REMOVING FROM STATE ADMINISTRATIVE AGENCIES

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INTRODUCTION

It is doubtful that appointees to the federal judiciary expect their posts will require them to stand in the shoes of, say, the Mississippi Motor Vehicle Commission,[1] the Illinois Liquor Control Commission,[2] or the Wisconsin Employment Relations Commission.[3] Equating a federal court with a state administrative agency seems strange, at the very least. What business do federal courts have in the dealings of Mississippi car lots, or Illinois beer distributorships? Perhaps justifiably, there is a mental disconnect between our visions of federal courts and state administrative agencies. They do, after all, find themselves separated by both horizontal and vertical institutional barriers. State administrative agencies are insulated vertically from federal courts through our federal system of government. Moreover, state agencies and federal courts are horizontally disconnected through separation of powers—agencies occupy a position in the executive branch while federal courts are positioned in the judiciary.

In spite of these institutional barriers, removal jurisdiction[4] has the potential to provide a direct link between state agencies and federal courts. In the normal course of things, removal jurisdiction permits federal courts to hear matters which were originally commenced in state courts, provided the federal court has original jurisdiction

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1 For a general overview of the agency, see Mississippi Motor Vehicle Commission, http://www.mmvc.state.ms.us/mmvc/MotorVeh.nsf (last visited Mar. 9, 2009).

2 For a general overview of the agency, see Illinois Liquor Control Commission, http://www.state.il.us/LCC (last visited Mar. 9, 2009).

3 For a general overview of the agency, see Wisconsin Employment Relations Commission, http://werc.wi.gov (last visited Mar. 9, 2009).

4 The general removal statute is found in 28 U.S.C. § 1441 (2006).

over the claim.[5] Procedurally, the defendant petitions the district court to take hold of the matter.[6] At that point, the state court's jurisdiction ceases, and the case is lodged in the district court.[7] The district court's jurisdiction is then subject to remand either at the plaintiff's request or on the judge's own motion.[8] Thus, removal jurisdiction is a procedural mechanism which typically permits federal courts to render judgments in matters commenced in state *courts*.

Through this same procedural mechanism, however, defendants have also petitioned federal courts to take hold of proceedings commenced in state *administrative bodies*,[9] and, surprisingly, in some cases the federal judiciary has accepted the invitation.[10] What follows is a strange turn of events. A proceeding instituted in, for example, the Wisconsin Employment Relations Commission suddenly finds itself whisked off to federal court. A state administrative law judge is swapped for an Article III judge, and the relative informality of administrative adjudication gives way to a full blown federal trial.[11]

What permits removal from a state agency? The federal removal statute[12] allows a defendant to transfer "any civil action brought in a

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5 A federal district court has original jurisdiction in federal question, diversity, admiralty, and many other kinds of civil actions. *See id.* §§ 1331–1333.

6 *See id.* § 1446(a) ("A defendant or defendants desiring to remove any civil action . . . shall file in the district court . . . a notice of removal . . . containing a short and plain statement of the grounds for removal . . . .").

7 *See id.* § 1446(d) ("[T]he filing of such notice of removal . . . shall effect the removal and the State court shall proceed no further unless and until the case is remanded.").

8 *See id.* § 1447(c).

9 Indeed, defendants have petitioned for removal from each of the agencies mentioned here. *See* Wirtz Corp. v. United Distillers & Vintners N. Am., Inc., 224 F.3d 708, 710 (7th Cir. 2000) (considering removal from the Illinois Liquor Control Commission); Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1101 (7th Cir. 1979) (per curiam) (considering removal from the Wisconsin Employment Relations Commission); Southaven Kawasaki-Yamaha v. Yamaha Motor Corp., 128 F. Supp. 2d 975, 976 (S.D. Miss. 2000) (considering removal from the Mississippi Motor Vehicles Commission).

10 *See, e.g.*, Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd., 454 F.2d 38, 40 (1st Cir. 1972) (permitting removal from a labor relations board).

11 *See* Granny Goose Foods, Inc. v. Bhd. of Teamsters, 415 U.S. 423, 437 (1974) ("[O]nce a case has been removed to federal court, it is settled that federal rather than state law governs the future course of proceedings . . . ."); *see also* CHARLES ALAN WRIGHT & MARY KAY KANE, 20 FEDERAL PRACTICE & PROCEDURE DESKBOOK § 42, at 336 (2002) ("A removed case proceeds according to federal procedural rules, as though it had originally been commenced in federal court . . . .").

