REVERSING A WAYWARD TREND: Why Courts Using the Functional Test For Removal Are Right

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ABSTRACT

The federal courts are divided concerning the interpretation of the general, federal removal statute 28 U.S.C. § 1441(a). The statute states that a defendant can remove any civil action from state court to a federal district court so long as the federal court has original jurisdiction. Some courts use a functional test to interpret the meaning of "state court," while other courts use the plain meaning test and exclude state administrative courts from the "state court" definition. Thus, in some jurisdictions certain cases can be removed from a state administrative court to a federal district court if the federal court applies the functional test and finds that the administrative court functions as a "court" that provides judicial, binding, enforceable decisions. In contrast, other jurisdictions require cases to continue in administrative court until adjudication is complete, before there is any chance of removal to federal court. This Article analyzes the two approaches and concludes that courts should use only the functional test. Leaving this circuit split unresolved is detrimental to defendants and many cannot afford to be forced to adjudicate a matter through administrative court, only to face a subsequent appeal to a federal court. Furthermore, federal courts are better qualified to interpret federal issues of high interest than state administrative tribunals. The United States Supreme Court or Congress should promptly resolve this issue to prevent further nationwide inconsistencies in interpreting section 1441(a).

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*. J.D. Candidate, May 2015, Arizona State University Sandra Day O' Connor College of Law; B.S. Finance, University of Arizona, 2010. I would like to dedicate this article to Kevin M. Kane, a 1971 graduate of the Sandra Day O' Connor College of Law who died of Hodgkin's lymphoma in 1999 and was like a father to me. Though his presence and advice is phenomenally missed, I know he is guiding me from above. I would also like to thank Professor Patrick Luff, Julia Koestner, Mary Curtin, David Medina, Katie Brown, and the research librarians at the John J. Ross-William C. Blakley Law Library for their help with this article. I urge all law students to get advice from their research librarians when writing journal articles because research librarians are highly knowledgeable legal researchers.

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I. INTRODUCTION

"Removal is but one aspect of 'the primacy of the federal judiciary in deciding questions of federal law.'"[1] The federal removal statute, 28 U.S.C. § 1441(a) reads:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a *State court* of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.[2]

The modern version of the removal statute was enacted in 1948[3] to ensure that better-informed federal courts adjudicate federal questions, instead of other tribunals.[4] Section 1441 was partly designed to provide defendants with a federal forum for federal question claims,[5] but also to protect a defendant's right of removal from state infringement.[6] Despite the lengthy existence of the statute, the statute has caused widespread confusion and inconsistencies,[7] hindering the federal court system. In 2010, about 11% or over 31,000 of all cases awaiting adjudication in federal courts were removed cases,[8] including cases removed from state and administrative courts. These numbers indicate that differing removal statute interpretations are a significant problem that requires an immediate, federal resolution.

In the past, the meaning of "state court" in section 1441(a) included state administrative courts if the administrative court's function was judicial in nature.[9] However, a split emerged among United States courts as to the meaning of "state court," and whether a case can be removed from a state

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1. Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557, 560 (1968).
2. Federal Judiciary Act, 28 U.S.C. § 1441(a) (2012) (emphasis added). Removal is a statutorily created law not mentioned in Article III or anywhere else in the United States Constitution, though removal has existed as early as the original Federal Judiciary Act of 1789, the first congressional implementation of Article III's judiciary power. Article III of the United States Constitution establishes the judiciary branch of the United States government. The clause vests power in the Supreme Court, allows Congress to establish lower federal courts, empowers federal courts to decide cases, and grants federal question and diversity jurisdiction to the federal courts, among other things. U.S. CONST. art. III, § 1, cl. 2.
3. Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 632 (2004).
4. 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.01 (3d ed. 2013).
5. *Id.*
6. *Id.*
7. *Id.* at 107–18.
8. *Id.* at 107–22.
9. *Id.* at 107–18.

administrative court to a federal district court using a functional test. The pre-eminent case supporting the idea that a state administrative court can be a "state court" under section 1441(a) was decided in 1959 in the U.S. District Court for the Eastern District of Wisconsin.[10] At issue was whether a case could be removed to federal court from a state administrative court in the context of a collective bargaining agreement dispute brought before a state labor board.[11] In that case, removal to federal court from the administrative agency was permitted.[12] The issue of whether a case can be removed to federal court from a state administrative court is primarily considered in the context of collective bargaining agreement disputes, but has been considered in different fact patterns.[13]

There is no formulaic functional test; rather, the test is based upon the facts of each case, and courts may have slightly different applications of the test.[14] Essentially the functional test is that where a federal district court has original jurisdiction over a matter removed from a state administrative tribunal to the district court, the district court will evaluate the functions, powers, and procedures of the tribunal to determine whether the tribunal has judicial

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

11. *Id.* at 948 (disputing a collective bargaining agreement before the Wisconsin Employment Relations Board).

12. *Id.* at 951.

13. *See, e.g.*, Or. Bureau of Labor & Indus. *ex rel.* Richardson v. U.S. W. Commc'ns, Inc., 288 F.3d 414, 417–20 (9th Cir. 2002) (proceeding before the Oregon Bureau of Labor and Industries); Wirtz Corp. v. United Distillers & Vintners N. Am., Inc., 224 F.3d 708, 712–16 (7th Cir. 2000) (applying functional test to a proceeding before the Illinois Liquor Control Commission (ILCC) and rejecting removal); Sun Buick, Inc. v. Saab Cars USA, Inc., 26 F.3d 1259, 1261–63 (3d Cir. 1994) (applying functional test to a proceeding regarding a franchise agreement between car dealerships); Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1101–02 (7th Cir. 1979) (proceeding before the Wisconsin Employment Relations Committee); Volkswagen de P.R. Inc. v. P.R. Labor Relations Bd., 454 F.2d 38, 44 (1st Cir. 1972) (proceeding before the Puerto Rico Labor Relations Board); Cnty. of Nassau v. Cost of Living Council, 499 F.2d 1340, 1343 (Temp. Emer. Ct. App. 1974) (proceeding before the Cost of Living Council); Bellsouth Telecomms., Inc. v. Vartec Telecom, Inc., 185 F. Supp. 2d 1280, 1283–85 (N.D. Fla. 2002) (applying functional test in a contract dispute over underpayment of access charges between telecommunications companies); *In re* Petition to Detach Prop., 874 F. Supp. 200, 202–03 (N.D. Ill. 1995) (applying functional test to an annexation proceeding before county school board of trustees and finding that the agency was not a state court). The Fourth Circuit adopted the functional test but for the federal officer removal statute, 28 U.S.C. § 1442 (2013), in Kolibash v. Comm. on Legal Ethics of W. Va. Bar, 872 F.2d 571, 576 (4th Cir. 1989).

14. *See Wirtz Corp.*, 224 F.3d at 712–14; *Sun Buick, Inc.*, 26 F.3d at 1259; *Floeter*, 597 F.2d at 1101–02; *Cnty. of Nassau*, 499 F.2d at 1343; *Volkswagen de P.R. Inc.*, 454 F.2d at 44; *Bellsouth Telecomms., Inc.*, 185 F. Supp. 2d at 1283–85; In re *Petition to Detach Prop.*, 874 F. Supp. at 202–03.

power comparable to a judicial court.[15] Then the district court will consider those factors along with state and federal interests in a case's subject matter to determine whether a case should be removed.[16] Courts that accept state administrative courts as potential state courts within the meaning of section 1441(a) use the functional test to determine whether an administrative court functions as a judicial court, and allow removal to the federal district court when the tribunal functions as a judicial court, but remand back to the tribunal when the tribunal does not act like a judicial court.[17]

On the other hand, courts that outright reject that a state administrative court can be a "state court" under section 1441(a) use a plain meaning interpretation of the removal statute.[18] The plain meaning approach strictly construes the removal statute against removal jurisdiction and narrowly interprets the meaning of "state court" to mean only judicial branch courts, not executive branch courts.[19] Use of the plain meaning approach disallows removal of cases to a federal district court from a state administrative court and results in remand of a removed case to the administrative court for adjudication.

Many district courts do not have guidance from their respective courts of appeals on whether to apply the functional test, whereas some district courts do.[20] The First[21] and Seventh[22] Circuit Court of Appeals have adopted the

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15. *Floeter*, 597 F.2d at 1101–02.

16. *Id.*

17. *Id.*

18. *See, e.g.*, *Oregon Bureau*, 288 F.3d at 419–20.

19. *Id.* at 417–18.

