43</sup>

The Court then distinguished the facts of the present case from those of its previous cases in which it also had been tasked with determining whether an appeal to a board of commissioners constituted a suit at law. In its previous cases, the Court appeared to focus on two requirements for a suit to arise: (1) the tribunal must be vested with judicial powers; and (2) the action must be *inter partes*.<sup>44</sup> The Court summarized the cases' principles as follows:

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38. *Id.* (emphasis added).

39. *Id.* The amendment, adopted in 1880, replaced Article Eight of West Virginia's 1872 Constitution. The actual powers granted to the county courts included: "jurisdiction in all matters of probate," "appointment and qualification of personal representatives, guardians, committees, curators, and the settlement of their accounts," "superintendence and administration of the internal police and fiscal affairs of their counties," "judge of the election, qualification, and returns of their own members, and of all county and district officers." *Id.* at 471–72.

40. *Id.* at 472 (emphasis added).

41. *Id.*

42. *Id.* at 473.

43. *Id.* at 474.

44. *See id.* at 476 (explaining that a claim against a county heard before county commissioners, though the proceedings were in some respects similar to a court, was not in the nature of a trial *inter partes*, and thus was not removable until an appeal was taken to the circuit court for the county (citing *Bd. of Comm'rs of Del. County v. Diebold Safe & Lock Co.*, 133

[A] proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a suit; and that an appeal in such a case, to a board of assessors or commissioners *having no judicial powers*, and only authorized to determine questions of quantity, proportion and value, *is not a suit*; but that such an appeal *may become a suit*, if made to a court or tribunal having power to determine questions of law and fact, . . . and there are parties litigant to contest the case on the one side and the other.<sup>45</sup>

In applying this principle to the facts, the Court easily concluded that the county court was not a judicial body or "court," but was "charged with the management of [Upshur County's] financial and executive affairs."<sup>46</sup> The county court was no different than an appraiser, and thus, the owners' appeal before it was not removable because it was not a "suit" at law.<sup>47</sup> Ultimately, the language used by the Supreme Court to draw a comparison between the county court and courts vested with judicial power becomes problematic for later federal courts attempting to resolve whether the term "state court" in the removal statute includes a state agency. Clearly, *Upshur County* at least stands for the principle that the title a state bestows upon a tribunal is not dispositive of whether the tribunal is actually a "court," but that does not necessarily imply that the Court also provided a standard by which to evaluate whether an agency is the functional equivalent of a "court."

#### IV. Courts Adopting the Functional Test

##### A. Tool & Die Makers Lodge Sets the Standard

Subsequent courts to consider removal from state agencies mark the decision in *Tool & Die Makers Lodge v. General Electric Co. X-Ray Department*<sup>48</sup> as the first time a lower federal court interpreted *Upshur County*

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U.S. 473, 486–87 (1890)); *id.* at 475 (stating that the general rule is "that the initial proceeding of appraisement by commissioners is an administrative proceeding, and not a suit; but that if an appeal is taken to a court, and a litigation is there instituted between parties, then it becomes a suit").

45. *Id.* at 477 (emphasis added).

46. *Id.*

47. *Id.*

48. See *Tool & Die Makers Lodge No. 78 Int'l Ass'n of Machinists v. Gen. Elec. Co. X-Ray Dep't*, 170 F. Supp. 945, 950 (E.D. Wis. 1959) (holding proper removal of a proceeding before the Wisconsin Employment Relations Board (WERB) because the WERB "meets the test

as endorsing a functional test.<sup>49</sup> The *Tool & Die Makers* court was concerned with whether, under the rationale of *Textile Workers Union of America v. Lincoln Mills*,<sup>50</sup> removal of complaints filed with the Wisconsin Employment Relations Board (WERB) would be defeated because the WERB was not a "state court" within the meaning of the removal statute.<sup>51</sup> The dispute involved the alleged breach of a collective bargaining agreement (CBA), and both the WERB and the State of Wisconsin retained concurrent jurisdiction over CBA claims.<sup>52</sup> After the WERB scheduled hearings, the employer filed a petition for removal pursuant to 28 U.S.C. § 1441.<sup>53</sup> The district court denied remand.<sup>54</sup>

The district court's analysis stressed two things: the Supreme Court's language in *Upshur County* and the implications of *Lincoln Mills* on CBA disputes filed in the WERB.<sup>55</sup> Citing *only* to *Upshur County* and *Prentis v. Atlantic Coast Line Co.*,<sup>56</sup> the court stated:

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of a judicial proceeding within the meaning of the Federal Judicial Code").

49. See *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1261 (3d Cir. 1994) ("The genesis of the 'functionalist test' for purposes of removal appears to have been the decision in *Tool & Die Makers Lodge* . . ."); *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38, 43-44 (1st Cir. 1972) (noting that the *Tool & Die Makers* court "recognized that the Supreme Court 'has adopted a functional rather than literal test' in the interpretation of the removal statute"); *Southaven Kawasaki-Yamaha v. Yamaha Motor Corp., USA*, 128 F. Supp. 2d 975, 979 n.3 (S.D. Miss. 2000) ("The origin of the 'functional test' is traced to the Supreme Court's opinion in *Upshur County v. Rich* . . .").

50. See *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (holding that federal law is the substantive law to apply in suits brought under Section 301(a) of the Labor Management Relations Act (LMRA)). Section 301(a) states:

Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Labor Management Relations Act, ch. 120, § 301(a), 61 Stat. 136, 156 (1947) (codified as amended at 29 U.S.C. § 185(a) (2006)). The Supreme Court concluded that Section 301(a) conferred jurisdiction upon federal district courts to resolve disputes concerning collective bargaining agreements (CBA) and expressed that federal courts should fashion remedies for breaches of CBAs from federal labor policy. *Lincoln Mills*, 353 U.S. at 455.

51. *Tool & Die Makers Lodge*, 170 F. Supp. at 948.

52. *Id.* at 950; see also Note, *Removal to Federal Courts from State Administrative Agencies*, 69 YALE L.J. 615, 617-18 (1960) (discussing status and powers of the WERB).

53. *Tool & Die Makers Lodge*, 170 F. Supp. at 947.

54. *Id.* at 951.

55. See *id.* at 950, 951 (noting that "it is clear that the Supreme Court of the United States has adopted a functional rather than a literal test" and explaining that the court's "understanding of the *Lincoln Mills* case [is] that State courts . . . must apply the Federal substantive law governing collective bargaining rights").

56. See *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908) (concluding that railroad

In the construction of Federal statutes dealing with proceedings in State courts, *it is clear that the Supreme Court of the United States has adopted a functional rather than literal test.* Thus the question of whether a proceeding may be regarded as an action in a State court within the meaning of the statute is determined by reference to the procedures and functions of the State tribunal rather than the name by which the tribunal is designated.<sup>57</sup>

Pronouncing this to be the Supreme Court's standard, the district court concluded that the WERB qualified as a "judicial proceeding" under the functional test, regardless of two facts: (1) the Supreme Court of Wisconsin's previous holding that the WERB does not exercise judicial functions when it resolves CBA disputes; and (2) the WERB did not have the power to enforce its own orders.<sup>58</sup> The court observed that while an inability to enforce orders is often a dispositive factor weighing against characterizing a state agency as a "court," it still would decline to accord either fact weight because of the overwhelming policy implications of allowing a litigant's right of access to a federal forum to be defeated by a state that has "divided the judicial function between a Board which hears the evidence and declares the facts and the law, and a State court which enforces its rulings."<sup>59</sup>

According to the court, Congress intended for uniform application of the removal statute throughout the country, without interference from a state-created special remedy providing an alternative to a traditional court action.<sup>60</sup> Seriously calling into question this statement by the district court, however, is the Supreme Court's later observation that it has never been contended seriously that Congress intended federal question removal "be utilized to foreclose completely remedies otherwise available in the state courts," nor

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ratemaking proceedings before the Virginia State Corporation Commission were legislative in nature and therefore not proceedings in a "state court" entitled to *res judicata* effect).

57. *Tool & Die Makers Lodge No. 78 Int'l Ass'n of Machinists v. Gen. Elec. Co. X-Ray Dep't*, 170 F. Supp. 945, 950 (E.D. Wis. 1959) (emphasis added).

58. *Id.* An agency's inability to accord equivalent relief found in its state court counterpart has led some circuits to hold that the agency will *never* be considered a "court" for removal purposes. See *Sun Buick, Inc. v. Saab Cars, USA*, 26 F.3d, 1259, 1265 (3d Cir. 1994) (noting that it has held previously that an administrative agency unable to accord equivalent relief as that found in a state court will never be considered a "court").

59. *Tool & Die Makers Lodge*, 170 F. Supp. at 950. The district court also observed that the unfair labor practice charges were breach of contract disputes, which could have been brought in Wisconsin state trial courts without any question as to the propriety of removal. *Id.*

60. *Id.* at 951; see also *Harrison v. St. Louis & S.F. R.R. Co.*, 232 U.S. 318, 328 (1914) (observing "that the judicial power of the United States as created by the Constitution . . . is a power wholly independent of state action, and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious").

"effect a wholesale dislocation in the allocation of judicial business between the state and federal courts."<sup>61</sup> The district court, however, felt reassured in the correctness of its holding because *Lincoln Mills* directed that state courts must apply federal substantive law in interpreting CBAs.<sup>62</sup>

One of the instant criticisms of the district court's analysis was its failure to account for the State of Wisconsin's reasons for its "peculiar . . . partial[] jettisoning [of] traditional notions of the judicial process through the establishment of an administrative agency."<sup>63</sup> Subsequent courts, however, have indicated that the inquiry should focus not only on whether the board or tribunal "functions" as a court but also on the nature of the respective state and federal interests in the particular proceeding.<sup>64</sup> Ultimately, *Tool & Die Makers* placed a defendant's right to a federal forum over and above the State of Wisconsin's interests in creating a state agency, and in so doing, provided a standard for future courts that undervalued legitimate state interests in delegating power to state agencies and overvalued the federal interest in providing access to a federal forum.

### B. The First Circuit Adopts the Functional Test

In *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*,<sup>65</sup> the First Circuit undertook to "plot the intersection" of Section 301(a) with the federal removal statute.<sup>66</sup> Interestingly, the question of removal was

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61. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 246, 247 (1970).

62. *Tool & Die Makers Lodge*, 170 F. Supp. at 951.

63. *Removal to Federal Courts from State Administrative Agencies*, *supra* note 52, at 619.

64. *See Floeter v. C.W. Transp., Inc.*, 597 F.2d 1100, 1102 (7th Cir. 1979) (*per curiam*) (explaining that it is "necessary to evaluate the functions, powers, and procedures of the state tribunal and consider those factors along with the respective state and federal interests"); *see also Removal to Federal Courts from State Administrative Agencies*, *supra* note 52, at 626 (arguing that the right to remove a proceeding from an agency should depend upon the importance of the "advantages contemplated by the state in establishing [an] agency" and in "restricting review of its orders").

65. *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38, 41 (1st Cir. 1972) (holding proper removal of action from territory-created tribunal under functional test).

66. *Id.* at 40. Originally, the Asociacion Insular de Guardianes de Puerto Rico, the union representing Volkswagen's security guards, filed a complaint with the Puerto Rico Labor Relations Board (PRLRB), claiming that Volkswagen breached the CBA between the two parties. *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 331 F. Supp. 1043, 1044-45 (D.P.R. 1970). The Board then issued a complaint alleging that Volkswagen's actions violated Puerto Rico's unfair labor practice statute. *Id.* at 1045. Volkswagen filed suit in the United States District Court for the District of Puerto Rico, asking for a declaratory judgment that Section 301(a) deprived the PRLRB of jurisdiction over its issued complaint because such

not presented directly to the court; instead, the court was to determine whether the Puerto Rico Labor Relations Board (PRLRB) had jurisdiction over the complaint issued by it in response to a charge of unfair labor practices.<sup>67</sup> Previously, *Star Publishing Corp. v. Puerto Rico Newspaper Guild*,<sup>68</sup> a district court opinion, held that the PRLRB was an "administrative agency that lack[ed] the power to enforce its own orders," therefore making removal improper.<sup>69</sup> To the First Circuit, the distressing implication of *Star Publishing* was that if decisions of the Board were final, binding, and *non-removable*, then it would be forced to deprive the Board of jurisdiction, lest a defendant be denied access to a federal forum.<sup>70</sup> Therefore, the court had to prove that an action before a state administrative agency was removable.<sup>71</sup>

Even if state agency proceedings were not removable, the First Circuit conceded that defendants still had access to a federal forum because, in order to enforce its orders, the PRLRB had to petition the Puerto Rico Supreme Court, which would allow the litigant access to a definitive "state court" and subsequent access to a federal forum through removal.<sup>72</sup> Seeking removal once an administrative action has been appealed to a state court for *de novo* review or enforcement had been the standard practice of litigants.<sup>73</sup> The First Circuit,

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jurisdiction can only be vested in a state tribunal from which there may be removal to a federal court. *Id.* The district court dismissed Volkswagen's complaint, holding that the PRLRB had jurisdiction of the complaint and that the removal statute did not contemplate removal from administrative agencies but only "state courts." *Id.* at 1049. Volkswagen appealed, but *only* on the issue of whether the PRLRB had jurisdiction of the complaint, although the First Circuit entertained the removability issue as well. *Volkswagen*, 454 F.2d at 41.

67. *Volkswagen*, 454 F.2d at 41.

