

**A COURT BY ANY OTHER NAME: PRESERVING THE RIGHT OF
DIVERSITY REMOVAL FROM STATE ADMINISTRATIVE
AGENCIES THAT EMULATE COURTS**

I.	INTRODUCTION.....	472
II.	BACKGROUND	474
	A. <i>The Right of Removal and Its Early Statutory Authority</i>	475
	B. <i>The Current Removal Statute: 28 U.S.C. § 1441</i>	480
	C. <i>Removal of State Agency Actions</i>	481
III.	THE CIRCUIT SPLIT AND CURRENT APPROACHES.....	484
	A. <i>The Functionalist Approach Establishes Its Dominance</i>	484
	B. <i>Functionalist Sub-Approaches Develop</i>	489
	1. The “Dispute-Specific” Approach	489
	2. The “Global” Approach	490
	3. The “Federal-State Interests” Approach	491
	C. <i>The Textualist Approach Emerges and Threatens Functionalist Dominance</i>	492
	D. <i>The Circuits Split and Betray Any Real Standard</i>	494
IV.	STATE WITHIN A STATE: THE BLURRED LINE BETWEEN	496
	STATE AGENCIES AND STATE COURTS	496
	A. <i>Growth of the Administrative State and the Expansion of Agency Scope and Power</i>	497
	B. <i>Claimed Benefits to Administrative Adjudication</i>	498
	1. Cost and Time Savings	499
	2. Agency Expertise	499
	C. <i>Abandoning the Separation of Powers Doctrine for Administrative Agencies</i>	500
	D. <i>Agencies v. Courts: Defining a Difference</i>	502
V.	DISFUNCTIONALIST: REWORKING THE FUNCTIONALIST APPROACH ...	504
	A. <i>The Functionalist Approach Is the Best Approach to Protecting the Right of Removal Against Political Influence and Subject Matter Bias</i>	505
	B. <i>The Functionalist Approach Is Superior but Requires Some Reworking</i>	508
	1. The Federal-State Interest Approach Should Be Abandoned ..	508
	2. Consideration of the Defendant’s Affected Right Using a Due-Process Lens.....	510
	3. The Textualists Got It Wrong	511

C. <i>The Claimed Benefits of Agency Adjudication Are Largely Illusory</i>	512
D. <i>Two Potential Criticisms</i>	515
VI. CONCLUSION	516

I. INTRODUCTION

State agencies have grown exponentially in scope and reach; they exercise significant power to affect the rights of individuals and business. Agencies determine whether you receive a license to practice law, practice medicine, or cut hair; they regulate and limit the use of your private property; they dictate relationships between employees and employers, manufactures and dealers, buyers and sellers; and they exercise many more powers. State agencies wield immense power to control behavior and issue monetary penalties in many areas of our personal and professional lives.¹ Add to that power the political nature of agencies, and the result is significant potential for biased agency decisions.² These scenarios are bad enough for in-state defendants; but what about the out-of-state defendant who believes he will be the victim of additional bias based on their out-of-state status?

From the very beginning of the federal judiciary, the law has assured the right of a diverse defendant³ to remove a suit from state court to federal court, provided that the defendant meets certain criteria.⁴ In one form or another, that right has remained intact for nearly 225 years.⁵ But how does that removal right apply to administrative agencies? Can they emulate a court to a point that subjects them to removal procedures? Today, states turn to administrative agencies to adjudicate a wide variety of matters originally handled by traditional state courts, including labor disputes,⁶ motor vehicle and

¹ See generally A.M. Gulas, *The American Administrative State: The New Leviathan*, 28 DUQ. L. REV. 489 (1989); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Jerry L. Mashaw, *Reinventing Government And Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405 (1996). Although most of the scholarly writing on this topic surrounds federal agencies, many of the issues surrounding the expanding administrative state apply equally at the state level. See, e.g., Gulas, *supra*, at 489 (“Out of necessity, discussion will be limited to the federal sphere although the questions raised are applicable to state administrative agencies as well.”).

² See *infra* Part IV.A for discussion on political influence and agency subject matter bias.

³ Whether or not a defendant is a diverse party for removal purposes is determined pursuant to 28 U.S.C. § 1332(a) (2012).

⁴ See *infra* Part II for a discussion of the removal statutes and their criteria over time.

⁵ See *infra* Part II.

⁶ See *Floeter v. C.W. Transp., Inc.*, 597 F.2d 1100 (7th Cir. 1979) (adjudicating a breach of a collective bargaining agreement); *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38 (1st Cir. 1972) (same).

transportation claims,⁷ alcoholic beverages controls,⁸ and a host of others. Many of these agencies have taken on court-like attributes: engaging lawyers, holding hearings, using pleadings, collecting evidence, taking depositions, and more.⁹ Additionally, many agencies utilize administrative law judges, who adjudicate the dispute and issue orders.¹⁰

Whether a state agency can qualify as a court for removal purposes has spawned a significant amount of debate and a split amongst the federal courts. The removal statute provides that a defendant may remove to federal court “any civil action brought in a State *court* of which the district courts of the United States have original jurisdiction.”¹¹ Some Circuit Courts of Appeals have adopted a textualist approach, which holds that the plain meaning assigned to the statute limits removal to regular courts only.¹² Other circuits, however, have adopted a functionalist approach, which looks beyond the plain language of the statute and evaluates whether the agency’s procedures, functions, and powers emulate a court so as to make them effectively indistinguishable.¹³ These two approaches are the foundation of the circuit split that belie any real standard. So how should the courts decide?

This Note argues that the split of authority and confusion among circuits should be resolved by uniformly adopting a modified functionalist approach to determine whether a state agency is effectively acting as a state court, because this approach better evaluates the changing administrative landscape and preserves the right of diverse defendants to seek removal to a federal forum.

At the core of the right of removal is the fear that an out-of-state defendant might be subject to significant local prejudice if a plaintiff forces them to defend their case in a state other than their own.¹⁴ Thus, removal

⁷ See *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259 (3d Cir. 1994) (adjudicating an early termination of a dealership agreement controlled by state regulations); *Southaven Kawasaki-Yamaha v. Yamaha Motor Corp., USA*, 128 F. Supp. 2d 975 (S.D. Miss. 2000) (adjudicating a dispute between a motorcycle dealer and manufacturer).

⁸ See *Wirtz Corp. v. United Distillers & Vintners N. Am., Inc.*, 224 F.3d 708 (7th Cir. 2000) (adjudicating a dispute between a liquor distributor and a manufacturer that wanted to obtain more distributors); *R.J. Distributing Co. v. Sutter Home Winery, Inc.*, No. 99 C 3836, 1999 WL 571009 (N.D. Ill. July 29, 1999) (same).

⁹ See *infra* Part IV.D.

¹⁰ See *infra* Part IV for a discussion of agency’s administrative law judges.

¹¹ 28 U.S.C. § 1441(a) (2012) (emphasis added). Although this is the current removal statute, previous removal statutes have contained essentially the same requirement. See *infra* Part II for a discussion of the statute’s history.

¹² See *infra* Part III.C.

¹³ See *infra* Parts III.A, III.B.

¹⁴ See Scott R. Haiber, *Removing The Bias Against Removal*, 53 CATH. U. L. REV. 609, 614 (2004).

insures a defendant's right to have the case heard in a federal forum, in front of a presumptively neutral federal judge. The theory holds that a defendant should not be subjected to the risk of having his rights violated by a biased adjudicator. As this Note shows, these risks exist for out-of-state defendants when agencies act as *de facto* courts. As a result, actions under state administrative agencies that present substantially similar risks should be subject to the same right of removal.

Part II of this Note reviews the right of removal, the federal judicial structure, and the authority to exercise diversity jurisdiction. It then examines the underlying intent and purpose of removal. Next, this Part outlines the statutory authority for the removal statute from its inception in 1789 all the way through its current form in 28 U.S.C. § 1441. Finally, this Part provides a brief overview of the removal of state administrative action to federal court as it currently exists.

Part III provides a detailed description of the various approaches for removal of agency actions. It explains the functionalist approach and its rise to dominance, functionalist sub-approaches, and the countervailing textualist approach. This Part closes with a discussion of the current circuit split that belies any real standard and leads to disparate outcomes.

Part IV analyzes how state agencies have grown into an administrative "state" and how the expanding scope and power of these agencies makes them similar to state courts. This Part goes on to discuss how the expansion of administrative adjudication falls short of its claimed benefits. Next, Part IV looks at the abandonment of the separation of powers doctrine in the context of state agencies and the attendant risks that reinforce the necessity of the removal right. Lastly, Part IV lays out the factors that courts weigh in determining an agency's resemblance to a court, including some drawbacks and benefits.

Part V advocates for the functionalist approach while recommending an additional factor. Next, this Part shows the necessity of the removal right by comparing how the potential agency bias presents the same risks as state court bias. Finally, Part V explains why two concerns expressed by opponents of agency removal do not justify overriding the removal right.

II. BACKGROUND

In order to understand why the right of removal to a federal court should extend to state agency actions, we must have an understanding of the right of removal generally. First, this Part looks at the underlying reasoning and intent of the right of removal and why the founders felt it was necessary. Then, this part provides a historical rundown of the statutory authority for removal over time, beginning with the Judiciary Act of 1789 and culminating with the current removal statute, 28 U.S.C. § 1441. Finally, this Part looks at the approaches courts take when determining whether it is proper to allow removal of a state agency action to federal court under the current removal statute.

A. *The Right of Removal and Its Early Statutory Authority*

The United States Constitution establishes one Supreme Court and authorizes Congress to “ordain and establish” inferior federal courts as it deems necessary.¹⁵ Congress, under the Judiciary Act of 1789 (“the 1789 Act”), established two additional levels of federal courts below the Supreme Court: federal district courts and federal circuit courts.¹⁶ The federal district court level consisted of a district court in each state, presided over by one federal judge, “which heard admiralty and maritime cases and some other minor cases.”¹⁷ The federal circuit court level “served as the principal trial courts in the federal system and exercised limited appellate jurisdiction.”¹⁸

The federal courts’ power to hear cases comes only from either the express authority of the Constitution or the express authorization of Congress.¹⁹ Consequently, if neither Congress nor the Constitution extended jurisdiction, there is no legal authority for a federal court to hear a suit;²⁰ the plaintiff’s only recourse is to file in state court. Under the Constitution, the Supreme Court’s original jurisdiction was limited to specific suits: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”²¹ Of particular concern for this Note is the grant of original jurisdiction to cases “between a State and Citizens of another State;—between Citizens of different States”—also known as diversity jurisdiction.²²

When Congress passed the 1789 Act, it extended jurisdictional limits to the newly established lower federal courts.²³ Among those jurisdictional limits

¹⁵ U.S. CONST. art. III, § 1.

¹⁶ Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789); *see also The Judiciary Act of 1789: “An Act To Establish the Judicial Courts of the United States.”*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/landmark_02.html (last visited Sept. 2, 2014).

¹⁷ *See The Judiciary Act of 1789: “An Act To Establish the Judicial Courts of the United States.”*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/landmark_02.html (last visited Sept. 2, 2014).

¹⁸ *Id.*

¹⁹ *See Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)). “‘Federal courts are courts of limited jurisdiction,’ possessing ‘only that power authorized by Constitution and statute.’” *Id.*

²⁰ 13 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3522, at 100 (3d ed. 1998). The parties cannot waive jurisdiction, and federal courts must look sua sponte at whether they have subject matter jurisdiction to hear a suit. *Id.* at 122.

²¹ U.S. CONST. art. III, § 2, cl. 2.

²² U.S. CONST. art. III, § 2, cl. 1. This Constitution provision authorizes the original grant of diversity jurisdiction to the federal courts.

²³ Judiciary Act of 1789, ch. 20, §§ 9–13, 1 Stat. 73 (1789).

was original jurisdiction in suits between citizens of different states.²⁴ Additionally, Section 12 of the 1789 Act explicitly provided for removal from state court to federal court.²⁵ In summary, the 1789 Act provides that a defendant may remove a civil action instituted in state court, which has more than \$500 at controversy, and for which the court extended original jurisdiction to the federal court in Section 11—most particularly for our purposes—cases in which there was diversity of citizenship.²⁶ History shows that Congress had specific reasons for providing a defendant the right to remove.

From its inception, the removal statute's well-accepted primary purpose was to protect out-of-state defendants against potential bias in court.²⁷ Chief Justice John Marshall recognized this necessity in *Bank of U.S. v. Deveaux*.²⁸ In *Deveaux*, the Chief Justice recognized that, regardless of a belief in impartiality of the state courts, the Constitution, nevertheless, implicitly showed its concern for bias by establishing a federal forum for diverse parties.²⁹ As a result, an important objective of the early judiciary was to have federal courts "in each state, presumed to be free from local influence; and to which all who were non-residents or aliens might resort for legal redress."³⁰

Additionally, a review of the framers'³¹ concerns on the subject bolsters the Court's findings. James Madison, the "father of our Constitution,"³² showed concern that "a strong prejudice may arise, in some

²⁴ *Id.* § 11 ("That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another state.").

²⁵ *Id.* § 12.

²⁶ See Haiber, *supra* note 14, at 617–18.

²⁷ See *Gordon v. Longest*, 41 U.S. 97, 104 (1842); *Bank of U.S. v. Deveaux*, 9 U.S. 61, 87 (1809), *overruled in part on other grounds by Louisville, Cincinnati, and Charleston R.R. Co. v. Letson*, 43 U.S. 497 (1844).

²⁸ 9 U.S. 61 (1809), *overruled in part on other grounds by Letson*, 43 U.S. 497.

²⁹ *Id.* at 87. Marshall found:

However, true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Id.

³⁰ *Gordon*, 41 U.S. at 104.

³¹ The term "framers" refers to the original drafters and debaters of the United States Constitution.

³² See, e.g., John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 720 (2002) (describing Madison as the "Father of our Constitution" and explaining how Madison received that moniker).

states, against the citizens of others, who may have claims against them.”³³ Alexander Hamilton echoed Madison’s concern, adding that suits “between citizens of different states should be assigned to a federal court ‘likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded.’”³⁴ It is this concern for impartial treatment towards all parties that influenced the evolution of removal’s statutory regulation.

The language of Section 12 of the 1789 Act limited the removal jurisdiction to a specific group of suits, including removal of any suit “commenced in *state court*” for which the amount in controversy was greater than \$500, provided that the suit involved either an alien defendant or an in-state plaintiff suing an out-of-state defendant.³⁵ Section 12 contained only one additional type of suit for which Congress authorized removal: land disputes involving conflicting claims of state land grants.³⁶ Thus, the removal statute contained in the First Judiciary Act was primarily concerned with diverse parties and did not include federal question jurisdiction—a common basis of jurisdiction in the modern federal court system.³⁷

The original removal authority granted under the 1789 Act, notwithstanding its brief expansion and retraction from 1801 to 1802, remained intact for almost 85 years with a few limited statutory exceptions.³⁸ However, in 1875, Congress significantly changed the jurisdictional authority when it

³³ 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787*, at 533 (2d ed. 1836).

³⁴ Haiber, *supra* note 14, at 614 (quoting *THE FEDERALIST* NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982)).

³⁵ *Id.* (emphasis added).

