

2015

## When Is an Agency a Court? A Modified Functional Approach to State Agency Removal Under 28 U.S.C. § 1441

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### Recommended Citation

Nicholas Jackson, *When Is an Agency a Court? A Modified Functional Approach to State Agency Removal Under 28 U.S.C. § 1441*, 49 U. MICH. J. L. REFORM 273 (2015).

Available at: <https://repository.law.umich.edu/mjlr/vol49/iss1/5>

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## WHEN IS AN AGENCY A COURT? A MODIFIED FUNCTIONAL APPROACH TO STATE AGENCY REMOVAL UNDER 28 U.S.C. § 1441

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Nicholas Jackson

*This Note argues that courts should interpret 28 U.S.C. § 1441, which permits removal from state court to federal court, to allow removal from state administrative agencies when the agency performs “court-like functions.” Circuits that apply a literal interpretation of the statute and forbid removal from state agencies should adopt this “functional” approach. The functional approach, which this Note calls the McCullion-Floeter test, should be modified to comport with legislative intent and public policy considerations: first, state agency adjudications should not be removable when the adjudication requires technical expertise, which federal courts cannot obtain because they adjudicate cases in a variety of subject areas; second, they should not be removable where an agency’s authorizing statute demonstrates a clear legislative intent to prefer plaintiffs. Absent either of these features, however, court-like agency adjudications should be removable.*

### INTRODUCTION

State administrative agencies perform administrative adjudications in a large and increasing number of cases and across a broadening range of parties.<sup>1</sup> Often, state administrative tribunals are indistinguishable from state courts because similar procedures protect parties’ rights in both forums. Under 28 U.S.C. § 1441 (2011), the federal removal statute, defendants may remove their cases from state court to federal court when the federal court has jurisdiction. In some circuits, parties in state administrative hearings may remove their cases and in other circuits they may not.<sup>2</sup>

This Note argues that public policy concerns and the legislative intent underlying the removal statute indicate that courts should permit removal from agencies where agency tribunals function as courts do. Yet, it also argues that general removal should be limited where there is a clear legislative preference for plaintiffs and where agencies have the necessary technical expertise.

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1. See Revised Model State Admin. Procedure Act, 15 U.L.A. 1–5 (2010) (citing the growth of the state administrative state as justification for a uniform set of procedures).

2. See, e.g., Oregon Bureau of Labor & Indus. ex rel. Richardson v. United States W. Commc’ns, 288 F.3d 414, 416 (9th Cir. 2002) (forbidding removal from state agencies); Tool & Die Makers Lodge v. Gen. Elec. Co. X-Ray Dep’t, 170 F. Supp. 945 (E.D. Wis. 1959) (permitting removal from state agencies).

The disparate treatment of cases before agencies compared to cases before courts causes real harm: courts treat defendants in state administrative tribunals unfairly in jurisdictions where removal is forbidden.<sup>3</sup> Lengthy appeals processes burden these defendants with significant costs and a scarce likelihood of success.<sup>4</sup> Some circuits have remedied this problem by incorporating state agencies into the removal process where it makes sense to do so.

Congress can best resolve this question. Congress should amend the removal statute to include relevant state agency tribunals and thereby adapt the statute to the growing administrative state. If Congress does not thus amend the removal statute, courts should nevertheless adopt the proposed approach to removal because it conforms to the legislative intent underlying the statute.

This Note examines the legislative history and public policy consequences of removal to demonstrate the rationales for adopting the functional approach. Then, the Note proposes forbidding removal in two narrow classes of tribunals because they do not conform to these rationales. Part I of the Note discusses the functions and history of the removal provisions of the Judiciary Act of 1789<sup>5</sup> and the Jurisdiction and Removal Act of 1875.<sup>6</sup> In this Part, the Note discusses the Congressional intent that motivated the expansion of federal jurisdiction through removal.

Part II discusses the heightened need to consider state administrative adjudications as the role of administrative agencies continues to increase. Next, it discusses the current circuit split concerning the appropriate interpretation of the removal statute. This part expounds the two approaches to the statute: the first adopts a literal interpretation of removal by permitting removal of state court cases, but not state agency adjudications, and the second adopts a functional approach by allowing cases in court-like agency adjudications to be removed.

Part III argues that a modified functional approach is preferable for two reasons: first, it resolves a number of public policy problems inherent in the literal approach. Second, it most accurately tracks the legislative intent motivating the removal statute. The best solution to the problem would be a clarifying statute that applies the appropriate reform. If that is not possible, then courts should nevertheless apply the modified functional approach.

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3. See *infra* Part II.C.

4. See, e.g., Jessica J. Berch, *The Costs of Litigation: A Proposal to Amend Federal Rule of Appellate Procedure 39(A)(4)*, 83 TEMP. L. REV. 103 (2010) (discussing appellate costs in the context of litigation for large defendants like Exxon Valdez).

5. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

6. Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.

## I. REMOVAL UNDER 28 U.S.C. § 1441

This Part discusses removal and the legislative history and policy rationales for the most salient aspects of its evolution. The history of removal reveals an amalgamation of policy considerations and historical flukes leading to 28 U.S.C. § 1441, the current removal statute. Before Congress passed the statute, the Constitution permitted jurisdiction in federal courts over diversity and federal question cases.<sup>7</sup> The legislative history of present-day removal can be understood best in the context of the first Judiciary Act of 1789, which allowed removal for diversity between civil litigants,<sup>8</sup> and the Jurisdiction and Removal Act of 1875<sup>9</sup> (as well as some other closely preceding statutes),<sup>10</sup> which first permitted general federal question removal.<sup>11</sup> The purposes for these statutes, as informed by legislative history, included avoiding bias against civil defendants, remedying unreliability in the state court system, and improving the efficiency of federal tribunals.<sup>12</sup>

## A. What is Removal?

Removal is a mechanism by which defendants in certain cases originating in state courts may transfer their case to federal court. This process is codified at 28 U.S.C. § 1441 (2011). Under this statute, “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant . . . to [a] district court of the United States.”<sup>13</sup> This process requires a defendant to file a notice of removal in a federal district court.<sup>14</sup> Notice of removal has an automatic effect; once filed state courts may not take any further

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7. U.S. CONST. art. III, § 2, cl. 2.

8. See Judiciary Act of 1789, ch. 20, 1 Stat. 73.

9. Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.

10. See Separable Controversies Act, ch. 288, 14 Stat. 306 (1866); Local Prejudice Act, 14 Stat. 558 (1867).

11. See generally, Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923); William M. Wiecek, *The Reconstruction of Federal Judicial Power, 1863–1875*, 13 AM. J. LEGAL HIST. 333 (1969).

12. See generally Wiecek, *supra* note 11. Congress had a number of other reasons for permitting removal, including relying on the expertise of federal courts in applying federal law and promoting uniformity of interpretation. See Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 104–09 (2009).

13. 28 U.S.C. § 1441(a) (2011).

14. Paul E. Lund, *The Timeliness of Removal and Multiple-Defendant Lawsuits*, 64 BAYLOR L. REV. 50, 59 (2012).

action unless the case is remanded to the state court.<sup>15</sup> But, there are some procedural limitations to this general right of removal. For example, in diversity cases, all defendants that are joined on an individual case are required to consent to the removal petition.<sup>16</sup> In addition, defendants have only thirty days from the date a case is filed in state court to remove it to federal court.<sup>17</sup>

For many plaintiffs in the United States, the ability to select their forum has a considerable effect on the outcome of their case. In 2013, defendants removed 32,041 cases from state courts, which amounted to 11.2% of all civil cases heard in federal courts.<sup>18</sup> In addition, the differential rights of parties to forum selection are considered significant and problematic in some areas of law.<sup>19</sup> Win-loss statistics suggest that outcomes are considerably more likely to favor the plaintiff if she is permitted to remove her case to federal court.<sup>20</sup> Thus, the right to try a case in a federal forum may advantage or disadvantage a significant number of parties.

### B. History of Removal

The Constitution permits jurisdiction in federal courts over civil cases between diverse litigants and over all federal questions.<sup>21</sup> The Framers of the Constitution provided for federal diversity jurisdiction to avoid prejudice to defendants.<sup>22</sup> James Madison supported this provision because “a strong prejudice may arise, in some states,

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15. *Id.*

16. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 11263, § 125 Stat. 758, 759–61 (2011); Lund, *supra* note 14, at 59–60.

17. 28 U.S.C. § 1446(b); *see* Lund, *supra* note 14, at 60.

18. *See* UNITED STATES COURTS, JUDICIAL FACTS AND FIGURES 2013, CIVIL CASES FILED, BY ORIGIN (Sept. 30, 2013), <http://uscourts.gov//figures-2013.aspx>.

19. *See, e.g.*, Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 CONN. L. REV. 159, 162 (2013) (identifying the problem of differential right to forum selection in bankruptcy law).

20. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About The Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 602–03 (1998).

21. U.S. CONST. art. III, § 2 (“*The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and Foreign States, Citizens or Subjects.*” (emphasis added)).