68. See *Star Publ'g Corp. v. P.R. Newspaper Guild*, 303 F. Supp. 760, 761 (D.P.R. 1969) (holding that removal from administrative bodies was not contemplated by the federal removal statute and therefore removal from the PRLRB was improper).

69. *Id.* (emphasis added). The district court applied the reasoning advanced by *California Packing Corp. v. I.L.W.U. Local 142*, 253 F. Supp. 597 (D. Haw. 1966), that "removal from administrative bodies [was] not contemplated by the removal statute." *Star Publ'g Corp.*, 303 F. Supp. at 761.

70. *Volkswagen*, 454 F.2d at 42.

71. See Michael Katz, *The Consequences of Removal from State Labor Boards into the Federal Courts: Volkswagen Reconsidered*, 17 REV. JUR. U.I.P.R. 111, 116 (1982) (stating that "[i]n effect, the court held that the Board had jurisdiction because the case was removable rather than removable because the Board had jurisdiction").

72. *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38, 42 (1st Cir. 1972).

73. See Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 660-66 (1999) (discussing historical practice of allowing lower federal courts to review initial state agency action when states provide for *de novo* review).

however, assumed that a federal district court would give deference to the PRLRB's findings, thereby still depriving a litigant of his "critical" right to have facts found in a federal forum.<sup>74</sup> The court also believed that federal court deference on appeal "would place a federal court in an improper posture vis-à-vis a non-federal agency,"<sup>75</sup> but this argument has since been rejected by the Supreme Court.<sup>76</sup>

Thus, the court essentially justified its conclusion that proceedings before the PRLRB had to be removable based only on the fact that a litigant could not be granted access to a federal forum until after an appeal from the PRLRB's decision.<sup>77</sup> The First Circuit concluded that, because courts are required to interpret CBAs according to federal law, a rehearing *de novo* in federal court would be redundant, would force the litigant to endure preliminary proceedings before the PRLRB, would penalize the litigant's right to a federal forum, and would reduce the PRLRB proceeding to a charade if a litigant made known his intentions ultimately to seek a rehearing *de novo* in the federal court upon removal.<sup>78</sup> These consequences, for the First Circuit, compelled it to conclude that removal of the initial proceeding before the PRLRB was proper.<sup>79</sup>

The court then attempted to dismantle the reasoning of *Star Publishing*. The court indicated that *Star Publishing* had relied on the questionable precedent of *American Dredging Co. v. Local 25, Marine Division*,<sup>80</sup> a case which subsequently had been overturned by *Avco Corp. v. Aero Lodge No. 735*.<sup>81</sup> With little actual precedent on which to base its reasoning, the First Circuit concluded that *Star Publishing* was left only to invoke an "unquestioning reliance on the state's characterization of its chosen instrument as a board or a court" to justify its conclusion that removal from state agencies

74. *Volkswagen*, 454 F.2d at 42.

75. *Id.*

76. *See City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 171 (1997) (concluding that "[n]othing in § 1367(a) suggests that district courts are without supplemental jurisdiction over claims seeking [deferential] review of local administrative determinations").

77. *Volkswagen*, 454 F.2d at 42-43.

78. *Id.*

79. *Id.* at 43.

80. *See Am. Dredging Co. v. Local 25, Marine Div.*, 338 F.2d 837, 849-50 (3d Cir. 1964) (holding improper removal of case to enjoin union's violation of no strike provision of contract from Pennsylvania state court because the case did not arise under a federal law, and thus the federal court had no subject matter jurisdiction).

81. *See Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers*, 390 U.S. 557, 560 (1968) (holding that dispute concerning no strike clause in CBA arose under laws of the United States, and therefore the dispute was removable from the state to the federal court).

was improper.<sup>82</sup> The First Circuit, however, appears to have misunderstood *Avco Corp.* and *American Dredging*.

First, the *Volkswagen* court argued that *American Dredging* stood for the proposition that "no removal [of CBA disputes] was permitted even from state courts."<sup>83</sup> A closer reading of *American Dredging*, however, reveals that, in the case, the Third Circuit concluded removal from the state court was improper because it thought that the collective bargaining "no-strike" clause at issue in the case *did not arise under federal law*.<sup>84</sup> In turn, *Avco Corp.* held that CBA "no-strike" clauses do arise under federal law, namely Section 301(a), and therefore actions involving such clauses, brought in state court, can be removed pursuant to federal question jurisdiction.<sup>85</sup> The First Circuit's (mis)characterization of *American Dredging* allowed it to argue with greater force that *Star Publishing* was left with no substantive legal precedent to support its claim that removal was not contemplated from state agencies.<sup>86</sup> The First Circuit's confusion over *American Dredging*, however, tends to discredit the force of this statement.<sup>87</sup>

Turning its discussion to *Upshur County* and *Tool & Die Makers*, the First Circuit agreed with the *Tool & Die Makers* court that a state should not be able to bifurcate the traditional judicial function between a board and a court, thereby defeating a litigant's right to a federal forum.<sup>88</sup> The First Circuit stated that "the [PRLRB]'s procedures and enforcement powers, the locus of traditional jurisdiction over breaches of contract, and the respective state and

82. *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38, 43 (1st Cir. 1972).

83. *Id.*

84. *See Am. Dredging Co.*, 338 F.2d at 846 (concluding that the case "was not one 'arising under' [Section] 301(a), or any other law of the United States, so as to permit removal under § 1441, since the complaint was cast solely on a state-created right to bring suit for violation of a collective bargaining agreement").

85. *See Avco Corp.*, 390 U.S. at 560 (explaining that the dispute "under this collective bargaining agreement is one arising under the laws of the United States within the meaning of the removal statute" and that "this suit is within the 'original jurisdiction' of the District Court within the meaning of 28 U.S.C. §§ 1441(a) and (b)") (internal quotation marks omitted).

86. *Volkswagen*, 454 F.2d at 43 ("What remains of *Star Publishing* and *California Packing* after *Avco* and *Boys Market*, then, is an unquestioning reliance on the state's characterization of its chosen instrument as a board or a court, even for the purpose of a federal removal statute in the context of federal substantive law.").

87. *See Star Publ'g Corp. v. P.R. Newspaper Guild*, 303 F. Supp. 760, 761 (D.P.R. 1969) (noting the futility of saying that a district court has subject matter jurisdiction when it does not have jurisdiction to entertain and decide the case on the merits).

88. *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38, 44 (1st Cir. 1972).



federal interests in the subject matter and in the provision of a forum" should determine whether an agency functions as a "court" for removal purposes, rather than a "Steinian rendering of a board is a board is a board."<sup>89</sup> The court, however, did limit its functional test to cases where the PRLRB exercised concurrent jurisdiction under Section 301(a), emphasizing that it was not questioning the legal status of the PRLRB "as to any of its other functions, jurisdictions, or procedures," but was attempting to reconcile the "removal statute with the federal law relating to [Section] 301 and its implementation in both state and federal forums."<sup>90</sup>

The remainder of the court's analysis focused on supporting its conclusion that the PRLRB fulfilled the requirements of the functional test: the proceeding was *inter partes*, there was a complaint, the PRLRB lacked legislative power under Section 301(a), the PRLRB governed the proceeding in an adjudicative format, and the courts traditionally maintained jurisdiction over breach of contract cases.<sup>91</sup> The only factor weighing against the PRLRB's characterization as a "court" was its lack of enforcement power, much like the WERB in *Tool & Die Makers*, but the First Circuit appeared unbothered by this point as well.<sup>92</sup> Finally, after comparing the respective state and federal interests, the court concluded that the federal interest far outweighed Puerto Rico's interest:

The state interest after *Lincoln Mills*, *Dowd Box*, and *Avco* is indeed a limited one . . . . Substantive law is purely federal, and while both state and federal governments may create forums, an action brought before a state forum is, in general, removable to a federal court. Nor do the states have in practice the opportunity to go their own ways which they lack in theory, since a state proceeding is in any event removable at the enforcement stage. Any advantage which the state might find in the specialized expertise of its Board or in expedited procedures would then be lost. . . . The interest in the federal forum to decide questions of federal substantive law . . . would thus be burdened without substantial benefit to the state.<sup>93</sup>

Thus, the court held that the PRLRB, in conducting proceedings for breach of CBAs under Section 301(a), functioned as a court, therefore making removal proper pursuant to § 1441.<sup>94</sup>

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

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 44–45.

94. *Id.* at 45.

### C. The Seventh Circuit Adopts the Functional Test

In 1979, the Seventh Circuit adopted the functional test in *Floeter v. C.W. Transport, Inc.*<sup>95</sup> The plaintiffs had appealed both the district court's grant of summary judgment and the propriety of removal from the Wisconsin Employment Relations Commission (WERC), arguing that the WERC was not a "state court" for purposes of the removal statute.<sup>96</sup> At the outset, the Seventh Circuit observed that not only had the *Tool & Die Makers* court applied the functional test in an almost identical action but that its decision had been "cited with approval in several subsequent discussions of the question"—including *Volkswagen*—although the Seventh Circuit cited to only one other United States District Court case in support of its observation.<sup>97</sup>

The court then fashioned its own functional test by stating that "the title given a state tribunal is not determinative; it is necessary to evaluate the functions, powers, and procedures of the state tribunal and consider these factors along with the respective state and federal interest in the subject matter and in the provision of the forum."<sup>98</sup> Applying this fact intensive test, the Seventh Circuit readily concluded that the WERC functioned as a "court" while presiding over collective bargaining disputes.<sup>99</sup> Comparing the state and federal interests also confirmed the court's conclusion.<sup>100</sup> According to the court, "the state's interest in providing a 'convenient and expeditious tribunal to adjudicate the rights and interest of

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95. See *Floeter v. C.W. Transp., Inc.*, 597 F.2d 1100, 1102 (7th Cir. 1979) (per curiam) (holding proper the removal of a proceeding before the Wisconsin Employment Relations Commission (WERC) to federal district court).

96. *Id.* at 1101. Fourteen employees brought the complaint against the defendants, the plaintiffs' employer and the plaintiffs' union, alleging that the "union and the employer conspired to give 'superseniority' to two employees in violation of the collective bargaining agreement" between the union and the defendant-employer. *Id.*

97. *Id.* at 1101–02. In support of its statement, the Seventh Circuit cited to *Martin v. Schwerman Trucking Co.*, a case that briefly discussed the split of authority on removal from state agencies. See *Martin v. Schwerman Trucking Co.*, 446 F. Supp. 1130, 1131 (E.D. Wis. 1978) (adopting functional test). The district court decided that the "flexible approach" of the functional test "is consistent with the intent of the removal statute" and thus held that the WERC—an agency that would follow judicial procedures, would be obligated to apply federal law to collective bargaining claims, would not be exercising any sort of special expertise, and would be adjudicating a dispute that could be brought in Wisconsin state court—functioned as a "court," making proper removal of collective bargaining claims to federal court. *Id.*

98. *Floeter*, 597 F.2d at 1102.

99. *Id.* The court reasoned that the underlying dispute was a breach of contract, that the dispute could have been brought in state or federal court, that federal law would be applied regardless of the forum, and that the WERC's procedures were substantially similar to those of a traditional court. *Id.*

100. *Id.*

parties to a labor dispute' is not substantially greater than the state's interest in maintaining any court system and does not outweigh the defendant's right to remove the action to federal court."<sup>101</sup> The Seventh Circuit, like the First Circuit, stressed that its holding was limited to the facts of this particular case, and furthermore, that other actions brought before the agency "may involve different state and federal interests, or a different agency role, and a weighing of the competing interests in those cases might well result in a determination that those cases cannot be properly removed."<sup>102</sup>

The First and the Seventh Circuit Courts of Appeals are the only two courts of appeals to adopt the functional test.<sup>103</sup> Multiple district courts, however, also have adopted the test and have applied it to other state agency proceedings besides disputes involving CBAs, even though both *Volkswagen* and *Floeter* limited their holdings and analyses to such cases. District courts applying the "functional test" include district courts in the First Circuit,<sup>104</sup> the Fourth Circuit,<sup>105</sup>

101. *Id.* (quoting *Layton Sch. of Art & Design v. Wis. Employment Relations Comm'n*, 82 Wis. 2d 324, 341 (1978)).

102. *Id.* The Seventh Circuit affirmed the grant of summary judgment to the defendants. *Id.*

103. *See* *Gottlieb v. Lincoln Nat'l Life Ins. Co.*, 388 F. Supp. 2d 574, 579 (D. Md. 2005) (observing that "[a]t least two circuits have adopted the functional test").

104. *See* *Ins. Comm'r of P.R. v. Doral Ins. Agency, Inc.*, No. 05-2230CCC, 2006 U.S. Dist. LEXIS 80333, at \*5-10 (D.P.R. Oct. 31, 2006) (reaffirming use of functional test and concluding that a proceeding instituted by the Office of the Insurance Commissioner against defendant satisfied both prongs of the functional test to allow for removal).