³⁶ *Id.*

³⁷ Jed Glickstein, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 *YALE J.L. & HUMAN.* 543, at 543, 546 (2012). Congress briefly granted federal question jurisdiction to the lower federal courts in the Judiciary Act of 1801. *Id.* at 546. However, Congress repealed the 1801 Act on April 29, 1802, and partially replaced it with the Judiciary Act of 1802. An Act to Amend the Judicial System of the United States (*The Judiciary Act of 1802*), ch. 31, 2 Stat. 156 (1802). While the 1802 Act did reinstitute some portions of the 1801 Act, federal question jurisdiction was not included. *Id.* For a thorough discussion of the Judiciary Act of 1801, see Erwin C. Surrency, *The Judiciary Act of 1801*, 2 *AM. J. LEGAL HIST.* 53 (1958).

³⁸ Congress did on occasion provide for statutory removal in legislation aimed at forwarding certain policy objectives, including customs enforcement during the War of 1812, “collection of revenue following South Carolina’s attempt to nullify tariff laws,” and to “protect civil and political liberties” in post-Civil War confederate states (primarily to protect the rights of the newly freed slaves and Union soldiers). See *The Jurisdiction and Removal Act of 1875: “An Act To Determine the Jurisdiction of the Circuit Courts of the United States, and To Regulate the Removal of Causes from State Courts, and for Other Purposes.”*, *FED. JUD. CTR.*, http://www.fjc.gov/history/home.nsf/page/landmark_11.html (last visited Sept. 2, 2014).

passed the Jurisdiction and Removal Act of 1875 (“the 1875 Act”).³⁹ The 1875 Act significantly addressed the concerns that state court actions were interfering with interstate commerce by broadening the original and removal jurisdiction that federal courts could exercise.⁴⁰ First, the 1875 Act allowed for “federal question” jurisdiction.⁴¹ Federal question jurisdiction allows a party to remove to federal court any suit in which they could show that the Constitution, a duly enacted federal law, or a ratified treaty, to which the United States was a signatory, was at the crux of the dispute.⁴² Additionally, any suit in which the United States was “plaintiff or petitioner,” would provide a basis for removal to federal court.⁴³

Second, the 1875 Act solidified and expanded removal jurisdiction for diverse parties. The Act retained removal for “controvers[ies] between citizens of the same State claiming lands under grants of different States,” defendant aliens, and defendants that were citizens of a different state than the plaintiff.⁴⁴ However, the significant expansion afforded by this section was not only the continuation of allowing defendants to remove to federal court, but also the novel allowance that *plaintiffs* could remove to federal court.⁴⁵ Regardless of which litigant removed the suit, or how they removed it, the suit still needed to

³⁹ Judiciary Act of 1875, ch. 137, 18 Stat. 470 (1875). The full title of the Act is “The Jurisdiction and Removal Act of 1875: ‘An Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes.’” *Id.* Interestingly, those that supported expanding the right of removal under the 1875 Act did so with the belief that it would help protect the constitutional rights of freed slaves and southern Unionists. See *Landmark Judicial Legislation - The Jurisdiction and Removal Act of 1875*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/landmark_11.html (last visited Sept. 2, 2014). The belief was that freed slaves and those that sided with the Union during the Civil War were at significant risk of encountering state judicial systems in formerly confederate states that were hostile. *Id.* However, by the time that Congress actually debated the Act, most legislators were more concerned with rapidly expanding interstate commerce—an area that state courts often stifled. *Id.*

⁴⁰ Presumably, the idea behind the expansion of removal was that operators in commerce, who state court decisions were restraining, would have the ability to remove to a federal forum where they would be more likely to get a ruling favoring their interstate commerce concerns as opposed to narrow or biased state interests.

⁴¹ Judiciary Act of 1875, ch. 137, § 2, 18 Stat. 470, (1875), available at http://www.fjc.gov/history/home.nsf/page/landmark_11_txt.html (last visited Sept. 2, 2014).

⁴² See, e.g., *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005) (“The [federal question] doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.”); *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 818 (1986).

⁴³ Judiciary Act of 1875, ch. 137, § 2, 18 Stat. 470 (1875).

⁴⁴ *Id.*

⁴⁵ *Id.*

meet the \$500 minimum amount in controversy threshold.⁴⁶ Lastly, the Act of 1875 retained the specific wording that required any action removed to federal court be a civil suit that was “brought in any *State court*.”⁴⁷ In sum, the 1875 Act allowed greater access to federal courts by expanding both their original and removal jurisdictions. This expansion attracted “new types of litigation that swelled the caseload of the federal courts.”⁴⁸

The sizable increase in the federal trial and appellate court dockets generated by the 1875 Act’s jurisdictional expansion proved to be unworkable and prompted Congress to act.⁴⁹ A mere 12 years later, Congress reworked the removal statute by enacting the Judiciary Act of 1887 (“the 1887 Act”).⁵⁰ The 1887 Act reversed the expansion of removal jurisdiction in several ways. First, the 1887 Act revoked the availability of removal for plaintiffs, explicitly limiting the possibility of removal to defendants.⁵¹ Second, the 1887 Act raised the minimum amount in controversy threshold to \$2,000.⁵² Third, the 1887 Act explicitly required that, in order for removal to be proper, a state action may only be removed to a federal court if that federal court would have had original jurisdiction had the defendant filed the suit there originally.⁵³

In reviewing the history of the 1887 Act, it appears evident that Congress intended to limit the jurisdiction of the federal courts to hear suits based on removal, largely in response to the swelling court dockets.⁵⁴ This

⁴⁶ *Id.*

⁴⁷ *Id.* (emphasis added).

⁴⁸ *The Jurisdiction and Removal Act of 1875: “An Act To Determine the Jurisdiction of the Circuit Courts of the United States, and To Regulate the Removal of Causes from State Courts, and for Other Purposes.”*, FED. JUD. CTR., http://www.fjc.gov/history/home.nsf/page/landmark_11.html (last visited Sept. 2, 2014).

⁴⁹ See Erica B. Haggard, *Removal to Federal Courts from State Administrative Agencies: Reevaluating the Functional Test*, 66 WASH. & LEE L. REV. 1831, 1836 (2009) (citing Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 738–42, 744 (1986) (discussing the background of the 1887 Act and the almost immediate attempts to amend the 1875 Act after it passed)).

⁵⁰ Judiciary Act of 1887, ch. 373, 24 Stat. 552 (1887). The full title of the Act is: “An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes and to further regulate the jurisdiction of circuit courts of the United States, and for other purposes.”

⁵¹ *Id.* § 1.

⁵² *Id.*

⁵³ *Id.* § 2.

⁵⁴ See Haggard, *supra* note 49, at 1836–37 (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941)). “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.” *Id.* (citing Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 720 (1986)).

tighter gateway remained virtually unscathed for nearly six decades⁵⁵ until Congress promulgated the current removal statute under 28 U.S.C. § 1441.⁵⁶ The next Section describes how § 1441 changed the landscape of removal proceedings.

The removal statute, established in the very beginning of our nations' judiciary, went through a period of expansion followed by an abrupt restriction; however, the core concept—the right of removal for a diverse defendant—remained intact throughout. That core tenet continues on in our modern removal statute.

B. The Current Removal Statute: 28 U.S.C. § 1441

The Judicial Code of 1948 Act (“the 1948 Act”)⁵⁷ made some changes to the authority and process of removal, which have varying degrees of relevance to this Note. The first significant change relates to the timing of removal. Prior to the 1948 Act, a defendant could properly remove at any time prior to the final due date of any responsive pleading.⁵⁸ Because jurisdictional requirements for the timing of responsive pleadings varied significantly across jurisdictions, Congress, in an effort to provide a more consistent removal standard, “enacted language that required service ‘within twenty days after commencement of the action or service of process, whichever is later.’”⁵⁹ Although this does not bear heavily on the removal authority or procedure, it is an example of Congress’ intent to make the removal statute more fair and standardized for all defendants seeking a federal forum.⁶⁰

Again, evidence exists that Congress’ “desire for removal practice to remain fair, uniform, and efficient” was at the heart of the 1948 Act and its subsequent amendments.⁶¹ For example, the committee notes to the 1988 amendment discuss the unfair gamesmanship of last minute additions of “Doe”

⁵⁵ With the exception of some minor organizational changes by Congress in 1911. *See* 28 U.S.C. § 71 (1940); Act of Mar. 3, 1911, ch. 231 § 28, 36 stat. 1094; *see also* Haiber, *supra* note 14, at 626.

⁵⁶ Congress enacted the Federal Rules of Civil Procedure (FRCP) in 1938. It was not until 1948 that 28 U.S.C. § 1441 was codified.

⁵⁷ Act of June 25, 1948, Pub. L. No. 80-773, ch. 89, § 1441, 62 Stat. 937.

⁵⁸ 28 U.S.C. § 72 (1940) (consolidated in 28 U.S.C. § 1446).

⁵⁹ Haiber, *supra* note 14, at 633.

⁶⁰ *Id.* (citing Committee Note to 1948 Enactment of Removal Statutes, H.R. Rep. No. 80-308, at A135 (1948) (stating that revised §1446 “will give adequate time and operate uniformly throughout the Federal jurisdiction”)).

⁶¹ *See* Haiber, *supra* note 14, at 634. Haiber discusses at length the evidence of congressional intent to provide for a “fair, uniform, and efficient” application of the removal statutes, rather than the belief that congress somehow intended to limit access to the federal court forum through procedural barriers; barriers that Haiber claims courts placed there over time through judicial fiat. *Id.* at 632-34.

defendants.⁶² This tactic could potentially destroy diversity of the parties or toll the statute of limitations, which could lead to difficulties in determining the timing of removal.⁶³

Ultimately, the current removal statute follows the underlying premises of the original removal statute, as well as the 1887 Act; it affirms a defendant's right⁶⁴ to remove a suit initiated in state court to a federal district court, so long as the federal court could have exercised original jurisdiction had the suit been initiated there.⁶⁵ The original jurisdiction requirement retained the federal court's diversity and federal question jurisdictions for the same reasons that they were originally included—protection of out-of-state defendants' rights and the prudence of having federal courts decide matters of federal law.⁶⁶

C. Removal of State Agency Actions

Neither 28 U.S.C. § 1441, nor any of its predecessor statutes, contains any language expressly addressing the right of a defendant to remove a state agency's administrative action to federal court. Traditionally, the only course of action for a defendant was to fight it out with the state agency and then appeal any agency ruling to the state courts.⁶⁷ Any such defendant is subject to that agency's procedural system and their decision—often the ruling of an administrative law judge (“ALJ”).⁶⁸ Prior to reaching a federal court, that defendant might have to exhaust all administrative remedies, appeal the agency's final ruling to a state trial court, continue appealing until reaching the

⁶² See 16 MOORE'S FEDERAL PRACTICE - CIVIL § 107App.08[2] (referring to committee notes to the 1988 amendment of § 1441(a)). A “Doe” defendant, often called “John Doe” or “Jane Doe” is a pseudonym for an unknown, and thus unnamed, defendant used to secure a claim procedurally. See Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure To Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 885–86 (1996) (“John Doe preserves the plaintiff's claim by standing in for an unknown defendant while the plaintiff tries to determine the defendant's actual name.”).

⁶³ See 16 MOORE'S FEDERAL PRACTICE - CIVIL § 107App.08[2] (referring to committee notes to the 1988 amendment of § 1441(a)).

⁶⁴ See *supra* Part II.A discussing the right of removal; see also *Martin v. Hunter's Lessee*, 14 U.S. 304, 348–49 (1816) (inferring that choice of federal forum was not plaintiff's alone and that the power to remove, although not expressed in the Constitution, was “necessary and proper to carry into effect some express power” granted to defendant's “who might be entitled to try their rights, or assert their privileges [sic], before the same [federal] forum”).

⁶⁵ The Judiciary Act of 1887, ch. 373, § 1, 24 Stat. 552 (1887); see also *Removal to Federal Courts from State Administrative Agencies*, 69 YALE L.J. 615, 615, n.4 (1960) [hereinafter *Removal to Federal Courts*].

⁶⁶ See *supra* Part II.A.

⁶⁷ See PAUL M. BATOR ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1767 (3d ed. 1988).

⁶⁸ See 32 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE & PROCEDURE JUDICIAL REVIEW § 8199, at 281 (1st ed. 2013).

state's court of last resort, and finally, apply for certiorari to the United States Supreme Court.⁶⁹ Thus, without the right of removal, the first opportunity for a defendant to have a non-state court hear their case could be after years of litigation and significant expense—not to mention that it would still rely on the one to two percent chance of the Supreme Court actually granting certiorari.⁷⁰ This long and arduous path is both time and cost prohibitive, effectively preventing a defendant from any practical ability to have their case heard in a federal forum solely because the action is in front of a state agency rather than a state court.

The express language of the removal statutes provides that only suits brought in “state court”⁷¹ are eligible for removal. However, over time, courts have looked at the meaning and intent of the statutes in order to interpret a meaning of “state court” that would comport with the underlying purposes of removal.⁷² Legal scholars have primarily employed two approaches to interpret what constitutes a state court for purposes of removal.

First is the “textualist approach,” sometimes called the “formalist approach,” which uses only the plain language meaning of “state court,” and consequently holds that only a cause of action brought in an actual state court, vested with “judicial power,” can qualify for removal purposes.⁷³ One of the appeals of the textualist approach is its binary simplicity—if the state

⁶⁹ See BATOR ET AL., *supra* note 67. Under some circumstances, the path may be different, for example, some actions can be brought either in a federal circuit court or in the agency depending upon the plaintiff's choice. See *Bellsouth Telecomms., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280, 1281 (N.D. Fla. 2002). Also, it is important to note that, depending on the statutory structure, some agency actions are appealable directly to state court, at which point the case could arguably be removed to federal court—assuming that the other removal requirements are met.

⁷⁰ See *Supreme Court Procedures-Writs of Certiorari*, USCOURTS.GOV, <http://www.uscourts.gov/educational-resources/get-informed/supreme-court/supreme-court-procedures.aspx> (“In fact, the Court accepts 100[–]150 of the more than 7,000 cases that it is asked to review each year.”).

⁷¹ 28 U.S.C. § 1441 (2012) (“action brought in a State court”); Judiciary Act of 1875, ch. 137, § 2, 18 Stat. 470, (1875), available at http://www.fjc.gov/history/home.nsf/page/landmark_11_txt.html (last visited Sept. 2, 2014) (“brought in any state court”); Judicial Act of 1789, ch. 20, § 12, 1 Stat. 73 (1789), available at <http://www.ourdocuments.gov/doc.php?doc=12&page=transcript> (last visited Sept. 2, 2014) (“any action commenced in state court”).

⁷² See Haggard, *supra* note 49, at 1832.