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

against the citizens of others, who may have claims against them.”<sup>23</sup> The Framers included federal question jurisdiction in order to cement the judicial branch’s role as the expositor of the law;<sup>24</sup> to ensure it is able to “say what the law is.”<sup>25</sup> A final arbiter promotes uniformity: “[t]o avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest . . . authorized to settle and declare in the last resort a uniform rule of civil justice.”<sup>26</sup>

Although the Constitution allowed for jurisdiction in federal courts, it did not confer that jurisdiction because it did not create lower federal courts on its own authority.<sup>27</sup> The Constitution grants the Supreme Court jurisdiction over “cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party.”<sup>28</sup> In order for original jurisdiction over other cases to inhere in federal courts, Congress needed to establish federal courts that had original jurisdiction over such cases.<sup>29</sup>

Under the authority of Article III, Congress passed the Judiciary Act of 1789, which created a system of federal circuit and district courts that had original jurisdiction over cases of federal law and between diverse citizens.<sup>30</sup> Among the provisions of the Act was the right of defendants to remove a case in state court to a federal court if that court had diversity jurisdiction.<sup>31</sup> Absent from the Act, however, was any mention of removal for federal question purposes.<sup>32</sup>

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23. *Id.* (citing 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 1789 533 (2d ed. 1836)).

24. Lumen N. Mulligan, *Jurisdiction by Cross-Reference*, 88 WASH. U. L. REV. 1177, 1235 (2011) (citing THE FEDERALIST No. 22, at 143 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

25. *See* *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

26. THE FEDERALIST No. 22 (Alexander Hamilton).

27. *See* Haiber, *supra* note 22, at 616.

28. U.S. CONST. art. III, § 2.

29. *See* Haiber, *supra* note 22, at 616–17. Note that, of course, Congress may only grant jurisdiction to lower federal courts over cases permitted by the U.S. Constitution in Article III, Section 2.

30. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73 § 1–4.

31. *Id.* at § 12 (“[I]f a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending . . . it shall then be the duty of the state court to accept the surety, and proceed no further in the cause . . . in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process.” (emphasis added)).

32. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73 § 12.

In practice, this meant, in federal question cases, the original Judiciary Act did not permit federal courts to review a state supreme court's final interpretation of a Constitutional or statutory question.<sup>33</sup>

Federal question removal was born of emergency conditions during the War of 1812. During the war, New England ship owners harassed U.S. military and customs officers with frivolous state court lawsuits.<sup>34</sup> During periods of local unrest, Congress deemed state courts unreliable in the protection of certain federal rights. Consequently, it permitted removal of federal questions cases in certain contexts.<sup>35</sup> The Force Act<sup>36</sup> further permitted federal officials to remove suits to federal courts because of local resistance to federal claims.<sup>37</sup> Under the Act, Congress permitted tax collectors to remove suits brought in state courts because South Carolina began nullification proceedings<sup>38</sup> and its courts no longer recognized the federal government's right to collect taxes.

Two statutes that preceded general federal question removal similarly indicated doubt that state courts could competently apply federal law: the Separable Controversies Act of 1866<sup>39</sup> and the Local Prejudice Act of 1867.<sup>40</sup> The Separable Controversies Act enabled parties intending to remove state court disputes to federal court to separate controversies that had diverse parties from those with non-diverse parties.<sup>41</sup> In other words, if twenty plaintiffs joined in a suit against a defendant, and only ten were diverse litigants, the Act permitted the defendant to remove those ten controversies. This Act greatly increased the number of cases heard in federal court.<sup>42</sup> The Local Prejudice Act permitted a party in state court to remove to federal court if he submitted an affidavit stating that he believed, because of "prejudice or local influence, he [would] not be able to obtain justice in such state court."<sup>43</sup> The original bill introduced as the Local Prejudice Act applied only to states "lately in insurrection;" that is, former Confederate states.<sup>44</sup>

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33. See Paul Taylor, *Congress's Power to Regulate the Federal Judiciary: What the First Congress and the First Federal Courts Can Teach Today's Congress and Courts*, 37 PEPP. L. REV. 847, 861–62 (2010).

34. See Wiecek, *supra* note 11, at 337.

35. Warren, *supra* note 11, at 91.

36. Force Act, ch. 3, 4 Stat. 632 (1833).

37. See *id.*

38. Warren, *supra* note 11, at 91.

39. Separable Controversies Act, ch. 288, 14 Stat. 306 (1866).

40. Local Prejudice Act, 14 Stat. 558 (1867).

41. Wiecek, *supra* note 11, at 340.

42. *Id.* at 340.

43. *Id.* (citing Local Prejudice Act, 14 Stat. 558 (1867)).

44. *Id.*

Congress codified general federal question removal in the Judiciary Act of 1875,<sup>45</sup> which coincided with a general broadening of federal jurisdiction after the Civil War.<sup>46</sup> This statute granted jurisdiction over federal questions to federal courts. “[T]he circuit courts of the United States shall have original cognizance . . . of all suits of a civil nature . . . arising under the Constitution or laws of the United States . . . .”<sup>47</sup> It also permitted removal for such questions. “[E]ither party may remove said suit into the circuit court of the United States for the proper district.”<sup>48</sup>

The latest major change to the relevant portions of the Judiciary Act came from the Judiciary Act of 1887,<sup>49</sup> which withdrew from the broad expansion of federal power provided in the 1789 and 1875 Acts.<sup>50</sup> The 1887 Judiciary Act increased the amount-in-controversy requirement to \$2,000, which prevented defendants in smaller cases from reaching a federal tribunal.<sup>51</sup> In addition, the 1887 Act repealed the right of plaintiffs to remove cases from state courts.<sup>52</sup> The House passed a bill that more significantly limited the right of removal, and the Senate Judiciary Committee softened many of the harshest provisions.<sup>53</sup>

### C. Why Did Congress Change the Judiciary Acts of 1789 and 1875?

The history discussed in Part I.B can be understood as a general trend toward permissive removal. During Reconstruction, Congress distrusted state courts to follow federal laws, so it established generally applicable federal question removal.<sup>54</sup> In fact, some have argued that removal, generally, is an “implicit insult” to state

45. Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470.

46. Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 720–21 (1986).

47. Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470, 470.

48. *Id.* at 471.

49. Judiciary Act of 1887, ch. 373, § 2, 24 Stat. 552, 553 (as corrected by Act of Aug. 13, 1888, 25 Stat. 433).

50. Haiber, *supra* note 22, at 623.

51. DANIEL S. HOLT, FEDERAL JUDICIAL CTR., DEBATES ON THE FEDERAL JUDICIARY: A DOCUMENTARY HISTORY, VOLUME II: 1875-1939 18, 28(2013), [http://www.fjc.gov/public/pdf.nsf/lookup/debates-federal-judiciary-vol-ii.pdf/\\$file/debates-federal-judiciary-vol-ii.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/debates-federal-judiciary-vol-ii.pdf/$file/debates-federal-judiciary-vol-ii.pdf).

52. *Id.* at 28. This topic had been argued over in the passage of the Jurisdiction and Removal Act of 1875. Ultimately, the Senate (and final) bill changed the House bill to permit removal by both plaintiffs and defendants. *See id.* at 18, 28. The Senate was not successful at including plaintiffs in the Judiciary Act of 1887. *Id.*

53. *See* Collins, *supra* note 46, at 741–42.

54. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 511 (1995); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1826–27 (2008).



courts.<sup>55</sup> Because of this distrust, federal courts, through removal, became instruments in enforcing federal policy.<sup>56</sup> Removal was a necessary tool for enforcing federal law when states refused to comply.<sup>57</sup> This became important when state governments refused to acquiesce to the federal government's authority to enforce the 14th Amendment after the Civil War.<sup>58</sup> Among the varied reasons for removal, hostility of state courts thus holds special historical importance.

Congress did not believe state courts would willingly apply federal law, so it permitted federal question removal via the Force Act (discussed above), the Separable Controversies Act, and the Local Prejudice Act.<sup>59</sup> Concerning the Separable Controversies Act, Congress mistrusted state courts' ability to adequately apply the law to diverse defendants.<sup>60</sup> Thus, permitting the separation of cases otherwise joined in a single controversy would result in such cases being tried in federal courts.<sup>61</sup> Similarly, Congress passed the Local Prejudice Act in part because it doubted that local tribunals could fairly adjudicate cases with diverse defendants because of local prejudices.<sup>62</sup>

Congress passed the 1875 Act following a landslide 1874 election that put Democrats in power.<sup>63</sup> Given this background, and especially in the context of the Local Prejudice Act and the Separable Controversies Act, some commentators have interpreted the expansion of federal power as a way to ensure that hostile courts did not adjudicate federal laws.<sup>64</sup> Courts in southern states repeatedly flouted Federal Reconstruction era laws, so the Act was a way to ensure that federal courts safeguarded those laws, even in unfriendly states.<sup>65</sup>

The policy of the Judiciary Act of 1875 clearly included an expansion of federal jurisdiction, and there is little evidence in the Congressional Record that members of the House of Representatives were bothered by the Act's broad expansion to include general federal question removal.<sup>66</sup> Instead, their discussion of the bill

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55. Chemerinsky, *supra* note 54, at 511, 512.