105. *See* *Woodruff v. Hartford Life Group Ins. Co.*, 378 F. Supp. 2d 546, 548-49 (D. Md. 2005) (discussing split among courts regarding the functional test but ultimately deciding propriety of removal on a different issue); *Gottlieb*, 388 F. Supp. 2d at 579-82 (applying functional test to proceeding before Maryland Insurance Administration (MIA) and finding that Maryland's substantial interest in enforcing its insurance licensing and regulatory scheme eclipsed any federal interest in the provision of a forum, although the MIA used many court-like procedures); *Rockville Harley-Davidson, Inc. v. Harley-Davidson Motor Co.*, 217 F. Supp. 2d 673, 676-80 (D. Md. 2002) (applying functional test to proceeding before the Maryland Motor Vehicle Administration (MVA) and finding that the MVA lacks traditional judicial powers, and the state's strong interest in enforcing its vehicle-distribution licensing scheme dwarfs any federal interest in the provision of a forum); *Ginn v. N.C. Dep't of Corrs.*, 829 F. Supp. 804, 806-07 (E.D.N.C. 1993) (applying functional test to discrimination claim before the North Carolina Office of Administrative Hearings and finding that both the state and federal interests implicated in Title VII claims militated against finding the action removable, although the OAH has court-like powers, functions, and procedures). Additionally, the Fourth Circuit has adopted the functional test in the context of the federal officer removal statute, 28 U.S.C. § 1442 (2006). *Kolibash v. Comm. on Legal Ethics of W. Va. Bar*, 872 F.2d 571, 576 (4th Cir. 1989). Courts, however, have held that § 1442 should be interpreted more broadly than § 1441 to adequately protect the important government interests involved. *See, e.g., Becenti v. Vigil*, 902 F.2d 777, 779 (10th Cir. 1990) ("[W]e have stated that § 1442 should be interpreted broadly to fully protect the important governmental interests involved."). For a criticism of the *Kolibash* decision, see Franklin D. Cleckley, *Clearly Erroneous: The Fourth Circuit's Decision to*

the Fifth Circuit,<sup>106</sup> the Sixth Circuit,<sup>107</sup> the Seventh Circuit,<sup>108</sup> the Eighth Circuit,<sup>109</sup> and the Eleventh Circuit.<sup>110</sup> The test even has spawned mini-splits within circuits that have yet to have the question decided by the circuit's court of appeals.<sup>111</sup> Interestingly, most courts to adopt and to apply the test never find in favor of the case remaining in federal district court, usually due to a

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*Uphold Removal of a State-Bar Disciplinary Proceeding Under the Federal-Officer Removal Statute*, 92 W. VA. L. REV. 577 (1990).

106. See *Southaven Kawasaki-Yamaha v. Yamaha Motor Corp., USA*, 128 F. Supp. 2d 975, 979 (S.D. Miss. 2000) (addressing the propriety of removal of a complaint before the Mississippi Motor Vehicles Commission and assuming "for the sake of argument that the way to identify [whether a state administrative agency is properly considered a state court for removal purposes] is by resort to the 'functional test'").

107. See *Ford Motor Co. v. McCullion*, No. C2-88-142, 1989 WL 267215, at \*2-3 (S.D. Ohio Apr. 14, 1989) (concluding that "under some circumstances, administrative agencies are 'state courts' for purposes of removal" and finding improper removal from the Ohio Motor Vehicle Dealers Board because the state's "substantial interest in preserving the validity of its administrative infrastructure" completely outweighed the "lack of a federal interest").

108. See *Wirtz Corp. v. United Distillers & Vintners N.A., Inc.*, 224 F.3d 708, 712-14 (7th Cir. 2000) (applying functional test to a proceeding before the Illinois Liquor Control Commission (ILCC) and finding that it was not removable because Illinois's interest in regulating its alcohol statutory scheme outweighed defendant's interest in a federal forum and it did not function as a court); *R.J. Distrib. Co. v. Sutter Home Winery, Inc.*, No. 99C3836, 1999 U.S. Dist. LEXIS 11890, at \*4-7 (N.D. Ill. July 27, 1999) (applying functional test to a proceeding before the ILCC and finding that the ILCC was not functionally a court because it was not authorized to provide full judicial relief and there was a substantial state interest in the regulation of alcohol); *In re Petition to Detach Prop.*, 874 F. Supp. 200, 202-03 (N.D. Ill. 1995) (applying functional test to an annexation proceeding before county school board of trustees and finding that the board of trustees, as an arm of the state legislature, is an administrative agency and not akin to a state court).

109. See *In re Registration of Edudata Corp.*, 599 F. Supp. 1089, 1090-91 (D. Minn. 1984) (holding that a proceeding before the Minnesota Commissioner of Commerce is an administrative proceeding not subject to removal after considering the functional test and the competing federal and state interests).

110. Compare *Bellsouth Telecomms., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280, 1283-85 (N.D. Fla. 2002) (assuming that "a state tribunal that functions as a court is a 'State court'" and finding that the Florida Public Service Commission functioned generally as an administrative agency—sometimes resolving disputes between carriers only as an ancillary function—and thus removal was improper), with *Johnson v. Albertson's LLC*, No. 3:08cv236/MCR/MD, 2008 WL 3286988, at \*1 (N.D. Fla. Aug. 6, 2008) (agreeing with Ninth Circuit that "[t]here is nothing in the text of § 1441 which suggests that Congress intended to authorize the removal of cases from state administrative agencies . . . , even where the agency performs ordinary judicial functions"), and *Civil Rights Div. v. Asplundh Tree Expert Co.*, No. 08-60493-CIV, 2008 WL 2616154, at \*5 (S.D. Fla. May 15, 2008) (rejecting the "functional test" as going "beyond the language of [§] 1441, which does not authorize the removal of proceedings from administrative agencies").

111. *Supra* note 110 and accompanying text.

strong state interest in the regulation of the subject matter and a comparatively weaker federal interest in the provision of an alternate federal forum.<sup>112</sup>

Thus, it appears that the final test to emerge from these cases is a bifurcated one focusing on the functionality of the agency's proceeding, with an even stronger emphasis on a balancing test between the implicated state and federal interests.<sup>113</sup> This second, "more critical inquiry" focuses on the "state's interests in using administrative agencies as whole, against any federal claim present in the action."<sup>114</sup> Federal courts must consider "whether the state has inherently remedial or ministerial interests in the dispute and whether federal interests are more intimately or locally connected with the dispute."<sup>115</sup>

## V. Courts Rejecting the Functional Test

### A. The Beginning of the Split

Seven years after the decision in *Tool & Die Makers*, another district court, in *California Packing Corp. v. I.L.W.U Local 142*,<sup>116</sup> disagreed with the functional test, thus commencing the split in the lower federal courts over the validity of removal from state administrative agencies.<sup>117</sup> The United States District Court for the District of Hawaii had to decide whether a complaint filed by the California Packing Corporation against the defendant union, alleging unfair labor practices stemming from a violation of the parties' CBA, could be removed from the Hawaii Employment Relations Board (HERB) to federal district court.<sup>118</sup> The district court concluded that removal of the employer's action was "wide of the mark."<sup>119</sup>

First, the court observed that the removal statutes refer only to removal from state courts and do not contemplate removal from state administrative

112. *Supra* notes 105–09.

113. *See Ford Motor Co. v. McCullion*, No. C2-88-142, 1989 WL 267215, at \*2 (S.D. Ohio Apr. 14, 1989) (explaining a defendant must show that "the functions, powers, and procedures are those of a state tribunal" and that "the respective state interests in litigating the matter as a whole are subordinate to any unique federal interest, in light of the subject matter and in provision of a forum").

114. *Id.* at \*3.

115. *Id.*

116. *See Cal. Packing Corp. v. I.L.W.U. Local 142*, 253 F. Supp. 597, 598 (D. Haw. 1966) (holding improper removal of action from Hawaii Employment Relations Board).

117. *See id.* at 599 (noting its disagreement with the *Tool & Die Makers* court's reasoning).

118. *Id.* at 598.

119. *Id.*

bodies.<sup>120</sup> The court then criticized the *Tool & Die Makers* opinion, noting its failure to cite to any other removal cases endorsing the functional test, and finding that in its assessment, the *Tool & Die Makers* reasoning was "strained."<sup>121</sup> It summarily granted the employer's motion to remand the complaint back to the HERB.<sup>122</sup>

### *B. Temporary Emergency Court of Appeals Finds Interruption of Agency Proceedings Improper*

Shortly after the First Circuit's decision in *Volkswagen*, the Temporary Emergency Court of Appeals took up removal from state agencies in *County of Nassau v. Cost of Living Council*.<sup>123</sup> Unhappy with a pay increase given by the County of Nassau to the Nassau County Patrolmen's Benevolent Association, the Cost of Living Council (COLC) investigated the pay increase and issued a notice of challenge and a temporary order limiting pay increases to 5.5%.<sup>124</sup> The COLC's actions prompted the plaintiffs to file a series of petitions and actions in the United States District Court for the Eastern District of New York, purposefully seeking to interrupt the COLC's investigation and to obtain injunctions against the COLC's temporary and final orders.<sup>125</sup>

First, the court of appeals surmised that the district court had issued its series of rulings in order to interrupt the COLC's administrative proceedings.<sup>126</sup> Thus, as to the ordered removal of the proceedings from the COLC to federal district court, the court of appeals stated that "there was no basis for removal of

120. *Id.* at 598–99.

121. *Id.* at 599.

122. *Id.*

123. *See County of Nassau v. Cost of Living Council*, 499 F.2d 1340, 1343 (Temp. Emer. Ct. App. 1974) (holding that there was no basis for removal of the proceedings before the Cost of Living Council). Congress created the Temporary Emergency Court of Appeals in 1971 in its amendments to the Economic Stabilization Act of 1970, securing the American economy through the stabilization of "prices, rents, wages, salaries, dividends, and interest." Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, Sec. 2, § 202, 85 Stat. 743, 744. Absent specific provisions, the court of appeals held exclusive jurisdiction over all appeals from the district courts in cases and controversies arising under the Act. *Id.* § 211(b)(2), 85 Stat. at 749. Eventually, Congress abolished the Temporary Court of Appeals. *See Federal Courts Administration Act of 1992*, Pub. L. No. 102-572, § 102(d), 106 Stat. 4506, 4507 ("The Temporary Emergency Court of Appeals . . . is abolished, effective 6 months after the date of the enactment of this Act.").

124. *County of Nassau*, 499 F.2d at 1342.

125. *Id.* at 1342–43.

126. *Id.* at 1343.

the unfinished COLC proceedings to the Eastern District of New York."<sup>127</sup> While not directly referencing the functional test, the court explained that neither Section 211(a) of the Economic Stabilization Act<sup>128</sup> nor § 1441(a) "contemplate removal from other court proceedings to a federal district court; they do not apply to the interruption of administrative proceedings of the COLC."<sup>129</sup> The district court's rulings had "prematurely interfered with the normal course of administrative proceedings, a practice ordinarily disapproved."<sup>130</sup> The court of appeals remanded the proceedings back to the COLC because there were no circumstances which could have justified the district court's actions in the case.<sup>131</sup>

*C. The Third Circuit Hedges: Sun Buick, Inc. v. Saab Cars USA, Inc.*

In 1993, the Third Circuit, in *Sun Buick, Inc. v. Saab Cars USA, Inc.*,<sup>132</sup> had to determine whether the term "state court" applied to actions filed in the Pennsylvania Board of Vehicles (Board).<sup>133</sup> After the Board had consolidated the plaintiff's complaints arising out of the termination of a franchise agreement, the respondent Saab removed the action to federal district court, which subsequently denied remand.<sup>134</sup> Prior to *Sun Buick*, district courts in the Third Circuit had adopted the functional test in addressing the problem.<sup>135</sup>

127. *Id.*

128. Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, sec. 2, § 211(a), 85 Stat. 743, 748.

129. *County of Nassau v. Cost of Living Council*, 499 F.2d 1340, 1343 (Temp. Emer. Ct. App. 1974).

130. *Id.*

131. *Id.*

132. *See Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1264 (3d Cir. 1994) (holding improper removal from Pennsylvania Board of Vehicles (Board) because, under any circumstances, it failed to qualify as a court due to its lack of judicial attributes).

133. *Id.* at 1261.

134. *Id.*

135. *See Corwin Jeep Sales & Serv., Inc. v. Am. Motors Sales Corp.*, 670 F. Supp. 591, 593 (M.D. Pa. 1986) (observing that "[i]n the construction of federal statutes dealing with proceedings in State court, it is clear that the Supreme Court . . . has adopted a functional rather than a literal test"). The district court indicated that the removability of a proceeding before an administrative agency is "determined by reference to the procedures and functions of the State tribunal rather than the name by which the tribunal is designated." *Id.*; *see also Edelson v. Soricelli*, 610 F.2d 131, 142-43 (3d Cir. 1979) (Rosenn, J., dissenting) (discussing use of functional test by other courts and arguing that the Pennsylvania Arbitration Panels for Health Care should be considered a "court" for the purposes of removal). The dissent in *Edelson* argued that the majority's opinion failed to address the functional test, as it reasoned that the

The Third Circuit raised the issue of whether the Board was a "court" *sua sponte*.<sup>136</sup>

The Third Circuit observed that, on its face, the removal statute is limited to cases pending before state "courts," which should be dispositive because the Board is not a "court."<sup>137</sup> In questioning the reasoning of the *Tool & Die Makers* court, the Third Circuit recognized the use of the functional test by other federal courts, but reasoned that the Supreme Court's holding in *Upshur County*—that a named court is not necessarily a "court" for removal purposes—does not mean that the Supreme Court adopted the standard.<sup>138</sup> For support of this observation, the court noted that other Supreme Court decisions from the *Upshur County* era did not broadly adopt a functional test by which an agency is treated as a court for removal purposes simply because it is akin to a court in some instances.<sup>139</sup> "In those cases, when the Court held that removal was proper it was careful to note that the body in question was a judicial body under state law."<sup>140</sup>

The court ultimately hedged between adopting and rejecting the functional test by reasoning that, because it had never definitively held an administrative agency to be a "court" in other contexts, it did not have to decide whether removal under § 1441(a) would ever be permissible in an exceptional case because the Board "would not qualify under any circumstances."<sup>141</sup> The Board is an agency that enforces and administers the Board of Vehicles Act.<sup>142</sup> It also lacks the traditional attributes of a "court"—disinterestedness, separation from the executive, and learnedness in the law<sup>143</sup>—and generally, the Third Circuit

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arbitration remedy was a substantive condition precedent to suit, and therefore the *Erie* doctrine required that the federal court adhere to this condition under state law. *Id.* at 146. For a critique of the majority's reasoning in *Edelson v. Soricelli*, see Note, *Mandatory State Malpractice Arbitration Boards and the Erie Problem*: *Edelson v. Soricelli*, 93 HARV. L. REV. 1562 (1980).