⁷³ See *id.* at 1872 (citing *Upshur Cnty. v. Rich*, 135 U.S. 467, 471–72 (1890) and *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1264, 1263 (3d Cir. 1994), as examples of courts analyzing under a textualist approach); Emily M. Rector, *Removing from State Administrative Agencies*, 84 NOTRE DAME L. REV. 2269, 2273 (2009) (citing the Ninth Circuit's decision in *Or. Bureau of Labor and Indus. v. U.S. West Commc'ns, Inc.*, 288 F.3d 414 (9th Cir. 2002), in which, the court looks solely to the plain text of the removal statute, thus adopting the textualist or formalist approach).

designates it as a court, removal is proper; if the state does not designate it as a court, removal is improper.⁷⁴

Second is the “functionalist approach,” which arguably began in 1959, and has become the courts’ predominant approach for agency removal analysis.⁷⁵ Under the functionalist approach, courts have established a test that “evaluate[s] the functions, powers, and procedures of the state tribunal and consider[s] those factors along with the respective state and federal interests in the subject matter and in the provision of a forum.”⁷⁶ The core objective of the functionalist test is to evaluate the “courtiness”⁷⁷ of an administrative agency; thus, the more closely an agency and its proceedings resemble a state court and its proceedings, the more likely that removal will be proper.

In summary, the likelihood that a federal court will allow state agency removal will depend on which of the two main approaches that federal court has adopted. Additionally, if the federal court follows the functionalist approach, the likelihood of removal will then depend on how closely the agency proceedings emulate a state court. Finally, the criteria and factors used by courts in evaluating the similarity between agencies, state courts, and their corresponding procedures exacerbate the uncertainty of removal actions. The next Part of this Note discusses the two approaches in more detail, including the various factors used in the functionalist test. Suffice to say, the legitimacy of removal of state agency actions to federal court is an unsettled question in need of some stability. Inconsistent judgments across federal circuit courts underscore this need. Ultimately, we need clarity and consistency to secure the rights of diverse defendants to remove actions from state agencies to federal court when those state agencies operate as *de facto* courts.

⁷⁴ See Rector, *supra* note 73, at 2272–75 (2009).

⁷⁵ See *supra* Part III.A–III.B; Darren W. Ford, Comment, *Getting Past Function and Focusing on Results: When Should a Proceeding Before a State Administrative Agency Be Removable Under 28 U.S.C. § 1441(A)?*, 78 U. CIN. L. REV. 321, 327–28 (2009). Ford discusses the decision in *Tool & Die Makers Lodge No. 78 v. Gen. Elec. Co. X-Ray Dep’t*, 170 F. Supp. 945 (E.D. Wis. 1959). The 1959 date for the beginning of the functionalist approach is arguable because, as Ford notes, the *Tool & Die* court cited two earlier cases, *Upshur Cnty. v. Rich*, 135 U.S. 467 (1890) and *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908). Unfortunately, the *Tool & Die* court did not provide much analysis as to how they utilized those two earlier cases; see also Haggard, *supra* note 49, at 1839–40. It should be noted that in *Upshur Cnty.* the Court held that a body titled the “circuit court” was not a court for the purposes of removal; however, the *Upshur Cnty.* Court found that the “circuit court” in that case was merely a tax assessing board, whose functions were “administrative, and not judicial in the ordinary sense of that term, though often involving the exercise of quasi judicial functions.” *Upshur Cty.*, 135 U.S. at 471.

⁷⁶ *Floeter v. C.W. Transport, Inc.*, 597 F.2d 1100, 1102 (7th Cir. 1979) (per curiam).

⁷⁷ See Rector, *supra* note 73, at 2286. “This part of the test is designed to measure the ‘courtiness’ of a particular administrative body; if the body sufficiently resembles a court, it is considered a ‘State court’ within the meaning of the removal statute.” *Id.*

III. THE CIRCUIT SPLIT AND CURRENT APPROACHES

Federal courts are split over which framework should be applied to determine removability of agency actions. On one side of the split is the “functionalist approach,” which looks at “the procedures and functions of the State tribunal rather than the name by which the tribunal is designated.”⁷⁸ Furthermore, amongst those courts that favor the functionalist approach, several sub-approaches have emerged.⁷⁹ On the other side of the split is the “textualist approach,” which maintains that only the plain language of the statute should control.⁸⁰ Textualists hold that the plain language of § 1441 allows removal only from a “state court,” thus, an action in any tribunal that is not a court is not removable.⁸¹ This Part explains the various approaches and sub-approaches, including the factors that the courts consider in determining whether a state agency is, in effect, a state court for removal purposes. Section A begins with the historical growth and dominance of the functionalist approach. Section B follows with a description of the major sub-approaches that have developed. Section C explores the growth of a new textualist approach and its threat to functionalist dominance. Lastly, Section D outlines the current circuit split that belies any real standard.

A. *The Functionalist Approach Establishes Its Dominance*

Some courts have long recognized the changing nature of state administrative agencies and their growing resemblance to state courts.⁸² Dissatisfied with the all-or-nothing nature of a textualist approach and its blanket application to all agencies, they looked beyond the plain meaning of the removal statute’s language: They formulated a functionalist approach. Courts began to “evaluate the functions, powers, and procedures of the state

⁷⁸ *Tool & Die*, 170 F. Supp. at 950.

⁷⁹ See Jason Johnston, Oregon Bureau of Labor & Indus., ex rel Richardson v. U.S. West Communications: *Can Administrative Agencies be Considered Courts for the Purposes of Removal?*, 26 AM. J. TRIAL ADVOC. 449, 449 (2002). Johnson breaks out three sub-categories of functionalist analysis: (1) “jurisdictions that apply the functional test but only look at the way the agency will handle the current dispute,” (2) “jurisdictions that apply the functional test but look at the overall purpose of the agency,” and (3) “jurisdictions that apply the functional test but put more emphasis on the state and federal interest than on the agency’s function.” *Id.* at 451.

⁸⁰ See Or. Bureau of Labor and Indus., ex rel. Richardson v. U.S. W. Commc’ns, Inc., 288 F.3d 414, 417–18 (9th Cir. 2002).

⁸¹ *Id.* “We therefore agree with the Third Circuit that the language of § 1441(a) ‘should be dispositive.’ Thus, our analysis of the statutory language need go no further: 28 U.S.C. § 1441(a) authorizes removal only from a ‘state court,’ which necessarily implies that the entity in question must be a *court*.” *Id.* at 418 (emphasis in original).

⁸² See *supra* Part IV.

tribunal.”⁸³ These courts recognized that, regardless of the name assigned to a tribunal by the state, they were sometimes a functional equivalent to a state court for removal purposes.⁸⁴

The first explicit recognition of the functionalist approach came from the Eastern District of Michigan’s decision in *Tool & Die Makers Lodge No. 78 v. General Electric Co. X-Ray Department*.⁸⁵ However, the *Tool & Die* court relied significantly on two earlier United States Supreme Court decisions, *Upshur County v. Rich*⁸⁶ and *Prentis v. Atlantic Coast Line Co.*,⁸⁷ which arguably established a functionalist approach as early as 1890.⁸⁸ To place the *Tool & Die* holding in proper perspective, a review of those two cases is in order.

In *Upshur County*, the Court reviewed a claim by property owners that the “county court of Upshur county” improperly assessed their land.⁸⁹ The West Virginia Constitution established such county courts and ordained them with a variety of powers and responsibilities.⁹⁰ Additionally, article 8, section 24 of the state constitution contained a residual clause that allowed the county courts to “exercise such other powers and perform such other duties, not of a judicial nature, as may be prescribed by law.”⁹¹ The legislature subsequently enacted a law that allowed property owners to appeal property tax assessments

⁸³ *Floeter v. C.W. Transp., Inc.*, 597 F.2d 1100, 1102 (7th Cir. 1979); *see also Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38, 43–44 (1st Cir. 1972). In discussing the value of a textualist approach the court was “unconvinced that, as to the Board’s specific function . . . the institutional label is dispositive.” *Id.* at 43. Further, the First Circuit cited the *Tool & Die* reasoning and adopted the functionalist approach, finding that

[s]uch an approach is not cavalierly undertaken, but must focus on a number of relevant factors, including the Board’s procedures and enforcement powers, the locus of traditional jurisdiction over breaches of contract, and the respective state and federal interests in the subject matter and in the provision of a forum.

Id. at 44.

⁸⁴ *See Floeter*, 597 F.2d at 1102 (“We hold that the title given a state tribunal is not determinative.”); *Volkswagen de P.R., Inc.*, 454 F.2d at 44 (holding that by adopting a functionalist approach, “[c]oncentrating on such factors seems to us far more satisfactory than to be content with a Steinian rendering of ‘a board is a board is a board.’”).

⁸⁵ 170 F. Supp. 945 (E.D. Wis. 1959). *See Ford*, *supra* note 75, at 322–23 (stating that the administrative removal “debate most likely began” with the *Tool & Die* decision and that the functionalist approach became the predominant approach).

⁸⁶ 135 U.S. 467 (1890).

⁸⁷ 211 U.S. 210 (1908).

⁸⁸ *See generally Upshur Cnty.*, 135 U.S. 467 (1890). *But see supra* note 75 and accompanying text.

⁸⁹ *Upshur Cnty.*, 135 U.S. at 467.

⁹⁰ W. VA. CONST. art 8, §§ 22–24 (1872); *Id.* at 471–72.

⁹¹ *Upshur Cnty.*, 135 U.S. at 472 (quoting W. VA. CONST. art 8, § 24 (1872)).

to those county courts;⁹² the Upshur County property owners filed their appeal based on this law.⁹³ The same day that the owners filed their appeal to the county court, they also filed a petition for removal to the federal district court of West Virginia.⁹⁴

The district court analyzed the relevant statutory power granted to the county court under the state constitution and the procedures it employed in furtherance of that power.⁹⁵ First, the court established that the valuation of land and assessment of taxes were administrative functions.⁹⁶ Second, the court concurred with the West Virginia Supreme Court that an appeal of tax assessments, whether to “a court or other body . . . are no more judicial acts than the acts of the officer or authority making the original assessment.”⁹⁷ The court recognized that a suit questioning the validity or constitutionality of a tax assessment could become the subject of an actual judicial review;⁹⁸ however, in this case, the Upshur County court was merely an administrative extension of the tax assessor.⁹⁹ Based on this finding, the Supreme Court held that despite possessing the label of county “court,” the Upshur County court did not qualify as a court for removal purposes.¹⁰⁰

The *Prentis* Court reviewed the actions of the Virginia State Corporation Commission, which the Virginia Constitution authorized to “supervise, regulate, and control public service corporations.”¹⁰¹ The Commission, as one of its duties, set railway rates for passenger travel within

⁹² *Id.* (“Any person feeling himself aggrieved by the assessment of his real estate, made under the provisions of this act, may, within one year after the filing of a copy of such assessment with the clerk of the county court, apply, by himself or his agent, to the said court for redress.”).

⁹³ *Id.*

⁹⁴ *Id.* at 468.

⁹⁵ *Id.* at 471–73.

⁹⁶ *Id.* at 472.

⁹⁷ *Id.* at 473 (quoting *Pittsburgh, Cincinatti & St. Louis Ry. Co. v. Bd. of Public Works*, 28 W. Va. 264, 270 (1886)).

⁹⁸ *Id.* at 477. For example, the *Upshur Cnty.* court stated:

[The] legality and constitutionality of taxes and assessments may be subjected to judicial examination in various ways,-by an action against the collecting officer, by a bill for injunction, by certiorari, and by other modes of proceeding. Then, indeed, a suit arises which may come within the cognizance of the federal courts, either by removal thereto, or by writ of error from this court, according to the nature and circumstances of the case.

Id. at 473.

⁹⁹ *Id.* at 472–73, 477.

¹⁰⁰ *Id.* at 477. This is somewhat opposite of the majority of claims, in which a court is asked to determine if an agency that is *not* labeled as a court still functions as a court. This distinction is one which textualists use to make their claims that the *Upshur Cnty.* decision did not establish a functionalist approach. *See supra* Part III.C.

¹⁰¹ *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 224 (1908).

the state; several railroad companies objected to the new rate increases and filed suit.¹⁰² Although the *Prentis* Court acknowledged that the Commission was “clothed with legislative, judicial, and executive powers,” it separated the ratemaking function—the subject of the suit—from the Commission’s other functions.¹⁰³ The Court held that the question of whether a proceeding was judicial, thus qualifying as a claim in a state court, “depends not upon the character of the body, but upon the character of the proceedings.”¹⁰⁴ Because the Court found the ratemaking procedure to be legislative in nature, it could not be considered a judicial proceeding “no matter what may be the general or dominant character of the body in which they may take place.”¹⁰⁵

With the *Upshur County* and *Prentis* rulings as background, we once again look at the case that began the predominance of the functionalist approach—*Tool & Die*.¹⁰⁶ In 1958, two labor unions filed complaints with the Wisconsin Employment Relations Board (“WERB”), alleging that an employer was engaging in unfair labor practices according to Wisconsin state law and had violated their collective bargaining agreement.¹⁰⁷ The *Tool & Die* court, relying solely on the *Upshur County* and *Prentis* rulings,¹⁰⁸ opined decisively:

[I]t is clear that the Supreme Court of the United States has adopted a functional rather than a 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.¹⁰⁹

As with the *Upshur County* and *Prentis* Courts, the court here looked at the proceeding that was the subject of the suit and analyzed the procedures and functions of the WERB.¹¹⁰

¹⁰² *Id.* at 225.

¹⁰³ *Id.* at 226.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* This is the basis of a “dispute-specific” approach, in which the court determines the whether the particular agency proceeding is conducting similarly to a court proceeding. *See supra* Parts III.B.1–III.B.2 for discussion on the dispute specific approach and its counter, the “global” approach.

¹⁰⁶ *Tool & Die Makers Lodge No. 78 v. Gen. Elec. Co. X-Ray Dep’t*, 170 F. Supp. 945 (E.D. Wis. 1959).

¹⁰⁷ *See id.* at 947.

¹⁰⁸ Although the *Tool & Die* court failed to analyze those rulings, or detail the reasoning with which they agreed, it seems clear that the court fully adopted those decisions based on their matter-of-fact acceptance of them and their statement that “it is clear” the functionalist approach is the approach accepted by the Supreme Court. *Id.* at 950.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

The court started by analyzing the statutory language that allowed the WERB to hear these cases and found that language to “reveal[] its judicial character.”¹¹¹ Contained within the authorizing statute was the power for the WERB to accept complaints, receive answers, set hearing dates, issue subpoenas under threat of contempt, allow for depositions, prepare and keep a record subject to the prevailing court rules of evidence, make findings, and enter orders compelling one of the parties to act.¹¹² The court did recognize that the Wisconsin Supreme Court had previously ruled that the WERB was not “exercising judicial functions when it makes a determination”; however, it gave that ruling virtually no weight in its determination.¹¹³

The court did take significant notice of the fact that the “judicial inquiry” was bifurcated between the WERB, which investigates and issues orders, and the court, which enforces those orders.¹¹⁴ The court recognized that the ability to enforce its own orders was “significant if not decisive on the question as to whether a tribunal is a court.”¹¹⁵ Despite this recognition, the court found that the separation “presents no obstacle to removal since the actions have the same essentials as original suits permissible in Federal district courts or in State trial courts.”¹¹⁶ In other words, if a Board’s actions and powers significantly resemble the actions and powers of a court, the mere separation of the enforcement ability does not defeat its recognition as a court for removal purposes.