20. District courts in the First, Fourth, Seventh, and Eighth Circuits have followed the functional test. The Fourth and Eighth Circuit Court of Appeals have not published a decision endorsing any test. *See* Ins. Comm'r of P.R. v. Doral Ins. Agency, Inc., No. 05-2230CCC, 2006 WL 3196472, at *5–10 (D.P.R. Nov. 2, 2006); Rockville Harley-Davidson, Inc. v. Harley-Davidson Motor Co., Inc., 217 F. Supp. 2d 673, 678–79 (D. Md. 2002); *In re* Registration of Edudata Corp., 599 F. Supp. 1089, 1090–91 (D. Minn. 1984). District courts within the Sixth and Eleventh Circuits have split over adopting the functional test. *See* Ford Motor Co. v. McCullion, Nos. C2-88-142, C2-87-1459, 1989 WL 267215, at *2–3 (S.D. Ohio Apr. 14, 1989) (concluding that under some circumstances, administrative agencies are state courts but finding removal improper here under the functional test). *Compare* Bellsouth Telecomms., Inc. v. Vartec Telecom, Inc., 185 F. Supp. 2d 1280, 1283–85 (N.D. Fla. 2002) (stating that "a state tribunal that functions as a court is a 'State court'"), *with* Johnson v. Albertson's L.L.C., No. 3:08cv236/MCR/MD, 2008 WL 3286988, at *1 (N.D. Fla. Aug. 6, 2008) (stating that nothing in the text of § 1441 suggests that Congress intended to authorize removal of cases from state administrative agencies), *and* Civil Rights Div., *ex rel.* Joseph v. Asplundh Tree Expert Co., No. 08-60493-CIV, 2008 WL 2616154, at *5 (S.D. Fla. May 15, 2008) (rejecting the functional test).

21. Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd., 454 F.2d 38, 43–45 (1st Cir. 1972).

22. Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1101–02 (7th Cir. 1979).

functional test. In contrast, the Ninth,[23] and Tenth[24] Circuit Court of Appeals have decisively adopted a plain meaning interpretation of the removal statute.[25] The Third Circuit Court of Appeals has used the functional test in the past, but it is unclear whether that court now would follow a plain meaning interpretation.[26]

This Article begins by analyzing the United States Supreme Court precedent used by the first modern court to adopt the functional test to interpret section 1441(a). Then this Article analyzes significant decisions of courts that have adopted the functional test and of courts that have rejected the functional test. Section III discusses why the functional test is preferable to the plain meaning test where there is a federal question at issue. Section IV addresses the common criticism of the functional test. Last, this Article recommends that the United States Supreme Court or Congress resolve this circuit split as soon as possible to provide guidance for judicial courts.

II. THE CIRCUIT SPLIT

This Section describes a situation where too many courts have disagreed over the interpretation of two words in the general, federal removal statute for over half a century. One group of courts uses a functional test to interpret the two words in section 1441(a), "state court." The other group of courts uses a plain meaning test to interpret "state court." In the following discussion, district court and federal circuit court decisions are both included because the first innovative decisions to adopt the functional test and reject the functional test were not appealed to circuit courts. Many circuit courts of appeals relied on the reasoning of these district courts to adopt or reject the functional test. The cases in subsection A describe important court decisions that adopt the functional test and each case in the subsection provides unique aspects of the overall patchwork picture of the functional test and its varied reasoning. The cases in subsection B exemplify the emergence of the plain meaning test and provide the varied reasoning for the test. As it stands, two federal circuit courts of appeals have adopted the functional test, whereas two federal circuit courts of appeals have adopted the plain meaning test to

23. Or. Bureau of Labor & Indus. *ex. rel.* Richardson v. U.S. W. Commc'ns, Inc., 288 F.3d 414, 419–20 (9th Cir. 2002).

24. Porter Trust v. Rural Water Sewer & Solid Waste Mgmt. Dist. No. 1, 607 F.3d 1251, 1255 (10th Cir. 2010).

25. *See id.*; *Or. Bureau of Labor & Indus.*, 288 F.3d at 419–20. Support for the plain meaning approach has been growing since the original implementation of the functional test in 1959.

26. Sun Buick, Inc. v. Saab Cars USA, Inc., 26 F.3d 1259, 1263–67 (3d Cir. 1994).

interpret the meaning of "state court" under section 1441(a). One federal circuit court of appeals is somewhere in the middle, having applied the functional test in the past but now conducting only a half-hearted application.

A. Courts That Have Adopted the Functional Test

The functional test has slightly different elements depending on the court that applies the test, but the general elements remain the same. The functional test first requires that a federal district court have original jurisdiction over a matter brought before a state administrative tribunal, meaning the federal court would be able to hear and decide the matter if the complaint was first brought in federal court.[27] The court then evaluates the "functions, powers, and procedures" of the state administrative tribunal.[28] Though not always explicit in the court opinions, courts often consider those factors along with state and federal interests in a case's subject matter to determine whether a case should be removed to federal court.[29] This additional state-federal interest consideration is more common in cases where a court asserts that a federal interest outweighs a state interest and refuses to remand to a state administrative court.[30] Most often, application of the functional test results in remand to the administrative tribunal,[31] but this does not mean the functional test is useless. On the contrary, the functional test provides an important mechanism for the federal judiciary to assert its power to decide federal substantive law in place of a state administrative agency that is exercising federal judicial power.[32]

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27. *See Floeter*, 597 F.2d at 1102.

28. *Id.*

29. *Id.*

30. *Compare Floeter*, 597 F.2d at 1102 (affirming district court decision that action was properly removed to federal court because state's interests did not outweigh right to remove the action to federal court), *and* Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd., 454 F.2d 38, 44–45 (1st Cir. 1972) (holding that the proceeding was removable to federal court because the state interest was "indeed a limited one"), *with* Wirtz Corp. v. United Distillers & Vintners N.Am., Inc., 224 F.3d 708, 712–14 (7th Cir. 2000) (reversing a district court's holding that federal interests outweighed state interests and ordering remand back to the administrative agency), *and Sun Buick, Inc.*, 26 F.3d at 1264, 1267 (ordering remand back to an adiminstrative agency and holding that the agency was not a "state court," though not weighing state and federal interests in determining this holding).

31. *E.g., Wirtz Corp.*, 224 F.3d at 712–14; Ford Motor Co. v. McCullion, No. C2-88-142, 1989 WL 267215, at *2–3, *5 (S.D. Ohio Apr. 14, 1989); *In re* Petition to Detach Prop., 874 F. Supp. 200, 202–03 (N.D. Ill. 1995).

32. *Volkswagen de P.R.*, 454 F.2d at 45.

1. Wisconsin District Court Creates the Functional Test Using United States Supreme Court Precedent

In 1959, the Federal District Court for the Eastern District of Wisconsin decided *Tool & Die Makers Lodge No. 78 v. General Electric Co. X-Ray Department*.[33] The *Tool & Die* decision was the first to formulate the functional test[34] and courts consider the decision's reasoning as fundamental for adopting the functional test.[35] In the case, employees filed complaints with the Wisconsin Employment Relations Board (WERB) against their employer, General Electric.[36] The employees argued that the company violated a collective bargaining agreement under Wisconsin statute[37] and the corporation moved to remove the case to federal court under 28 U.S.C. § 1441(a), citing section 301(a) of the federal Labor Management Relations Act of 1947 (LMRA).[38]

The question before the court then was whether the WERB was a "state court" within the meaning of section 1441(a).[39] In deciding this important question, the court relied upon *Upshur County v. Rich*[40] as the primary basis for its rationale, stating "it is clear that the Supreme Court of the United States has adopted a functional test rather than a literal test" for interpreting federal statutes dealing with proceedings in state administrative courts.[41]

In *Upshur*, a West Virginia district court accepted removal of a case challenging the land valuation for a tax assessment and refused to remand the case to an administrative tribunal.[42] At issue was the definition of a "suit" within the meaning of the former removal statute, and the United States Supreme Court used its own precursor to the functional test to analyze the issue.[43] The Court noted that the administrative tribunal did not exercise

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33. 170 F. Supp. 945, 947 (E.D. Wis. 1959).

34. *See Sun Buick, Inc.*, 26 F.3d at 1261 ("genesis of the 'functional test' for purposes of removal appears to have been the decision in *Tool & Die*"); *see also* Southaven Kawasaki-Yamaha v. Yamaha Motor Corp., USA, 128 F. Supp. 2d 975, 978 n.3 (S.D. Miss. 2000) ("The origin of the 'functional test' is traced to the Supreme Court's opinion in *Upshur County.*").