136. *Sun Buick*, 26 F.3d at 1261.

137. *Id.*

138. *Id.* at 1263.

139. *Id.* (citing *Comm'rs of Road Improvement Dist. No. 2 v. St. Louis Sw. Ry. Co.*, 257 U.S. 547, 556–57 (1922); *Madisonville Traction Co. v. Saint Bernard Mining Co.*, 196 U.S. 239, 250–51 (1905)).

140. *Id.*

141. *Id.* at 1264.

142. *Id.* In this capacity, "[i]t regulates the licensing of salesperson, dealers, brokers and manufacturers," as well as "investigates allegations of wrongful acts" and prosecutes unauthorized practices, which are powers characteristic of an administrative agency, not a court. *Id.* at 1265.

143. *Id.* at 1266. The court also distinguished the Board based upon the composition of its adjudicators, which included new car dealers, used car dealers, mobile home dealers, recreational dealers, and motorcycle dealers. *Id.* at 1266. The court contrasted the Board's



has recognized that the word "court" in a statute refers "only to the tribunals of the judiciary and not to those of an executive agency with quasi-judicial powers."<sup>144</sup> The court also described the Board's absence from sections in the Pennsylvania Constitution and in Pennsylvania statutes related to the state court system.<sup>145</sup> Furthermore, according to the Third Circuit's own precedent, the Board could never be a court because it lacks the power to award damages or full injunctive relief, a power any equivalent Pennsylvania state "court" would have.<sup>146</sup>

Finally, the Third Circuit rejected the argument that, because the Board was acting in an adjudicatory manner, rather than in an administrative one, in resolving the specific dispute between the parties in this case, removal was proper based on the nature of the proceeding.<sup>147</sup> The defendant's argument improperly conflated the "civil action" and "State court" requirements of the removal statute: "State court" requires an analysis of the Board's status as a whole, while the *nature* of the proceedings before the Board determines whether the proceeding is a "civil action."<sup>148</sup> The Board's *general status* is not one of a court, therefore making it "irrelevant whether the *proceeding* may qualify as a 'civil action.'<sup>149</sup>

Ultimately, despite its "unrelenting criticism," the Third Circuit never adopted or rejected the functional test.<sup>150</sup> However, in *DeLallo v. Teamsters Local Union #776*,<sup>151</sup> an opinion issued approximately two months after *Sun Buick*, the United States District Court for the Eastern District of Pennsylvania concluded that, "if squarely presented with the question, the Third Circuit would refuse to apply the functional test and would not allow removal from a

composition with a section in the Pennsylvania Constitution that requires judges to devote full time to their judicial duties. *Id.* (citing PA. CONST. art. V, § 17(a)).

144. *Id.* at 1264 (quoting *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 217 (3d Cir. 1979)).

145. *Id.* at 1266.

146. *Id.* at 1265-66.

147. *Id.* at 1267.

148. *Id.*

149. *Id.* (emphasis added).

150. *DeLallo v. Teamsters Local Union #776*, No. CIV.A. 94-3875, 1994 WL 423873, at \*3 (E.D. Pa. Aug. 12, 1994).

151. *See id.* at \*5 (holding improper removal from Pennsylvania Human Relations Commission (PHRC) because although it is acting as an adjudicator in the instant case, implying that the case is a "civil action," it does not follow that the PHRC is a state "court" for removal purposes); *accord* *Borough of Olyphant v. Pa. Power & Light Co.*, 269 F. Supp. 2d 601, 602 (M.D. Pa. 2003) (noting that "the Third Circuit has questioned the validity of the functional test and its adoption in other circuits").

state administrative agency."<sup>152</sup> The Third Circuit may have been uncomfortable completely rejecting the functional test because only a decade earlier it had applied its own functional test to interpret whether the phrase "state court," in the context of the Clean Air Act (CAA)<sup>153</sup> and the Clean Water Act (CWA),<sup>154</sup> encompassed state administrative actions.<sup>155</sup>

To promote public participation in enforcing the CWA and the CAA, Congress provided both with citizen suit enforcement provisions, but preempted the suits if the EPA or a state is "diligently prosecuting a civil or criminal action in a court of the United States or a State to require compliance . . . ."<sup>156</sup> The Third Circuit, in *Baughman v. Bradford Coal Co.*,<sup>157</sup> applied its own variation of the functional test.<sup>158</sup> It observed that the word "court" generally does not refer to an executive agency with quasi-judicial powers.<sup>159</sup> But by extrapolating from the First Circuit's reasoning in *Volkswagen*, the Third Circuit concluded that an agency may be a "court" if its "powers and characteristics make such a classification necessary to achieve statutory goals."<sup>160</sup> In applying its test to the Pennsylvania Environmental Hearing Board (PEHB), the Third Circuit determined that the PEHB failed to advance Congress's statutory goals for two reasons: Not only did the PEHB

152. *DeLallo*, 1994 WL 423873, at \*3.

153. Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392 (codified as amended at 42 U.S.C. §§ 7401-7671q (2006)).

154. Federal Water Pollution Control Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (2006)).

155. See Randall S. Schipper, *Administrative Preclusion of Environmental Citizen Suits*, 1987 U. ILL. L. REV. 163, 168 (noting that "[t]he first question one must address in interpreting the citizen suit preclusion provision is the meaning of the word 'court'").

156. See Jeffrey G. Miller, *Theme and Variations in Statutory Preclusions Against Successive Environmental Enforcement Actions by EPA and Citizens: Part One: Statutory Bars in Citizen Suit Provisions*, 28 HARV. ENVTL. L. REV. 401, 408 (2004) (explaining that because it was "[n]ot confident that federal and state authorities would fully enforce against violations of the statutes, [Congress] also authorized citizens to enforce through an ingenious new device, the citizen suit provision"). Both the CAA and the CWA preclusion provisions are interpreted interchangeably. See *Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) ("The citizen suit provision of the Clean Water Act was explicitly modeled on the similarly worded [S]ection 304 of the Clean Air Act.").

157. See *Baughman v. Bradford Coal Co.*, 592 F.2d 215, 219 (3d Cir. 1979) (holding that a prior enforcement action before the Pennsylvania Environmental Hearing Board did not constitute a prior diligent prosecution in a court of a state for the purposes of precluding a subsequent civil suit); see also *Student Pub. Interest Research Group v. Fritzsche, Dodge & Olcott, Inc.*, 759 F.2d 1131, 1137 (3d Cir. 1985) (interpreting identical preclusion provision in the CWA and holding that an EPA enforcement action was not a "court" proceeding).

158. *Baughman*, 592 F.2d at 217-18.

159. *Id.*

160. *Id.* at 217.

lack the ability to award relief equivalent to that which the EPA could secure in federal court, but the PEHB also lacked the ability to allow for citizen intervention as a matter of right—a right citizens have when the EPA files an action in federal court.<sup>161</sup>

The Second Circuit Court of Appeals, in *Friends of the Earth v. Consolidated Rail Corp.*,<sup>162</sup> interpreted the CWA's preclusion provision according to the statute's plain language.<sup>163</sup> The statute "unambiguously and without qualification" refers to an action in a *court* of the United States or a state.<sup>164</sup> The CWA's legislative history indicated that Congress meant for citizens to have a clear role in its enforcement, and allowing "court" to be interpreted to include agency proceedings was contrary to both plain language and congressional intent.<sup>165</sup> Additionally, in other statutes, Congress explicitly had provided that either an administrative proceeding *or* a court action would preclude citizen suits.<sup>166</sup> Thus, in accordance with the statute's plain language, the Second Circuit held that citizen suits would be precluded only by actions filed in a state or federal court, not in administrative agencies.<sup>167</sup> Both the Ninth and Fifth Circuit Courts of Appeals have agreed with the reasoning of the Second Circuit,<sup>168</sup> and there is

161. *Id.* at 219.

162. *See Friends of the Earth v. Consol. Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (holding that in accordance with the plain language of Section 505(b)(1)(B) of the CWA, only a prosecution by the EPA or a state initiated and diligently prosecuted in a state or federal court will operate to preclude a citizen suit).

163. *Id.*

164. *Id.* at 62.

165. *Id.* at 62–63; *see also* Schipper, *supra* note 155, at 169 (discussing the Second Circuit's conclusion that there is nothing to indicate that "Congress had any intention different from that which the words convey").

166. *Friends of the Earth*, 768 F.2d at 63 (emphasis added); *see also* Miller, *supra* note 156, at 437 ("By referring to both judicial and administrative enforcement actions in the same provisions or in different preclusions in the same statute, Congress indicated that it knew they were different types of actions, knew how to describe each, and meant its references to each as discrete types of actions."); *id.* at 442–43 (discussing the fact that Congress "amended CWA [Section] 505(a) to cross reference the [Section] 309(g)s bar on citizen suits for administratively assessed penalties . . . reinforcing its intent that 'court' in [Section] 505 does not include administrative agencies").

167. *Friends of the Earth*, 768 F.2d at 63.

168. *See* *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 794–95 (5th Cir. 2000) (agreeing with Second and Ninth Circuits that the plain meaning of the preclusion provision in the CWA refers only to a court of the United States or a state, thus excluding prior administrative actions); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1524–25 (9th Cir. 1987) (holding that previous administrative action taken against defendant did not preclude a subsequent citizen suit because the plain language of the CWA refers only to "courts").

agreement that adherence to the plain language is more "faithful" and makes more "policy sense."<sup>169</sup>

Perhaps its adoption of a functional test in the citizen suit context explains the Third Circuit's reluctance in *Sun Buick* to reject officially the use of the functional test in the removal context, calling its discussion of the functional test in *Baughman* and subsequent cases "dictum,"<sup>170</sup> as well as acknowledging that its reasoning had been rejected by both the Second and Ninth Circuit Courts of Appeals.<sup>171</sup> In *Sun Buick*, it did appear to intimate that it might not be inclined to follow its *Baughman* reasoning if presented with the issue again, which would be more consistent with its criticism of the functional test in the removal context.<sup>172</sup> It ultimately tried to remedy any apparent inconsistency by noting the different contexts of citizen suit provisions and removal.<sup>173</sup>

#### D. The Ninth Circuit Rejects the Functional Test

In 2002, the Ninth Circuit, in *Oregon Bureau of Labor and Industries ex rel. Richardson v. U.S. West Communications, Inc.*,<sup>174</sup> resolutely rejected the use of the functional test.<sup>175</sup> The Oregon Bureau of Labor and Industries (BOLI) had served U.S. West with unlawful employment discrimination charges after its employee Darryl Richardson filed a complaint alleging discrimination against him for accompanying an Oregon state safety compliance officer on an investigation of a U.S. West facility.<sup>176</sup> After BOLI

169. Miller, *supra* note 156, at 443.

170. See *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1264 (3d Cir. 1994) (noting that it "need not decide the viability of the dictum in these cases"); Miller, *supra* note 156, at 438 (observing in the context of the citizen suit preclusion provisions that the Third Circuit "may subsequently have repudiated its reasoning in favor of a plain English interpretation").

171. *Sun Buick*, 26 F.3d at 1264.

172. See *id.* (acknowledging that "[e]ven if [it] were still inclined" to follow *Baughman*'s reasoning, the removal context was sufficiently distinguishable (emphasis added)); Miller, *supra* note 156, at 439 (observing that in *Sun Buick*, the "court was clearly uncomfortable applying its 'functional equivalent' doctrine" in the removal context).

173. *Sun Buick*, 26 F.3d at 1264; see also Miller, *supra* note 156, at 439 (explaining that, in *Sun Buick*, the Third Circuit "strongly questioned the viability" of its precedents in the context of the CAA and CWA but stated "that it would take an *en banc* court to jettison them").

174. See *Or. Bureau of Labor & Indus. ex rel. Richardson v. U.S. W. Commc'ns, Inc.*, 288 F.3d 414, 419 (9th Cir. 2002) (holding improper removal from the Oregon Bureau of Labor and Industries because § 1441(a) "does not authorize removal of proceedings from an administrative agency").