56. Wiecek, *supra* note 11, at 337.

57. *See id.* at 337–40.

58. *See id.*

59. *Id.* at 340.

60. *See id.*

61. *See id.*

62. *Id.*

63. Seinfeld, *supra* note 12, at 104 n.24.

64. *Id.* at 105.

65. *See id.* at 104–05.

66. *See* 2 CONG. REC. 4978–92.

demonstrated a concern for the unfairness to defendants from being tried in a federal court outside their place of business.<sup>67</sup> Notably, no Congressman discussed the expansion of federal question removal that resulted from the Act.<sup>68</sup>

The final House bill ended up striking almost all of the removal provisions intended to broaden federal power,<sup>69</sup> but the Senate Judiciary Committee largely rewrote these sections as provided in the original bill.<sup>70</sup> Given the importance of the national marketplace, the Senate was unwilling to permit the prejudices of postwar state judges and juries to impede interstate commerce.<sup>71</sup> From the Congressional Record, it appears that the Senate did not discuss the Judiciary Act of 1875 on the Senate floor at all.<sup>72</sup> Unsurprisingly, this provision did not trouble legislators because previous legislation had already extended the right of removal to federal questions. The House, in particular, was not concerned with the increased number or variety of cases in federal court, but rather with fairness in the application of the new grounds for removal. House members feared that defendants might be forced to litigate in a state far removed from their residence or place of business.<sup>73</sup>

Finally, this Note must account for the departure in the Judiciary Act of 1887 from Congress's general distrust, expressed in earlier versions of the statute. The two major provisions of the Judiciary Act that limited the right of parties to remove (forbidding plaintiffs to remove and increasing the amount-in-controversy requirement) tend to conform to the trend of distrust of state courts. Although there is a consensus that Congress's intent was to limit removal,<sup>74</sup>

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67. See *id.* at 4981–83.

68. See *id.* at 4978–86.

69. Wiecek, *supra* note 11, at 341. This appears to support the opposite argument of this Note, but it should not be read as such. Rather, the House was concerned, not about the broad expansion of federal power, but rather only with concern for defendants whom they believed would be hauled into a distant court. See *id.* 4981–83.

70. Wiecek, *supra* note 11, at 341.

71. *Id.* at 342.

72. See 2 CONG. REC. xi-ccii (Index to the Congressional Record, 43d Congress); 3 CONG. REC. xi-cc (Index to the Congressional Record, 43d Congress).

73. 2 CONG. REC. 4985. "But to select a tribunal where neither the plaintiff nor defendant nor any party to the suit resides may work a great hardship and even injustice in many cases, and I see no cause for the rule; but it seems to be both prudent and sensible that the defendant or some party to the suit should be within the jurisdiction of the tribunal selected. This will have a tendency to localize actions and to compel the trial where some of the parties are within reach of their witnesses." *Id.* Here, Congressman Hager makes clear that his concern in the implementation of the Judiciary Act was that the geographically ideal venue would be chosen, both from the perspective of efficiency (the location of witnesses) and fairness.

74. Haiber, *supra* note 22, at 624. Notably, courts and commentators do not overstate the limitation. While the 1887 version does eliminate some of the opportunities for removal

some alternative justifications for these provisions *support* interpreting the history of removal as reflecting a distrust of state courts.

First, because plaintiffs may choose the federal court in selecting their forum, also permitting them to remove would create an unfair advantage for civil plaintiffs.<sup>75</sup> House reports indicate that the House repealed plaintiff removal because it was “just and proper to require the plaintiff to abide by his selection of forum.”<sup>76</sup> This provision should not be understood as withdrawing from a commitment to broad removal, but instead in the context of fair treatment of both parties in a civil case. Second, regarding the amount-in-controversy requirement, one may interpret raising the requirement merely as a policy conforming to inflation.<sup>77</sup> By 1887, the \$500 amount-in-controversy requirement would lead to far more cases removed to federal court than originally envisioned.<sup>78</sup> As evidence of this fact, the amount-in-controversy requirement has increased a number of times since the first Judiciary Act in 1769.<sup>79</sup> For these reasons, the 1887 Act should be read as part of a historically consistent Congressional broadening of federal jurisdiction beginning with the Judiciary Act of 1789.

Congress’s general broadening of the removal right occurred against the backdrop of state court adjudication of every case except those few brought in federal court.<sup>80</sup> Because of numerous policy rationales, some of which are briefly described above, Congress chose to shift cases from state to federal courts. The Congress that enacted the original removal statutes did not likely consider the possibility of adjudication in state agencies.<sup>81</sup> For this reason,

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available under the Judiciary Act of 1875, it does not (and cannot) eliminate a defendant’s right to a federal forum. *Id.* Admittedly, the Supreme Court has held that the removal statute (28 U.S.C. § 1441) should be strictly construed, but some commentators have argued that this does not conform with the legislative history of removal. *Compare id.* at 630, *with* Collins, *supra* note 46, at 718–19, *with* *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 100 (1941).

75. Collins, *supra* note 46, at 7433.

76. *Id.*

77. Michael W. Lewis, *Comedy or Tragedy: The Tale of Diversity Jurisdiction Removal and the One-Year Bar*, 62 SMU L. REV. 201, 204 (2009).

78. See Claudia D. Goldin & Frank D. Lewis, *The Economic Cost of the American Civil War: Estimates and Implications*, 35 J. ECON. HIST. 299, 309–13 (1975) (describing the drastic inflation caused by the Civil War).

79. See Lewis, *supra* note 77, at 204.

80. See Seinfeld, *supra* note 12, at 102–04 (discussing the reasons why Congress “shifts” some cases to federal courts and leaves others in state courts).

81. See Suzanne Antley, *The “Appearance of Fairness” Versus “Actual Unfairness”: Which Standard Should the Arkansas Courts Apply to Administrative Agencies?*, 16 U. ARK. LITTLE ROCK L. REV. 587, 587 n.4 (1994). The first federal administrative agency, the Interstate Commerce Commission, was created in 1887, after Congress had already made all of its amendments to the removal statute. See *id.* It was not until the 20th century that the administrative state became significant enough for Congress to consider it relevant. Comm. on Comm’n & Media Law,

Congress changed the removal statute in the context of a binary adjudicative system, where state courts or federal courts were the only available forums.

## II. REMOVAL FROM STATE AGENCIES: PROBLEMS AND INCONSISTENCIES

This Part addresses removal as it applies to state administrative agencies. First, it describes the increasing impact that state agencies' court-like institutions have on matters that courts might otherwise handle. Second, it discusses the current circuit split regarding a defendant's ability to remove her case from these quasi-judicial state administrative proceedings. Third, it explains why the inability to remove cases makes the circuit split especially harmful to certain defendants. Fourth, it lays out two additional inconsistencies that justify adopting the functional approach to removal over the literal approach. A resolution to the problem must explain why federal courts treat state court proceedings differently from agency proceedings over similar subjects. It must also explain the illogical timing of appeals.

### A. *The Increasing Breadth of State Administrative Agencies*

Since the 1940s, state administrative agencies have proliferated, and their mandate has broadened.<sup>82</sup> The policy areas governed by state agencies have steadily increased from about fifty-one in the 1950s to about 117 in the 1990s.<sup>83</sup> During this period, the role of agencies expanded from traditional state governmental roles (safety, agriculture, corrections) to include environmental issues, labor, civil rights, and, ever-increasingly, social welfare services.<sup>84</sup>

Additionally, quasi-judicial decisions, which are often indistinguishable from court proceedings,<sup>85</sup> increasingly occupy a more

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"If It Walks, Talks and Squawks . . ." *The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 60 REC. ASS'N B. CITY N.Y. 343, 347 n.8 (2005).

82. See Revised Model State Admin. Procedure Act, 15 U.L.A. 1-5 prefatory note (2010) (citing the growth of the state administrative state as justification for a uniform set of procedures).

83. See Cynthia J. Bowling et al., *Cracked Ceilings, Firmer Floors, and Weakening Walls: Trends and Patterns in Gender Representation Among Executives Leading American State Agencies, 1970-2000*, 66 PUB. ADMIN. REV. 823, 825-26 (2006).

84. Stephen S. Jenks & Deil S. Wright, *An Agency-Level Approach to Change in the Administrative Functions of American State Governments*, 25 ST. & LOC. GOV'T REV. 78, 83 (1993).