35. *See, e.g.*, *Floeter*, 597 F.2d at 1101–02; *Volkswagen de P.R.*, 454 F.2d at 41–44.

36. *Tool & Die*, 170 F. Supp. at 947.

37. *Id.*

38. Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1947); *Tool & Die*, 170 F. Supp. at 947–48. Under section 301(a), suits by labor organizations fall within the original jurisdiction of federal courts, so General Electric argued that the WERB was a state court and that the case was removable to federal court. 29 U.S.C. § 185(a); *Tool & Die*, 170 F. Supp. at 947–48.

39. *Tool & Die*, 170 F. Supp. at 948.

40. 135 U.S. 467 (1890).

41. *Tool & Die*, 170 F. Supp. at 950.

42. *Upshur County*, 135 U.S. at 467–68.

43. *Id.* at 477.

judicial, but rather, quasi-judicial functions,[44] and denied removal because quasi-judicial tribunals are not covered by the removal statute.[45] Although the Court held that the case was not removable because the tribunal did not exercise judicial functions by merely reviewing and correcting the value of the tax assessment,[46] it did not preclude future cases *originating in the same tribunal* from being removed, if, for instance, the tribunal adopted an illegal valuation principle, an unconstitutional tax, or practiced fraud.[47] Thus, whether the dispute was removable depended not on the name of the tribunal, but rather the nature of its processes in relation to the specific facts and circumstances of the case.[48] Unfortunately, this was as specific as the Court got, and it did not offer any more guidance specifying when a case would be removable to federal court from a state administrative tribunal.[49]

Though *Upshur* considered the meaning of a "suit" in the former removal statute,[50] the Supreme Court adopted a functional test and implied that state administrative courts fall within the meaning of a "state court," even calling the administrative court a "state court" multiple times in the *Upshur* opinion.[51] Given the Court's analysis, it is easy to see why the judge in *Tool & Die* cited *Upshur* as an endorsement for the functional test[52] to determine whether, under the current removal statute, a case from a state administrative court is removable to federal court.

In *Tool & Die*, the federal district court found that the WERB functioned as a "state court," despite the Wisconsin Supreme Court previously ruling that the WERB did not exercise judicial functions in part because the WERB had no power to enforce its orders.[53] The district court reviewed the characteristics of the WERB and identified key factors revealing its judicial character.[54] For example, functional factors included that the parties filed a

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44. *Id.* at 471.
45. *Id.*
46. *Id.* at 473.
47. *Id.* at 474. Even though the tribunal swore in witnesses at proceedings, it was not enough to hold the assessment review as a "suit" under the previous removal act. *See id.* at 472.
48. *Id.* at 473.
49. *See id.* at 471–74.
50. *Id.* at 470.
51. Five times to be exact. *Id.* at 468, 470, 477.
52. Tool & Die Makers Lodge No. 78 v. Gen. Elec. Co. X-Ray Dep't, 170 F. Supp. 945, 950 (E.D. Wis. 1959). Other legal scholars also view *Upshur* as endorsing a functional test. *See* Kenneth C. Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Power*, 44 W. VA. L.Q. 270, 284 n.51 (1938); James William Moore & William VanDercreek, *Federal Removal Jurisdiction—Civil Action Brought in a State Court*, 14 SW. L.J. 297, 306 (1960).
53. *Tool & Die*, 170 F. Supp. at 950.
54. *Id.*

complaint and answer and the WERB "sets the time for the hearing of the complaint."[55] The WERB could issue subpoenas to compel attendance of witnesses and depositions could be taken, with reimbursement of the same fees and mileage for witnesses in judicial court proceedings.[56] "A record [was] kept of all court proceedings" and the rules of evidence governed the proceedings.[57] The WERB could punish people that failed to testify or produce documents by applying to a Wisconsin judicial court.[58] The WERB made findings and entered orders that could require that a party cease and desist or reinstate employees.[59] Lastly, the state had allowed the WERB to hear evidence, and declare facts and the law, though the state courts would enforce the administrative board's rulings.[60]

Effectively, the State of Wisconsin sought to prohibit the right of removal to federal court by delegating state court power to the administrative board.[61] The district court was concerned that the State of Wisconsin was punishing a party for exercising its right of removal.[62] The district court pointed out that federal judicial power is independent of the states and states cannot abridge that power.[63] Here, limiting state infringement of federal power was an important consideration of the functional test.[64]

2. First Circuit Follows the Functional Test

In 1972, the First Circuit Court of Appeals adopted the functional test in *Volkswagen de Puerto Rico v. Puerto Rico Labor Relations Board*.[65] In *Volkswagen*, a union brought an action against employer Volkswagen, arguing that the company had breached a collective bargaining agreement between the parties.[66] The union filed a complaint with the Puerto Rico Labor Relations Board (PLRB) and, without answering the complaint, Volkswagen filed an action in the Puerto Rico district court seeking a declaration that the

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55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 951.
63. *Id.*
64. *See id.*
65. Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd., 454 F.2d 38, 41–42 (1st Cir. 1972).
66. *Id.* at 40.

PLRB lacked jurisdiction over the matter.[67] Here, as in *Tool & Die*, there was a federal question regarding section 301(a) of the LMRA.[68]

The union raised what would seem to be a powerful argument against removal, that Volkswagen must first exhaust administrative remedies before removing to the district court.[69] However, the First Circuit pointed to a similar case[70] where the United States Supreme Court had held that administrative exhaustion was unnecessary where the state agency's jurisdiction interfered with a federal law.[71] The court then emphasized that there is "a strong federal interest in uniform substantive labor law."[72]

To decide whether the PLRB was a "state court" within the meaning of section 1441(a), the First Circuit acknowledged that it was faced with a circuit split over whether to apply the functional test.[73] Exploring the reasoning of *Tool & Die*, the court pointed out a few things regarding PLRB proceedings.[74] First, like the WERB in *Tool & Die*, the PLRB had no power to enforce its own orders, but instead had to seek enforcement through the state judiciary.[75] If the federal court removed a case only after the Puerto Rico administrative tribunal had heard the case, litigants trying for removal would be deprived of their right to have facts found in federal court, because the federal court would defer to the PLRB's determinations,[76] similar to *Tool & Die*. The court was concerned that forcing a defendant to go through an administrative proceeding adjudicated by the PLRB would penalize that defendant's right to a federal forum and that a subsequent federal proceeding would simply be a wasteful rehearing of the same issues.[77] An "eleventh hour" removal would render all prior proceedings futile and asserting intent to later remove would reduce the authority of a PLRB proceeding.[78] Furthermore, the court noted that some of the cases or the cases' reasoning relied upon by courts that had adopted the plain meaning test were later

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67. *Id.* at 39–40.
68. *Id.* at 43.
69. *Id.* at 40.
70. Pub. Util. Comm'n v. United Fuel Gas Co., 317 U.S. 456 (1943).
71. *Volkswagen de P.R.*, 454 F.2d at 40.
72. *Id.* at 41.
73. *Id.* at 41–42. The circuit split exists between federal courts that apply the functional test, such as the First Circuit here, and courts that apply the plain meaning test. I further discuss the split in the coming pages. *See* discussion *infra* Part II.B.
74. *Volkswagen de P.R.*, 454 F.2d at 42–44.
75. *Id.* at 44.
76. *Id.* at 42.
77. *Id.* at 42–43.
78. *Id.* at 43.

overruled by the Supreme Court,[79] though the Supreme Court did not directly address the functional test versus plain meaning test issue in those cases.[80] The court here rejected the idea that a state administrative tribunal could not be a "state court," within the meaning of section 1441(a) and was convinced by the *Tool & Die* court's reasoning.[81]

The First Circuit's functional test focused on the PLRB's "procedures and enforcement powers, the locus of traditional jurisdiction over breaches of contract [claims], and the respective state and federal interests in the subject matter and . . . forum."[82] In this case, the court noted that the PLRB's proceeding was adversarial, like in *Tool & Die*; the PLRB directed Volkswagen to respond to the union's complaint; and the PLRB lacked rule-making power under section 301.[83] In addition, the PLRB's adjudicative power suggested that it was a court, though it lacked enforcement power.[84] Most states also had not authorized unfair labor practice proceedings at the time of the enactment of section 301, suggesting that the federal interest was greater than the state interest for section 301 cases.[85] The aforementioned facts led the First Circuit to conclude that under the functional test the PLRB was a state court from which proceedings could be removed to federal court.[86]