175. *Id.*

176. *Id.* at 415.

scheduled a hearing, U.S. West removed the action, alleging that the district court had subject matter jurisdiction under Section 301(a).<sup>177</sup> The district court denied BOLI's motion for remand, citing to both the complete preemption doctrine of Section 301(a) and to BOLI's functionality as a "court" for removal purposes.<sup>178</sup>

The Ninth Circuit approached the question of removal as a statutory question: Is the plain language of § 1441(a) susceptible to ambiguity or is it definite and plain?<sup>179</sup> The court indicated that the phrase in the removal statute, "state court," meant just what it said:

We look first to the statutory language. If it is clear and consistent with the statutory scheme, the plain language is conclusive and our inquiry goes no further. . . . The plain language of 28 U.S.C. § 1441(a) limits removal to cases pending before a "state court." U.S. West does not argue that the term "state court" is ambiguous, nor do we think that it is. The term is clear and consistent with the overall statutory scheme for removals because it is used repeatedly throughout the removal statutes and is the only term used in reference to the tribunal from which removal may be taken.<sup>180</sup>

The court agreed with the Third Circuit that the statutory language of § 1441(a) should be dispositive, and because all the parties agreed that BOLI was not a *court*, although it may conduct court-like adjudications, the action against the defendant was not removable.<sup>181</sup>

The Ninth Circuit then provided three reasons why it refused to adopt the functional test. First, although the construction of the removal statute is a matter of federal, not state, law, the functional test goes beyond the plain language of § 1441, as it is a "judicially-developed analysis that neither appears in, nor is necessarily implied by, the statutory language."<sup>182</sup> Second, precedent in the Ninth Circuit required courts, in interpreting statutes, to not reach "beyond clear and consistent statutory language," and because the Ninth Circuit found § 1441(a) to be clear and consistent, it refused to adopt the test.<sup>183</sup>

Finally, it bothered the court that the adoption of the functional test necessarily transformed the "meaning and reach" of the removal statute.<sup>184</sup> Instead of only allowing removal from a "state court," the test would allow

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177. *Id.*

178. *Id.*

179. *Id.* at 417.

180. *Id.* at 417–18.

181. *Id.* at 418.

182. *Id.*

183. *Id.* at 419.

184. *Id.*

removal from "any tribunal that acts as a state court," or "any tribunal having court-like functions," or some other similar phrase.<sup>185</sup> Allowing removal in these situations shifts the inquiry from one into the "nature of the *tribunal* to one into the nature of the *proceeding*,"<sup>186</sup> the same concern voiced by the Third Circuit in *Sun Buick*. Consequently, as the number of state agency proceedings continues to increase, an improper focus on the agency proceeding would expand removal jurisdiction, directly contradicting the mandate "that removal statutes . . . be strictly construed so as to *limit*, not expand, federal jurisdiction."<sup>187</sup> The court also agreed with the Third Circuit that just because *Upshur County* held that a court is not necessarily a court for removal purposes, does not mean necessarily that the Supreme Court endorsed the functional test.<sup>188</sup> The Ninth Circuit, therefore, held that § 1441 does not authorize removal of proceedings from an administrative agency, regardless of how akin its proceedings are to a "court."<sup>189</sup> The BOLI was not a court and thus removal from it was impermissible.<sup>190</sup>

#### VI. Upshur County Did Not Adopt a Functional Test

Courts allowing removal from a state agency sustain much of their conclusion on the Supreme Court's alleged endorsement of a functional test in *Upshur County*.<sup>191</sup> But the Court did not endorse or impliedly endorse this standard. First, the Court resolved whether a property appraisal became a "suit" at law when it was appealed to the Upshur county court.<sup>192</sup> To justify its conclusion that the appeal was not a "suit" at law, the Supreme Court focused on the fact that the so-named county court was not a "court" because it lacked judicial powers, and in reviewing the appraiser's original valuation, it did not conduct a proceeding *inter partes*.<sup>193</sup> The original appraisal and the appeal

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185. *Id.*

186. *Id.*

187. *Id.* (emphasis added) (citing *Frize, Inc. v. Matrix, Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999)).

188. *Id.*

189. *Id.*

190. *Id.* at 419–20. The court declined to reach the complete preemption doctrine relied upon by the district court as providing it with original jurisdiction because the "state court" requirement of § 1441(a) was not satisfied. *Id.* at 420.

191. See *supra* notes 55–57 and accompanying text (discussing the *Tool & Die Makers* court's view that *Upshur County* endorsed a functional test).

192. See *supra* note 36 and accompanying text (stating Upshur County's argument).

193. *Supra* notes 39, 44–45 and accompanying text. As the Third Circuit reiterated, the

were executive and administrative county affairs, and thus, the appeal was not a "suit" at law, a separate requirement for removal.<sup>194</sup>

It also is unlikely that the Supreme Court—aware of the dramatic increases in federal dockets resulting from the expansive removal provisions of the Judiciary Act of 1875—sought to provide further federal court access to complaints filed originally in state commissions.<sup>195</sup> Additionally, the Court's analysis in *Upshur County* bears no similarity to the functional test adopted by the First and Seventh Circuits. For one thing, those courts focused on the similarity of the tribunal's procedures to those used in state courts, while the Supreme Court's discussion in *Upshur* focused on whether the State of West Virginia had vested judicial power—the power to determine questions of law and fact—in the county court, as well as whether the county court conducted the proceeding *inter partes*.<sup>196</sup> There is little discussion of the county court's procedures in *Upshur County* other than a mention that the county court may swear witnesses during the appeal proceeding, which the Supreme Court regarded as irrelevant because appraisers are often empowered to do so without altering the nature of their appraisal.<sup>197</sup> Furthermore, focusing on the agency's procedures is wholly improper because a state legislature could easily alter a tribunal's procedures to block a defendant's access to removal through the functional test, and procedure-based removal could lead to removal of proceedings from agencies with an undeniably legislative purpose.<sup>198</sup> The

Supreme Court held in other cases from the *Upshur County* era that removal was proper because "the body in question was a *judicial body* under state law." *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1263 (3d Cir 1994) (emphasis added).

194. *Upshur County v. Rich*, 135 U.S. 467, 472 (1890); see also Marc D. Falkoff, *Abrogating State Sovereign Immunity in Legislative Courts*, 101 COLUM. L. REV. 853, 879 (2001) (observing that "[i]n the past, the [Supreme] Court has adopted a functional standard for determining whether an action before an agency is to be deemed a *suit at law*" (emphasis added)); Martin H. Redish & Daniel J. LaFave, *Seventh Amendment Right to a Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 433 n.136 (1995) (noting that "[i]n *Upshur County*, the [Supreme] Court held that despite the fact that removal was from a 'county court,' the case did not involve a removable 'suit'").

195. See *supra* notes 28–30 (discussing increase to federal dockets following the Judiciary Act of 1875).

196. *Supra* note 44 and accompanying text. In its analysis, the *Tool & Die Makers* court looked at the procedures of the WERB and found that they revealed its judicial character, but a proper focus on the judicial power of the WERB under *Upshur* would have revealed that the WERB lacked the power to enforce its own orders, which certainly a "court" vested with judicial power by a state would have the ability to do.

197. *Upshur County*, 135 U.S. at 472.

198. For example, in 1959, the WERB and the Wisconsin Public Service Commission (WPSC) used the same procedures, but the ratemaking performed by the latter agency is a

Supreme Court, therefore, did not adopt a functional test in its decision; however, it did state that for an action to be a "suit" at law, the proceeding needed to be *inter partes*, and the tribunal needed to be *vested with judicial power* by its state.<sup>199</sup>

### VII. *The Functional Test: A Reevaluation*

In a 1960 law review commentary on the *Tool & Die Makers* opinion, it was predicted that with the increasing grants to state administrative agencies of functions formerly exercised by courts, the federal courts, in deciding whether a state agency is a "court" for removal purposes, would "attempt to formulate new and more meaningful standards."<sup>200</sup> Unfortunately, the federal courts have come no closer to developing a meaningful standard than they had in 1960, nor has the issue yet reached the Supreme Court for clearer guidance.

This Part attempts to reconcile the tension between the respective state and federal interests at stake in the argument over removal from state agencies. In examining the tension, it becomes apparent that the functional test has outgrown any usefulness it might have once had for federal courts struggling to interpret the phrase "state court." Because of the overwhelming policy implications for states and plaintiffs, this Part argues for adherence to the plain language of the phrase "state court," an analytic method which recognizes the legitimate and valuable role agencies occupy in a state's development of its regulatory and administrative system. Addressing what constitutes a "court," furthermore, should depend on whether a state's constitution has vested judicial power in the state agency, which respects the states' rights to provide for a judicial system as they see fit and comports with the Supreme Court's standard in *Upshur County*. However, because Section 301(a) claims greatly increase the federal interests in the subject matter and in the provision of a federal forum, while simultaneously nearly extinguishing most state interests in establishing a labor agency, this Part also advocates for an amendment to 29 U.S.C. § 185(a),<sup>201</sup> the current federal statute implementing Section 301(a) of

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legislative, not judicial, function. A proceeding before the WPSC, therefore, should never constitute a removable suit regardless of the similarity between its procedures and a court's. Note, *Removal of State Administrative Proceedings to the Federal Courts*, 12 STAN. L. REV. 492, 497 (1960).

199. *Upshur County*, 135 U.S. at 475, 476.

200. *Removal to Federal Courts from State Administrative Agencies*, *supra* note 52, at 617.

201. See 29 U.S.C. § 185(a) (2006) (providing litigants ability to bring labor disputes involving CBAs in any district court of the United States regardless of citizenship or amount in controversy).



the LMRA, which would provide litigants charged in state agencies the ability to remove actions arising out of or requiring the interpretation of a CBA.

*A. "State Court" Requires a Plain Language Interpretation*

Justice Cardozo once said, "[W]e do not pause to consider whether a statute differently convened and framed would yield results more consonant with fairness and reason. We take the statute as we find it."<sup>202</sup> Those courts adopting the functional test have not heeded Justice Cardozo's maxim, but instead impermissibly have reached far beyond the plain language of the removal statute, as the question is not whether Congress *should* allow for removal from state agencies, but rather whether Congress explicitly has provided so.<sup>203</sup>

It is axiomatic that statutory interpretation begins with the text of the statute, and if the language is plain and unambiguous, then the language controls.<sup>204</sup> Traditionally, an agency is not a court; it is an executive or legislatively created tribunal that regulates a certain subject matter.<sup>205</sup> Because an agency is not a court vested with judicial power, although it may conduct court-like adjudications, the plain language of the removal statute is unambiguous, and therefore controlling. Section 1441(a) should not apply to state agencies not vested with judicial power. Additionally, courts have pointed out that when Congress has seen fit to allow removal from tribunals that are not considered traditional "state courts" it has done so, and when it has chosen not to grant status to non-federal trial courts, federal courts have held that those courts are not "state courts."<sup>206</sup> Thus, because removal jurisdiction is a

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202. *Anderson v. Wilson*, 289 U.S. 20, 27 (1933).

203. *See supra* notes 184–87 and accompanying text (noting that the functional test has been criticized as transforming the removal inquiry).

204. *See Felix Frankfurter, Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947) ("Though we may not end with the words in construing a disputed statute, one certainly begins there.").

205. *See COOPER, supra* note 9, at 96 (defining administrative agency to include "all those governmental organs (other than the legislature or the courts) which possess authority to make rules affecting private rights or to adjudicate contested cases").

206. *See Becenti v. Vigil*, 902 F.2d 777, 780 (10th Cir. 1990) (discussing inapplicability of removal to tribal court). *Compare* 28 U.S.C. § 1451 (2006) (defining "State court" to include the Superior Court of the District of Columbia), *and* 48 U.S.C. § 864 (2006) (authorizing removal of actions commenced in the District Court for the District of Puerto Rico), *with* *Territory of Guam v. Landgraf*, 594 F.2d 201, 202 (9th Cir. 1979) (refusing to read congressional references in 28 U.S.C. § 1443(1) to an action in "state" court as including an action in the Territory of Guam because there was no explicit reference in the statute including the Territory of Guam as a "state court").

statutory creation, until Congress decides to expand federal removal jurisdiction to encompass actions filed in state agencies, the federal courts may not exercise jurisdiction over such actions.

There are also other reasons why a plain language interpretation of the phrase "state court" is required in the removal context. Adherence to the plain language of "state court," instead of resorting to the functional test, comports with the policy and purpose behind Congress's provision of removal jurisdiction. As noted previously, the right of removal is purely statutory, and as such, is entirely subject to legislative control.<sup>207</sup> While the interpretation of the removal statute is a matter of federal, not state, law, the Supreme Court has directed lower courts to construe the grant of removal strictly.<sup>208</sup>

Cited earlier, Justice Stone's opinion in *Shamrock Oil & Gas Corp. v. Sheets*<sup>209</sup> advanced the rule for strict construction of the removal statute.<sup>210</sup> The Act of 1887's substantial contraction of removal that was provided by the Judiciary Act of 1875, coupled with the "policy of the successive acts of Congress regulating the jurisdiction of federal courts," in his opinion, indicated a desire by Congress for strict construction.<sup>211</sup> Both the Supreme Court and lower federal courts have reaffirmed Justice Stone's strict construction philosophy, and some courts have required that all doubts on the propriety of removal be resolved in favor of remand.<sup>212</sup>

Strict construction of removal, in turn, respects our nation's idea of federalism. The Supreme Court has long cited to the reserved power of the states, under the Tenth Amendment,<sup>213</sup> to provide for the determination of controversies in their courts, which may be restricted only by acts of Congress

207. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 349 (1816) (explaining that the power of removal "is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication" and "[t]he time, the process, and the manner, must be subject to its absolute legislative control"); *see also* WRIGHT ET AL., *supra* note 3, § 3721 (discussing removal's dependence on congressional authority).

208. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (stating that the removal statute must be construed strictly).