12 28 U.S.C. § 1441(a) (2006). Here I exclusively discuss the general removal statute; for a discussion of "specialized" bases for removal, see Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 634–35 (2004).

State court" where a federal district court can exercise original jurisdiction.[13] Whether to treat an administrative agency as "State court" for the purposes of the removal statute has recently sparked debate in the federal courts.[14] Two camps have formed. One clutches the words of the removal statute as conclusive proof that an action before a "non-court" such as an administrative agency is not removable.[15] I label this view the "formalist" approach. The other camp treats the words of the statute as a starting point, insisting upon a functional approach that considers the agency's powers and essential nature to determine its "courtness," and from there determines whether the action is removable.[16] I call this competing view the "functional" approach.

Each approach is fraught with difficulties. The central problem with the formalist approach lies in its premise that courts and agencies are inherently different. Recent developments have, to a degree, blurred the distinction between state agencies and state courts. Below I explore the growing similarity between state courts and state agencies in terms of the disputes that they handle as well as in terms of their institutional structuring. I contend that treating removal from a state court as proper while barring removal from a state agency perhaps does not make sense, given that state agencies are increasingly judicial in character.

The functional test comes with its own set of difficulties. In particular, the functional test's assessment of the agency's "courtness" is a highly elastic analysis, which runs the risk of becoming an unprincipled inquiry. Further, there are conflicts among courts about how the test is to be applied—for instance, whether to analyze the "courtness" of the agency's operations as a *whole*, or to analyze how court-like the agency is in handling the *particular dispute*. Lastly, the functional test creates an opportunity for unequal treatment of diversity and federal question cases even though such disparate treatment is not sanctioned by the removal statute.

After surveying the difficulties with the current formal and functional approaches, I conclude that there must be a better way to sort out the "agency removal problem." At the close of this Note, I formu-

13 28 U.S.C. § 1441(a) (emphasis added).

14 *See* Jason Johnston, Oregon Bureau of Labor & Indus., ex rel. Richardson v. U.S. West Communications*: Can Administrative Agencies Be Considered Courts for the Purposes of Removal?*, 26 AM. J. TRIAL ADVOC. 449, 449 (2002); *see also* Rockville Harley-Davidson, Inc. v. Harley-Davidson Motor Co., 217 F. Supp. 2d 673, 676 (D. Md. 2002) ("Whether removal can extend to proceedings before administrative agencies has generated substantial debate in the federal courts.").

15 *See infra* Part I.

16 *See infra* Part II.

late a new functional approach. This new functional approach is an adaptation of the inquiry developed in *Commodity Futures Trading Commission v. Schor*,[17] which considered the extent to which Congress may delegate judicial power to non–Article III decisionmakers, such as federal agencies. I contend that the "modified *Schor* inquiry" is better than the current formalist and functional tests. It disentangles the many competing concerns underlying the agency removal problem, and it promises to fix some of the practical problems courts have had in applying the current tests.

This Note proceeds as follows. Part I begins by summarizing the formalist approach to removal adopted by the Ninth Circuit and surveys the disputes handled by modern state agencies and their institutional structuring. This Part proceeds to question whether it is proper to treat agencies as distinct from courts in the context of removal. Part II then outlines the alternative approach to agency removal, the functional tests adopted by the First and Seventh Circuits, and identifies the practical and conceptual problems that these tests present. Part III presents a new answer to the removal question, sketching a test derived from the *Schor* case.

I. The Formalist Approach to Agency Removal and Attendant Difficulties

This Part addresses the formalist approach to agency removal. It begins by outlining the approach, as articulated by the Ninth Circuit in *Oregon Bureau of Labor and Industries v. U.S. West Communications, Inc.*[18] This Part then further explores the formalist approach's sharp distinction between state courts and state agencies. If the body adjudicating the dispute is a court, removal is permitted; if the body adjudicating the dispute is denominated an agency, however, removal is *not* permitted. This Part then proceeds to question whether making a distinction between state courts and state agencies in the context of removal is logical in light of two considerations. One, the disputes before state agencies and state courts may not be distinct. Two, state agencies are developing a resemblance to state courts in terms of their institutional structuring.