85. See Phyllis E. Bernard, *The Administrative Law Judge as a Bridge Between Law and Culture*, 23 J. NAT'L ASS'N ADMIN. L. JUD. 1, 18 (2003).

significant segment of states' administrative duties.<sup>86</sup> The Honorable Loren A. Smith, professor of law at George Mason University, argues that this "judicialization of the administrative process" is the result of a political avoidance maneuver on the part of administrators.<sup>87</sup> By leaving policy decisions over individual cases to adjudication, an administrator can use procedural mechanisms to avoid making a value decision, which some political actors might oppose.<sup>88</sup> Courts have fueled the trend toward judicialization by requiring agencies to implement court-like procedures that guarantee due process in decision-making.<sup>89</sup> The judicialization argument contends that the increase in quasi-judicial administrative proceedings also stems from a desire to curb majoritarian political will; that is, to protect the rights of individual parties through procedural due process.<sup>90</sup>

Much of the existing case law on state agency removal has consisted of state labor boards and commissions, particularly with respect to collective bargaining agreements.<sup>91</sup> The question of whether to permit removal from state agencies would be significant if the issue just applied to labor and collective bargaining cases.<sup>92</sup> Given the trend toward the expansion of the administrative state, and, especially, the judicialization of the administrative state, however, it is reasonable to expect the breadth of this issue to extend to areas where administrative influence is growing.<sup>93</sup>

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86. Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 429–30 (1985).

87. *Id.* at 429.

88. *See id.* at 429–30.

89. *Id.* For the particular procedures that agencies follow, see Part III.

90. Smith, *supra* note 86, at 437.

91. *See, e.g.*, *Tool & Die Makers Lodge v. Gen. Elec. Co. X-Ray Dep't*, 170 F. Supp. 945 (E.D. Wis. 1959); *Volkswagen De Puerto Rico v. Labor Relations Bd.*, 331 F. Supp. 1043 (D.P.R. 1970); *Smith v. Detroit Entm't, LLC*, 919 F. Supp. 2d 883 (E.D. Mich. 2013).

92. *See* Jihong Zhao & Nicholas Lovrich, *Collective Bargaining and the Police: The Consequences for Supplemental Compensation Policies in Large Agencies*, 20 POLICING J. INT'L POLICE STRAT. & MGMT. 508, 510 (1997) (describing the periods of expansion of collective bargaining since the 1950s); *see also* Richard B. Freeman, *Contraction and Expansion: The Divergence of Private Sector and Public Sector Unionism in the United States*, 2 J. ECON. PERSPECTIVES 63, 78 (1988) (describing the expansion of public sector collective bargaining).

93. There are a large number of cases where both state and federal legislatures regulate simultaneously. In such cases, either the state or federal administrative agency is empowered to hear the case. Among these include water rights and employment discrimination. *See* Robert M. Mahoney, Note, *Don't Discriminate Against Distinct or Highly Personal Harms: An Analysis of Section 717 of Title VII Pertaining to Preemption of Alternative Theories of Recovery by Federal Employees*, 19 SUFFOLK J. TRIAL & APP. ADVOC. 310 (2014); John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299, 362 (2006). Given the trend toward concurrent regulatory jurisdiction, we can expect that the

### B. The Circuit Split

The two competing approaches in federal Circuit courts are the functional approach, applied by the Seventh and First Circuits, and the literal approach, applied by the Ninth and Tenth Circuits. The literal approach permits only administrative tribunals designated as courts by state statutes (or state Constitutions) to be eligible for removal to federal court.<sup>94</sup> The functional approach permits removal to federal court from state agencies with “court-like functions.”<sup>95</sup>

#### 1. The Functional Approach

Currently, the Seventh and First Circuits permit removal from quasi-judicial state agencies based on a “functional” interpretation of the provision in 28 U.S.C. § 1441 that limits removal to “civil actions brought in a State court.”<sup>96</sup> The functional interpretation treats agency tribunals as courts when they contain some traditional court functions and powers: an adversarial system in which an opposing party has the right to file an answer, the power to issue subpoenas compelling the attendance of a witness, the ability to punish for contempt, and the maintenance of records, among others.<sup>97</sup>

This interpretation was established by the seminal case, *Tool & Die Makers Lodge v. General Electric Co. X-Ray Dep’t*, 170 F. Supp. 945, 950 (E.D. Wis. 1959). In that case, the Tool & Die Makers Lodge (a labor organization) filed two complaints with the Wisconsin Employment Relations Board detailing a breach of a collective

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number of mutually regulated areas between the states and the federal government will continue to increase. See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 151–52 (2001).

94. See, e.g., *Porter Trust v. Rural Water Sewer & Solid Waste Mgmt. Dist. No. 1*, 607 F.3d 1251, 1251–52 (10th Cir. 2010); *Oregon Bureau of Labor & Indus. ex rel. Richardson v. United States W. Commc’ns*, 288 F.3d 414, 416 (9th Cir. 2002); *Tool & Die Makers Lodge*, 170 F. Supp. at 950. Some federal circuits adopt these approaches in varying degrees of permissiveness and some have not yet decided on an interpretation.

95. *Richardson*, 288 F.3d at 416; see *Tool & Die Makers Lodge*, 170 F. Supp. at 950 (“[T]he 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.”).

96. Darren W. Ford, Note, *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, 331 (2009).

97. See *Tool & Die Makers Lodge*, 170 F. Supp. 945, 950 (E.D. Wis. 1959).

bargaining agreement between the parties.<sup>98</sup> The Board filed petitions for removal of the complaint to federal district court.<sup>99</sup> The court held that the Supreme Court's dicta in *Upshur County v. Rich*, 135 U.S. 467 (1890),<sup>100</sup> permitted removal in cases where adjudicative bodies function as state courts. The court stated that, by definition, "courts" are bodies that serve judicial functions, regardless of what they are called, so the plain meaning of the statute incorporates certain agency tribunals.<sup>101</sup> This case's exposition of the functional approach became the consensus opinion until 1972.<sup>102</sup>

Eleven years later, in *Volkswagen de Puerto Rico v. Labor Relations Board*, 454 F.2d 38 (1st Cir. 1972), the First Circuit vindicated that approach. There, the First Circuit held that the defendant, Volkswagen de Puerto Rico, could not remove its case to federal district court from the Labor Relations Board of Puerto Rico. The court interpreted the removal statute to require a functional approach because Congressional history demonstrated no intent to have courts narrowly construe the statute to apply only to state courts. The *Volkswagen* court also emphasized three relevant (though non-exhaustive) factors for determining whether a state agency acts as a state court: "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."<sup>103</sup>

The Seventh Circuit similarly applies a version of the functional approach. In *Floeter v. C.W. Transport, Inc.*,<sup>104</sup> the court held that the functional approach was appropriate in a case where an employer violated a collective bargaining agreement.<sup>105</sup> In its exposition of the rule, the court specified that the procedures governing the case are determinative of the conclusion as to removal.<sup>106</sup> A defendant may not remove from any tribunal, but only those whose procedures "are substantially similar to those traditionally associated with

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98. See *id.*

99. See *id.*

100. 135 U.S. 467 (1890). In this case, the Supreme Court ultimately held that an administrative action by an executive officer may not be reasonably treated as a court proceeding. *Id.* at 477. The relevant question for the Supreme Court was whether the action was "judicial in the ordinary sense of that term." *Id.* at 471. Presumably, the *Tool & Die Makers* court understood that this interpretation left open administrative activity that is reasonably "court" activity.

101. See *Upshur Cty. v. Rich*, 135 U.S. 467, 477 (1890).

102. See Ford, *supra* note 96, at 330 n.63.

103. *Volkswagen de Puerto Rico v. Labor Relations Bd.*, 454 F.2d 38 (1st Cir. 1972).

104. 597 F.2d 1100 (7th Cir. 1979).

105. *Id.* at 1101-02.

106. *Id.* at 1102.

the judicial process . . . .”<sup>107</sup> This slightly more tempered approach (only permitting removal in tribunals “substantially similar” to courts) is the approach most commonly followed by courts applying the functional approach.<sup>108</sup>

## 2. The Literal Approach

The Ninth and Tenth Circuits and the Eastern District of Michigan have adopted a literal approach to the removal statute.<sup>109</sup> In these courts, regardless of an agency’s resemblance to a state court, removal is not permitted unless the institution’s authorizing statute defines it as a court. In *Oregon Bureau of Labor & Industries ex rel. Richardson v. United States West Communications*,<sup>110</sup> the Ninth Circuit declined to adopt the functional approach because it conflicted with the plain language of the statute.<sup>111</sup> The court held that when the language of the statute is “clear and consistent with the statutory scheme, the plain language is conclusive.”<sup>112</sup> According to the Ninth Circuit, the functional approach treats the removal statute as if it were applied to “any tribunal that acts as a court,” when the statute does not contemplate such broad application.<sup>113</sup>

The Tenth Circuit also adopted the literal approach. In *Porter Trust v. Rural Water Sewer & Solid Waste Mgmt. Dist. No. 1, Logan County, Oklahoma (“Logan I”)*,<sup>114</sup> the court held that *Logan I* could not remove its case from the Logan County Board of County Commissioners to federal court.<sup>115</sup> The court concluded that the plain language of 28 U.S.C. § 1441 permits only state court proceedings, and not proceedings in administrative agencies, to be subject to removal.<sup>116</sup> Also, the court noted a recent trend favoring the literal

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107. *Id.*

108. *See* Ford, *supra* note 96, at 332.