209. *See id.* (holding that the removal statute did not allow a plaintiff, who was sued by the original defendant in a counterclaim, to remove the action to federal district court).

210. *Id.*

211. *Id.*; *see also supra* notes 28–32 and accompanying text (discussing Congress's restrictions on removal in 1887).

212. *See* WRIGHT ET AL., *supra* note 3, § 3721 ("Consistent with the philosophy expressed by Justice Stone, there is ample case support . . . at all levels of the federal courts . . . for the proposition that removal statutes will be strictly construed," and "[s]ome federal courts go further . . . and say that all doubts . . . should be resolved" in favor of remand).

213. U.S. CONST. amend. X.

in conformity with Article III of the Constitution.<sup>214</sup> "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."<sup>215</sup> Furthermore, the federal courts are courts of limited jurisdiction, and depriving a state court of an action properly brought within its jurisdiction, interferes with states' rights to resolve controversies pursuant to their own determinations, thereby exacerbating the federalism concerns.<sup>216</sup> Both statutory and federalism reasons, therefore, require plain language to control the interpretation of "state court."

Additionally, in the Judicial Code, there are examples of the Supreme Court interpreting jurisdictional statutes according to their plain language, and in many of the situations, the stakes are higher for the loser than for defendants seeking removal of initial state agency proceedings to federal court.<sup>217</sup> The Supreme Court previously has been tasked with interpreting the phrase "state court" in the context of 28 U.S.C. § 1738<sup>218</sup>—the implementing statute of the Full Faith and Credit Clause<sup>219</sup>—which requires federal courts to give full faith and credit to the "judicial proceedings of any *court* of any . . . State."<sup>220</sup> In

214. See *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (explaining basis for strict construction of removal statute as it pertains to amount-in-controversy requirement of removal based upon diversity-of-citizenship).

215. *Id.*

216. MOORE ET AL., *supra* note 2, § 107.05.

217. A further illustration of this point is the Supreme Court's refusal to find a Seventh Amendment defect in the refusal of Congress to permit juries to be seated in non-Article III courts. See Falkoff, *supra* note 194, at 879–80 (discussing formalist approach of Supreme Court in its treatment of the Seventh Amendment in non-Article III courts in support of contention that non-Article III courts, as creatures of Congress and subject to elected-branch control should not be answerable to judicially developed doctrines like sovereign immunity). Professor Falkoff argues that "sovereign immunity is a concept foreign to the administrative agency context, since legislative courts are more properly understood to be regulatory bodies rather than courts of law." *Id.* at 876. Some would argue that halting a state into a legislative court should make no constitutional difference in invoking the sovereign immunity doctrine, but Falkoff argues that "there is a clear conceptual difference between legislative and judicial courts, even if the distinction between them has been a problem of a 'highly theoretical nature' and 'productive of much confusion and controversy.'" *Id.* at 879. For a further discussion of why the Seventh Amendment right to a jury trial *should extend* to administrative adjudications of a "statutorily created cause of action on behalf of or against a private individual or entity," see Redish & LaFave, *supra* note 194, at 432–34.

218. See 28 U.S.C. § 1738 (2006) (implementing the Full Faith and Credit Clause).

219. See U.S. CONST. art. IV, § 1 (requiring that "[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State").

220. 28 U.S.C. § 1738 (2006) (emphasis added). The act provides:

The records and judicial proceedings of any *court* of any such State . . . shall be proved or admitted in other *courts* within the United States . . . . Such Acts,

*University of Tennessee v. Elliott*,<sup>221</sup> the Supreme Court stated that § 1738 "is not applicable to the unreviewed state administrative factfinding" of a state administrative law judge.<sup>222</sup> The Supreme Court similarly found § 1738 inapplicable to a judicially unreviewed decision of an arbitrator in light of the plain language of the statute, which refers to "judicial proceedings" of state courts.<sup>223</sup> Nearly every lower court to examine the issue has held that § 1738 is inapplicable to unreviewed state administrative decisions because of the statute's specific reference to "judicial proceedings" of "state courts."<sup>224</sup>

More recently, the Supreme Court used plain language to interpret the supplemental jurisdiction statute.<sup>225</sup> The Court allowed a federal district court to exercise supplemental jurisdiction over pendent state claims seeking deferential review of administrative decisions in federal court, despite the fact that the district court would not have original jurisdiction over the state claims.<sup>226</sup> The Court applied the statute to the facts of the case in a very straightforward manner, observing that "[n]othing in § 1367(a) suggests that district courts are without supplemental jurisdiction over claims seeking [on-the-record review] of local administrative determinations," as the statute

records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . .

*Id.* (emphasis added).

221. See *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 796–99 (1986) (holding that unreviewed state agency proceedings should be given preclusive effect in federal courts, except for when Congress, as in the case of Title VII, has provided otherwise); see also BATOR ET AL., *supra* note 16, at 1627–28 (discussing effect of res judicata on state court judgments).

222. *Univ. of Tenn.*, 478 U.S. at 794 (emphasis added). The Court, however, also held that the federal common law rule of preclusion applied when a state agency "acts in a judicial capacity" and "resolves disputed issues of fact properly before it which the parties have had an opportunity to litigate." *Id.* at 799. While this holding would appear to lend support to those courts adopting the functional test, there is no federal common law governing removal; removal is solely governed by statute. See 28 U.S.C. §§ 1441–1452 (2006) (enumerating the different ways removal can be accomplished).

223. *McDonald v. City of W. Branch*, 466 U.S. 284, 288 (1984).

224. See Robert P. Morris, *How Many Bites are Enough? The Supreme Court's Decision in University of Tennessee v. Elliott*, 55 TENN. L. REV. 205, 226 n.150 (1988) (citing cases).

225. 28 U.S.C. § 1367 (2006). The statute provides:

In any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction *over all other claims* that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

*Id.* § 1367(a) (emphasis added).

226. See *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165–66 (1997) (holding that the district court properly exercised federal question jurisdiction over the plaintiff's claims and properly recognized that it could also exercise supplemental jurisdiction over the plaintiff's state law claims for deferential review of an agency decision).

generally provides supplemental jurisdiction over "all other claims," not just claims of which the district courts would have original jurisdiction.<sup>227</sup> The Court specifically noted that Congress could establish an exception to supplemental jurisdiction for claims seeking deferential review of state agency decisions, but the plain language of the statute bore no such construction.<sup>228</sup>

Even though the Supreme Court has applied plain language to interpret "state court" in the Judicial Code, the courts adopting the functional test still argue that a plain language reading of the statute forecloses defendant access to a federal forum.<sup>229</sup> Thus, in effect, those courts have allowed access to a federal forum—a right only available to litigants that meet every requirement of the removal statute—to trump every legitimate interest states have in establishing agencies to regulate through adjudication. As the *Volkswagen* court conceded,<sup>230</sup> however, appeals from state agency decisions or petitions to enforce agency action in a definitive "state court" may be removable to a federal district court, thereby allowing the defendant access to a federal forum.<sup>231</sup>

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227. *Id.* at 171.

228. *Id.* at 169.

229. *Supra* notes 59, 70–74, 101 and accompanying text.

230. *Supra* notes 72–73 and accompanying text.

231. See WRIGHT ET AL., *supra* note 3, § 3721 ("[A]n appeal to a state court from an administrative agency or a de novo judicial proceeding following an administrative determination may take the form of a civil action and therefore be removable."). The ability to remove an appeal of a state agency decision to federal district court could be foreclosed by characterizing the initial agency proceeding as "judicial" under the functional test because removal of an "appellate" action brought in a state court to a federal court does not come within the original jurisdiction of the federal district courts. See *Chi., Rock Island & Pac. R.R. Co. v. Stude*, 346 U.S. 574, 581 (1954) (upholding dismissal, for lack of subject matter jurisdiction, of an original diversity action seeking review of a state agency's orders in a condemnation proceeding because lower federal courts do not sit on appellate review of state agency proceedings). However, if a state provides de novo review of state agency action, then the lower federal courts have original jurisdiction. *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 355 (1961); see also *Range Oil Supply Co. v. Chi., Rock Island & Pac. R.R. Co.*, 248 F.2d 477, 479 (8th Cir. 1957) (upholding removal from state court of an appeal from an order of the Minnesota State Railroad and Warehouse Commission because proceeding became a "civil action" and federal court had "original jurisdiction"); *Woolhandler & Collins*, *supra* note 73, at 664–66 (arguing that employing a functional analysis to classify initial state agency proceedings as either administrative or "judicial" runs the risk of excluding federal courts after the initial agency proceeding). *Woolhandler and Collins* argue this can be avoided by presuming that judicial review of an initial agency decision is itself the beginning of an original "judicial" phase and not an "appellate" phase. *Id.* at 666 n.219. Eventually, whether an appeal from an agency decision is considered de novo or deferential may not be determinative of whether a federal district court has "original jurisdiction" over the removal of the appeal, providing even further support for the argument that defendants will have access to a federal forum upon removal of an agency appeal in a state court. See *id.* at 661 (arguing that the Supreme Court's decision in *City*

Thus, with prior plain language interpretations of "state court" in the Judicial Code and in the context of the CWA and CAA,<sup>232</sup> there is ample support for the argument that the phrase "state court" is not applicable to state agency proceedings, even if such agencies exercise quasi-judicial functions. Although there are plenty of valid and logical reasons why Congress *should allow* for removal from state agencies, federal courts must only interpret the statute Congress has provided.<sup>233</sup> Additionally, since 1789, the removal statute has required that a civil action be brought originally in a "state court."<sup>234</sup> Although this antedates the creation of modern state administrative agencies, Congress has since amended the removal statute several times without changing the "state court" requirement and has in other statutes equated administrative agencies to "state courts."<sup>235</sup> Until Congress provides otherwise, it is improper for federal courts to reach beyond the directive of a long-standing congressional statute.<sup>236</sup> The language of the statute should be dispositive, and the language implies that the entity in question be a "court," not a state administrative agency.<sup>237</sup>

### *B. The Policy Consequences of Allowing Removal from State Agency Proceedings*

The overwhelming policy consequences that could result from the extensive adoption and use of the functional test also support a plain language interpretation of "state court." First, the functional test has the "capacity to create substantial mischief in the administrative arena, by encouraging parties

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*of Chicago v. International College of Surgeons* "may be a welcome step in recognizing that federal courts can readily accommodate deferential review and the exercise of original jurisdiction").

232. See *supra* notes 162–69 and accompanying text (discussing the general agreement among the circuit courts of appeals that "state court" in the CAA and CWA citizen suit provisions does not apply to state agency adjudications due to the plain language of the statutes).

233. See *Becenti v. Vigil*, 902 F.2d 777, 780 (10th Cir. 1990) ("We must be careful not to expand the jurisdiction of federal courts beyond Congressional mandates.").

234. *Supra* note 17 and accompanying text.

235. See *supra* Part II (discussing creation and amendments of removal statute); *supra* note 166 (discussing statutes with preclusion provisions that apply to actions diligently prosecuted in "state courts" or "administrative agencies").

236. *Becenti*, 902 F.2d at 781.

237. *Johnson v. Albertson's LLC*, No. 3:08cv236/MCR/MD, 2008 WL 3286988, at \* 4 (N.D. Fla. Aug. 6, 2008).

to take a shot at removal, with inevitable delays and disruptions."<sup>238</sup> The ability to remove state agency proceedings also could result in "the unwarranted, and thus wasteful, expenditure of limited federal judicial resources" as courts struggle to deal with the inevitable increased petitions for removal that could result from the widespread use of the functional test.<sup>239</sup> Furthermore, motions to remand would require detailed factual inquiries into agencies' procedures and functions, "raising the potential for evidentiary challenges necessitating discovery and evidentiary hearings," a result not contemplated by the creation of removal in the Judiciary Act of 1789.<sup>240</sup>

Widespread adoption and use of the functional test also undervalues states' interests in establishing agencies and interrupts agency adjudications that are attempting to fulfill their administrative delegations. Surely, despite the suggestion of the *Volkswagen* court, the states' purposes and interests reach beyond providing litigants with an alternate forum.<sup>241</sup> Agencies, whether federal or state, are creatures of the executive and legislative branches of government, with goals of instituting and enforcing substantive regulations.<sup>242</sup> Agency adjudications, which often provide an efficient method of regulating,<sup>243</sup> were not intended to co-opt the traditional powers of the courts.<sup>244</sup> Instead, states create and use agency adjudications for many legitimate reasons: to provide a more hospitable forum for interests often disfavored by the courts; to enable the development of expertise "as a result of extensive experience with case law, statutes, and technical facts in a particular area"; to enable the

238. *Bellsouth Telecomms., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280, 1283 (N.D. Fla. 2002). Mischief and delay were the chief consequences cited by the Temporary Emergency Court of Appeals for rejecting removal from state agency proceedings. *Supra* notes 126–31 and accompanying text.

239. *Albertson's LLC*, 2008 WL 3286988, at \*2.

240. *Id.*

241. See *Katz*, *supra* note 71, at 116 ("Essentially, the [*Volkswagen*] court analyzed the question in a way that both *overvalued* the federal interests involved and *undervalued* those of the states."). *Katz* concluded that the *Volkswagen* court's comparison of the "residual" state interest and the federal interests is "questionable." *Id.* at 117.

242. *Supra* note 205 and accompanying text.

243. See *Falkoff*, *supra* note 194, at 872 ("The driving force behind the creation of such tribunals . . . is that adjudication is both an efficient and inevitable mode of administrative regulation.").