A. The Formalist Approach: Looking to the Federal Removal Statute

One approach to the question of whether actions before state agencies may be removed to federal court is to look to the literal lan-

17 478 U.S. 833 (1986).

18 288 F.3d 414 (9th Cir. 2002).

guage of the federal removal statute. *Oregon Bureau* provides an example of this approach. *Oregon Bureau* involved allegations that U.S. West discriminated against one of its employees after he "accompanied an Oregon state safety compliance officer on an inspection of a U.S. West facility."[19] The employee took his complaint against U.S. West to the Bureau of Labor and Industries (BOLI), an administrative body created under the authority of Oregon law.[20] U.S. West removed to the District Court for the District of Oregon on the basis of federal question jurisdiction.[21] BOLI sought remand, but the district court held that removal was authorized under the statute and denied its motion for remand.[22] BOLI subsequently sought review in the Ninth Circuit.

The Ninth Circuit looked to the plain text of the removal statute: "The issue of whether BOLI is a 'state court' for purposes of 28 U.S.C. § 1441(a) is a statutory construction question . . . . We look first to the statutory language. If it is clear and consistent with the statutory scheme, the plain language is conclusive and our inquiry goes no further."[23] The court found the statutory term "State court" to be clear and consistent with the statutory scheme, and that there was no ambiguity inherent in the term "State court."[24] Because the term "State court" was not ambiguous, the court held that a literal application of the statutory text decided the case. In the court's view, only civil actions "brought in a State court" are removable, and in the case before it, neither party had argued that BOLI was a "State court" in the formal sense. Thus, remand was required:

> It is undisputed that BOLI is *not* a court. The parties agree that BOLI is an administrative agency, albeit one that, like many others, conducts court-like adjudications. Thus, we again need go no further. Because BOLI is not a court, the BOLI proceedings were not removable under 28 U.S.C. § 1441(a). The district court therefore erred in denying BOLI's motion to remand.[25]

Simply put, the Ninth Circuit decided agencies are agencies and courts are courts, and only proceedings from the latter are removable under the plain text of the removal statute.

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19 *Id.* at 415.

20 *Id.*

21 *Id.*

22 *See* Or. Bureau of Labor & Indus. v. U.S. West Comm'ns, Inc., No. 00-883-KI, 2000 WL 1635699, at *2 (D. Or. Oct. 31, 2000).

23 *Or. Bureau*, 288 F.3d at 417 (footnotes omitted).

24 *Id.* at 417–18.

25 *Id.* at 418.

U.S. West, which opposed remand, argued that the removal statute recognized a gray area between agency and court.[26] It asserted that the statutory term "State court" should be read "to encompass court-like administrative agency adjudications."[27] Since BOLI was a court in the functional sense—it was empowered to handle the proceeding in a court-like way—proceedings commenced before it could be removed to federal court.[28] The Ninth Circuit disagreed; the agency's court-like functioning was insufficient to place it within the reach of the removal statute.[29] According to the court, the removal statute does not permit "removal of proceedings from an administrative agency, regardless of how court-like the proceedings may be."[30] Thus, the Ninth Circuit rejected any sort of functional approach to the removal statute and instead adopted a "formalist" approach, whereby removal is only authorized if the proceedings are before an entity formally labeled a court.

The Ninth Circuit is the only court of appeals to have adopted the "formalist" approach, but such an approach may be gaining some ground at the district court level. In *Johnson v. Albertson's LLC*,[31] the District Court for the Northern District of Florida adopted the formalist analysis.[32] *Johnson* considered the propriety of removal from the Florida Commission on Human Rights (FCHR). Plaintiff Carolyn Johnson was an employee of the grocer Albertson's who brought a discrimination claim before the Commission.[33] Johnson contended that Albertson's discriminated against her on account of her race, gender, age, and disability in violation of Florida law and several federal statutes.[34] Albertson's removed the action from the Commission to federal court on the basis of federal question jurisdiction, and Johnson moved to remand.[35]

Like the Ninth Circuit, the *Johnson* court adopted the formalist approach and expressly declined to look at the functions of the agency from which the action was removed. The court decided that its analysis "need not extend beyond the statute's plain language,

26 *See id.*

27 *Id.*

28 *Id.*

29 *See id.* at 419.