109. Erica B. Haggard, *Removal to Federal Courts from State Administrative Agencies: Reevaluating the Functional Test*, 66 WASH. & LEE L. REV. 1831, 1856 (2009); *see, e.g.*, *Wirtz Corp. v. United Distillers & Vintners N. Am., Inc.*, 224 F.3d 708 (7th Cir. 2000); *Smith v. Detroit Entm’t, LLC*, 919 F. Supp. 2d 883 (E.D. Mich. 2012); *Darling’s v. Chrysler Group, LLC*, No. 1:14-cv-00208-NT, 2014 U.S. Dist. LEXIS 154917 (D. Me. Oct. 30, 2014); *Lou Bachrodt Chevrolet Co. v. GM LLC*, No. 12 C 7998, 2013 U.S. Dist. LEXIS 98870 (N.D. Ill. July 15, 2013).

110. 288 F.3d 414 (9th Cir. 2002).

111. *See id.* at 417.

112. *Id.*

113. *Id.* at 419.

114. 607 F.3d 1251 (10th Cir. 2010).

115. *Id.* at 1255.

116. *Id.* at 1254.



approach, even among jurisdictions that previously employed the functional approach.<sup>117</sup>

In 2013, a district court in Michigan held that the literal approach is more appropriate, creating a split within district courts in the Sixth Circuit.<sup>118</sup> In *Smith v. Detroit Entertainment*, the court held that a defendant could not remove a case regarding unpaid wages in violation of a collective bargaining agreement.<sup>119</sup> The court stated that Congress could have included administrative agencies in its removal statute but opted not to.<sup>120</sup>

Because of the circuit split, the question of removal from state administrative agencies to federal courts remains open and continues to create inconsistencies in the treatment of parties in state administrative proceedings.<sup>121</sup> In addition, some circuit courts have not yet considered whether to apply the functional or literal approach to 28 U.S.C. § 1441.<sup>122</sup> This circuit split poses significant problems for defendants in jurisdictions that use the literal approach. In those cases, defendants who want to change forums have no recourse, even though Congress intended for the cases to be removable.

### C. Why Not Agencies? Problems Resulting from the Circuit Split

The differences in treatment across circuits have real consequences for parties in administrative hearings: forbidding removal tends to disadvantage defendants, and appeal of agency decisions is especially difficult and costly.<sup>123</sup> There is evidence that the state agency forum advantages plaintiffs because plaintiffs are exclusively

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117. *Id.* at 1254–55.

118. *See Smith v. Detroit Entm't, LLC*, 919 F. Supp. 2d 883 (E.D. Mich. 2013); *see also Ford Motor Co. v. McCullion*, No. C2-88-142, 1989 U.S. Dist. LEXIS 19116 (S.D. Ohio Apr. 14, 1989) (adopting the functional approach).

119. *Smith*, 919 F. Supp. 2d at 884.

120. *See id.* at 888.

121. It might be argued that courts are approaching a consensus on the literal approach. *See Porter Trust v. Rural Water Sewer & Solid Waste Mgmt. Dist. No. 1*, 607 F.3d 1251, 1251–52 (10th Cir. 2010). However, the Sixth Circuit has not yet dealt with the question and district courts within the circuit have rendered conflicting interpretations. Wren M. Williams, *Removal Jurisdiction – Removable or Not? The Indecisive Sixth Circuit Creates its Own Split Within the Circuit Court Split Regarding Removal of Actions from Administrative Agencies to Federal Courts – Smith v. Detroit Entm't, LLC*, No. 12-12967, 2013 WL 119673 (E.D. Mich. Jan. 9, 2013), 37 AM. J. TRIAL ADVOC. 247, 247 (2013). Thus, an inference of consensus is unwarranted.

122. A Lexis search of circuit court cases from the Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits produced no relevant results.

123. *See, e.g., Berch, supra* note 4 (discussing appellate costs in the context of litigation for large defendants, like Exxon Valdez).

empowered to choose their forum.<sup>124</sup> This advantage is problematic because defendants in agency proceedings are arbitrarily subject to greater harm depending on the jurisdiction where their case is heard.<sup>125</sup> In addition, an inconsistency among circuits must be rectified, regardless of whether removal should be permitted from agencies.<sup>126</sup> If the purpose of the removal statute is to permit removal over the cases state courts adjudicated when the statute was passed, then removal should extend to proceedings before administrative agencies. On the other hand removal may undercut the value of agency expertise and efficiency in certain cases. In such cases, the agency is *not* like a court, and there are legitimate policy reasons to treat it differently.<sup>127</sup>

First, agencies handle many of the same cases that would have been handled in a state court when the removal statute was first enacted. Because administrative agencies adjudicate these cases today, it would frustrate Congress's intent to treat them differently.<sup>128</sup> In addition, defendants in circuits that prohibit removal face significant disadvantages compared to their counterparts in circuits that permit removal.<sup>129</sup> Empirical evidence supports the hypothesis that defendants who successfully remove their cases to federal court win more often than those whose cases originate in federal court.<sup>130</sup> Analysis of win-loss rates in federal court demonstrates that removal of civil cases to federal courts decreases the plaintiffs' win rate. Plaintiffs in federal question cases, excluding prisoner litigation, win fifty-two percent of the time when the cases originate in federal court and only twenty-five percent of the time when they are removed from state courts.<sup>131</sup> In diversity cases, plaintiffs win about sixty-nine percent of the time when cases originate in federal court and 27.6% of the time when they are removed from state courts. These disparities are concerning because general win rates in federal and state courts are similar. Thus, when the plaintiff chooses the forum, she wins more often than when the defendant chooses

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124. See Clermont & Eisenberg, *supra* note 20, at 602–03.

125. The circuit split itself treats defendants differently depending on the jurisdiction they are in, and to the serious detriment of some defendants.

126. A lack of uniformity is undesirable because it is “antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved.” Ford, *supra* note 96, at 323 n.16 (citing *Michigan v. Long*, 463 U.S. 1032, 1039 (1983)).

127. For example, institutions with expertise in an area are likely more efficient and more accurate in the adjudication of individual cases.

128. See *supra* Part I.C (describing the historical trend to broadening the removal right for cases brought before the only state adjudicative bodies at the time, state courts).

129. See Clermont & Eisenberg, *supra* note 20, at 602–03.

130. See *generally id.*

131. See Clermont & Eisenberg, *supra* note 20, at 594–95.

the forum. The benefits of forum shopping are also well-documented elsewhere.<sup>132</sup> It is a reasonable inference that the same benefit accrues to defendants removing from state agencies.

Second, there may be biases that influence administrative agencies and that defendants are best suited to identify.<sup>133</sup> There is some evidence, for example, that administrative agencies, including state agencies, have the incentive to self-aggrandize, which can skew their adjudicative decisions.<sup>134</sup> Individual actors and the heads of agencies have incentives to perpetuate their agency's influence and extend its jurisdiction.<sup>135</sup> There is also evidence that plaintiffs who are more certain of a trial's outcome are more likely to sue and carry it to trial.<sup>136</sup> Thus, agencies may entice litigants by offering favorable outcomes to plaintiffs, thereby increasing their own influence. State agencies are not necessarily immune from the same local prejudices feared by the framers of the removal statute.

Of course, the same suggested biases might also influence federal or state judges who handle similar matters but the effects of those biases may be less substantial. First, the judicial branch has a set of neutralizing features that are absent in administrative bodies. For example, judges are democratically accountable in ways that administrative agents are not.<sup>137</sup> In addition, the procedural rules of courts are more complex and more strictly enforced than those of

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132. See Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 200 (2000); Robert A. Zink & Walter E. Zink II, *Eliminating a Most Convenient Forum: The Case for Restricting the Extraterritorial Operation of Neb. Rev. Stat. Section 48-115(2)(b)*, 38 CREIGHTON L. REV. 1, 3 (2004) (discussing forum shopping in Nebraska).

133. They are best suited to know of the biases they face because they appear frequently before administrative adjudicators. Because they are most knowledgeable, they should be empowered to remove the case if they fear a particular bias.

134. See Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 568 (2002) ("The agency head can mobilize subordinate staff in efforts to expand the agency's budget or jurisdiction or both, thus consolidating both the costs and benefits of such an effort into one institutional structure. Subordinate staff will engage in these efforts . . . . They also have an individual interest in augmenting the authority and importance of the agency."); see also Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J. L. & PUB. POL'Y 203, 209-12 (2004) (stating that courts are willing to grant less deference to agencies when the legal question tends to aggrandize an agency's influence); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2127-29 (2002).

135. See Rachlinski & Farina, *supra* note 134, at 568.

136. See Joel Waldfogel, *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation*, 41 J. LAW & ECON. 451, 458-61 (1998) (noting that trial rates are affected by the plaintiff's knowledge of her likelihood to win and by her win rate).