244. In the federal context, Congress has long created non-Article III tribunals that regulate through adjudicatory processes. Originally, the agency adjudications vindicated "public rights"—"those which arise between the government and person subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments"—but eventually, the Supreme Court expanded on the subject matter and allowed non-Article III tribunals to resolve disputes between private parties. *Id.* at 873.

decision-maker to conduct a comprehensive independent factual investigation, both to address the private rights of parties before the tribunal and the greater public interest in the regulation; or to ease delay and costs that are often associated with bringing claims that usually accompany traditional judicial proceedings.<sup>245</sup> Moreover, because courts are often concerned with the resolution of rights between private parties and usually are not tasked with developing broad public policy, agency adjudications also can be structured to develop state legislative and regulatory policy.<sup>246</sup>

To put all these implications in perspective, one must realize the importance of removal jurisdiction in the modern judicial state of affairs. In 2006 alone, over 29,000 cases, or approximately 11% of the federal cases pending in federal court, were removed cases.<sup>247</sup> Regardless of whether or not cases stay in the federal system after removal, the increasingly extensive use of the functional test would burden an already strained judiciary, as courts applying the functional test would be required to engage in detailed, factual analyses into the functions and procedures of particular state agency adjudications.

Much is at stake for both parties in a struggle over the removal of an action, but especially for the plaintiff fighting removal to federal court. Empirical studies have shown that a "removal effect" "results [from] a precipitous drop in the plaintiffs' win rate."<sup>248</sup> By removing a case from the plaintiff-chosen state forum to federal court, the defendant greatly increases her odds of success.<sup>249</sup> One study, analyzing data from the Administrative Office of the United States Courts—assembled by the Federal Judicial Center—of civil cases terminated during fiscal years 1987 to 1994, found that, in diversity cases, the plaintiff's "win rate drops from 71% in original cases to 34% in removed cases," a consequence of "major importance" because "removed cases account[ed] for 17% of the diversity judgments in the data set."<sup>250</sup> In federal question cases, excluding prisoner litigation, the plaintiff's win-rate dropped

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245. See *Removal to Federal Courts from State Administrative Agencies*, *supra* note 52, at 619–20 (enumerating state purposes and goals in creating agencies).

246. See *Removal of State Administrative Proceedings to the Federal Courts*, *supra* note 198, at 497 (stating that the Wisconsin Employment Peace Act revealed that the legislature intended the WERB to be a policy-making body even when settling disputes over a CBA).

247. MOORE ET AL., *supra* note 2, § 107-23.

248. See 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, 581 (1998) (concluding that, in a regression "controlling for many case variables, [the] 'removal effect' remains sizable and significant").

249. *Id.* at 593.

250. *Id.*



from 52% to 25%.<sup>251</sup> The authors of the study concluded that the explanation for the "removal effect" is that forum *matters*.<sup>252</sup> The entire purpose and effect of removal jurisdiction is that it defeats the plaintiff's tactical forum choice.<sup>253</sup> The plaintiff's forum choice matters the most in removal cases because such cases are those in which both plaintiff and defendant have tried to forum-shop.<sup>254</sup>

Besides decreasing a plaintiff's win-rate, removal from state agencies could also result in the plaintiff's total abandonment of her claims when they are removed to federal court; other complainants, "through ignorance, inexperience or inadequate resources will delay long enough that their cases will go by default."<sup>255</sup> Complainants also may find that, upon removal to federal court, the costs of further litigation far outweigh their interests, thereby negating an advantage that often prompts creation of state agency adjudication—allowing citizens to take advantage of alternative, lower maintenance forums.<sup>256</sup> Instead, plaintiffs will find themselves in a federal court system that increasingly is hostile to their actions.<sup>257</sup>

Removal to federal courts also deprives plaintiffs of the "informality and flexibility which are characteristic of administrative proceedings," and in federal court, they face the burden of proving their case, whereas in an agency setting, the state's administrative system often investigates and processes claims.<sup>258</sup> Removal from state agencies denies the "complainants the benefits available to them in the state's forum," and "succeeds in denying the state all opportunity to implement its own policies, and to apply its own remedies."<sup>259</sup> The consequences of the functional test are real; the standard interrupts states' administrative systems and places plaintiffs in the very forum they sought to avoid.

251. *Id.* at 593–95.

252. *Id.* at 598.

253. *Id.*

254. *Id.* According to the authors, removal may "dislodg[e] the plaintiff's lawyer from a familiar and favored forum, and . . . [may] revers[e] the various biases, costs and other kinds of inconveniences, disparities in court quality, and differences in procedural law that led the plaintiff to prefer state court." *Id.*

255. Katz, *supra* note 71, at 119.

256. *Id.* at 120–21.

257. See Jeffrey W. Stempel, *Contracting Access to the Courts: Myth or Reality? Boon or Bane?* 40 ARIZ. L. REV. 965, 969–95 (1998) (chronicling the modern federal judiciary's efforts to increase hurdles for plaintiffs' access to adjudication on the merits in federal courts).

258. Katz, *supra* note 71, at 121–22.

259. *Id.* at 124.

### C. A New Solution

Although adhering to the plain language of the removal statute comports with both law and policy, there are two minor problems with the method: (1) there is no exact definition of "state court" in the removal statute; and (2) the complete preemption doctrine embodied in Section 301(a) of the LMRA eclipses almost all state interests in providing an agency forum to adjudicate unfair labor practice claims requiring interpretation of CBAs.

#### 1. The Correct Definition of "State Court"

The removal statute defines "State court" to include "the Superior Court of the District of Columbia" and defines "State" to include "the District of Columbia."<sup>260</sup> Beyond these two definitions, however, Congress provided no further guidance for courts attempting to apply the plain language of the statute to administrative agencies, although the implication of *Upshur County* is that the name a state bestows on a tribunal is not dispositive of whether it is a "court."<sup>261</sup>

Because the reference to "state court" has existed since the creation of removal in 1789, one possible analytic method by which to attack the issue involves examining the state judiciary systems, and specifically, their "courts," as they existed in 1789. A general survey of the state judiciary system reveals that in 1789, state courts were not organized in a hierarchical system—levels comprising trial courts, intermediate courts, and a supreme court—but instead, were structured horizontally, with "appeals" simply taken by courts with more judges than the previous court.<sup>262</sup> Corps of judges sometimes went singly into the field to try cases, and at other times, assembled as one body in order to try cases and consider "appeals."<sup>263</sup> Unlike America's modern judicial system, there was no clear distinction between trial courts and appellate courts, and review of a trial court decision often included a new trial, as the courts were concerned with the correctness of the resolution, not necessarily "making" the

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260. 28 U.S.C. § 1451 (2006).

261. See *Southaven Kawasaki-Yamaha v. Yamaha Motor Corp.*, 128 F. Supp. 2d 975, 978 n.3 (S.D. Miss. 2000) (observing that *Upshur County* held that "notwithstanding a state's characterization of a body as a 'court,' that body may not, in fact, be a court for removal").

262. See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE* 5–7 (Wythe Holt & L.H. LaRue eds., 1990) (providing description of state judiciaries in 1789).

263. *Id.* at 5–6.

law.<sup>264</sup> Finally, "the courts of last resort were commonly a branch of the legislature, or a body amalgamating judges, legislators, and members of the executive."<sup>265</sup>

With such diversity among the state judiciaries—"[I] legislatures made frequent changes, adding new features, dropping old ones, and changing those retained"—the drafters of the Judiciary Act of 1789 departed from the fluctuating state systems, and the new national system outlined in the Act became the model upon which the state judiciaries eventually were based.<sup>266</sup> Because many of the states at least had some form of general trial courts, it may be reasonable to assume Congress intended for removal to occur from such state trial courts.<sup>267</sup> But with the wide-ranging diversity apparent in the state judiciary systems at the time, it seems almost impossible to argue forcefully that there was a clear standard by which to determine the dispositive characteristics of "state courts."

The most logical way to resolve the issue is for courts, when faced with a civil action removed from a state agency, to examine the state's constitution and statutes to determine whether the state has vested "judicial power" in the administrative agency. Not only does this provide a rule that is dependent upon actual statutory law—rather than the judicially developed and malleable functional test—but the analysis would be consistent with the Supreme Court's holdings in multiple *Upshur County*-era cases that for a tribunal to be a "court," it must be vested with "judicial power" by its state.<sup>268</sup> The Court, in the removal context, did not focus on a tribunal's functionality with respect to a specific proceeding to determine the status of the tribunal.<sup>269</sup>

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264. See *id.* at 27–28 ("The point is that in the eighteenth-century successive trials, even successive jury trials were common. The final result of these successive trials would be to reach the one and only 'correct' result . . . . The eighteenth-century judge 'found' the law; the twentieth century judge 'makes' the law.").

265. *Id.* at 6.

266. *Id.* at 35.

267. See *supra* notes 16–18 and accompanying text (describing the Judiciary Act of 1789).

268. *Supra* notes 39, 44–45, 139–40 and accompanying text.

269. See *Comm'rs of Road Improvement Dist. No. 2 v. St. Louis Sw. Ry. Co.*, 257 U.S. 547, 560–61 (1922) (holding that Arkansas county court was a "court" because the Arkansas Constitution vested judicial power in the county courts, even though sometimes they also performed administrative functions); *Bellsouth Telecomms., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280, 1282–83 (N.D. Fla. 2002) (arguing that "[t]he nature of a specific dispute bears on the question of whether a proceeding is a 'civil action,' but ordinarily does not alter the status of the tribunal"). Reading § 1441(a) to allow for removal of "every proceeding of an adjudicatory nature" without imposing that the tribunal also be a "state court" would render the statute's reference to "state court" "wholly superfluous." *Id.* at 1283. *But see* *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908) (concluding that ratemaking proceedings before the Virginia State Corporation Commission were not proceedings in a "court" because they were

For example, in Maryland, the judicial power of the state "is vested in a Court of Appeals, such intermediate courts of appeal as the General Assembly may create by law, Circuit Courts, Orphans' Courts, and a District Court."<sup>270</sup> Unlike other states, Maryland has not provided expressly or impliedly for the creation of other courts by the legislature, and creation of a new "court" would require an amendment to Maryland's Constitution.<sup>271</sup> On the other hand, the Texas Constitution vests judicial power "in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law," but its courts have held that state agencies are not "courts."<sup>272</sup>

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legislative, not judicial, in nature). The Commission's decision regarding the legality of the rates should have been *res judicata*, but the Court ruled that the federal circuit court, on principles of comity, should not entertain a suit seeking injunctive relief against the Commission's rates, before an appeal was sought from the rates to the Virginia Supreme Court. *Id.* at 229–30. The *res judicata* and removal contexts are dissimilar enough to distinguish this case. Courts interpret the removal statute strictly in favor of remand—a legitimate and earnest reason not to include state agencies in its definition—while courts interpret *res judicata* more broadly so as to conserve judicial resources and to increase efficiency.

270. MD. CONST. art. IV, § 1.

271. See *Shell Oil Co. v. Supervisor of Assessments*, 343 A.2d 521, 526 (Md. 1975) (explaining that "[u]nder the Maryland Constitution, . . . the judicial function may be exercised only by those courts enumerated in the Constitution" and that "[w]ith the exception of the express authorization to create intermediate courts of appeal, the General Assembly . . . is not empowered to create additional 'courts' to exercise judicial power"). Furthermore, the court observed that the Maryland Constitution, and not the adjudicatory function which an entity performs, determines whether or not the entity is performing a judicial function. *Id.* Maryland courts have upheld the delegation to state agencies of certain "quasi judicial" functions, but also have held that the decision of an administrative agency is the result of the discharge of its *executive* duties, not the result of the exercise of *judicial power*. See *Ocean City Bd. of Supervisors of Elections v. Gisriel*, 648 A.2d 1091, 1096 (Md. Ct. Spec. App. 1994) (describing delegation of "quasi judicial" power to administrative agencies, but recognizing that because agencies do not exercise judicial power, review of an agency decision by a court is an exercise of original jurisdiction).

272. TEX. CONST. art. V, § 1. The Texas Constitution further provides that the "[l]egislature may establish such other courts as it may deem necessary and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto." *Id.* In interpreting the Texas Constitution's vesting of judicial powers, one court stated:

An administrative agency is not a "court" and its contested-case proceedings are not lawsuits, no matter that agency adjudications are sometimes referred to loosely as being "judicial" in nature. Agency adjudications do not reflect an exercise of the judicial power assigned to the "courts" of the State in Tex. Const. Ann. art. V, § 1; they are simply executive measures taken in the administration of statutory provisions.

*Beyer v. Employees Ret. Sys.*, 808 S.W.2d 622, 627 (Tex. App. 1991).

Other states, however, have not confined "judicial power" only to traditional "courts." The Alabama Constitution, beyond providing that the judicial power of the state is vested "exclusively in a unified judicial system which shall consist of a supreme court, a court of criminal appeals, a court of civil appeals, a trial court of general jurisdiction known as the circuit court, a trial court of limited jurisdiction known as the district court,"<sup>273</sup> also states that the legislature "may vest in administrative agencies established by law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes of which the agencies are created."<sup>274</sup> Thus, Alabama may consider state agencies, vested with judicial power by the legislature, to be the equivalent of "state courts," and actions filed in those agencies may be removable to federal district court under the plain language of the removal statute.