3. Seventh Circuit Affirms Use of the Functional Test

In the 1979 case, *Floeter v. C.W. Transport, Inc.*,[87] the Seventh Circuit Court of Appeals validated the use of the functional test for Seventh Circuit courts, which includes the *Tool & Die* Wisconsin district court.[88] *Floeter* was another case between a union and an employer concerning a collective bargaining agreement.[89] Here, the union filed a complaint before the Wisconsin Employment Relations Commission (WERC), and the case was removed to the U.S. District Court for the Western District of Wisconsin by

79. *Id.*
80. Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962); Am. Dredging Co. v. Local 25, Marine Div., Int'l Union of Operating Eng'rs, 338 F.2d 837 (3d Cir. 1964); Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).
81. *Volkswagen de P.R.*, 454 F.2d at 43.
82. *Id.* at 44.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 45.
87. 597 F.2d 1100 (7th Cir. 1979) (per curiam).
88. *Id.* at 1101–02.
89. *Id.* at 1101.

employer C.W. Transport.[90] The issue here once again was whether, under 28 U.S.C. § 1441(a), the WERC constituted a "state court."[91]

The issue of whether a state administrative tribunal could qualify as a "state court" was an issue of first impression for the Seventh Circuit.[92] The court adopted the functional test in a short opinion,[93] approved the *Tool & Die* and *Volkswagen* approaches, and noted that the facts before it were identical to *Tool & Die*.[94] The court's test was simple: "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."[95]

Here, the court applied the functional test and granted removal.[96] Some important factors in the court's decision were that the claims of breach of a collective bargaining agreement and unfair representation "could have been brought in either state or federal court," but would have been determined by federal law either way.[97] The WERC procedures were "similar to those traditionally associated with the judicial process," with the exception that parties had to resort to the court system for enforcement.[98] Lastly, the state's desire to provide a convenient and expedient forum through the WERC did not outweigh the defendant's right to remove to federal court.[99]

B. Courts That Have Adopted the Plain Meaning Approach

In 1966, only a few years after the 1959 *Tool & Die* decision, opposition to the functional test emerged. Though not specifically named or elaborated upon in early decisions, courts criticizing the functional test opted instead for a plain meaning approach to section 1441(a). The plain meaning approach is simpler than the functional test and looks no further than the language of section 1441(a). Because "state court" in the removal statute does not specifically include state administrative tribunals, federal courts applying the plain meaning test do not allow removal from such tribunals. Removal from

90. *Id.*
91. *Id.*
92. Int'l Union of Operating Eng'rs v. Morse, 529 F.2d 574, 577, n.1 (1976).
93. *See Floeter*, 597 F.2d 1000.
94. *Floeter*, 597 F.2d at 1101–02.
95. *Id.* at 1102.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*

a "state court" in a plain meaning jurisdiction seems to require that the court at issue be part of the state's judiciary branch. Over time the plain meaning approach has gained in popularity.

1. Hawaii District Court Sends the Functional Test "Packing" and Starts a Split

In 1966, the United States District Court for the District of Hawaii became the first court to part from the functional test.[100] In *California Packing Corp. v. I.L.W.U. Local*,[101] California Packing Corp. brought its complaint before the Hawaii Employment Relations Board (HERB), alleging a violation of LMRA section 301.[102] HERB, just as the WERC in *Floeter*, could not enforce its orders and had to apply to the state court to enforce its orders.[103]

In this case the adversary union removed to federal district court.[104] In deciding the issue, the court declared the reasoning in *Tool & Die* strained, though did not say why.[105] The court cited two later decisions that undermined *Tool & Die*'s rationale, *Sinclair Refining Co. v. Atkinson*[106] and *American Dredging Co. v. Local 25*,[107] and reasoned that *Tool & Die* would have resulted differently had the newer decisions been available for the *Tool & Die* court.[108] However, *Sinclair* was overruled eight years after the *Packing* decision[109] and *American Dredging Co.* relied heavily upon *Sinclair*'s reasoning.[110] In sum, the Hawaii District Court rejected the functional test and remanded to the HERB[111] in reliance on case law later overturned by the Supreme Court, though the Supreme Court did not specifically address the "state court" interpretation issue in its decisions.[112] Even though the cases relied on in *Packing* are no longer good law, *Packing* has not been overruled

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100. Cal. Packing Corp. v. I.L.W.U. Local 142, 253 F. Supp. 597, 599 (D. Haw. 1966).
101. *Id.*
102. *Id.* at 598–99.
103. *Id.* at 598.
104. *Id.*
105. *Id.* at 599.
106. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 203 (1962).
107. Am. Dredging Co. v. Local 25, Marine Div., Int'l Union of Operating Eng'rs, 338 F.2d 837, 839–40 (3d Cir. 1964).
108. *Cal. Packing Corp.*, 253 F. Supp. at 599.
109. Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962), *overruled by* Boys Mkts., Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 237–38 (1970).
110. *Am. Dredging Co.*, 338 F.2d at 839–40.
111. *Cal. Packing Corp.*, 253 F. Supp. at 600.
112. *Boys Mkts., Inc.*, 398 U.S. at 237–38.

and Hawaii federal courts still use a plain meaning test to interpret the meaning of "state court" within section 1441(a).

2. Ninth Circuit Rejects the Functional Test and Adopts the Plain Meaning Test

In 2002, the Ninth Circuit Court of Appeals decisively rejected the functional test and proudly adopted the plain meaning test in *Oregon Bureau of Labor & Industries v. U.S. West Communications, Inc*.[113] Here was another case involving removal and LMRA section 301.[114] In this case, an employee filed a complaint with the Oregon Bureau of Labor and Industries (BOLI) against her employer, U.S. West.[115] U.S. West removed to the Oregon district court under section 1441(a) and the BOLI moved to remand, arguing that it was not a "state court" from which proceedings could be removed to federal court.[116] The district court applied the functional test, found that the BOLI functioned as a state court, and denied remand to the BOLI.[117]

On appeal, the Ninth Circuit looked to the statutory language of section 1441(a), noting that if the language was clear and consistent, it would go no further to interpret the statute.[118] The Ninth Circuit strictly construed the removal statute against removal jurisdiction as it had in the past.[119] The court did not think the term "state court" was ambiguous and, based on a strict interpretation of section 1441(a), rejected the BOLI as a state court since it was a state administrative tribunal.[120] Interestingly, the court relied in part on the Third Circuit's *Sun Buick* decision for support,[121] even though it is ambiguous whether *Sun Buick* rejected the functional test.[122] Here, although the BOLI conducted court-like adjudications, under the court's plain meaning test, administrative tribunals were not state courts.[123] The Ninth Circuit rejected outright the First and Seventh Circuit's reasoning for the functional

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113. Or. Bureau of Labor & Indus. *ex rel.* Richardson v. U.S. W. Commc'ns, Inc., 288 F.3d 414, 419–20 (9th Cir. 2002).

114. *Id.* at 415.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 417.

119. *Id.* at 417, 417 n.18.

120. *Id.* at 417–18.

121. *Id.* at 418.

122. Sun Buick, Inc. v. Saab Cars USA, Inc., 26 F.3d 1259, 1264–65 (3d Cir. 1994). Some courts have argued that the Third Circuit did not apply a functional test in *Sun Buick*. Gottlieb v. Lincoln Nat'l Life Ins. Co., 388 F. Supp. 2d 574, 579 (D. Md. 2005).