137. Federal judges are accountable because they are appointed by the President, while agency adjudicators are not hired by politically accountable actors. Also, federal judges are constrained by procedural mechanisms that limit their discretion. Finally, even though federal judges do possess a degree of independence in decision-making, they tend not to exercise that independence. See Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575, 583-84 (2014) ("[T]he law makes [judges] publicly accountable. A

administrative agencies.<sup>138</sup> Finally, because judges handle cases in a variety of different areas of law, it is considerably harder for them to apply a consistent policy preference to the cases before them.<sup>139</sup>

The foregoing harms are especially unfair because the appellate process is arduous and costly. Also, is it highly unlikely that a party will eventually obtain judicial review in a federal court. First, all state court systems have a mechanism for judicial review of agency actions.<sup>140</sup> Many states follow the Model State Administrative Procedure Act, which outlines suggested procedures for state agencies and the deference afforded to them in state courts.<sup>141</sup> Thus, the typical path for a dispute originating in a state court is an appeal of the agency's decision to either a state trial or appellate court for review.<sup>142</sup> Then, once the state appeals process has been exhausted, remaining federal or constitutional questions may be appealed to the U.S. Supreme Court.<sup>143</sup> Even if the defendant does successfully navigate the difficult appeals process, the cost of appeals will certainly deter defendants whose transaction costs exceed the cost of the judgment.<sup>144</sup>

Regardless of its normative implications, differences among jurisdictions as to defendants' right to remove must be rectified. The plaintiff's right to forum selection permits her to choose the adjudicative body in which she is most likely to win. At present, defendants may remove cases originating in state agencies in some circuits and not others.<sup>145</sup> This leads to a disparity in the win rates of

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variety of institutions could facilitate that public accountability: executive or legislative appointments, popular elections, the threat of recall, and so forth . . . ."); see also David Pimental, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity*, 57 CLEV. ST. L. REV. 1, 3–4 (2009) (asserting that independence need not, in fact, result in misconduct under certain circumstances). But see Layne S. Keele, *Why the Judicial Elections Debate Matters Less Than You Think: Retention as the Cornerstone of Independence and Accountability*, 47 AKRON L. REV. 375, 376–77 (2014) (framing the long-term retention of judges as leading to the lack of accountability in many cases).

138. Nancy D. Freudenthal & Roger C. Fransen, *Rulemaking and Contested Case Practice in Wyoming*, 31 LAND & WATER L. REV. 685, 686 (1996) (describing the perception of some agency procedures as "second-class" as compared to "complicated" court-like procedures).

139. See, e.g., Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C. L. REV. 1951, 1956–57 (2013) (discussing a variety of procedural safeguards intended to protect against judicial biases, including recusal mechanisms).

140. See William R. Anderson, *Judicial Review of State Administrative Action – Designing the Statutory Framework*, 44 ADMIN. L. REV. 523, 527 (1992).

141. See generally Revised Model State Admin. Procedure Act, 15 U.L.A. 1 (2010).

142. Anderson, *supra* note 140, at 526–28.

143. See Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80, 80–84 (2002).

144. See, e.g., Berch, *supra* note 4, at 104–06 (discussing appellate costs in the context of litigation for large defendants, like Exxon Valdez).

145. See *supra*, Section II.B.

plaintiffs depending on the circuit in which the agency hearing the case is located.

*D. Exposition of Inconsistencies and Negative Consequences  
of the Literal Approach*

In addition to the expected inconsistency resulting from the circuit split described in Part II.C, this Section will explore two inconsistencies that result from adopting the literal approach and discuss their implications to show its doctrinal inadequacy. First, defendants in state agencies may not remove their cases, while defendants in state courts may. Circuits that forbid removal from agencies have the burden of explaining this apparent inconsistency. The differences in outcomes among circuits can deny defendants, unfairly and arbitrarily, the right to choose their forum. In many circumstances, agencies and courts have concurrent jurisdiction.<sup>146</sup> In those cases, the plaintiff's choice determines whether an administrative agency hears a case, rather than a principled legislative decision about the best suited forum. Therefore, when federal courts permit removal from state courts, but not from state agencies, the choice appears to be largely arbitrary.

Second, courts using the literal approach are inconsistent because they force defendants to wait until the agency reaches a final disposition before permitting recourse to another court. This inconsistency results in cases being heard before state agencies where federal question or diversity jurisdiction is properly invoked. In such cases, the defendant may appeal following, but not before, adjudication, even though they intend to appeal. This proceeding is thus superfluous because, if the defendant loses, appeal is inevitable. In addition, the costs of an unnecessary proceeding create significant inefficiencies and delays in the adjudicatory process.<sup>147</sup>

This inconsistency emerged because the first Judiciary Act granted federal courts appellate jurisdiction over state courts by two avenues: through removal and following a final disposition.<sup>148</sup> Removal is itself a mode of appellate jurisdiction; that is, appellate jurisdiction exercised before proceedings begin in the lower

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146. See, e.g., *Bellsouth Telecoms, Inc. v. Vartec Telecom, Inc.*, 185 F. Supp. 2d 1280, 1284–85 (N.D. Fl. 2002); Emily M. Rector, Note, *Removing from State Administrative Agencies*, 84 NOTRE DAME L. REV. 2269, 2278 (2009).

147. Carrie E. Johnson, Comment, *Rocket Dockets: Reducing Delay in Federal Civil Litigation*, 85 CALIF. L. REV. 225, 229, 240 (1997).

148. See Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PENN. L. REV. 1499, 1535 (1990).

court.<sup>149</sup> In *Martin v. Hunter's Lessee*, Justice Story described removal as appellate jurisdiction (permitted by Article III of the Constitution and granted by Section 12 of the Judiciary Act of 1789) exercised before state courts have undergone proceedings.<sup>150</sup> In general, defendants may appeal state agency cases to federal courts if federal question or diversity jurisdiction are properly invoked.<sup>151</sup> Thus, there is a discrepancy among different stages of appellate review. In some cases, despite the fact that a party may eventually appeal to a federal court, she may not “appeal” the case through removal from the state agency. When federal courts (rarely) review agency decisions, they do so as original civil actions (either under a *de novo* or deferential review standard), and not under their appellate review authority.<sup>152</sup> Thus, considerable inefficiencies will result from this inconsistency; two adjudicative bodies will review entire cases, wasting adjudicatory time and money.

This Part has established that there are disparities between the success of plaintiffs in state agencies and federal courts. Also, the appellate process is significantly more arduous for the typical defendant, who is required to pass through the administrative appeals, state appellate, and then federal appellate process. Few defendants survive this process long enough to be heard by a federal court, in part because appeal is almost always cost-prohibitive.<sup>153</sup> If we consider the faults of the appellate process, then, there is an evident difference in outcomes between jurisdictions that permit removal and those that do not. Thus, the various inconsistencies inherent in the current treatment of removal from state agencies could result in unjustified harm to some defendants and not others, namely through their lower chances of winning and the high costs of appeal. In addition, when federal courts forbid parties from removing, cases are heard in more forums than are necessary, making the courts hearing these cases less efficient.

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149. See *Martin v. Hunter's Lessee*, 14 U.S. 304, 349 (1816) (“If, then, the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as congress is not limited by the constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment.”).

150. *Id.* at 349–50 (1816).

151. Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 616 (1999). In many cases, federal courts have procedures of abstention, which curtails this possibility. *Id.* at 616–17. Nevertheless, some cases remain in which appeals are properly brought before federal courts.

152. *Id.* at 660–61.

153. See, e.g., Berch, *supra* note 4, at 106–07 (discussing appellate costs in the context of litigation for large defendants, like Exxon Valdez).

## III. A TAILORED SOLUTION

The functional approach is preferable to the literal approach to decide whether a state agency proceeding may be removed under 28 U.S.C. § 1441.<sup>154</sup> As a general presumption, courts should permit removal from any adjudicatory state proceeding. To decide whether an agency is a *court* for the purposes of removal, it should use the *Floeter* test.<sup>155</sup> That is, a court should treat a state agency as a court if it is “substantially similar to those traditionally associated with the judicial process.”<sup>156</sup> As defined more narrowly in *Ford Motor Co. v. McCullion*, the test should include, as factors, whether the agency performs the following functions: “filing of pleadings”; “taking of depositions”; “issuance of subpoenas”; “contempt powers”; and “powers to act, namely: injunctive, declaratory or compensatory relief.”<sup>157</sup> This list of functions is non-exhaustive and courts have frequently applied other factors to decide whether an agency body is sufficiently “court-like.”<sup>158</sup>

First, this Part describes a variation on the functional approach that will best serve the purposes of both legislative intent and public policy. Next, it justifies the rule with arguments relevant to two alternative institutional actors. It will argue that Congress should clarify its intent via statute to resolve the lack of clarity in 28 U.S.C. § 1441’s application to state administrative agencies. Then, if Congress does not act, the courts should use the legislative history of the statute to conform the rule to Congressional intent.

In Section A, this Part explains two classes of adjudication where state agencies should not be treated as courts for the purposes of removal. Section B discusses why the functional approach as modified by these exceptions conforms to public policy considerations. Section C describes how the modified functional approach conforms to legislative intent. Section D considers and responds to possible criticisms.