One significant concept to come out of *Tool & Die* is the concept that the *right* of removal cannot necessarily be defeated simply because a state decides to “divide[] the judicial function.”¹¹⁷ Rather, courts should look at whether the agency is performing part of the judicial function and, if so, how much of the function.¹¹⁸ In *Tool & Die*, the court recognized that the judicial function was composed of all the functions statutorily given to the Board, plus the enforcement powers that the court maintained. Although Wisconsin had the right to “provide the procedure by which, and the forum before which” certain types of suits may be brought, the “right of removal cannot be affected by the creation by the State of a special remedy as an alternative to a traditional court action.”¹¹⁹

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (citing *Dairy Emps. Indep. Union at Blochowiak Dairy v. Wis. Emp’t Relations Bd.*, 55 N.W.2d 3 (Wis. 1952)).

¹¹⁴ *Id.* at 951.

¹¹⁵ *Id.* at 950.

¹¹⁶ *Id.* at 951.

¹¹⁷ *Id.* at 950.

¹¹⁸ *Id.* (discussing the various factors that weighed in favor of finding an agency to be a court).

¹¹⁹ *Id.*

The core of the functionalist approach espoused in *Tool & Die* would provide the basis for the majority of agency removal decisions over the next fifty-four years.¹²⁰ However, courts would continue to refine the functionalist approach in an attempt to provide a fairer, more practical approach to determine whether a state agency was, in effect, a court for removal purposes.

B. *Functionalist Sub-Approaches Develop*

Since the *Tool & Die* ruling solidified a functionalist approach, several other courts have attempted to fine-tune the approach. These other courts' reasoning breaks out into three sub-approaches: (1) the "dispute-specific" approach, which looks at how the agency handles that particular type of dispute in question; (2) the "global" approach, which evaluates the overall general purpose and functions of the agency; and (3) the "federal-state interest" approach, which weighs the two interests against one another to determine which is superior. The sub-approaches utilize the core functionalist tenet—that the functions and procedures of an agency might make it a court for removal purposes.

1. The "Dispute-Specific" Approach

The dispute-specific approach finds its origins in the First Circuit decision *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*.¹²¹ In *Volkswagen de Puerto Rico*, the court declined to look at the "full breadth of [the Board's] jurisdiction" or the "institutional status of the Board as to any of its other functions, jurisdictions, or procedures."¹²² The court was "unconvinced that, as to the Board's specific function of applying federal substantive law to § 301 cases, the institutional label is dispositive."¹²³ Instead, the court looked very narrowly "at the reconciling [of] the removal statute with the federal law relating to § 301 and its implementation in both state and federal forums."¹²⁴ Although the Puerto Rico Labor Relations Board administered many types of labor related claims, this particular dispute implicated a specific section of the federal code regarding the violation of

¹²⁰ See Ford, *supra* note 75, at 322–23.

¹²¹ 454 F.2d 38 (1st Cir. 1972). The court declined to take a textualist approach; instead, they opted for a functionalist approach that looked at the specific function in dispute: "But we are unconvinced that, as to the Board's specific function of applying federal substantive law to § 301 cases, the institutional label is dispositive." *Id.* at 43.

¹²² *Id.* at 44.

¹²³ *Id.* at 43.

¹²⁴ *Id.* at 44. "Section 301" refers to § 301 of the National Labor Relations Act. National Labor Relations Act, Pub. L. No. 74-198, § 301, 49 Stat. 449 (1935).

collective bargaining agreements.¹²⁵ The court looked only at how the Board handled those specific disputes—not the totality of functions and procedures employed across the entire agency.¹²⁶ Several other courts have adopted this dispute-specific approach.¹²⁷

2. The “Global” Approach

In contrast to the dispute-specific approach, the global approach looks not at the procedures and functions surrounding the specific contested dispute, but instead it takes a holistic “look at the overall purpose of the agency”¹²⁸ The Third Circuit applied the global approach in *Sun Buick, Inc. v. Saab Cars USA, Inc.*,¹²⁹ when it endeavored to determine whether the Pennsylvania Board of Vehicles (“PVB”) was equivalent to a court for removal purposes. The Third Circuit did not expressly accept the functionalist approach.¹³⁰ However, it accepted the *Floeter* and *Volkswagen* rulings and then proceeded to perform a functionalist analysis to distinguish the PVB from agencies such as those in *Floeter* and *Volkswagen*.¹³¹ The functionalist analysis that the court performed

¹²⁵ *Id.* at 40.

¹²⁶ *Id.* at 44.

¹²⁷ See *Wirtz Corp. v. United Distillers & Vintners N. Am., Inc.*, 224 F.3d 708, 713 (7th Cir. 2000) (citing *Floeter*’s recognition that a fact-specific analysis of the particular dispute was required and finding that their case was “one of those other cases in which the weighing of the competing interests results in a different conclusion not sanctioning removal to federal court”); *Floeter v. C.W. Trans., Inc.*, 597 F.2d 1100 (7th Cir. 1979) (recognizing that the state agency may or may not be deemed a court for removal purposes depending upon the particular actions taken in each individual case); *Southaven Kawasaki-Yamaha v. Yamaha Motor Corp., USA*, 128 F. Supp. 2d 975 (S.D. Miss. 2000) (recognizing that the court could find an agency to be a court depending on the specific circumstances and particular situation).

¹²⁸ Johnston, *supra* note 79, at 451.

¹²⁹ 26 F.3d 1259 (3d Cir. 1994).

¹³⁰ One court within the Third Circuit has opined that the *Sun Buick* court did not accept the functionalist approach. See *DeLallo v. Teamsters Local Union #776*, No. CIV.A. 94-3875, 1994 WL 423873 (E.D. Pa. Aug. 12, 1994). It is worth noting that the *DeLallo* court stated that the *Sun Buick* opinion contained an “unrelenting criticism” of the functionalist approach. *Id.* at *3. However, this position may be overblown. The *Sun Buick* court merely states that it “questions” whether the Supreme Court had in fact, adopted a functionalist test. *Sun Buick*, 26 F.3d at 1263. The *DeLallo* court went on to proclaim that, “if squarely presented with the question, the Third Circuit would refuse to apply the functional test.” *DeLallo*, 1994 WL 423873 at *3. Again, this does not comport with the facts. First, the *Sun Buick* court had the opportunity to reject the functionalist approach expressly, but it declined to do so. Second, in the twenty years since the *Sun Buick* decision, the Third Circuit has not taken the opportunity to reject, explain, or even qualify its use of the functionalist analysis in *Sun Buick*. See Haggard, *supra* note 49, at 1854 (discussing the holding in *DeLallo* and the possible reasoning for the Third Circuit’s decision).

¹³¹ *Sun Buick*, 26 F.3d at 1265–67. “In enumerating the ways in which the Pennsylvania Board of Vehicles is unlike a court, it becomes clear that *Floeter*, *Volkswagen*, and *Tool & Die* are distinguishable on their facts.” *Id.* at 1266.

looked at the entirety of the Board's powers and functions—"separately from the nature of the proceedings before it."¹³² The analysis revealed what the court considered a "dearth of judicial-type powers" and a lack of other court-like characteristics.¹³³ The court's examination convinced it that, overall, "the Board's powers and duties makes it clear that its powers are those of the usual type of administrative agency rather than those of a court."¹³⁴ Other courts have also embraced the global approach.¹³⁵

3. The "Federal-State Interests" Approach

Some courts that apply a functionalist approach also weigh the federal interests against the state interests, often factoring those interests more heavily than the agency's functions.¹³⁶ Although the origin of the functionalist approach, *Tool & Die*, contained no consideration of competing federal and state interests, later courts added this factor to their analysis. Starting with the First Circuit decision in *Volkswagen*, some courts began to look not only at the agency's powers, procedures, and functions, but also at the "respective state and federal interests in the subject matter and in the provision of a forum."¹³⁷ In fact, some have opined that this second prong of the functionalist approach is the "more critical inquiry."¹³⁸

Similar to the First Circuit, the Seventh Circuit incorporated a federal-state interests inquiry.¹³⁹ The *Floeter* court recognized that the state maintained

¹³² *Id.* at 1267.

¹³³ *Id.* at 1266. "Not only does the Pennsylvania Board of Vehicles have a dearth of judicial-type powers but its composition also has none of the characteristics of a court such as disinterestedness, separation from the executive and learnedness in the law." *Id.*

¹³⁴ *Id.* at 1265.

¹³⁵ See *Bellsouth Telecomms., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280 (N.D. Fla. 2002). First, the court acknowledged that the functionalist approach was valid, invoking Shakespeare to accept that a court "by any other name" could still be a court in effect. *Id.* at 1282. Ultimately, the court found that the court held that whether an agency is a court "should be determined at a higher level of generality than its role in the specific proceeding at issue." *Bellsouth Telecomms., Inc.*, 185 F. Supp. 2d at 1283.

¹³⁶ See *Johnston*, *supra* note 79, at 451–52.

¹³⁷ *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38, 44 (1st Cir. 1972); see also *Floeter v. C.W. Transp., Inc.*, 597 F.2d 1100, 1102 (7th Cir. 1979) (quoting *Volkswagen* and adopting the federal-state interest prong).

¹³⁸ *Ford Motor Co. v. McCullion*, Nos. C2-88-142, C2-87-1459, 1989 WL 267215, at *3; see also *Gottlieb v. Lincoln Nat'l Life Ins. Co.*, 388 F. Supp. 2d 574, 581 (D. Md. 2005) (quoting *Rockville Harley-Davidson*); *Rockville Harley-Davidson, Inc. v. Harley-Davidson Motor Co., Inc.*, 217 F. Supp. 2d 673, 679 (D. Md. 2002) (quoting *McCullion*). It bears noting that the only opinions to elevate the federal-state interest to the more critical prong have been from federal district courts with no precedential value.

¹³⁹ See *Floeter*, 597 F.2d at 1102 (quoting *Volkswagen* and adopting the federal-state interests prong).

an interest in “providing a ‘convenient and expeditious tribunal to adjudicate the rights and interests of parties to a labor dispute’”¹⁴⁰ Nevertheless, that state interest was not sufficient to override the defendant’s right of removal.¹⁴¹ Courts can couple the federal-state interest with other sub-approaches.¹⁴² For example, a court might apply a dispute-specific analysis and find an agency to be a court, but nonetheless find that the federal-state interest balancing militates against removal.

The federal-state interest approach joins the dispute-specific and global approaches as sub-approaches to the functional analysis that courts apply when evaluating agencies for removal purposes. The basic tenets of the functionalist approach—that the functions, powers, and procedures of an agency might make it a *de facto* court for removal purposes—became, and remains, the predominant approach. However, over roughly the last 15 years, rulings advocating a different approach—a textualist approach—have started to chip away at that dominance.

C. *The Textualist Approach Emerges and Threatens Functionalist Dominance*

Contrary to the functionalist approach, some courts have declined to inquire beyond the plain meaning attached to the statutory language of the removal statute. This approach began in earnest¹⁴³ with the Ninth Circuit’s decision in *Oregon Bureau of Labor and Industries, ex rel. Richardson v. U.S. West Communications, Inc.*¹⁴⁴ The Oregon Bureau of Labor and Industry (“BOLI”) served “administrative charges alleging unlawful employment

¹⁴⁰ *Id.* (quoting *Layton School of Art & Design v. WERC*, 262 N.W.2d 218, 226 (Wis. 1978)).

¹⁴¹ *Id.* The court also noted that the state’s interest in maintaining the specialized tribunal were no greater than the interest they had in maintaining any of the state’s regular courts. *Id.* Thus, one could infer that the court felt that removal from the agency would have a substantially similar effect as removal from any other traditional state court.

¹⁴² For example, the court in *Floeter* assessed the nature of the tribunal (globally) along with a federal-state interest balancing. “We hold 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 those factors along with the respective state and federal interests in the subject matter and in the provision of a forum.” *Id.*

¹⁴³ In an early case, *Cal. Packing Corp. v. Int’l Longshoreman’s & Warehouseman’s Union Local 142*, 253 F. Supp. 597 (D. Haw. 1966), the Ninth Circuit also rejected the functionalist approach and favored a textualist approach. The court found the *Tool & Die* reasoning “strained” and looked to the plain meaning of the statutory language. *Id.* at 599. The reason this Note states that the textualist approach did not start in earnest until the Ninth Circuit decision is because the *Cal. Packing Corp.* decision was given in 1966 and had virtually no effect on the functionalist approach’s continued rise to dominance. Perhaps it was because courts felt more comfortable relying on a circuit court decision, which in turn relied on two Supreme Court decisions, than a lone district court decision.

¹⁴⁴ 288 F.3d 414 (9th Cir. 2002).

discrimination” on U.S. West Communications, Inc. (“U.S. West”) on behalf of one of U.S. West’s employees.¹⁴⁵ U.S. West, in arguing for removal, asked the court to apply a functionalist test to BOLI and find the agency to be the functional equivalent of a “state court” for purposes of removal.¹⁴⁶ The court expressly rejected the functionalist approach.¹⁴⁷ The *Richardson* court opined that courts adopting the functionalist approach incorrectly reached beyond the statute’s meaning.¹⁴⁸ According to the Ninth Circuit, the functionalist courts had effectively “replace[d] the statutory term ‘state court’ with the phrase ‘any tribunal that acts as a court,’ or ‘any tribunal having court-like functions,’ or some substantially similar phrase.”¹⁴⁹ Instead, the Ninth Circuit applied a statutory construction analysis to the removal question.¹⁵⁰ At bottom, the court posed one question: Is the statutory language of § 1441 unclear or ambiguous? Finding that it was not, the court declined to analyze any further.¹⁵¹ The Ninth Circuit is not alone in this approach.

The Tenth Circuit also adopted the textualist approach in *Porter Trust v. Rural Water Sewer & Solid Waste Management District No. 1*.¹⁵² In *Porter Trust*, a group of landowners petitioned the county Board of Commissioners to de-annex their land from the local sewer and water district; the water and sewer district filed for removal to federal court.¹⁵³ The Tenth Circuit affirmed the federal district court ruling, which denied removal and remanded the case back to the Board.¹⁵⁴ In doing so, the court adopted the Ninth Circuit’s reasoning in *Richardson* and found that reviewing the plain language of § 1441 using “standard applications of the canons of statutory construction” was the better approach.¹⁵⁵ Like the Ninth Circuit, the *Porter Trust* court found that, despite

¹⁴⁵ *Id.* at 415.

¹⁴⁶ *Id.* at 417.

¹⁴⁷ *Id.* at 418–19 (“While we agree that the question of what constitutes a ‘state court’ under the removal statute is a matter of federal, not state, law, we reject the ‘functional test’ analysis. The functional test goes beyond the language of the statute, because the functional test is a judicially-developed analysis that neither appears in, nor is necessarily implied by, the statutory language. The settled law in this circuit, however, is that we do not go beyond clear and consistent statutory language. Because the statutory language here is clear and consistent, we may not go beyond it to adopt the functional test.”).

¹⁴⁸ *Id.* at 419.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 417.

¹⁵¹ *Id.* at 418.

¹⁵² 607 F.3d 1251 (10th Cir. 2010).

¹⁵³ *Id.* at 1252.

¹⁵⁴ *Id.* at 1253.