123. *Or. Bureau of Labor & Industries*, 288 F.3d at 418.

test because the court found it unnecessary to go beyond the plain language of the statute, though it did agree that the question of what constitutes a "state court" under the removal statute was a matter of federal law.[124] The Ninth Circuit criticized the functional test as merely a judicially crafted analysis not appearing in or implied by the statutory language of section 1441(a).[125]

Furthermore, the Ninth Circuit reasoned that the functional test replaced the words "state court" in section 1441(a) with "any tribunal having court-like functions."[126] The court further explained that the functional test dramatically expanded federal courts' removal jurisdiction, conflicting with its strict construction of removal statutes to limit federal jurisdiction.[127] The court also disagreed that *Upshur* endorsed the functional test and pointed out that the issue in that case was when an appeal was a removable "suit," not whether a tribunal was a "state court."[128] The Ninth Circuit acknowledged that the Supreme Court had engaged in a functional test analysis, but argued *Upshur* had not endorsed the idea that a state administrative tribunal could be a "state court" for removal purposes.[129] Though the court conceded that *Upshur* might stand for the principle that the label a state attaches to a tribunal does not control the question of whether the tribunal is a "court" for removal purposes, it gave no further discussion on that point.[130]

Regardless of how court-like an administrative agency tribunal's proceedings were, the Ninth Circuit would not ignore the plain language of the removal statute and rejected the functional test.[131] It thus held that the BOLI was not a court and the action was not removable under a plain language interpretation of section 1441(a).[132]

3. Tenth Circuit Adopts Ninth Circuit Approach

In 2010, the Tenth Circuit Court of Appeals became the most recent addition to the plain language team of the functional test debate.[133] In *Porter Trust v. Rural Water Sewer & Solid Waste Management District No. 1*,

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124. *Id.*
125. *Id.*
126. *Id.* at 419.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 419–20.
133. Porter Trust v. Rural Water Sewer & Solid Waste Mgmt. Dist. No. 1, 607 F.3d 1251, 1255 (10th Cir. 2010).

landowners filed a petition with the Logan County Board of County Commissioners (LCBCC) seeking to de-annex their land from the water and sewer district of a utility company.[134] The utility company removed the action to the Oklahoma federal district court.[135] At issue was whether the LCBCC was a "state court" within the meaning of section 1441(a).[136] The district court held that the LCBCC was not a "state court," and remanded to the LCBCC.[137] The utility company appealed to the Tenth Circuit.[138]

Though the utility company cited an unpublished case from a district court within the Tenth Circuit where removal to a federal court from a state administrative tribunal was allowed, the court of appeals disregarded that case as non-binding.[139] The court reasoned, "a state's characterization of its own entity cannot simply be disregarded. The Oklahoma Supreme Court's reasons for characterizing a board of county commissioners as an executive body rather than a court are entitled to consideration as persuasive authority."[140] The utility company pointed to cases from other jurisdictions where the functional test had been applied and showed that the LCBCC exercised quasi-judicial powers.[141] The Tenth Circuit rejected any application of the functional test, noting that more recent authority had rejected or limited[142] the functional test in favor of a plain language interpretation.[143] Though conceding that the LCBCC exercised a judicial function in de-annexation proceedings, the Tenth Circuit still used the plain meaning test

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134. *Id.* at 1252.
135. *Id.*
136. *Id.* at 1252–53.
137. *Id.* at 1253.
138. *Id.*
139. *Id.* at 1253–54.
140. *Id.* at 1254.
141. *Id.*
142. *Id.* As discussed in the next Section, the Third Circuit may have limited the functional test in *Sun Buick, Inc. v. Saab Cars USA, Inc.*, but it still used the test. 26 F.3d 1259, 1263 (3d Cir. 1994). Another Third Circuit decision that rejects the functional test and adopts the plain meaning test is required for the Third Circuit to completely abrogate use of the functional test. While the Tenth Circuit states that in *Wirtz Corp. v. United Distillers & Vintners N. Am., Inc*., the Seventh Circuit limited its holding in *Floeter* to the particular facts of that case, a closer reading of *Wirtz* provides that the Seventh Circuit did not limit *Floeter* as asserted. 224 F.3d 708, 713 (7th Cir. 2000); *Porter Trust*, 607 F.3d at 1255. In *Wirtz*, the Seventh Circuit applied the functional test and remanded the case to an administrative tribunal because no federal law was directly involved in the dispute and because state interests outweighed the federal interests in the case. The case was only before the Seventh Circuit under diversity jurisdiction, not under a federal statute and federal question jurisdiction like in *Floeter*, reducing federal interest in the case. *Wirtz Corp.*, 224 F.3d at 713–14. The Seventh Circuit's analysis in *Wirtz* rings true to the functional test analysis as described in this Article, *infra* Part I.
143. *Porter Trust*, 607 F.3d at 1254–55.

and held that the LCBCC, as an administrative entity, was not a "state court" under section 1441(a).[144]

C. The Third Circuit is Unsure Whether to Use the Functional or Plain Meaning Test

In 1994, the Third Circuit Court of Appeals criticized the functional test in *Sun Buick, Inc. v. Saab Cars USA, Inc.*[145] after faithfully following the test in past decisions.[146] The Third Circuit did not reject the functional test outright, but did call its continued application into question. In *Sun Buick*, the single issue was whether the Pennsylvania Board of Vehicle Manufacturers (PBVM), a state administrative tribunal, was a "state court" within the meaning of section 1441(a).[147] On appeal, the Third Circuit raised the issue *sua sponte* and noted that the lower court used the functional test in compliance with past cases.[148] The court of appeals weighed the Seventh and First Circuits' adoption of the functional test against other jurisdictions' rejection[149] and argued that *Upshur "*held that a court is not necessarily a "court" for removal purposes,"[150] not that an administrative court could be a "state court."[151] Furthermore, the court here said that United States Supreme Court cases had not adopted a broad functional test.[152] Cases decided around the same time as *Upshur* that allowed removal from an administrative tribunal, the court said, were cases in which the tribunals were judicial bodies under state law or the state constitution.[153]

Then, the Third Circuit court distinguished past cases where it had applied the functional test as not interpreting section 1441(a), but rather a similar "state court" provision in the Clean Air Act.[154] Here, the court thought it significant that, although it had applied the functional test in the past, it had never actually found an administrative court to be a "state court" under the test.[155]

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144. *Id.* at 1255.
145. *Sun Buick*, 26 F.3d at 1263.
146. *Id.* at 1263–64.
147. *Id.* at 1260.
148. *Id.* at 1261.
149. *Id.* at 1262.
150. *Id.* at 1263.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

Nonetheless, the Third Circuit still applied the functional test[156] in determining that the PBVM was not judicial in character and therefore not a "state court".[157] The Third Circuit's functional test factors included that the PBVM could not award damages, notwithstanding that it could enjoin a car franchise termination, relocation, or addition, and impose disciplinary sanctions.[158] The PBVM could only levy up to $1,000 in a civil penalty against a licensee violating the Act, less than other administrative agencies that the Third Circuit had ruled were not state courts.[159] In addition, the PBVM was composed of nine vehicle dealers, a salesperson, four members of the general public, and three government officials.[160] It thus lacked the characteristics of disinterestedness, separation from the executive, and learnedness in the law.[161] Indeed, the court noted that "the absence of any requirement of legal knowledge or experience by almost all of the members of the Board [was] striking."[162]

Ultimately, the Third Circuit dodged the issue of whether it would apply the functional test in the future or use the plain meaning test.[163] Trying to minimize the past significance of the functional test, the court re-stated "[g]enerally, the word 'court' in a statute is held to refer only to the tribunals of the judiciary and not to those of an executive agency with quasi-judicial powers."[164] In the end, the court stated that under any test, the PBVM was not a "state court," and the court avoided deciding whether removal is ever permissible from an administrative tribunal.[165] The court indicated, however, that it might grant removal from an administrative tribunal if the tribunal had the power to give relief equivalent to that of a judicial court.[166]

District courts within the Third Circuit are unsure whether to use the functional test.[167] Since no Third Circuit Court of Appeals cases since *Sun Buick* have strictly dealt with the issue of whether a state administrative court

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156. *Id.*; Wirtz Corp. v. United Distillers & Vintners N. Am., Inc., 224 F.3d 708, 714 (7th Cir. 2000) (Ripple, J., concurring) (stating that the Third Circuit called the functional test into question but held that under the functional test, an administrative tribunal was not a state court).

157. *Sun Buick, Inc.*, 26 F.3d at 1263.

158. *Id.*

159. *Id.* at 1266.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 1263–67.

164. *Id.* at 1265 (citation omitted).

165. *Sun Buick, Inc.*, 26 F.3d at 1264.

166. *Id.* at 1265.

167. *See* Borough of Olyphant v. Penn. Power & Light Co., 269 F. Supp. 2d 601, 602–03 (M.D. Pa. 2003); *DeLallo*, 1994 WL 423873, at *3–5 (E.D. Pa. Aug. 12, 1994);.

is a "state court" within the meaning of section 1441(a), it seems that district courts in the Third Circuit, or at the very least in Pennsylvania, still apply the functional test, but are inclined to deny removal as a means of rejecting the functional test.[168]

III. THE FUNCTIONAL TEST: BENEFITS PROVIDED AND PROBLEMS AVOIDED

Though many courts have willingly adopted either the functional test or plain meaning test, few have fully discussed the broad, systemic implications of adopting one test and eliminating the other. Though the functional test requires federal courts to complete a more comprehensive review, the functional test is fairer to defendants. The functional test also allows federal judges, who are more qualified than administrative tribunal members to interpret federal law, to decide more federal questions of high interest and create important case law interpreting federal questions. While there are benefits to both tests, reducing the federal docket is not a legitimate reason to adopt the plain meaning test. For these reasons and others, courts should adopt the functional test instead of the plain meaning test.