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154. See *supra*, Part II.C and II.D.

155. Most courts that apply the functional approach have adopted this test. It offers a common sense taxonomy of agency actions, where adjudications that could have been brought in a court, and that have many or all of the same features as a court, may be removed to federal court.

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

157. *Ford Motor Co. v. McCullion*, No. C2-88-142, 1989 U.S. Dist. LEXIS 19116, at \*6-7 (S.D. Ohio April 14, 1989).

158. *Ford*, *supra* note 96, at 332-33. The question of which exact factors demonstrate that an adjudicative body is court-like is not within the purview of this Note.

*A. Functional Plus: A Variation on the Rule*

The general *Floeter-McCullion* factors should be limited in two circumstances to best accord with the legislative intent underlying the first Judiciary Act and public policy considerations. First, cases should not be removable from agencies when agency expertise is so vital that a federal judge is not able to handle the case as well as an agency adjudicator. Judges should consider whether the subject matter of an agency's adjudication requires specialized legal or technical knowledge that gives the agency a significant advantage over courts in justly deciding a case. For example, state agencies that resolve water rights issues under both federal and state statutes rely heavily on the technical expertise of the agency.<sup>159</sup> In such cases, the agency relies on its institutional knowledge and the expertise of engineers and scientists to reach decisions regarding the rights of claimants to various waters.<sup>160</sup> It would be inappropriate to remove such cases because federal judges are ill-equipped to handle those disputes. In comparison, if state agency adjudications use methods judges are familiar with, like in disputes over collective bargaining agreements, then they should be removable.

Second, cases should not be removable from administrative agencies whose statutory authority expresses a clear Congressional intent to prefer the plaintiff. Congress often considers the third-party policy effects resulting from the agency forum.<sup>161</sup> It also designates agencies in order to ensure that claimants receive a low-cost and timely judgment.<sup>162</sup> In such cases, the legislative intent should trump the general rule permitting removal. For example, agency proceedings should not be removable in proceedings before a state Fair Employment Practice Agency in a suit under Title VII of the Civil Rights Act.<sup>163</sup> Title VII creates a presumption in favor of the plaintiff's employment discrimination claim by granting her

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159. John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299, 362 (2006).

160. *Id.*

161. *See Removal to Federal Courts from State Administrative Agencies*, 69 YALE L.J. 615, 619–20 (1960).

162. *See id.* at 619.

163. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, FAIR EMPLOYMENT PRACTICES AGENCIES (FEPAs) AND DUAL FILING, <http://www.eeoc.gov/employees/fepa.cfm> (last visited September 27, 2015). A Fair Employment Practice Agency is a state adjudicative body empowered to hear federal and state employment discrimination claims. *See* Notes & Comments, *Removal to Federal Courts from State Administrative Agencies*, 69 YALE L.J. 615, 619–20 (1960).



broad discretion in choice of forums.<sup>164</sup> Further, the legislative history similarly suggests that Congress intended to favor the plaintiff's choice of where to bring her case.<sup>165</sup> In Title VII cases, Congress intended for the plaintiff to have a broad range of forum options so that the statute would provide protection from harmful practices.<sup>166</sup>

*B. The Legislative Solution: An Argument from Public Policy*

The preferable solution to the problems listed above is legislation that clarifies the scope of 28 U.S.C. § 1441. It should permit removal from state agencies that have court-like proceedings under the *Floeter-McCullion* criteria, but do not fall into one of the above-mentioned exceptions. A legislative change that broadens the scope of the removal statute is clearly justified by public policy considerations, including fairness to defendants, efficiency of court proceedings, and consistency across jurisdictions and forums. This modification permits Congress to encompass the public policy considerations in establishing the test for a court-like agency proceeding, without reference to the original removal statute. The preferable public policy considerations are perhaps clearer than the legislative intent behind the statute (which courts must ascertain by parsing through documents over a century old), and a statutory amendment is more likely to be consistently applied across jurisdictions.

First, the rule described above ensures that civil defendants are guaranteed as much of a right to choose their forum as are plaintiffs. As discussed in Part I, removal is necessary to allow defendants to choose the forum in which their case is heard.<sup>167</sup> To ensure fairness to both parties, removal avoids many of the disadvantages caused by forcing a defendant to remain in the plaintiff's choice of forum.<sup>168</sup> Considerable evidence indicates that the ability to choose one's forum is an advantage in litigation.<sup>169</sup>

In addition, fact-finding in state agencies may be given preclusive weight in later appeals, binding the defendant to decisions of the agency because she could not remove her case.<sup>170</sup> Courts apply a

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164. Piper Hoffman, *How Many Plaintiffs Are Enough? Venue in Title VII Class Actions*, 42 U. MICH. J.L. Reform 843, 845 (2009).

165. *See id.* at 847.

166. *See Mahoney, supra* note 93, at 332–33.

167. *See supra*, Part I.C.

168. *See supra*, Part II.A.

169. *See, e.g., Clermont & Eisenberg, supra* note 20, at 602.

170. Ford, *supra* note 96, at 340.

common law rule akin to the full faith and credit statute, 28 U.S.C. § 1738, to state administrative agencies.<sup>171</sup> This rule gives agency fact-finding preclusive effect and the federal reviewing body is required to give “substantial weight to final findings and orders” of state administrative agencies.<sup>172</sup> Thus, in some cases, not only is the appeal likely to be cost-prohibitive, but federal courts must also give substantial weight to the agency’s findings of fact.

The exception to the *Floeter-McCullion* rule, which forbids removal where there is a clear Congressional intent favoring plaintiffs, provides a tool of statutory construction for courts. The *Floeter-McCullion* rule presumes that Congress intends fairness to defendants in every statute that might be adjudicated in a state administrative agency. However, where Congress has specifically spoken on the subject with respect to a given statute, the rule gives way in favor of Congress’s particular policy preference. Congress may justifiably advantage one party where one party typically has more resources to fund a legal challenge,<sup>173</sup> for example, or where a particular group or class has been historically discriminated against.<sup>174</sup>

Second, this rule will increase the efficiency of overall adjudicative proceedings in the long run. There are two possible (and opposed) efficiency consequences to the functional approach. On the one hand, this rule may generate inefficiencies because it opens up federal dockets to many more defendants.<sup>175</sup> Some have argued that the opportunity to remove cases to federal court will result in many defendants taking advantage of that opportunity, further burdening the federal docket and creating costly delays in the state agency proceedings.<sup>176</sup> The functional approach may, however, ultimately generate efficiencies if those defendants would eventually appeal to federal court.<sup>177</sup> Some courts perform de novo review of

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171. See *University of Tennessee v. Elliott*, 478 U.S. 788, 794 (1986).

172. *Id.* at 795.

173. For example, in labor disputes, employers tend to leverage their litigation resources to get courts to enforce non-compete clauses, where an equal division of resources may yield a different outcome. See, e.g., Norman D. Bishara & David Orozco, *Using the Resource-Based Theory to Determine Covenant Not to Compete Legitimacy*, 87 IND. L.J. 979, 1002 (2012).

174. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e to 2000e-17. See generally Mahoney, *supra* note 93 (discussing the Congressional intent to remove barriers for Title VII plaintiffs).

175. Johnson, *supra* note 147, at 229, 240 (discussing the significant delays in the civil federal court system, the high costs of those delays, and the drain on public resources from increased federal dockets).

176. See *id.*

177. See Matthew J. Sorenson, Note, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 FORDHAM L. REV. 2521, 2527–28 (2014) (discussing the transactions costs that result from being forced into a different forum).

state agency proceedings,<sup>178</sup> and even when they do not, courts must at least examine the agency fact-finding for abuse of discretion and substantial evidence.<sup>179</sup> When a defendant who knows she will eventually appeal is not permitted to remove her case to federal court at the beginning of the proceedings, her case will functionally be heard twice by different tribunals. This unnecessary consequence can be prevented by permitting her to remove her case from the state agency.

The exception to the *Floeter-McCullion* test that forbids removal where an agency has expertise promotes efficiency. While it is generally more efficient for fewer tribunals to hear a particular case,<sup>180</sup> where adjudication requires complicated and specialized knowledge, the body with that knowledge is the logical “court” of first impression. In such cases, if federal courts were the courts of first impression, they would require expert testimony and additional research efforts to reach a decision.<sup>181</sup> Thus, a general interest in efficiency would counsel in favor of including the expertise exception.

Third, the stated rule best produces consistency across jurisdiction and forum. It enforces a commitment to treating similar cases alike. Functionally, in many cases, there is no difference between agency and court adjudication. Consider *BellSouth Telecommunications v. Vartec Telecommunications*, 185 F. Supp. 2d 1280 (N.D. Fla. 2002). In that case, the court held that the defendant was not entitled to removal because the state agency that heard its case did not perform the functions of a court.<sup>182</sup> The court permitted the plaintiff to either bring its case in a state court or before a state agency because both tribunals had legitimate jurisdiction.<sup>183</sup> Because the plaintiff chose a state agency, the defendant could not remove the

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178. See Ford, *supra* note 96, at 349.