¹⁵⁵ *Id.* at 1254–55 (citing *Or. Bureau of Labor & Indus., ex rel. Richardson v. U.S. W. Commc’ns, Inc.*, 288 F.3d 414 (9th Cir. 2002)). The court summarized by stating that, “[h]aving

the Board's exercise of a judicial function, it was nonetheless not a "state court" according to the plain language of § 1441.¹⁵⁶ Thus, removal was improper.¹⁵⁷ Other courts have also embraced the textualist approach.¹⁵⁸

D. The Circuits Split and Betray Any Real Standard

Armed with the varying approaches outlined above, the battle lines have been drawn—but not very clearly. On one side, stand the textualists, who believe that the clear and unambiguous language of § 1441 requires them to look no further. Essentially, if the state labels the tribunal a court, it is; if the state does not label the tribunal a court, it is not. Among the textualists' ranks are the Ninth Circuit, the Tenth Circuit, and a district court in the Sixth Circuit.¹⁵⁹

Mustering on the other side of the battle line are the functionalists, who believe that a plain language reading of the statutory language does not give adequate effect to its meaning or intent. The functionalists believe that the functions, powers, and procedures of the agency should determine whether it is, in effect, a court—not simply the label assigned to it. Among the functionalists' ranks are the First, Third, and Seventh Circuits, and two district courts from within the Fifth and Eleventh Circuits.¹⁶⁰ Additionally, the functionalists gather under what they believe is the authority of the Supreme Court.¹⁶¹

determined that the appropriate test involves application of the plain language of § 1441(a) rather than a functional test, we now apply that plain language to the facts of this case." *Id.* at 1255.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See *Smith v. Detroit Entm't*, 919 F. Supp. 2d 883 (E.D. Mich. 2013) (echoing much of the Ninth Circuit's reasoning from *Or. Bureau of Labor and Indus.*, and finding a literal statutory construction approach to be more appropriate).

¹⁵⁹ See, e.g., *Porter Trust*, 607 F.3d 1251 (adopting textualist approach); *Or. Bureau of Labor & Indus., ex rel. Richardson v. U.S. W. Commc'ns, Inc.*, 288 F.3d 414 (9th Cir. 2002) (same); *Detroit Entm't*, 919 F. Supp. 2d 883 (district court in the Sixth Circuit adopting the textualist approach); see also *supra* Part III.C. This is not a claim that other courts have not adopted the textualist approach; rather, these are merely the courts whose decisions this Note addresses and uses as examples.

¹⁶⁰ *Wirtz Corp. v. United Distillers & Vintners N. Am., Inc. (Wirtz II)*, 224 F.3d 708, 713 (7th Cir. 2000) (adopting the functionalist approach); *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259 (3d Cir. 1994) (same); *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38, 44 (1st Cir. 1972); *Bellsouth Telecomms., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280 (N.D. Fla. 2002) (same, by district court in the Eleventh Circuit); *Southaven Kawasaki-Yamaha v. Yamaha Motor Corp.*, 128 F. Supp. 2d 975 (S.D. Miss. 2000) (same, by district court in the Fifth Circuit); see also *supra* Parts III.A–B. This is not a claim that other courts have not adopted the functionalist approach; rather, these are merely the courts whose decisions this Note addresses and uses as examples.

¹⁶¹ Referring to the claims that *Upshur Cnty.* and *Prentis* established a functional test. See *supra* Part III.A, notes 86–105 and accompanying text.

This presents a large schism across the judiciary, with geographical inconsistency and no standard. Defendants facing administrative agency actions may or may not retain a right of removal based solely on whether the district court in that agency's state embraces a functionalist or textualist approach. For instance, a defendant facing a hearing in front of the Oregon Bureau of Labor and Industry regarding a labor dispute would be denied access to a federal forum. Simultaneously, that same defendant facing a hearing in front of the Wisconsin Employment Relations Board, regarding the same type of labor dispute, retains the right to remove the action to a federal forum. We end up with the same defendant, presented with a substantially similar issue, in front of two substantially similar agencies, but achieving substantially disparate results. The split betrays any real standard.

Even courts that embrace the functionalist approach can yield disparate results.¹⁶² Two cases surrounding the Illinois Liquor Control Commission ("ILCC") expose the potential disparity. The ILCC is an Illinois state agency authorized to control liquor licensing and registration, and to ensure that suppliers act in accordance with the "good faith provision" of the Illinois Wine and Spirits Industry Fair Dealing Act of 1999.¹⁶³ In both cases, a distributor filed a claim with the ILCC, alleging that their suppliers violated the Act; both suppliers filed for removal on diversity grounds.¹⁶⁴ The two cases produced opposing court decisions: one court found the ILCC to be an agency;¹⁶⁵ the other court found it to be the equivalent of a court.¹⁶⁶

Although the Seventh Circuit later reversed the decision that found the ILCC to be a court,¹⁶⁷ this shows the inconsistency and difficulty in applying the functionalist approach. Thus, in a one-year span, three courts applied three different analyses to the same agency, using identical prongs of the same test,

¹⁶² See Ford, *supra* note 75, at 342.

¹⁶³ 815 ILL. COMP. STAT. 725/1 §§ 1-99 (2014); see *R.J. Distrib. Co. v. Sutter Home Winery, Inc.*, No. 99 C 3836, 1999 WL 571009, at *2 (N.D. Ill. July 29, 1999); *Wirtz Corp. v. United Distillers and Vintners N. Am., Inc. (Wirtz I)*, 69 F. Supp. 2d 1063, 1064-65 (C.D. Ill. 1999), *rev'd by Wirtz II*, 224 F.3d 708.

¹⁶⁴ See *R.J. Distrib. Co.*, 1999 WL 571009, at *1. The defendant also asserted a federal question basis for removal jurisdiction, however, the court quickly dismissed that assertion. *Id.* at *3; *Wirtz I*, 69 F. Supp. 2d at 1065.

¹⁶⁵ *R.J. Distrib. Co.*, 1999 WL 571009. The court hinged its determination on the ILCC's inability to "provide full judicial relief," additionally the court applied a state's interest test. *Id.* at *2.

¹⁶⁶ *Wirtz I*, 69 F. Supp. 2d 1063. The court reasoned that the ILCC's ability to order specific performance pending the complete exhaustion of the appeal process was an "extraordinary" ability "so severe that the ILCC's authority must be characterized as judicial power." *Id.* at 1068.

¹⁶⁷ See *Wirtz II*, 224 F.3d 708. The circuit court, looking at the first prong, analyzed the "extraordinary powers" possessed by the LICC. *Id.* at 712. The circuit court applied an entirely different perspective and found that, because no other court possessed those powers, the ILCC could not be a court. *Id.* at 713-14.

derived from the same controlling precedent within their own circuit and reached different conclusions.

Conflicts from within the functionalist approach alone belie any real standard. This clear split of authority and confusion among circuits should be resolved by uniformly adopting a modified functionalist approach to determine whether a state agency is effectively acting as a state court, because this approach better evaluates the changing administrative landscape and preserves the right of diverse defendants to seek removal to a federal forum.

Determining whether a state agency is a court for the purposes of removal requires more predictability and consistency. Such a determination requires a deeper understanding of the expanding scope and power of state agencies, as well as states' reliance on them to act as specialized courts.

IV. STATE WITHIN A STATE: THE BLURRED LINE BETWEEN STATE AGENCIES AND STATE COURTS

[Administrative bodies] have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.¹⁶⁸

As we have seen, determining whether an agency is a *de facto* court for removal purposes is a complicated endeavor. It has become complicated because the administrative state has grown exponentially and its scope and power have expanded; the administrative state has developed into a "fourth branch" of government.¹⁶⁹ States have blurred the lines distinguishing agencies and courts—if not erased them altogether in some instances. So, how do we decide: Is it an agency, or is it a court? In order to answer that question we must look at the administrative agency, what it has become, and how it got there.

First, this Part reviews the expansion of state agencies, not just in their sheer numbers, but also in their scope and power. Following that is a brief description of the purported benefits to agency adjudication. Next, this Part follows by looking at how state administrative agencies have become a state within a state; often possessing, under one umbrella, the attributes of all three branches of government. Last, this Part reveals how political influence and potential abuse requires strengthening the right to remove from administrative agencies to federal court. This Part will show how the modified functionalist approach is best suited to determining whether a state agency is effectively acting as a state court, because this approach better evaluates the changing administrative landscape and preserves the right of diverse defendants to seek removal to a federal forum.

¹⁶⁸ *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952).

¹⁶⁹ *Id.*

A. *Growth of the Administrative State and the Expansion of Agency Scope and Power*

The administrative state has seen an exponential growth over the last 125 years. Beginning with the Interstate Commerce Commission in 1887 the federal government started to expand the administrative state slowly; however, that pace accelerated sharply during the New Deal era and has continued unabated.¹⁷⁰ In fact, the expansion of the administrative state is so prolific that the federal government can only vaguely claim that there are “hundreds of federal agencies and commissions,”¹⁷¹ leading some pundits to proclaim that the government does not even know how many agencies it has.¹⁷² State governments, like the federal government, have emulated this expansion across all fifty states; thus, state agencies and commissions vastly outnumber those at the federal level.¹⁷³ While no clear count or exhaustive compilation of all the various state agencies exists, they number into the thousands.¹⁷⁴

What has resulted from this massive expansion is that agency rules, decisions, actions, and enforcements permeate virtually every area of our private and business lives to one degree or another. In fact, one scholar compared the influence and effect of administrative agencies as being as common to our lives as electronics, “suburbs, and advertising.”¹⁷⁵ While some

¹⁷⁰ See Larry Kramer, *What's a Constitution for Anyway? Of History and Theory*, Bruce Ackerman and the New Deal, 46 CASE W. RES. L. REV. 885, 924 (1996) (noting that the federal government created between eight and ten new agencies during the new deal, which doubled the number from the previous decades since 1887).

¹⁷¹ See *Federal Agencies & Commissions*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/our-government/federal-agencies-and-commissions> (last visited Sept. 8, 2014).

¹⁷² See Josh Peterson, *The Government Has No Idea How Many Agencies it Has*, DAILYCALLER.COM (May 3, 2013, 11:35 AM), <http://dailycaller.com/2013/05/03/the-government-has-no-idea-how-many-agencies-it-has/#ixzz2oPwI2UOA>. Peterson claims that requests for a full agency list from the Government Accountability Office, the Office of Management and Budget, and the Congressional Budget Office were all fruitless. *Id.* Additionally, the Performance.gov website, which the Government Performance and Results Modernization Act of 2010 required to account for all the government agencies, was not complete, even missing large agencies such as the Federal Communications Commission. *Id.* It should be noted that as of this publication the FCC had been added to the list of agencies, however, these updates may be a further indication that the government has not been able to accurately assess the number and scope of all the federal agencies.

¹⁷³ See Haggard, *supra* note 49, at 1833. “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.” *Id.*

¹⁷⁴ See FRANK E. COOPER, 1 STATE ADMINISTRATIVE LAW 2 (1965). Cooper used conservative estimates and placed the number of agencies at over 2,000—in 1965. *Id.*

¹⁷⁵ See PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 7 (2d ed. 2004). Schuck compared the commonality to VCR’s rather than common electronics; however, although in

of these agencies are very limited in their scope and power, the government has imbued others with substantial reach and authority. For example, state agencies can significantly affect individuals and businesses on a plethora of issues, including settling labor disputes,¹⁷⁶ restricting property owners' ability to use land,¹⁷⁷ licensing individuals in their chosen profession,¹⁷⁸ deciding medical malpractice disputes,¹⁷⁹ and setting rates or prices,¹⁸⁰ as well as a host of other ways.

Although courts and scholars heavily debate the issue of whether the right of removal should extend to administrative agencies, it is clear that since the origins of the right, the reach of agency power and influence has grown well beyond the scope imagined.¹⁸¹ The states have delegated away the authority to promulgate rules that have the force of law, enforce those rules, and adjudicate based on those rules. The following Section discusses the perceived benefits that might motivate a state to delegate this authority.

B. Claimed Benefits to Administrative Adjudication

Proponents cite a variety of benefits to having agencies make decisions in lieu of courts.¹⁸² Among these reasons, two stand out as the most predominant: the speed and cost of dealing with an agency rather than the court system¹⁸³ and the potential benefits of utilizing agencies with perceived expertise rather than general courts of law.¹⁸⁴ However, achieving these

2004 VCR's were extremely common, they have since been replaced with more modern technologies. Regardless, the point is still valid.

¹⁷⁶ See, e.g., *Or. Bureau of Labor and Indus., ex rel. Richardson v. U.S. W. Commc'ns, Inc.*, 288 F.3d 414 (9th Cir. 2002); *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38 (1st Cir. 1972); *Tool & Die Makers Lodge No. 78 v. Gen. Elec. Co. X-Ray Dep't.*, 170 F. Supp. 945 (E.D. Wis. 1959).

¹⁷⁷ See, e.g., *Heritage Enter. v. City of Corvallis*, 708 P.2d 601 (Or. 1985) (en banc).

¹⁷⁸ See *Kolibash v. Comm. on Legal Ethics of the W. Va. Bar*, 872 F.2d 571 (4th Cir. 1989) (regarding state licensing of an attorney).

¹⁷⁹ See, e.g., *Wilson v. Gottlieb*, 821 F. Supp. 2d 778 (D. Md. 2011).

¹⁸⁰ See, e.g., *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210 (1908).

¹⁸¹ See *supra* Part IV.A for a discussion on the expansion of agency scope and power; see also Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189–92 (1986) (discussing the expansion of federal agencies).

¹⁸² See Bernard Schwartz, *The Administrative Agency in Historical Perspective*, 36 IND. L.J. 263, 265 (1961). “The advantages of decision by administrative organs—directness, expedition, freedom from the bonds of purely technical rules, and the consequent ability to give effect to the legislatively expressed policy . . .” *Id.*; *Removal to Federal Courts*, *supra* note 65, at 619–20 (discussing several purposes a state might wish to “jettison[] traditional notions of the judicial process through the establishment of an administrative agency”).

¹⁸³ See Schwartz, *supra* note 182, at 270; *Removal to Federal Courts*, *supra* note 65, at 620.

¹⁸⁴ See *Removal to Federal Courts*, *supra* note 65, at 619–20.

benefits may only be possible by sacrificing safeguards built in to the traditional court adjudication process. These judicial safeguards include, among others, certainty and predictability based upon principles of *stare decisis*, the use of well-established principles of law, and the “bridling of the individual will of the magistrate by formalized rules of procedure.”¹⁸⁵ Furthermore, many of these perceived benefits of administrative adjudication are of limited importance when weighed against a defendant’s right to removal.¹⁸⁶ A brief examination of the two most commonly cited benefits, cost and time savings and agency expertise, will highlight some of their shortcomings.