A. The Functional Test Gives Defendants a Fair Shake

The functional test is preferable to the plain meaning test because it gives defendants a better chance at justice. The functional test provides defendants with the opportunity to have pressing federal issues decided in federal court.[169] Arguably, federal courts are "better" at adjudicating federal issues compared to state courts and, presumably, state administrative tribunals.[170] Federal judges are compensated more and chosen more selectively than state court judges, and state administrative judges, resulting in a higher level of legal talent for federal courts.[171] At least with respect to removal from state courts, "[r]emoval significantly improves a defendant's chances of prevailing on the merits."[172] Furthermore, the United States Supreme Court has made it clear that a defendant has the right to have a federal question decided in

168. *Id.*

169. Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1101–02 (7th Cir. 1979); Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd., 454 F.2d 38, 44 (1st Cir. 1972).

170. *See* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121–22 (1977).

171. *See id.*

172. *See* JAMES WM. MOORE ET AL., *supra* note 4, at § 107.03.

federal court, even if doing so deprives the plaintiff of a procedural or remedial advantage.[173]

Removal does not unfairly benefit defendants; rather, removal offers defendants the same opportunity as plaintiffs to litigate in federal court.[174] Although a judicial presumption against removal is often premised on the grounds that plaintiffs possess a right to select the forum,[175] this is an invalid presumption not founded in the text of the Constitution nor created by Congress.[176] Plaintiffs do not have any superior right to select a forum and the federal courts were not created strictly for plaintiffs' benefit.[177] The reality is quite to the contrary, given that the plaintiffs' bar's preferred venue is state court over federal court.[178] In fact, the Framers intended that the right to litigate certain disputes in a federal forum be available to both plaintiffs and defendants.[179] Only in the past century have federal courts erroneously abandoned this notion of equality in favor of the plaintiff's superior right to select the forum.[180]

The functional test allows defendants a chance at removal[181] and thus gives defendants in cases that interpret pressing federal issues a better chance at justice. First, the test allows defendants the opportunity to have a federal forum make the findings of its case instead of a state administrative tribunal. Appealing to a federal court after administrative adjudication is an inadequate substitute for a full hearing in federal court. An appeal after administrative adjudication might cause the federal court to defer to the agency's findings of fact or law,[182] which could negatively affect the defendant's case when compared to the federal court making such findings first.[183] In contrast, when a federal district court instead allows a state court to hear a case, the federal issues can still be reserved by a litigant for the federal court, though not

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173. *Volkswagen de P.R.*, 454 F.2d at 41 (citing Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists, 390 U.S. 557, 560 (1968)).

174. Haiber, *supra* note 3, at 611.

175. *Id.* at 657.

176. *Id.* at 657–58.

177. *Id.* at 611–12.

178. *Id.*

179. *Id.*

180. *Id.*

181. Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1101–02 (7th Cir. 1979); Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd., 454 F.2d 38, 44 (1st Cir. 1972).

182. *See Volkswagen de P.R.*, 454 F.2d at 42 (stating concern that denying removal would deprive defendant "of the critical right to have facts found in federal court").

183. *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, 593–95 (1998) (finding that removal effect on case outcomes is sizable and that in federal, non-prisoner litigation question cases, the plaintiff's win-rate dropped from 52% to 25%).

always so for a hearing before a state administrative court.[184] Second, the quality gap between federal courts and state courts[185] presumably extends to administrative tribunals, since the tribunals do not have decision makers as qualified to decide federal issues as federal courts.[186] Thus, there exists a steep bias against defendants before administrative tribunals and the functional test helps even the playing field for defendants by giving them the opportunity to remove to a more qualified adjudicative body.[187]

B. Federal Adjudication of Federal Issues of High Interest is Preferable to Administrative Adjudication

Litigants have a right to have their federal questions decided in a federal forum.[188] The functional test allows federal courts the opportunity to more often decide important, federal questions of high federal interest. The plain meaning test on the other hand sometimes prevents such federal questions from federal adjudication. Litigants in plain meaning jurisdictions may not have the time, money, or knowledge to fully adjudicate their federal questions through administrative exhaustion and then appeal to federal court. The functional test may reduce administrative opportunity to decide federal questions, but section 1441(a)'s limitation to cases of original, federal jurisdiction minimizes the impact on administrative power loss should there be a nationwide implementation of the functional test.[189]

The Federal Judiciary Act indicates that Congress wanted cases of original jurisdiction to be removable from state courts to federal courts,[190] and the same motivations should apply to state agencies acting as courts when deciding federal questions. Federal courts should have the opportunity to interpret cases of important federal interest, such as federal labor law cases,[191] because federal courts are more qualified to do so.[192] In contrast,

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184. *Volkswagen de P.R.*, 454 F.2d at 42.

185. *See* Burt Neuborne, *Parity Revisited: The Uses of A Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 799–800 (1995).

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

187. Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1102 (7th Cir. 1979) (allowing removal of a case from an administrative agency to federal court); *Volkswagen de P.R.*, 454 F.2d at 45 (allowing removal of a case from an administrative agency to federal court).

188. *See* Volkswagen de P.R., 454 F.2d at 41; *See* Haiber, *supra* note 3, at 658–59.

189. Furthermore, the functional test often results in remand to the administrative tribunal.

190. Federal Judiciary Act, 28 U.S.C. § 1441(a) (2012).

191. *Floeter*, 597 F.2d at 1101–02; *Volkswagen*, 454 F.2d at 44.

192. *See, e.g.*, Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 297 (1988); Neuborne, *supra* note 170, at 1123; discussion *supra* Part III.A.

administrative agency tribunals are often composed of laypersons, untrained in the practice of law and unfit to decide important questions of federal law.[193] As the court noted regarding the administrative tribunal in *Sun Buick*, "the absence of any requirement of legal knowledge or experience by almost all of the members of the Board is striking."[194] Assuming that the parity debate regarding quality differences between state and federal courts can be extended to administrative tribunals, clerks and judges in federal courts are better qualified to interpret the meaning of federal statutes, when compared to state courts and administrative agencies.[195] It would make sense to have federal courts, which on average have higher performance compared to state courts,[196] create important federal case law. This is not to say that state courts should never decide federal issues; the costs of having only federal courts decide federal issues would outweigh the benefits and go against the principle of concurrent jurisdiction built into our Constitution.[197] But where federal interests outweigh state interests for important federal issues of high federal interest, as determined by federal district court judges hearing cases removed from administrative tribunals, removal should be permitted. The functional test allows federal judges to consider administrative tribunals' functions to determine whether the tribunals have too much judicial court power and weigh state and federal interests in a case's subject matter to determine whether the case should be removed.[198] Therefore, the functional test respects concurrent jurisdiction, but allows removal for cases of important federal interest. Where there are important federal interests at stake, federal courts should be able to take full advantage of the quality gap[199] between federal and administrative courts by having the functional test in its tool kit.

Moreover, adjudication of more federal questions in federal forums will result in greater legal and economic efficiency. Litigation, in any type of adversarial setting, gets expensive. Parties may be discouraged from appealing a case or even fully litigating a case because of expensive legal costs.[200] These costs discourage parties from appealing to a federal forum after being forced to go through administrative adjudication first.[201] Forcing litigants to go through administrative adjudication before appealing to federal

193. *See* Sun Buick, Inc. v. Saab Cars USA, Inc., 26 F.3d 1259, 1266 (3d Cir. 1994).
194. *Id.*
195. *See* Neuborne, *supra* note 170, at 1121–22.
196. *See* Neuborne, *supra* note 185, at 799–800.
197. *E.g.*, Tafflin v. Levitt, 493 U.S. 455, 458–59 (1990).
198. Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1101–02 (7th Cir. 1979).
199. Neuborne, *supra* note 185, at 800.
200. *See* England v. La. State Bd. of Med. Exam'rs, 375 U.S. 411, 418 (1964).
201. *See id.*

court results in higher litigation costs and thereby discourages parties to litigate important, federal questions in federal court. Federal adjudication of federal issues provides the opportunity for more consistent application of federal law since federal courts publish opinions and are bound by stare decisis, unlike administrative courts. More federal adjudication of important federal issues results in better conformity of the law, which is important because "[t]he removal statutes and the cases decided under them are intended to have uniform nationwide application."[202]

Proponents of the plain meaning test criticize the functional test as merely a judicially developed analysis not appearing in or implied by the statutory language of section 1441(a).[203] But the functional test is merely an extension of federal court interpretation of federal law of high federal interest, and federal courts are supposed to interpret federal law.[204] The functional test weighs case-specific circumstances and federal and state interests instead of merely giving deference to the plain meaning of section 1441(a).[205] As noted by numerous legal scholars, "state legislatures have increasingly granted to administrative agencies functions formerly exercised by courts,"[206] even though federal judges receive better information and are more likely to act for the public interest in rulings than legislatures[207] and are more qualified than administrative tribunals to decide federal questions.[208] Accordingly, now is more urgent a time than ever to adopt the functional test nationwide to balance state executive usurping of power from the federal judiciary.