Reliance on the state's provision of "judicial power" is a workable analysis for determining whether the plain language of "state court" encompasses agency adjudications. Not only does the analysis adhere to the plain language of the statute but it also accounts for the federal interests in removal jurisdiction and respects the states' judicial and regulatory provisions. If the state perceives it to be wise to vest "judicial power" in a state agency, then it is only fair to the defendant that removal be permissible from such an agency. If the state does not wish to vest "judicial power" in a state agency, then the federal courts should respect that decision, as well as the state's interests in the orderly development of its regulatory scheme.

## 2. *Amending Section 301(a) of the LMRA*

The second problem with adherence to the plain language of the removal statute concerns the complete preemption doctrine of Section 301(a) of the LMRA. Under complete preemption, the defendant argues that Congress, by legislating within a given field, evidenced an intent to "occupy the entire field," thus making any attempt to claim a remedy outside the congressional scheme preempted, "whether or not there is a direct conflict with state law."<sup>275</sup> "To the extent that Congress has provided for private remedies, those remedies become the exclusive remedies available to plaintiffs," and if the plaintiff characterizes her claims as state claims, the complete preemption doctrine recharacterizes

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273. ALA. CONST. art. VI, § 139(a).

274. *Id.* § 139(b).

275. MOORE ET AL., *supra* note 2, § 107.14[4][b][iii].

them as federal claims.<sup>276</sup> In other words, the plaintiff cannot "artfully plead" her claims to deprive the defendant of a federal forum.<sup>277</sup> Section 301(a) covers one of the rare substantive areas of law by which Congress has preempted available state remedies and causes of action.<sup>278</sup>

The Supreme Court jurisprudence interpreting Section 301(a) spans over a half-century.<sup>279</sup> The Court repeatedly has reaffirmed the two general propositions of *Lincoln Mills*: (1) federal courts have jurisdiction over controversies involving CBAs; and (2) state and federal courts must apply federal law fashioned from national labor law policy.<sup>280</sup> While state and federal courts retain concurrent jurisdiction in resolving disputes over CBAs,<sup>281</sup> "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent legal rules."<sup>282</sup> In *Avco Corp. v. Aero Lodge 735*, the Supreme Court held that Section 301(a) actions brought in state courts could be removed pursuant to federal question jurisdiction because claims dependent upon Section 301(a) necessarily arise under federal law.<sup>283</sup>

By the end of the 1980s, the Supreme Court had cemented its complete preemption doctrine. Section 301(a) completely preempts state law claims and remedies in two situations: (1) claims founded directly on rights created by CBAs; and (2) claims founded on state law that require the interpretation of a CBA.<sup>284</sup> While the states are not divested of jurisdiction as a result of complete

276. *Id.*

277. *Id.*

278. See *id.* § 107.14[4][b][iv] ("Complete preemption remains the exception rather than the rule.").

279. The Supreme Court's first major statement on Section 301(a) complete preemption occurred in *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957), which held that courts resolving suits brought under Section 301(a) must apply federal substantive labor law. *Lincoln Mills*, 353 U.S. at 456.

280. See *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 403 (1988) (explaining that in *Lincoln Mills*, "we held that Section 301(a) not only provides federal-court jurisdiction over controversies involving collective-bargaining agreements, but also 'authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements'" (quoting *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 451 (1957))).

281. See *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 522 (1962) ("The legislative history of the enactment nowhere suggests that, contrary to the clear import of the statutory language, Congress intended in enacting [Section] 301(a) to deprive a party to a collective bargaining contract of the right to seek redress for its violation in an appropriate state tribunal.").

282. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

283. *Avco Corp. v. Aero Lodge 735*, Int'l Ass'n of Machinists and Aerospace Workers, 390 U.S. 557, 560 (1968).

284. See *Lingle*, 486 U.S. at 405–06 ("[I]f the resolution of a state-law claim depends upon

preemption, claims filed by plaintiffs in state courts falling under either of the above situations are removable normally to federal court.<sup>285</sup> But, if a plaintiff files a claim in a state agency—not vested with judicial power by the state's constitution—that would be preempted by Section 301(a), then adherence to the plain language of the statute would deprive the defendant of a right to removal normally available in a "state court."<sup>286</sup>

The conundrum presented by such a situation forced the *Tool & Die Makers*, *Volkswagen*, and *Floeter* courts to adopt the functional test, although, at the time, Section 301(a)'s complete preemption doctrine lacked its current, stronger form. In order to solve this issue without resorting to the functional test, which this Note has argued impermissibly reaches beyond the plain language of the removal statute, Congress must amend Section 301(a) to allow for removal of such actions brought originally in a state agency. Comparing the state interests in establishing agency adjudications and the federal interest in providing for diversity and federal question removal warrants such a conclusion in this situation.

Traditionally, courts have argued that Congress intended for diversity jurisdiction removal to protect out-of-state defendants from the bias of state court judges.<sup>287</sup> When compared to the state interests in establishing agency adjudications discussed previously, the federal interest is dwarfed, a conclusion empirically supported by the fact that most federal courts presented with diversity jurisdiction removal, in applying the functional test, remand the case back to the state agency.<sup>288</sup> Turning to federal question removal, generally, the

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the meaning of a collective-bargaining agreement, the application of state law . . . is preempted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute."); see also MOORE ET AL., *supra* note 2, § 107.14[4][b][v][A] (discussing Section 301(a) and the complete preemption doctrine).

285. See MOORE ET AL., *supra* note 2, § 107.14[4][b][v][A] (observing that "any complaint that purports to assert a state law claim within the scope of the LMRA cause of action necessarily arises under federal law," and would be removable from state court under federal question removal).

286. See WRIGHT ET AL., *supra* note 3, § 3722.1 ("By recognizing a species of cases that are always removable, the complete-preemption doctrine has been said to function as an independent corollary to the well-pleaded complaint rule." (internal quotation marks omitted)).

287. See *id.* § 3721 ("As seems to be true of the original diversity of citizenship jurisdiction of the federal courts, the right of removal probably was designed to protect nonresidents from the local prejudices of state courts.").

288. See, e.g., *Civil Rights Div. v. Asplundh Tree Expert Co.*, No. 08-60493-CIV, 2008 WL 2616154, at \*4 (S.D. Fla. May 15, 2008) ("District courts considering this issue have largely applied the functional test, but have rarely decided the case should remain in federal court."); *Gottlieb v. Lincoln Nat'l Life Ins. Co.*, 388 F. Supp. 2d 574, 579–82 (D. Md. 2005) (applying functional test to proceeding before MIA and finding that Maryland's substantial interest in enforcing its insurance licensing and regulatory scheme dwarfed any federal interest

policy justification offered to support such removal is that federal courts are better equipped to resolve federal claims.<sup>289</sup> The *Tool & Die Makers* opinion appeared to imply that, in the state agency context, removal pursuant to federal question jurisdiction presented a stronger federal interest than diversity jurisdiction removal.<sup>290</sup> The presence of a possible federal question, however, does not mean necessarily that states are stripped of concurrent jurisdiction; when Congress has desired to eliminate completely the jurisdiction of the states, it has granted exclusive jurisdiction to federal courts.<sup>291</sup>

Perhaps federal question removal instead implies that federal courts are thought more competent to adjudicate federal claims, but Congress was nonetheless willing to allow plaintiffs to litigate federal claims in state courts if they so desired.<sup>292</sup> The possibly less-qualified state court, therefore, would present no greater harm to the defendant's interest than the possibly-biased state court, in which case, there should be no greater federal interest in federal question removal than there is in diversity jurisdiction removal.<sup>293</sup> The state's interests in facilitating enforcement of its administrative scheme, comparatively, would still outweigh the federal interest in providing a forum to a defendant to adjudicate federal claims.<sup>294</sup> Preemption in the collective bargaining context, however, greatly increases the federal interest, while simultaneously extinguishing most, if not all, of the state's interests in establishing labor agencies.<sup>295</sup>

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in the provision of a forum).

289. See MOORE ET AL., *supra* note 2, § 107.03 ("The original purpose of removal in federal question cases was to ensure that the tribunal better informed on questions of federal law would adjudicate the matter.").

290. See *Removal to Federal Courts from State Administrative Agencies*, *supra* note 52, at 621 (observing that the *Tool & Die Makers* court "did not intend to focus only on labor law, but meant to suggest that federal-question cases should be removed more easily than diversity cases").

291. *Id.* at 622.

292. See *id.* (arguing that federal question removal can be explained as an "indication that Congress believes federal courts to be somewhat more qualified than state courts but is nonetheless willing to have federal questions determined by state courts if litigants so desire").

293. See *id.* (explaining that there would be no greater need for removal from the less qualified state court than from the possibly biased state court).

294. If it has been determined the state's interests surpass the federal interest in providing for diversity jurisdiction removal, then the equivalence between the federal interest in diversity and the federal interest in federal question jurisdiction leads to the conclusion that the state's interests also would exceed the federal interest in federal question removal.

295. See WRIGHT ET AL., *supra* note 3, § 3722.1 ("[T]he complete-preemption doctrine overrides such fundamental cornerstones of federal subject matter jurisdiction as the well-pleaded complaint rule and the principle that the plaintiff is the master of the complaint.").



As discussed earlier, Section 301(a) covers one of the rare substantive areas of the law Congress has chosen completely to preempt.<sup>296</sup> Absent such complete preemption, the states maintain the power to provide for state law claims and remedies, one of their most important interests in establishing agencies.<sup>297</sup> But when the state is preempted by Section 301(a), any alternative state actions or remedies—most often those based on unfair labor practice charges—are ousted in favor of federal law and remedies.<sup>298</sup> Therefore, most, if not all, of the reasons that states establish agencies in the CBA context are eliminated, and the federal interest in providing a forum to the defendant equipped to adjudicate a Section 301(a) claim is much stronger comparatively than in all other removal cases.

With practically no substantive state interest in providing for an agency adjudication of claims that implicate Section 301(a)'s complete preemption doctrine, the reasons advanced for adherence to the plain language of the removal statute fade. A resolution, however, presents itself that accounts for both the states' interests in facilitating the orderly operation of agency adjudications absent interference from the threat of functional test removal, and the substantial federal interests implicated by Section 301(a) claims: Congress must amend the LMRA to provide an explicit removal clause for actions filed in state agencies that are adjudged to be preempted by Section 301(a). Because the *Tool & Die Makers*, *Volkswagen*, and *Floeter* courts could not petition Congress for such an amendment themselves, they resorted to adopting the functional test, and located the *Upshur County* opinion in an attempt to validate the test.

While it seemed at the time to be the only answer to the issue, and the three courts carefully limited their specific holdings to the context presented, later courts, not presiding over adjudications implicating Section 301(a) claims, applied the test to removal in a number of substantive legal areas, and generally, its application never results in the case remaining in federal court.<sup>299</sup> Therefore, as Congress has done in the past,<sup>300</sup> it must amend Section 301(a) to

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296. *Supra* note 278 and accompanying text.

297. *See* *Kaucky v. Sw. Airlines Co.*, 109 F.3d 349, 351 (7th Cir. 1997) ("When federal law creates an exclusive remedy for some wrong, displacing any remedy that the state may have for it, a suit to redress that wrong necessarily arises under federal law.").

298. *See* WRIGHT ET AL., *supra* note 3, § 3722.1 (explaining that in complete preemption, Congress has "replaced the state law with federal law and made it clear that the defendant has the ability to seek adjudication of the federal claim in a federal forum").

299. *Supra* note 288 and accompanying text.

300. For an example of Congress relaxing removal requirements, see 28 U.S.C. § 1453 (2006).

allow removal of preempted claims brought originally in state agencies, provided they meet the other requirements for removal. In the continued absence of such an amendment, however, adherence to the plain language of "state court" must be embraced by more courts. As outlined previously, such an interpretation furthers states' and plaintiffs' interests, reduces judicial waste, embraces strict construction, gives due regard to federalism, and comports with the Court's interpretation of "state court" in the Judicial Code.

### VIII. Conclusion

The invention of the functional test by the *Tool & Die Makers*, *Volkswagen*, and *Floeter* courts resulted from agencies adjudicating state law claims involving CBAs, state law claims which are now preempted completely by federal law. At the time, those courts needed validation for the functional test, and they thought they found it in the language of *Upshur County*. *Upshur County*, however, instead stood for the idea that, although a state may call a tribunal a "court," it is not a "court" unless the state's constitution has vested judicial power in it. To resolve the specialized problem presented by the complete preemption of Section 301(a) claims, Congress must amend the statute to allow removal of such actions brought originally in state agencies. Because outside of claims completely preempted by Section 301(a), the federal interest in providing a federal forum is weaker than the states' interests in the agency adjudication, the amendment would obviate the continued use of the functional test. Only in the Section 301(a) context is the federal interest greater than the state interests.

Removal from state agencies continues to perplex judges, almost fifty years after the invention of the functional test by the *Tool & Die Makers* court. As state agencies continue to increase in number and scope, clashes between the removal statute and the states' interests in the utilization of agency adjudications will continue to be problematic for federal judges. Although courts adopting the functional test often advance logical arguments why removal to federal courts *should be allowed* from state agencies, Congress has yet to provide such an authorization in the statute itself. Federal courts, therefore, should adhere to the plain language of the term "state court," which, in accordance with Supreme Court removal cases, would include tribunals vested with judicial power by state constitutions. From both doctrinal and policy perspectives, the plain language interpretation advances the interests of all the parties involved in the dispute over removal from state agencies, and hopefully, puts this one subtle refinement finally to rest.