1. Cost and Time Savings

Advocates of administrative justice saw the cost and delay normally associated with traditional court proceedings as a problem that administrative hearings would avoid.¹⁸⁷ Those advocates have long felt that justice through the courts entailed formalistic procedures that cost litigants a significant amount of time and money—often deterring them from pursuing their lawful rights.¹⁸⁸ The general idea is that an agency would be able to sidestep the formalistic procedures and work with parties to find faster solutions through a more informal system.¹⁸⁹ Proponents of agency adjudication claimed that many of these adjudications would not require an attorney, costly discovery processes, complicated trials, or other procedures and steps associated with traditional adjudications.¹⁹⁰ Additionally, agency adjudication would be faster because of crowded dockets and long times associated with traditional courts; thus, defendants would save time and money.¹⁹¹

2. Agency Expertise

Lastly, and perhaps most importantly, proponents of administrative justice point to the idea that members of an agency will develop expertise “as a result of extensive experience with case law, statutes, and technical facts in a

¹⁸⁵ See Schwartz, *supra* note 182, at 265.

¹⁸⁶ See *supra* Part II.A for a discussion of the right of removal and the importance assigned to that right by the Framers.

¹⁸⁷ See Schwartz, *supra* note 182, at 268.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See, e.g., *id.*

¹⁹¹ See, e.g., *id.* (“These difficulties, [long delay and high cost,] it has been claimed, are avoided by vesting judicial power in administrative agencies instead of courts.”).

particular area.”¹⁹² Some theorize that this expertise allows legislatures the freedom to delegate the difficult task of constructing specific standards and remedies to relevant agencies.¹⁹³ Such delegation also affords agencies a certain amount of leeway in how they enforce their rules—a form of agency discretion akin to prosecutorial discretion.¹⁹⁴ Further, some say this expertise contributes to a speedier outcome because the agency can investigate claims; gather and present evidence, some of which might normally be inadmissible in a court of law; and provide their own remedy.¹⁹⁵

C. *Abandoning the Separation of Powers Doctrine for Administrative Agencies*

Our tripartite system of governance consists of executive, legislative, and judicial branches and is the basis of our federal government.¹⁹⁶ The doctrine of “separation of powers,”¹⁹⁷ which is deeply rooted in our federalist form of government, holds that the three branches of government should remain distinct and independent from one another.¹⁹⁸ Additionally, this system of government intends that these branches provide a system of checks and balances against one another.¹⁹⁹ So necessary was this separation of powers to the founding fathers, that James Madison proclaimed, “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”²⁰⁰ Those that want to discount the dangers presented by softening the separation of powers doctrine may claim that the agencies are just exercising “quasi-legislative” or “quasi-judicial”

¹⁹² See *Removal to Federal Courts*, *supra* note 65, at 619; Comment, *Removal of State Administrative Proceedings to the Federal Courts*, 12 STAN. L. REV. 492, 495–96 (1960) [hereinafter *Proceedings to Federal Court*].

¹⁹³ See *Removal to Federal Courts*, *supra* note 65, at 619.

¹⁹⁴ See *id.*

¹⁹⁵ See *id.* at 619–20.

¹⁹⁶ See *Mistretta v. United States*, 488 U.S. 361, 371 (1989); Philip B. Kurland, *The Rise and Fall of the “Doctrine” of Separation of Powers*, 85 MICH. L. REV. 592, 593–95 (1986); F. Scott Boyd, *Florida’s ALJs: Maintaining a Different Balance*, 24 J. NAT’L ASS’N ADMIN. L.J. 175, 179–80 (2004).

¹⁹⁷ Generally, Montesquieu is credited with presenting the idea of the separation of powers. See Kurland, *supra* note 196, at 595.

¹⁹⁸ See *Buckley v. Valeo*, 424 U.S. 1, 24 (1976). “The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.” *Id.*; see also Kurland, *supra* note 196, at 593.

¹⁹⁹ See Kurland, *supra* note 196, at 593.

²⁰⁰ THE FEDERALIST No. 47, at 313 (James Madison) (Robert Scigliano ed., 2001).

authority.²⁰¹ Such a distinction is purely in name only; there is no such thing as a “quasi-effect” on those that are regulated.²⁰²

However, the modern administrative state has obliterated the doctrine of separation of powers in many cases. Federal and state legislatures have consolidated executive, legislative, and judicial powers within the same agency.²⁰³ One author describes the all-encompassing nature of the FTC and provides an example of the convergence of the tripartite powers.²⁰⁴ In this example, the agency promulgates rules relevant to their agency and its area of authority.²⁰⁵ Then, under this scenario, the agency then decides when and how to make investigations, reports any findings to itself, and reviews the investigation to decide whether enforcement is required; if enforcement is required, the agency files a complaint, prosecutes the offender, and then presides over that very adjudication.²⁰⁶ An agency board, commission, or administrative law judge, depending upon the particular agency, conducts the adjudications.²⁰⁷ If the agency does not like the outcome, they sometimes have the option of appealing to a higher level within the same agency.²⁰⁸

Some relaxation of the separation of powers doctrine is required in our modern age.²⁰⁹ The expansion of the administrative state was in direct response to the perceived inability “of a simple tripartite form of government to deal

²⁰¹ See, e.g., *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (“Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution.”).

²⁰² See Schwartz, *supra* note 182, at 273.

The constitutional purist may claim that this sort of authority exercised by the administrator is, at most, only quasi-legislative in nature. Certainly, to soften a legal term by a “quasi” is a time-honored lawyer’s device. Yet, in this case, it has become wholly illogical to grant the fact of the legislative power of the commissions and still to deny the name. When the Supreme Court in 1952 upholds an indictment of a trucker for violation of a regulation promulgated by the Interstate Commerce Commission prescribing certain compulsory safety precautions for trucks transporting inflammables or explosives, perhaps the ICC regulation is only a quasi-law. But when the trucker is convicted of violating such regulations, we may be certain that they do not incarcerate him in a quasi-cell.

Id.

²⁰³ See Lawson, *supra* note 1, at 1248. Although Lawson discusses the loss of separation of powers in federal agencies, state agencies have emulated this trend. *Id.*

²⁰⁴ See *id.* Although the FTC is a federal agency, the description applies similarly to state agencies imbued with the same tri-partite powers.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See Schwartz, *supra* note 182, at 272.

with modern problems.”²¹⁰ The practicalities of administering our ever more complicated society required that agencies be able to regulate, and in order to do so they must perform, to some extent, all three functions of government.²¹¹ Under a structure such as this, when the responsibilities and powers of all three branches of government have been placed within one agency, that agency has become a virtual state within the state, writing its own laws, executing and enforcing those laws, and finally, judging those charged with violating those laws. What is worse yet is that not only are they the judge in those adjudications but, because they often enforce their own regulations, they often act as the plaintiff.²¹²

It is likely that the success of the administrative apparatus does necessitate some combination of the tripartite powers.²¹³ However, that necessity does not automatically dictate that other means of preventing the potential tyranny caused by uniting the powers should be abandoned; on the contrary, protections such as the right of removal should be strengthened in the face of that potential tyranny.

D. Agencies v. Courts: Defining a Difference

If the functionalist approach is to prevail, as this Note advocates that it should, it is going to have to gain some consistency. One of the ways to accomplish this is through a more uniform agreement of what constitutes a court for removal purposes.²¹⁴ Courts look at these indicators differently and assign them varying weights. This inconsistency allows for federal district courts in the same district to hold that the same agency both *is* a court, and *is not* a court, on different occasions.²¹⁵ The indicators or factors that courts use vary, but several stand out as deserving significant weight and discussion.

First, courts have looked at the procedures employed by the agency when adjudicating a dispute to see whether the agency emulated a court in the way it actually handled the case. Procedures that courts found relevant were

²¹⁰ JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (1938). Landis was a leading advisor to President Franklin D. Roosevelt.

²¹¹ See Schwartz, *supra* note 182, at 274.

²¹² See *id.* For example, a perceived violation of an environmental protection law may motivate the state protective agency to enforce their regulations by issuing a citation and/or an injunction. In this case, the agency is effectively the plaintiff in the same way the state would be the plaintiff in a criminal case.

²¹³ *Id.* at 272.

²¹⁴ See *id.* at 275. Of course, achieving that consistency may require guidance from Congress or the Supreme Court.

²¹⁵ See *supra* Part III.D (discussing two Illinois district courts decisions in the same year disagreeing about whether the ILCC, acting under factually identical circumstances, was a court for removal purposes).

how the agency handled pleadings,²¹⁶ and discovery and pre-hearing motions.²¹⁷ In addition, whether they allowed parties to “cross-examine adverse witnesses, and present summation and argument” could factor into the court’s determination.²¹⁸ Unfortunately, courts have provided no real indication as to the weight any of these factors should command, thus, it is unknown what combination of factors, if any, will tip the scales in favor of finding the agency to be a court.

Second, courts have looked at the agency’s power to enforce their decisions.²¹⁹ For example, whether the agency has subpoena power,²²⁰ and whether it may “provide ‘declaratory relief, injunctive relief, or monetary damages.’”²²¹ In addition, one of the enforcement powers an agency can possess is the ability to enforce its decisions without resorting to filing an action in a traditional court.²²² Like the procedural factors, courts have provided little guidance as to the necessity or weight of any of these factors.

Lastly, courts look at the decision-maker factors: whether an agency employs administrative law judges (ALJ) to adjudicate the dispute, the finality of those decisions, and the independence of the ALJ are factors that the court may weigh.²²³ Originally, ALJs presided over agency hearings, but their rulings were little more than advisory, with agencies retaining the ability to “amend the ALJ’s findings of fact and conclusions of law with relative ease.”²²⁴ The trend has shifted, however, to systems that promote “finality in all matters heard by

²¹⁶ See *Tool & Die Makers Lodge No. 78 v. Gen. Elec. Co. X-Ray Dep’t.*, 170 F. Supp. 945, 950 (E.D. Wis. 1959) (noting that the agency action procedures included a complaint, and answer, and a hearing date set by the agency); see also *Southaven Kawasaki-Yamaha v. Yamaha Motor Corp.*, 128 F. Supp. 2d 975, 980 (S.D. Miss. 2000) (citing the agency practice of filing a complaint but denying the defendant an opportunity to file an answer or conduct discovery).

²¹⁷ See *Rockville Harley-Davidson, Inc. v. Harley-Davidson Motor Co.*, 217 F. Supp. 2d 673, 677 (D. Md. 2002).

²¹⁸ *Id.*; see also *Southaven Kawasaki-Yamaha*, 128 F. Supp. 2d at 980.

²¹⁹ See, e.g., *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38, 44 (1st Cir. 1972) (stating that the lack of enforcement power supported concluding that the agency was not a court); see also *Rector*, *supra* note 73, at 2286–87.

²²⁰ See *Gottlieb v. Lincoln Nat’l Life Ins. Co.*, 388 F. Supp. 2d 574, 580 (D. Md. 2005).

²²¹ See *Rector*, *supra* note 73, at 2287 (quoting *Rockville Harley Davidson*, 217 F. Supp. 2d at 677).

²²² See, e.g., *Gottlieb*, 388 F. Supp. 2d at 580 (citing the inability to enforce subpoenas through contempt and the reliance on a court to do so as an example of how the agency “does not exercise traditional judicial powers”); *Southaven Kawasaki-Yamaha*, 128 F. Supp. 2d at 980 (discussing the commission’s limited powers of enforcement of its decisions).

²²³ See, e.g., *Ginn v. N.C. Dep’t of Corr.*, 829 F. Supp. 804, 806 (E.D.N.C. 1993).

²²⁴ James F. Flanagan, *Redefining the Role of the State Administrative Law Judge: Central Panels and Their Impact on State ALJ Authority and Standards of Agency Review*, 54 ADMIN. L. REV. 1355, 1373 (2002).

the ALJ,”²²⁵ either through statutory provisions, or by severely limiting agency review of the ALJ’s decision.²²⁶ Such finality buttresses the similarity that an agency adjudication shares with a traditional court proceeding.²²⁷

Another trend that has emerged is the use of “central panels,” which are groups of “professional adjudicators who are administratively independent of the agencies whose cases they hear, and thus, they are removed from agency influence.”²²⁸ Starting with California in 1945, these central panels have gained popularity with over 25 states embracing their use as of 2002.²²⁹ Central panels come in several different configurations: independent executive branch agencies; completely independent but within another agency for administrative support; within a separate organization but assigning ALJ’s to a particular agency based on the judge’s expertise; and, within a separate organization but assigning ALJ’s to various agencies on a rotating basis.²³⁰

Of course, the central panel system provides advantages and disadvantages. Among its advantages is the ALJ’s independence to make their decisions without the manifest or latent influence of the agency. Disadvantages include the loss of expertise of the ALJ in the particular agency’s field of regulation, one of the perceived benefits of agency adjudication.²³¹

To summarize, many state agencies have come to emulate state courts so closely that the net effect on a diverse defendant is effectively indistinguishable. Additionally, the claimed benefits of agency adjudication have proven illusory and the potential for bias against a diverse defendant is significant. For these reasons, it is best to adopt a modified functionalist approach to determine whether a state agency is effectively acting as a state court, because this approach better evaluates the changing administrative landscape and preserves the right of diverse defendants to seek removal to a federal forum.

V. DISFUNCTIONALIST: REWORKING THE FUNCTIONALIST APPROACH

Courts have had little problem identifying the characteristics of a traditional court and identifying which of those characteristics they should compare to determine the level of “courtiness” an agency’s adjudication possesses. Unfortunately, courts vary on these characteristics’ significance, or even whether any of them must necessarily be present or absent to find for or

²²⁵ *Id.* at 1360.

²²⁶ *See id.* at 1359–61.

²²⁷ *See* Rector, *supra* note 73, at 2282.

²²⁸ *See* Flanagan, *supra* note 224, at 1356.

²²⁹ *See id.* at 1357–58.

²³⁰ *See id.* at 1356 (describing the four main configurations).

²³¹ *See supra* Part IV.B.2.

against removal.²³² Some, such as the utilization of an ALJ whose decisions are final, and an agency's ability to enforce those decisions, would intuitively seem to indicate that the agency is effectively a court.²³³ Others, such as pleadings, discovery, and other procedural processes are less indicative. What is clear is that the functionalist approach, although superior, requires guidelines that are more concrete and a more rigid framework with which to evaluate whether an agency is effectively acting as a state court for removal purposes. Ultimately, any such guidelines or framework must keep the right of removal's core tenets as its guiding principles; it should not become hung up on nomenclature or labels. Adopting a modified functionalist approach is the fairest method to evaluate the changing administrative landscape and preserve the right of diverse defendants to seek removal to a federal forum. This Part looks at why the functionalist approach is superior, how it can be modified for improvement, and two potential criticisms. Section A discusses why the functionalist approach is superior for protecting against political influence and subject matter bias within agencies. Section B discusses how the textualists got it wrong and suggests several ways to improve the functionalist approach. Section C analyzes why the perceived benefits of agency adjudication are largely illusory and Section D closes with a rebuttal of two potential criticisms.

A. The Functionalist Approach Is the Best Approach To Protect the Right of Removal Against Political Influence and Subject Matter Bias

State agencies are inherently political. Generally, states form agencies through the legislative process or by gubernatorial fiat,²³⁴ and often those two branches struggle over their control.²³⁵ Depending on the statutory structure, politicians may retain some review power over agency regulations, even having the power to alter or disallow a proposed regulation.²³⁶ Usually, the state's

²³² See, e.g., Ford, *supra* note 75, at 332 (discussing the various factors courts weigh and whether a court must weigh any particular factors).