179. See Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1165–66 (1995).

180. See, e.g., Anne Bowen Poulin, *Prosecution Use of Estoppel and Related Doctrines in Criminal Cases: Promoting Consistency, Tolerating Inconsistency*, 64 RUTGERS L. REV. 409, 414 (2012) (discussing the efficiency gains from rules that limit re-litigation of issues).

181. See Michael Penney, Note, *Application of the Primary Jurisdiction Doctrine to Clean Air Act Citizen Suits*, 29 B.C. ENVTL. AFF. L. REV. 399, 420 (2002) (discussing the inefficiencies inherent in courts attempting to adjudicate cases over which they need technical expertise).

182. *Bellsouth Telecomm., Inc. v. Vartec Telecom., Inc.*, 185 F. Supp. 2d 1280, 1283 (2002).

183. *Id.* at 1284–85 (“[Such claims] are normally filed in [state] court . . . 364.07, Fla. Stat. (2001) . . . gives the Florida Public Service Commission jurisdiction to resolve at least some disputes between carriers.”).

case.<sup>184</sup> Thus, it is arbitrary to advantage the plaintiff so significantly in one of these forums but not the other when both the agency and the court could hear the case.

*C. The Judicial Solution: An Argument from Legislative Intent*

If Congress does not resolve the circuit split with clearer text, courts should nevertheless apply the above interpretation based on an analysis of legislative intent. The policy considerations that Congress should consider parallel the legislative intent of the statute's authors. Congress first passed the removal statute to protect the rights of defendants and to allow for broadly permissive removal from the only state adjudicators at the time, state courts.<sup>185</sup> Although courts have recently applied the literal approach to the removal statute, a commitment to legislative intent would require courts to apply the functional approach. This approach best conforms to the changed and changing adjudicatory landscape.

The legislative history of the 1789 Judiciary Act suggests that Congress intended the removal statute's diversity provision to address the concern of fairness to defendants, one of the main justifications of the functional approach. Under the 1789 Act, defendants were only permitted to remove for purposes of diversity and not on the basis of federal-question jurisdiction.<sup>186</sup> Thus, under the 1789 Act, plaintiffs held the exclusive right to choose their forum.<sup>187</sup> Under a draft of the Act, removal was only permitted for defendants in state courts, but the Judiciary Committee ultimately expanded the right of removal to both plaintiffs and defendants.<sup>188</sup> In addition, under a draft version of the Act, diversity jurisdiction would have applied even if neither party were a citizen of the state in which the claim was brought.<sup>189</sup> The final version requires that one party must be a citizen of the state in which the claim was brought.<sup>190</sup> Thus, Congress considered a much broader application of the statute in its previous versions, but ultimately decided on a rule that applied only to defendants.<sup>191</sup>

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184. *Id.* at 1281 ("I conclude that the Florida Public Service Commission is an administrative agency, and not a court, both generally and when addressing matters of this type, and that removal therefore was improper.").

185. Collins, *supra* note 46, at 743; Warren, *supra* note 11, at 92.

186. Judiciary Act of 1789, ch. 20, 1 Stat. 73 § 12.

187. See Collins, *supra* note 46, at 743.

188. Warren, *supra* note 11, at 92.

189. *Id.* at 90–91.

190. Judiciary Act of 1789, ch. 20, 1 Stat. 73 § 12.

191. See *supra* note 51 and accompanying text.

The legislative intent underlying the federal question removal statute similarly supports the functional approach. As described in Part I.C, the legislative history of the Judiciary Act of 1875 suggests that Congress intended to broaden federal jurisdiction for many reasons, including fear that state courts were hostile to applying federal law, apprehension that the law would not be applied uniformly, and doubts regarding the competency of the state courts.<sup>192</sup> With these purposes in mind, the 1875 Act should be understood as conferring a broad right of removal from state courts.<sup>193</sup> The expanding jurisdiction of administrative agencies naturally shifts the balance of cases away from state courts.<sup>194</sup> However, this frustrates the original intent of Congress in permitting removal, at least in part out of concern for defendants.<sup>195</sup>

Legislative intent similarly justifies the exceptions to the general rule. First, the exception for a clear Congressional preference for plaintiffs is justified by legislative intent because the removal statute should be read as conferring only a presumed right of removal. While the removal statute may establish a general Congressional preference for fairness to defendants and broad permission to remove from state adjudicators, it should not trump later evidence that Congress intended to favor plaintiffs in particular types of disputes. Second, the agency expertise exception avoids Congress's main worry that state courts lacked expertise.<sup>196</sup> In these areas, adjudicator expertise in applying federal law motivates a decision to forbid removal because the state agency has the technical knowledge to accurately apply the law.

#### D. Response to Criticism

Opponents of the functional approach assert that the removal process will frustrate some of the purposes of state administrative agencies, including the development of expertise, easing the delay and costs inherent in judicial proceedings, and creating a forum for interests disfavored by courts.<sup>197</sup> Also, there is an alleged expressive concern that results from this rule: state agencies become undervalued and removal may function as an “implicit insult” to those

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192. See also Seinfeld, *supra* note 12, at 104–09; Wiecek, *supra* note 11, at 341.

193. See *supra* Part I.C (explaining the trend toward broadening defendants' right to removal).

194. See *supra* Part II.C.

195. See Seinfeld, *supra* note 12, at 104–09.

196. *Id.* at 108–09.

197. See, e.g., Haggard, *supra* note 109, at 1868.

agencies.<sup>198</sup> The modified rule recommended by this Note is responsive to all of these concerns.

First, the expertise exception directly responds to the first critique leveled by opponents. Where there is highly technical or complicated knowledge required to resolve a dispute, the court of first impression should always be the administrative agency. However, many state agencies do not have specialized technical knowledge, but rather, exist for other reasons (including efficiency, the desire for quick resolution of disputes, and the ability to conduct a more detailed factual investigation).<sup>199</sup> In such cases, the expertise argument for a literal approach is unwarranted.

Second, some critics challenge the efficiency consequences of incorporating state agency adjudications into the federal court system.<sup>200</sup> They argue that the ability to remove cases will create an incentive for parties to frustrate and delay the federal judicial process.<sup>201</sup> The ability to remove to federal court (and the ancillary consideration of whether a state agency adjudication is court-like) may delay the administrative process and further burden federal dockets.<sup>202</sup> The corresponding increases in efficiency from the proposed rule likely outweigh the increased delay and other anticipated inefficiencies (as argued in Part II.C). By reducing the number of tribunals in which a case must be heard, removed cases will lighten the burden on both administrative agencies and federal courts. As of yet, no reliable empirical data exists comparing the efficiency outcomes between jurisdictions that do and do not apply the functional approach. Nevertheless, the fairness and competency concerns tend to tip the scale in favor of the proposed rule.

Third, where the purpose of a state agency is to offer a forum to plaintiffs whom courts often disadvantage, the Congressional preference exception to the functional approach should apply. For example, plaintiffs with limited resources often cannot afford to engage in costly and time-consuming litigation. By exempting agency adjudication where Congress has expressed a preference for plaintiffs, this criticism can be entirely avoided. If the purpose of the adjudicative body is to give plaintiffs a unique forum, it would be self-defeating to permit defendants to remove from that forum at will.

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198. Chemerinsky, *supra* note 54, at 512.

199. Haggard, *supra* note 109, at 1868–69.

200. *See* Johnson, *supra* note 147, at 229, 240; *see also* Haggard, *supra* note 109, at 1868.

201. Haggard, *supra* note 109, at 1867–68.

202. *Id.* at 1868; Johnson, *supra* note 147, at 229, 239.

Finally, the recommended rule may add to the “implicit insult” to state courts by applying it to state agencies.<sup>203</sup> This expressive argument suggests that the rule undervalues the role of state administrative agencies.<sup>204</sup> First, this contention probably mischaracterizes the expressive effect. By permitting a defendant to remove, the functional approach merely asserts a defendant’s right to have her case heard where she believes she will most likely win. Defendants also know that agencies have expertise and efficiencies that federal courts do not have. The rule does not create a preference for federal courts, but merely gives defendants the same choice of forum that plaintiffs enjoy. Second, even if the recommended rule does undervalue state agencies, the expressive concerns should not trump the rights of actual parties.

#### CONCLUSION

This Note demonstrates that a modified functional approach is the most logical and natural interpretation of the removal statute. Often, state agencies perform the same functions as state courts, but the parties before them are treated differently. A literal approach misconstrues Congressional intent of the removal statute: it does not matter whether a tribunal is *called* a court; it matters whether a tribunal *acts* as a court. Because of some Circuits’ strict textualism, courts have failed to adapt the statute appropriately to changing times. In the process, defendants, agencies, and courts are all harmed. If agencies are more qualified, then cases should not be removable. Also, where Congress conveys a clear preference for plaintiffs, cases should not be removable. In all other court-like agency tribunals, the just and reasonable solution is the functional approach.

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203. Chemerinsky, *supra* note 54, at 512.

204. Haggard, *supra* note 109, at 1868.