Last, the functional test promotes fairness for both parties in litigation. In many cases the district court relies on the administrative court's rulings and findings of facts to decide a specific issue and does not fully adjudicate the claim.[209] This could unfairly disadvantage either side in a subsequent adjudication[210] where a less qualified administrative tribunal incorrectly interprets the law or finds facts. The First Circuit expertly summarized part of the problem with requiring administrative adjudication before an appeal

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202. *See* JAMES WM. MOORE ET AL., *supra* note 4, at § 107.03.

203. Or. Bureau of Labor & Indus. *ex rel.* Richardson v. U.S. W. Commc'ns, Inc., 288 F.3d 414, 418 (9th Cir. 2002).

204. *E.g.*, Marbury v. Madison, 5 U.S. 137, 177 (1803).

205. Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1101–02 (7th Cir. 1979).

206. *Removal to Federal Courts from State Administrative Agencies*, 69 YALE L.J. 615, 617 (1960).

207. *See* Patrick Luff, *Captured Legislatures and Public-Interested Courts*, 2013 UTAH L. REV. 519, 519 (2013).

208. *See supra* note 192.

209. *Id.* at 624.

210. *See supra* notes 183–84 and accompanying text.

when it explained that removing near the end of proceedings would render all previous proceedings futile, and asserting intent to remove but having to wait until an administrative order is given would also render such proceedings futile.[211]

C. Federal Docket Management is Not a Legitimate Reason to Reject the Functional Test

Federal docket management is not a legitimate reason to reject the functional test in favor of the plain meaning test. Many federal courts follow a misguided philosophy to limit removal in an effort to reduce or streamline a growing federal docket.[212] The plain meaning test furthers this philosophy since it disallows removal of many cases to federal court and results in remand to the respective state administrative agency. Proponents of the plain meaning test argue that the functional test dramatically expands jurisdiction of federal courts,[213] conflicting with the strict construction of removal statutes to limit federal jurisdiction.[214] However, obstacles against removal can undermine respect for the judiciary and the law[215] where strictly interpreting laws leads to unfair results.[216] Furthermore, federal courts should not be concerned that nationwide adoption of the functional test would significantly increase the federal docket. The functional test is employed by many circuits already,[217] so only courts that apply the plain meaning test would have an increase in removal caseload.

IV. CRITICISM OF THE FUNCTIONAL TEST

Critics of the functional test propose that the United States Supreme Court did not adopt a functional test in *Upshur County v. Rich*.[218] Functional test critics also posit that the removal statute is meant to have a narrow construction, with any ambiguity in interpretation of the statute deferring to remand to the state administrative court.[219] On the other hand, courts that

211. Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd., 454 F.2d 38, 43 (1st Cir. 1972).
212. Haiber, *supra* note 3, at 609.
213. Or. Bureau of Labor & Indus. *ex rel.* Richardson v. U.S. W. Commc'ns, Inc., 288 F.3d 414, 419 (9th Cir. 2002).
214. *Id.*
215. Haiber, *supra* note 3, at 610.
216. *Id.* at 656.
217. *See supra* Part II.A.
218. 135 U.S. 467 (1890); *Or. Bureau of Labor & Indus.*, 288 F.3d at 419.
219. *See id.* at 417–19.

have adopted the functional test agree that *Upshur County* endorses the functional test and interpret the case differently than critics.[220] This Article has offered the functional test jurisdictions' interpretation of *Upshur County*[221] and the policy support for adopting the functional test. The following subsections provide and address the counterarguments to adopting the functional test.

A. Upshur *Did Not Endorse a Functional Test*

The United States Supreme Court's decision in *Upshur County v. Rich*,[222] explained at the beginning of Section II of this Article,[223] provides the rationale federal courts use to adopt the functional test.[224] But parties against interpreting "state court" to include state administrative courts argue that *Upshur* does not endorse the functional test or hold that removal is possible from a state administrative court to federal court.[225]

Critics point out that in *Upshur*, the Supreme Court decided whether a property appraisal became a "suit" at law under the removal statute when appealed from the Upshur County court[226] (a state administrative tribunal) and not whether an administrative tribunal might be a "state court" for removal purposes.[227] The Court held that the appraisal appeal was not a "suit," but rather an administrative affair because the administrative tribunal lacked judicial powers and did not conduct a proceeding between two conflicting parties.[228] Critics also argue that just because *Upshur* held that the county court was not a "state court" for removal purposes, it does not mean that the

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220. *See, e.g.*, Tool & Die Makers Lodge No. 78 v. Gen. Elec. Co. X-Ray Dep't, 170 F. Supp. 945, 950 (E.D. Wis. 1959)).

221. *See* discussion *supra* Part II.A.1.

222. 135 U.S. 467 (1890).

223. *See* discussion *supra* Part II.A.1.

224. *See* Sun Buick, Inc. v. Saab Cars USA, Inc., 26 F.3d 1259, 1261 (3d Cir. 1994) ("genesis of the 'functionalist test' for purposes of removal appears to have been the decision in *Tool & Die*"); Southaven Kawasaki-Yamaha v. Yamaha Motor Corp., USA, 128 F. Supp. 2d 975, 978 n.3 (S.D. Miss. 2000) ("origin of the 'functional test' is traced to the Supreme Court's opinion in *Upshur County*").

225. *E.g.*, Or. Bureau of Labor & Indus. *ex rel.* Richardson v. U.S. W. Commc'ns, Inc., 288 F.3d 414, 419 (9th Cir. 2002); Report & Recommendation on Plaintiff's Motion to Remand at 8 n.2, Smith v. Detroit Entm't, L.L.C., 919 F. Supp. 2d 883 (E.D. Mich. 2013) (No. 12-12967); Erica B. Haggard, *Removal to Federal Courts from State Administrative Agencies: Reevaluating the Functional Test*, 66 WASH. & LEE L. REV. 1831, 1859 (2009).

226. Haggard, *supra* note 225, at 1859.

227. Report & Recommendation on Plaintiff's Motion to Remand, *supra* note 225, at 8.

228. Haggard, *supra* note 225, at 1859.

Supreme Court conversely endorsed the idea that a state administrative court *could be* a "state court" for removal purposes.[229]

However, such assertions exclude important parts of the rationale in the *Upshur* case. It is clear from reading *Upshur* that the Court employs a functional examination to determine whether the county court, an administrative body, exercised judicial functions.[230] Though the issue in *Upshur* was the interpretation of the meaning of a "suit," the Supreme Court did not instead consider whether the administrative court was a "state court" within the meaning of the removal statute because it was presumed outright that the administrative court was a "state court." Evidence for this proposition is the Supreme Court's presumptive reference to the county administrative court as a "state court" in its opinion.[231] Further, the removal statute has evolved and no longer contains the word "suit," but rather substitutes "civil action" for "suit."[232] So to more closely follow *Upshur*, it would seem federal courts should actually assume that an administrative court is a "state court," and instead focus on removing a case from a state administrative tribunal where the case is judicial enough under the functional test to be considered a "civil action" under the current removal statute, section 1441(a).

Critics argue that at most, *Upshur* could stand for the proposition that the label a state attaches to a state administrative tribunal does not control the question of whether the tribunal is a "state court" for removal purposes.[233] But this argument is essentially a concession that the Supreme Court endorsed the functional test. If a judicial court cannot rely upon the label a state gives to a state administrative tribunal, a judicial test would inevitably need to be developed over time to determine whether judicial power is being improperly delegated to a state executive agency.[234] *Upshur* endorses the functional test to determine whether the executive branch is delegating too much federal judicial power to a state administrative tribunal. It may be unlikely that the *Upshur* Court—at a time of dramatic increases in federal dockets resulting from expansive removal provisions in the Judiciary Act of 1875—would seek to increase federal removal power by allowing removal from an administrative tribunal.[235] However, such power balancing of comity

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229. *Or. Bureau of Labor & Indus.*, 288 F.3d at 419.