²³³ See, e.g., Sun Buick, Inc. v. Saab Cars USA, Inc., 26 F.3d 1259 (3d. Cir. 1994) (“[A]n administrative agency would not be considered a court if it did not have the ‘power to accord relief equivalent to that available from a court.’” (citation omitted)); Tool & Die Makers Lodge No. 78 v. Gen. Elec. Co. X-Ray Dep’t., 170 F. Supp. 945, 950 (E.D. Wis. 1959) (noting “that the [agency] lacks the power to enforce its own orders, an attribute whose presence or absence is significant if not decisive on the question as to whether a tribunal is a court”).

²³⁴ See Neal D. Woods, *Political Influence on Agency Rule Making: Examining the Effects of Legislative and Gubernatorial Rule Review Powers*, 36 ST. & LOC. GOV’T REV. 174, 174 (Fall 2004). Gubernatorial fiat is the process whereby a state’s Governor establishes an agency using only his executive power, rather than establishing an agency through legislation.

²³⁵ See *id.*

²³⁶ See *id.*

Governor appoints agency heads to oversee various state agencies.²³⁷ A Governor presumably appoints an agency head that will champion that Governor's agenda. This power of appointment should not be undervalued.

A politically based appointment assures the executive that the agency will advance the executive's agenda; it is common for agency heads to be of the same political party and ideology as the appointing executive.²³⁸ This is important in several respects. An agency will promulgate rules based upon that agenda, which is subject to change with every executive term. An agency's rules are subject to "drift," a term that describes slow, incremental movement away from the originally perceived purpose or scope of the agency.²³⁹ More importantly though, is the concept of enforcement and remedial discretion afforded to agencies. Mix this discretion with the fluid nature of an agency's agenda, the abandonment of the separation of powers, and agency adjudication; the result is a significant potential for unfair, arbitrary, and inconsistent application of the law.

Another consideration is "subject matter bias" within an agency, which this Note uses to denote a personal, ideological, or political interest in the subject matter regulated by an agency.²⁴⁰ Agency actors may have a subject matter bias that motivates them to be more lax or more vigorous in the

²³⁷ See, e.g., *Appointments of State Officials*, W. VA. SECRETARY OF STATE, <http://www.sos.wv.gov/PUBLIC-SERVICES/EXECRECORDS/APPOINTMENTS/Pages/default.aspx> (last visited Sept. 8, 2014) ("The Governor is given the authority to make appointments of four types, including executive agency heads, members of boards, commissions, task forces and councils, positions authorized by the Legislature for specific reasons, and persons to fill vacancies in certain federal, state, legislative and judicial offices.").

²³⁸ See David Miller, *Efficiency and Environmentalism: The Case for Uniform Procedures Acts in State Environmental Laws*, 10 RUTGERS J. L. & PUB. POL'Y 435, 466 (2013) ("Governors . . . typically appoint members of their own political parties to agency head positions. The reasons for this are obvious, . . . it is done to help ensure state agencies implement and enforce policies consistent with the Governor's overall policy goals.").

²³⁹ See Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG. 93, 94, 98-99 (1992). Macey describes the phenomenon of "bureaucratic drift and legislative (coalitional) drift," and some of their attendant consequences. *Id.* at 94.

²⁴⁰ It is intuitive that some agencies will attract more people with a personal interest in the area in which the agency operates. For example, a state environmental protection agency is more likely to attract individuals who have an interest in the environment, or a labor relations board may attract those with an interest in organized labor. While there may be nothing inherently wrong with this, it still presents a fair possibility that such an individual will apply the agency regulations in a biased way. See, e.g., RYAN BUBB & PATRICK L. WARREN, *OPTIMAL AGENCY BIAS AND REGULATORY REVIEW* 1, 2-3, 35-36 (2012), available at https://www.law.berkeley.edu/files/Bubb_Paper_Dec2012.pdf. (last visited Sept. 8, 2014) (discussing the appointment of agents who are biased in favor of the agency mission or a particular political agenda).

enforcement and adjudication of the agency's regulations.²⁴¹ For example, an agency representative who was formerly a member of a union, or who has family members that are union members, is more likely to be sympathetic to union causes or complaints. They may or may not investigate and prosecute claims with a conscious bias favoring unions. Even if that bias is not conscious, it is hard to argue that there would not be some *unconscious* bias to side with the union over an employer. Similarly, an enforcement agent for a professional licensing board might have a personal bias against an out-of-state individual or corporation expanding into what that agent perceives as his territory. Perhaps an administrative agent with a state environmental protection agency, who has a bias against certain large corporations, might zealously hamper a proposed land use application.

Lastly, agencies may be "susceptible to powerful local influences," and industry interference.²⁴² For example, the *Sun Buick* court recognized that the Pennsylvania Board of Vehicles was comprised of several new and used car dealers and "persons who are likely to be partial toward dealers and their industry."²⁴³ In addition, the court in *Wirtz* noted that the Fair Dealing Act, which was the basis of the agency's action, was "commonly referred to as 'The Wirtz Law' because of plaintiff's active support of its passage."²⁴⁴ Furthermore, an agency that serves one "clientele," such as a banking regulator, may have a tendency to generate rules that are more favorable to that clientele.²⁴⁵ This influence adds to the possibility of bias against an out-of-state defendant.

The inherently political nature of agency rulemaking, enforcement, and adjudication, coupled with the possible subject matter bias among agency representatives, local industry influences, and the dangers associated with abandoning the separation of powers, presents the very real possibility of bias—including bias against an out-of-state defendant. This significant

²⁴¹ See, e.g., *id.*; see also Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 488–95 (1990) (discussing the potential for and impermissibility of political bias in agency functions). Although both of these sources discuss federal agencies, this should translate accordingly to state agencies. Additionally, it should be noted that bias could also be inherent in judges; however, because of the specific subject matter that an agency handles, and the attraction of agency personnel with a keen interest in that subject matter, it is fairly conceivable that the agency will be more likely to be biased. When the combination of rulemaking, enforcement, and adjudication powers are exercised by an agency, this bias can be compounded and provides much more risk of bias than the possibility of a federal judge alone being biased.

²⁴² Ford, *supra* note 75, at 339.

²⁴³ *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1266 (3d Cir. 1994).

²⁴⁴ *Wirtz II*, 224 F.3d 708, 709 (7th Cir. 2000).

²⁴⁵ See, e.g., Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 390–92 (2011) (discussing agency influence by stakeholders, i.e., the regulated industry, and shaping of rules).

potential for bias militates in favor of a strengthening a diverse defendant's right of removal from state agencies when they act as *de facto* courts.

B. The Functionalist Approach Is Superior but Requires Some Reworking

This Note concludes that the functionalist approach is the superior approach because it is more likely to preserve the rights of the defendant that the removal statute is intended to protect. Despite this superiority, the functionalist approach needs some improvements to adapt to the modern administrative state and its effects. First, the federal-state interest approach should be abandoned, because this standard does not test whether the purpose of removal has been met. Second, the functionalist approach should be bolstered by adding an important perspective to the evaluation—that of the defendant's affected rights. Textualists are mistaken in their rigid application of a plain-meaning only stance that disregards the underlying intent of the removal statute, the increasingly judicial nature of the administrative state, and the effect of agencies on defendant's rights.

1. The Federal-State Interest Approach Should Be Abandoned

Courts that engage in a federal-state interest approach²⁴⁶ to evaluate the propriety of removal disregard the intent of the removal statute. Removal is proper under § 1441 as long as it is a “civil action brought in a State court of which the district courts of the United States have original jurisdiction.”²⁴⁷ The form of original jurisdiction relevant to this Note is diversity jurisdiction, pursuant to Title 28 of the United States Code § 1332.²⁴⁸ In any civil case in which the parties are diverse according to § 1332, and the amount in controversy threshold is met, the removal statute provides that the defendant or defendants *may* remove the case to federal court, thus it is a retained right of the defendant.²⁴⁹ No mention of weighing any state interests is present; in fact, the right of diversity removal specifically means to protect out-of-state defendants against an in-state bias.²⁵⁰ This Note argues against the textualist approach, which aims to define the word “court,” but at least textualists argue over a word that is actually present in the statute; federal-state interest proponents insert a component that is completely absent from the statute.

If fear of bias by an in-state judge against an out-of-state defendant is the core of the right of diversity removal, then surely the potential bias of an

²⁴⁶ See discussion *supra* Part III.B.3.

²⁴⁷ 28 U.S.C. § 1441(a) (2013).

²⁴⁸ 28 U.S.C. § 1332 (2013).

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

²⁵⁰ See discussion *supra* Part II.A (discussing the intentions behind the right of removal and providing the full text of the statute).

administrative agency should qualify an out-of-state defendant for the same protection. State agencies are arguably subject to much more significant biases than state court judges are. Agencies often stock their staffs with people who have a personal interest in the subject matter that skews their judgment.²⁵¹ The heads of many state agencies are political appointees, empowered to advance the political agenda of the governor—an agenda that may not coincide with the rights of an out-of-state defendant. Additionally, the agenda of an agency, the decisions regarding which violations to prosecute, the penalties sought, and other relevant factors are subject to change from administration to administration, which provides less stability and predictability.²⁵²

Proponents of a federal-state interest balancing approach would have a more plausible argument in the context of federal question jurisdiction; the federal-state interests are not relevant in diversity jurisdiction.²⁵³ Agency removal does not disrupt a state's interests in administering its laws and providing a forum to hear parties any more than regular court removal disrupts those interests. We quite regularly task federal courts with handling cases that apply state law, which a state would seem to have an inherent interest in applying. Those laws are not somehow less important to a state than an agency's regulations. Federal judges capable of applying state law are capable of applying state regulations. The concern that a court sitting in diversity jurisdiction, hearing a dispute regarding a state regulation, is somehow disrupting the state's ability to administer its laws seems irrational. Removal merely assures that a defendant retains the right to have his case heard in a presumptively neutral federal forum.

State and federal interests require no balancing under removal from traditional state courts. In fact, the courts hold that states may not “impair the right to remove a cause on diversity grounds when the removal is timely and diversity does in fact exist” and that any attempt by a state statute to do so would be unconstitutional.²⁵⁴ Thus, the defendant retains a right of removal regardless of the state's interests. Defining the word “court,” which is present

²⁵¹ See discussion *supra* Part IV.B. (discussing the possibility of personal interest in the agencies area of regulation and the attendant bias).

²⁵² See, e.g., BUBB & WARREN, *supra* note 240, at 35–36 (discussing the appointment of agents who are biased in favor of the agency mission or a particular political agenda).

²⁵³ The struggle between state and federal interests in federal question jurisdiction is more legitimate than in diversity jurisdiction because in the former there is a balancing between a state's sovereign right to regulate its own affairs under our federalist system and the necessity for applying federal law consistently across states. On the other hand, diversity jurisdiction merely contemplates the fair application of law, whether state or federal, regulatory or common, to an out-of-state defendant.

²⁵⁴ *Davila v. Hilton Hotels Int'l, Inc.*, 97 F. Supp. 32, 34 (D.P.R. 1951). “The decisions uniformly hold that it is beyond the power of the States to impair the right to remove a cause on diversity grounds when the removal is timely and diversity does in fact exist. A statute which in terms purported to effect such a result would be unconstitutional.” *Id.* (citations omitted).

in the statute, is one thing; but fabricating a state interest out of thin air is another. For these reasons, courts should discard the federal-state interest prong.

2. Consideration of the Defendant's Affected Right Using a Due-Process Lens

What should become part of the functionalist approach is an analysis of the effect that the agency's decision has on a defendant. In other words, what does the defendant stand to lose if the agency action does not decide in his favor? Because the right of removal is a right intended to benefit the defendant, it is reasonable to analyze the decision to extend or retract that right, at least in part, from the perspective of the defendant. An approach that looks solely to the "functions, powers, and procedures of the state tribunal"²⁵⁵ misses a valuable consideration that lies at the heart of the right of removal—protecting the defendant.

The right of removal assures that a defendant has an opportunity to have his case heard in front of a federal court, which we presume to be free from bias; such bias, it is believed, could lead to the unfair and unequal application of the law. The result of that unfair or unequal application of the law may be the violation of a defendant's substantive due process rights. "The Due Process Clause includes a substantive component that 'bar[s] certain [arbitrary wrongful] government actions regardless of the fairness of the procedures used to implement them.'"²⁵⁶ A comprehensive definition of exactly which rights are substantive due process rights is well beyond the scope of this Note.

However, the Supreme Court has defined certain rights as requiring due process. For example, the Court has invalidated "arbitrary and unreasonable" government actions that adversely affect property rights, such as certain zoning laws.²⁵⁷ Additionally, the Court has found that the rights to enter into contracts,²⁵⁸ and to earn a livelihood,²⁵⁹ were beyond arbitrary government

²⁵⁵ Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1102 (7th Cir. 1979). This is the central factor of the functionalist's approach to determining whether the agency is acting like a court. See discussion *supra* Part III.A.

²⁵⁶ Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 521 (2008) (alteration in original) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

²⁵⁷ *Id.* at 533–34 (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (citing Nectow v. City of Cambridge, 277 U.S. 183 (1928))).

²⁵⁸ See *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating a law that limited the amount of hours an employee and employer could agree to under their contract). Although *Lochner* has been overturned, and the level of scrutiny used in these types of cases has been tempered, the premise underlying the limitation of arbitrary government interference in substantive economic rights remains valid. See Levinson, *supra* note 256, at 525–26.

interference. Thus, agency actions that have the power to limit or forbid a defendant's use of his land, or deny a defendant the necessary license to pursue his chosen profession, substantially affect a right that would normally be subject to substantive due process protections.

Ultimately, whether a substantive due process prism is used, or some other evaluative method, courts should include an analysis of the agency's actions' effect on the defendant. Indeed, it is highly likely that a defendant's only concern is to what extent the agency's action will negatively affect his personal or business interests. In the context of diversity removal, the proper measure is not the state's interests, but rather, the defendant's interests. A court may best determine whether an agency is acting like a court by looking at how that agency can affect the defendant. A person whose livelihood is destroyed, or whose property becomes virtually worthless as a result of adjudication, probably cares little about the label affixed to the entity that performed that adjudication. Thus, modifying the functionalist approach to include an examination of the defendant's affected rights will more fairly assist a court in determining whether the state agency is effectively a state court.

3. The Textualists Got It Wrong

Textualist courts claim that agency removals merely present a question of statutory construction and they have no authority to go beyond the plain meaning of the statute.²⁶⁰ This simplistic view, while easy to defend, summarily discards any intentions that the text might not fully capture. The *Volkswagen* court was correct when they gingerly broached the subject of agency removal and proclaimed a functional evaluation was "far more satisfactory than to be content with a Steinian rendering of 'a board is a board is a board.'"²⁶¹ Even those courts and pundits who claim that *Upshur County* did not adopt a functionalist approach must concede that the Court went beyond a purely textualist approach. Rather than sticking resolutely to the plain language, they proceeded to analyze any administrative, judicial, or *quasi*-judicial powers

²⁵⁹ See *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (invalidating a state statute that interfered with an individual's right "to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation"). Similar to *Lochner*, *Allgeyer* has since been abrogated, but the underlying idea limiting arbitrary government action regarding economic rights remains intact. See also *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House*, 111 U.S. 746, 762 (1884) (Bradley, J., concurring) ("The right to follow any of the common occupations of life is an inalienable right . . .").

²⁶⁰ See *Or. Bureau of Labor and Indus., ex rel. Richardson v. U.S. W. Commc'ns, Inc.*, 288 F.3d 414, 417 (9th Cir. 2002).

²⁶¹ *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38, 44 (1st Cir. 1972).

exercised by the *Upshur County* court.²⁶² The outcome does not belie the approach they used to arrive at it.

Additionally, the reliance on a purely textualist approach appears to be a selective one. The Ninth Circuit, for example, in *Nationwide Investors v. Miller*,²⁶³ went beyond a purely textualist approach when it reviewed the meaning of “civil action” in the context of federal officer removal pursuant to § 1442(a)(1).²⁶⁴ There, the circuit court relied upon Supreme Court precedent “endors[ing] a broad reading of § 1442 rather than ‘a narrow, grudging interpretation’”²⁶⁵—a statement which itself could be interpreted to reject strict textualism. The court also looked to precedent within its own circuit to define whether the particular action at hand, a wage garnishment, was a civil action according to the statute.²⁶⁶ The court ultimately used the precedent from that case, which defined “civil action” in the context of the federal removal statute, § 1441, and applied the same reasoning to *Miller*, which implicated § 1442(a)(1).²⁶⁷ That precedent established that the court should broadly construe the language of the statute—not apply a strict textualist argument.²⁶⁸ The court then proceeded to discuss the underlying purpose of the statute and found that the “form of the action is not controlling; it is the state’s power to subject federal officers to the state’s process that § 1442(a)(1) curbs.”²⁶⁹ Thus, it looked beyond the language and based its holding on the agency’s power and function.²⁷⁰

C. *The Claimed Benefits of Agency Adjudication Are Largely Illusory*

Cost and time savings, along with agency expertise, are benefits that proponents of administrative justice claimed would follow the expansion of agency adjudication; however, these claims have proven to be both illusory and not significant enough to override a defendant’s right of removal. Agency expertise in rulemaking and enforcement is a valid benefit, but agency expertise may be overblown in the adjudicatory context for two reasons. First, federal

²⁶² *Upshur Cnty. v. Rich*, 135 U.S. 467, 470–72 (1890).

²⁶³ 793 F.2d 1044 (9th Cir. 1986).

²⁶⁴ *See id.* at 1045–46; *see also* 28 U.S.C. § 1442(a)(1) (2013) (providing for removal to federal court whenever the defendant is a federal officer or agent acting in their official capacity).

²⁶⁵ *Miller*, 793 F.2d at 1046 (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)).

²⁶⁶ *Id.* at 1045 (“In *Swanson v. Liberty National Insurance Co.*, 353 F.2d 12, 13 (9th Cir. 1965), we held that the characterization of a garnishment proceeding is a question of federal law and that the Alaska proceeding in that dispute was a ‘civil action’ under 28 U.S.C. § 1441.”).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1046.

²⁶⁹ *Id.* at 1047 (citing *Willingham*, 395 U.S. at 406).

²⁷⁰ *Id.* at 1046 (describing the ability of the state to fine and imprison the defendant and the state’s coercive power).

judges are often required to adjudicate cases where they have little or no knowledge of the underlying subject matter. Second, very often the agencies base their adjudications on traditional common-law concepts, not on some specialized causes of action inherent only to the subject matter of their agency.

Society often asks judges to review cases that center on areas they know very little about—including judicial review of agency adjudications. We would not suggest that a federal court judge is incapable of evaluating a patent claim on a highly complicated chemical compound or an intellectual property claim regarding a highly technical computer program; this is a task regularly undertaken every day in our federal courts. Yet, proponents of administrative justice based on agency expertise assert that a regulation promulgated by a Department of Transportation or a Labor Relations Board would overwhelm these same judges. Such a tepid justification should not quash a defendant's right to removal.

This is particularly true when we take into account the fact that many of the agency disputes are, at base, no more than common law causes of action. For example, the bulk of cases that comprise the circuit split on agency removal are, at base, no more than common law causes of action. Many of these cases were questions of collective bargaining agreements or labor agreements regulated by federal law.²⁷¹ Others involved contract disputes in regulated industries, but retained at their core basic contract rights that would need to be determined.²⁷² Yet others involved adjudication of cases involving disputes of a typical nature that appear in front of federal judges on a regular basis, such as medical malpractice claims,²⁷³ age discrimination,²⁷⁴ and insurance misrepresentation.²⁷⁵ Such pedestrian causes of action and the attendant interpretation of state laws certainly do not require expertise beyond the capacity of a federal judge.

Additionally, reliance on such agency expertise may sometimes prove unfruitful. As previously discussed, agencies may be subject to political influence and subject matter bias that can consciously or unconsciously cloud

²⁷¹ See, e.g., *Or. Bureau of Labor and Indus., ex rel. Richardson v. U.S. W. Commc'ns, Inc.*, 288 F.3d 414, 417 (9th Cir. 2002); *Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd.*, 454 F.2d 38, 44 (1st Cir. 1972); *Tool & Die Makers Lodge No. 78 v. Gen. Elec. Co. X-Ray Dep't.*, 170 F. Supp. 945 (E.D. Wis. 1959).

²⁷² See, e.g., *Wirtz II*, 224 F.3d 708, 713 (7th Cir. 2000) (dispute regarding the termination of a liquor distribution contract in violation of state regulation); *R.J. Distrib. Co. v. Sutter Home Winery, Inc.*, No. 99C 3836, 1999 WL 571009 (N.D. Ill. July 29, 1999) (same).

²⁷³ See, e.g., *Wilson v. Gottlieb*, 821 F. Supp. 2d 778 (D. Md. 2011) (claiming medical malpractice by federal employee made the case removable under § 1442(a)(1)).

²⁷⁴ See, e.g., *Ginn v. N.C. Dept. of Corr.*, 829 F. Supp. 804 (E.D.N.C. 1993) (claiming employment age discrimination in violation of state law).

²⁷⁵ See, e.g., *Gottlieb v. Lincoln Nat'l Life Ins. Co.*, 388 F. Supp. 2d 574 (D. Md. 2005) (claiming misrepresentation in the sale of life insurance policy).

their judgment.²⁷⁶ Couple this with the reduced or eliminated separation of powers and the potential for unfair outcomes or abuse becomes significant.²⁷⁷ When a defendant can remove to a federal court, he succeeds in replacing the agency and its representatives as the adjudicator, foiling any possibility of engaging in unfair adjudication, whether conscious or not. Plenty of reasons can support utilizing agency expertise when it comes to formulating regulations and investigating claims; however, the reliance on agency expertise as justification for the superiority of agency adjudications becomes more tenuous. Ultimately, however, no reasons support that this supposed expertise should override a defendant's right of removal.²⁷⁸

Similarly, cost and time savings do not necessarily result from agency adjudication; on the contrary, for diverse defendants in particular agency adjudication may cause higher costs and longer delays. Over the years, committees and commissions reviewing the efficacy of the administrative state have found that in actuality litigants have realized no such benefit.²⁷⁹ Because most litigants choose to engage legal representation when confronted with an agency action, they are unlikely to see a major reduction in the cost of legal fees.²⁸⁰ This is particularly true when we account for the fact that the administrative adjudication adds another layer, or multiple layers,²⁸¹ between the initiation of an action and its ultimate terminus.²⁸² Add to this the ancillary costs associated with delays, such as lost revenues or the ability to practice a chosen profession, and it becomes apparent that the time and cost benefits

²⁷⁶ See discussion *supra* Part V.A.

²⁷⁷ See *supra* Part IV.C for a discussion on the consequences of abandonment of the separation of powers doctrine.

²⁷⁸ See *Removal to Federal Courts*, *supra* note 65, at 620 ("On the other hand, the fact that an agency has some advantage over a court should not automatically defeat removal. While the right to remove has been limited, and in some situations eliminated, Congress has always believed it important enough to be retained in most cases."). *But see Proceedings to Federal Courts*, *supra* note 192, at 496 ("A combination of these motives would seem to outweigh the need for diversity jurisdiction.").

²⁷⁹ See Schwartz, *supra* note 182, at 270–72; Mashaw, *supra* note 1, at 411 (finding the average wait time for a decision on a disability claim and 18 months to two years for an appeal to the same agency).

²⁸⁰ A potentially valid point exists that the reduced formality and procedural rigor of an administrative agency action may reduce the amount of work required for a litigant's attorney, however, this is likely to be limited, particularly in agency actions that employ administrative law judges and follow more court-like procedural and evidentiary rules.

²⁸¹ As opposed to traditional court actions, where the suit originates in a state court and the defendant can remove at that point if it is proper. Under the agency adjudication model, the defendant must navigate the full agency procedures before a traditional court hears his case. How many layers may depend upon the amount of agency appeals are available before the administrative remedies are exhausted and whether or not a defendant must exhaust *all* remedies before they can present their action to a state court.

²⁸² See Schwartz, *supra* note 182, at 272.

alleged to accompany administrative justice are not nearly as promised. In fact, the opposite may be true.²⁸³

Lastly, even if defendants on the whole could save some time and cost by submitting to agency adjudication, this is not a significant enough benefit to override an individual defendant's right to removal. The right of removal is a long-standing right that Congress has repeatedly affirmed. Only a small number of diverse defendant's will be able to exercise their right to removal. Thus, if an agency's adjudication process is more cost and time effective, the vast majority of defendants will still benefit; only diverse defendants who *choose* to remove will lose that alleged benefit.

D. Two Potential Criticisms

There are at least two primary concerns surrounding removal from state agencies. Although, it is unlikely that these concerns are sure to materialize, even if they did, these concerns should not override the valuable and long-standing right of removal. The first concern is that utilizing a functionalist approach will encourage defendants to try and "game" the system by frivolously "tak[ing] a shot at removal," leading to "inevitable delays and disruptions."²⁸⁴

This concern is overblown. First, it is no more likely than a gaming of the system by states that may wish to insulate their agencies from removal to federal court. States can accomplish this by statutorily requiring that an agency exclusively handle a particular type of case that regular state courts traditionally adjudicated. By calling the adjudicatory body a board, commission, or whatever else, they can avoid the court label that would allow removal. Additionally, concerns over delay should not override a defendant's right to remove, particularly in light of the fact that agency action is often just as slow or slower.²⁸⁵

The second main criticism that opponents of agency removal cite is that allowing it will lead to a massive expansion of removal cases that will overwhelm the federal courts.²⁸⁶ As one court noted, this could subject federal courts to "unwarranted, and thus wasteful, expenditure" of their resources as

²⁸³ See *id.* at 271. This is particularly true for diverse defendants who would normally be entitled to removal from a state court to federal court, but now, because the suit originates in a state agency, have to defend themselves through the agency's multiple layers prior to appealing to a state court from which they can then exercise their right to a federal forum.

²⁸⁴ *Bellsouth Telecomms., Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280, 1283 (N.D. Fla. 2002); see also Haggard, *supra* note 49, at 1867–68 (discussing the concern and citing *Bellsouth Communications, Inc.*).

²⁸⁵ See discussion *supra* Part IV.B.1.

²⁸⁶ See Haggard, *supra* note 49, at 1868.

they dealt with the “inevitable increase in removal notices that would result from wide-spread adoption of the functional approach.”²⁸⁷

Again, this concern is overblown. No evidence is present to indicate such a deluge will occur. Quite the contrary, the functionalist approach has been the dominant approach and has remained in use for over 50 years. That should be enough time to see just how many defendants will game the system or whether such a claimed increase actually is inevitable. Diversity jurisdiction will still only apply to a limited number of defendants, those that are diverse and have over \$75,000 involved in the controversy, thus the pool of potentially removable cases is necessarily limited already.²⁸⁸ Neither of these tenuous concerns should trump the right of removal. Congress has established in § 1441 the right of removal as just that—a right. Courts should address logistical concerns about crowded courts or bad actors gaming the system through means other than quashing a defendant’s right.

VI. CONCLUSION

The right of removal affords diverse defendants an opportunity to remove their case from a potentially biased state court to a presumptively neutral federal forum. The Founders recognized the necessity of this right, and successive legislatures and courts have continued to recognize it for over two centuries. It is an important right that should not be abrogated based on nomenclature; courts should preserve its purpose and intent by extending it to court-like agencies.

Today’s society is a complicated one. States rely on agencies to handle many areas of our personal and business lives, imbuing many of them with significant authority. Agencies often operate in ways that are indistinguishable from the operations of state courts. These agencies promulgate rules that have the power of law, enforce these rules, and then judge those charged with violating those rules. This concentration of power within one entity can be dangerous to individuals and businesses—a concern that is at the heart of the separation of powers doctrine. Furthermore, political influence, local interests, and subject matter bias add to the chances that an agency might subject an out-of-state defendant to unfair bias in the adjudication of his case. These factors militate for applying the right of removal to agencies that act as *de facto* courts.

The modified functionalist approach provides the most appropriate method for defining what exactly qualifies a state agency as a court while keeping with the underlying intent and purpose of the right of removal. The textualist approach employs a simplistic approach that disregards the intent of the diversity removal statute—to protect diverse defendants from a biased

²⁸⁷ Johnson v. Albertson’s LLC, No. 3:08CV236/MCR/MD, 2008 WL 3286988, at *2 (N.D. Fla. Aug. 6, 2008).

²⁸⁸ See 28 U.S.C. § 1332(a) (2012).

2014]

PRESERVING THE RIGHT OF DIVERSITY REMOVAL

517

adjudication—regardless of the label applied to the adjudicator. On the other hand, the functionalist approach preserves that intent by looking at the way the agency operates and how it can affect the defendant through its enforcement and adjudicatory powers. Fine-tuning the functionalist approach by eliminating the state interest inquiry, and concentrating on whether the agency will impact the defendant's rights, will continue to ensure that the removal right's underlying purpose is served.

Of course, guidance by Congress or the Supreme Court could provide much needed clarity, but in lieu of that, courts should continue to apply a functionalist approach that takes into account the effect of the agency's actions on the defendant rather than any supposed state interests. Because, ultimately, if an agency is going to affect a defendant in the same way, and to the same extent, that a state court can affect him, that agency *is* a court. The split of authority and confusion among circuits should be resolved by uniformly adopting a modified functionalist approach to determine whether a state agency is effectively acting as a state court, because this approach better evaluates the changing administrative landscape and preserves the right of diverse defendants to seek removal to a federal forum.

*John D. Pizzo**

* Executive Editor for Article Selection and Symposium, *West Virginia Law Review* Volume 117; J.D. Candidate 2015, West Virginia University; B.S. Political Science, cum laude, William Paterson University. I owe a debt of gratitude to my colleagues at the *West Virginia Law Review* for all their hard work and support during the writing and editing process. I would like to thank Professor Will Rhee for his invaluable advice and guidance during this process. Lastly, I would like to thank my family for their never ending support, and in particular, my wife, Lisa, for her interminable patience during my law school journey. Any errors or omissions contained herein are mine alone.