230. Upshur Cnty. v. Rich, 135 U.S. 467, 467–68 (1890); Tool & Die Makers Lodge No. 78 v. Gen. Elec. Co. X-Ray Dep't, 170 F. Supp. 945, 950 (E.D. Wis. 1959).

231. The Supreme Court references the county administrative court as a state court five times. *Upshur*, 135 U.S. at 468, 470, 477.

232. *See* Federal Judiciary Act, 28 U.S.C. § 1441(a) (2012); *Upshur*, 135 U.S. at 470.

233. *Or. Bureau of Labor & Indus.*, 288 F.3d at 419.

234. *See Upshur*, 135 U.S. at 473–74.

235. Haggard, *supra* note 225, at 1860.

with state courts is often a federal concern, and federal courts still remove cases where merited. *Upshur* endorses removal to a federal district court to check states from delegating too much judicial power regarding important federal issues to state administrative courts.

B. Removal Statutes are Narrowly Construed and Support Remand

Critics of the functional test argue that removal statutes should be narrowly construed,[236] and that expanding the reach of section 1441(a) is inconsistent with Supreme Court instruction to limit federalism and uphold the principle of State independence to adjudicate State cases.[237] Critics are concerned that more federal power to remove cases from state entities would result in greater federal court jurisdiction and adjudicatory power,[238] inconsistent with the framers of the Constitution's intent.[239] Thus, any doubts regarding the validity of removal from a state administrative tribunal to a federal district court should be resolved in favor of remanding to the tribunal.[240] However, as evidenced by the circuit split itself, the meaning of "state court" under section 1441(a) is ambiguous, and where the statutory text is ambiguous, the inquiry does not end with the text.[241] To complicate matters further, there is a lack of documented legislative intent to help decide whether Congress meant to include administrative courts within the meaning of "state court" under section 1441(a). Furthermore, the point of allowing removal from state administrative courts is precisely to increase federal adjudicative power, not to foster federal overreaching, but rather to strengthen federal power to decide important federal issues, as discussed in Section III.B above. The functional test allows removal where the federal interests outweigh the state interests in a case, but where the state interests outweigh the federal interests, a federal court will remand to a state administrative court.[242] The test accommodates narrow construction, preservation of state independence, and judicial comity between state and federal courts by weighing state and federal interests before removal.

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236. Report & Recommendation on Plaintiff's Motion to Remand, *supra* note 225, at 12–14.

237. *Id.* at 12–13 (citing Healy v. Ratta, 292 U.S. 263, 270 (1934)).

238. Palkow v. CSX Transp., Inc., 431 F.3d 543, 555 (6th Cir. 2005).

239. *Id.*

240. *Id.*

241. *See* BedRoc Ltd., L.L.C. v. United States, 541 U.S. 176, 183 (2004) (Rehnquist, J., plurality opinion).

242. *See* Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1101–02 (7th Cir. 1979).

Critics further argue that Congress could have easily included administrative agencies that function as judicial courts within section 1441(a)'s definition of "state court," and believe it is suspect that the removal statute does not mention administrative agencies.[243] On the other hand, Congress could have easily amended section 1441(a) in response to *Tool & Die* and its progeny to outright eliminate removal from state administrative courts to federal courts. Here, the issue is one of a lack of records describing congressional intent regarding the meaning of "state court" in section 1441(a). A lack of documentation leaves us with no information whether legislators meant to include state administrative courts within the meaning of "state court" or even proof legislators know of the judicial ambiguity problem of interpreting the meaning of "state court" in section 1441(a). Thus, it is best for functional test proponents and critics to do away with any congressional intent related arguments for or against the functional test.

V. RECOMMENDATION

The United States Supreme Court denied review of the Third Circuit's *Baughman v. Bradford Coal Co.*,[244] a case that applied the functional test in a removal action.[245] That case from 1979 is the most recent section 1441(a) interpretation case to be petitioned for certiorari. Litigation costs or overall case strategy might be the reason why there has not been a more recent petition for certiorari, but the circuit split over the functional and plain meaning tests has significantly widened since 1979. So it seems the functional test versus plain meaning test issue is ripe for Supreme Court review. An enterprising attorney seeking a chance to argue before the Supreme Court should petition for certiorari and the Court should adjudicate the case to clear up this longstanding, split-causing issue. Congress might also codify the functional test, though courts should not wait for Congress to create a solution. Both the judiciary and Congress have the ability to adopt the functional test nationwide.[246] Congress could simply formulate an addition to section 1441(a) or LMRA section 301 that requires courts to apply a functional test to determine the scope of "state court" in a case. Statutes would not even have to go so far as to define "state court" to include

243. *Id.*

244. 592 F.2d 215 (3d Cir. 1979), *cert. denied*, 441 U.S. 961 (1979).

245. *Id.* at 217.

246. To adopt the functional test nationwide, the Supreme Court could adopt the test in case law or Congress could, among other things, define state court in the Federal Judiciary Act to include administrative tribunals that function as a judicial court.

administrative tribunals, but rather could codify that the functional test be used where there is a challenge that a state administrative tribunal is acting as a "state court" in order to adjudicate federal questions.[247] The functional test, whether congressionally approved or judicially crafted, would best tailor to each situation and result in a more proper adjudication, without overwhelming federal dockets.

The United States District Court for the Eastern District of Michigan's recent decision that adopts the plain meaning test demonstrates that the circuit split concerning interpretation of "state court" is large and growing.[248] The United States Supreme Court should have plenty of upcoming cases to grant certiorari for to adopt the functional test and clear judicial confusion. An ideal case to interpret the meaning of "state court" under section 1441(a) in favor of the functional test might be within the context of LMRA section 301 or another similar federal labor statute. The case would have been removed from a state administrative tribunal under allegations that the tribunal functioned as a "state court" under 1441(a). This tribunal might exist in a functional test jurisdiction, though the arguments for both sides of the functional test are pretty well established by now and would be similar despite the case's beginning jurisdiction prior to Supreme Court review.

In such a hypothetically ideal case for which to petition for certiorari, the administrative tribunal should have characteristics that are "judicial in nature." Proceedings might include the requirement that parties to the suit file a complaint, and the tribunal issue subpoenas or hear witnesses. The rules of evidence may govern the proceedings, and the tribunal may have the power to punish people that fail to testify or produce documents, even if having to apply to a state judicial court for enforcement. Maybe more importantly, the tribunal would declare facts, the law, and decide equitable or judicial remedies. In any event, so long as there are characteristics of a delegation of state judicial power to the state administrative tribunal, such a hypothetical case would give the Supreme Court the opportunity to adopt the functional test. Given that the split has only widened for the past fifty-five years, the Supreme Court has good reason to set much needed precedent for the nation when given its next best opportunity.

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247. An example of an amendment to section 1441(a) that codifies the functional test might read: "'State court' in section (a) includes administrative or other tribunals that function as a judicial or quasi-judicial court. In deciding whether a tribunal qualifies as a "state court" for the purposes of section (a), courts should evaluate the functions, powers, and procedures of an administrative tribunal to determine whether the tribunal has judicial power comparable to a judicial court." Then the court should consider those factors along with state and federal interests in a case's subject matter to determine whether a case should be removed.

248. *See* Smith v. Detroit Entm't, L.L.C., 919 F. Supp. 2d 883, 883 (E.D. Mich. 2013).

VI. CONCLUSION

In conclusion, courts are divided as to whether cases can be removed directly from state administrative agency courts to a federal district court. There are conflicting interpretations of whether *Upshur* endorses use of the functional test and critics argue the removal statute should be narrowly construed. However, a nationwide adoption of the functional test and rejection of the plain meaning test is preferable for several reasons. The functional test gives defendants a fair chance at pleading their case and allows for more federal adjudication of important federal issues, which results in greater legal and economic efficiency. Federal courts are also better qualified to decide important federal issues of high interest than state administrative tribunals. Though more cases would be removed if the functional test were adopted nationwide, federal courts should not be concerned with a substantially higher number of cases on the federal docket because many jurisdictions already employ the functional test, and history dictates that often the application of the functional test results in remand to an administrative tribunal anyway. The United States Supreme Court or Congress should resolve this circuit split in the near future and put an end to the over half a century old disagreement over one of the United States' most important, and highly debated statutes.