30 *Id.*

31 No. 3:08cv236, 2008 WL 3286988 (N.D. Fla. Aug. 6, 2008).

32 *See id.* at *1.

33 *See id.* at *2 (detailing the report and recommendation of the magistrate judge).

34 *See id.*

35 *See id.*

which does not authorize removal of proceedings to [a district court] from an administrative agency."[36] Therefore, because the court readily concluded that a "state administrative agency is not a 'State court' for purposes of § 1441," the court decided it did not need to "analyze the nature and type of functions performed by the FCHR."[37] The *Johnson* court echoed the formalist approach of the Ninth Circuit: a court is a court and an agency is an agency, and removal jurisdiction only extends to proceedings before courts.

Both the Ninth Circuit in *Oregon Bureau* and the *Johnson* court adhere to a strict dichotomy: courts are courts and agencies are agencies. As a result, there can be no agency that is a court within the meaning of the removal statute. On the face of each opinion, it is said that the plain language of the removal statute is conclusive; the agency from which the action was removed is not in fact a "State court" within the meaning of the statute. But, neither opinion ventures a definition of "State court." Presumably, for a tribunal to be a "State court" from which removal is permitted, the tribunal must be a "court" under the state's nomenclature and it must fall squarely within the state's judicial branch as opposed to the executive branch. However, neither opinion defines a "State court" as such explicitly. Definitional uncertainties aside, the formalist approach attempts to provide a simple solution to the administrative removal problem: disallow removal from any agency.

B. Questioning the Formalist Approach: Are State Agencies Truly Different Creatures than State Courts?

The formalist approach is premised upon the notion that state agencies and state courts cannot be equated. This approach is simple to apply—removal from a state agency is not permissible, regardless of how court-like the agency's functioning is. Moreover, its connection to the statutory text is demonstrable; removal is only permitted when the action is commenced in a "State court," and an administrative agency does not constitute a "court." However, are state agencies truly unlike state courts?

Conventional wisdom, of course, tells us that courts and agencies are indeed different creatures. They reside in different branches; courts are positioned in the judicial branch while agencies are a part of the executive branch. Moreover, they are tasked with distinct responsibilities. Courts resolve disputes. Some agencies, too, may take on an adjudicative role that parallels a court, but many others

36 *Id.*

37 *See id.* at *1.

concentrate on tasks—for instance rulemaking—that have no easy analogue in the judiciary.

While conventional wisdom soundly rejects equating court with agency, recent developments in the area of state administrative law have somewhat blurred the distinction between state agencies and state courts. This blurring is evident in two respects. One, there is a growing similarity in the disputes handled by state courts and state agencies. Two, the institutional structures states use to carry out administrative adjudications increasingly imitate the institutional structuring of state judiciaries. Below I discuss each of these trends in turn with the ultimate goal of questioning whether court and agency necessarily demand different treatment in the context of removal.

1. Similarity in Disputes Handled

The conventional wisdom suggests that state courts and state agencies are different creatures. However, in reality they may bear a closer resemblance than the conventional wisdom suggests. Disputes that were previously resolved only before state courts have found their way into administrative forums, suggesting that courts and (at least some) agencies play similar roles. Workers' compensation schemes provide an obvious example. Prior to such schemes, matters regarding injured employees were under the purview of the courts.[38]

Workers' compensation is one area where state agencies have taken on adjudicative responsibilities previously left to courts, but it is not the only one. Recently, some states have taken further steps to shift adjudication of rights from the court system to agencies. For example, the Virginia Birth-Related Neurological Injury Compensation Program[39] shifts adjudication of certain medical malpractice claims from traditional state courts to a state administrative agency.[40] The program provides for an administrative adjudication before the Virginia Workers' Compensation Commission in cases of birth-related neurological injury.[41] The enabling legislation expressly provides that a proceeding before the Commission displaces a civil action in a state court: "[R]ights and remedies herein granted to an infant on account

38 *See* John G. Farrell, *Administrative Alternatives to Judicial Branch Congestion*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 7 (2007).

39 *See* Virginia Birth-Related Neurological Injury Compensation Program, http://www.vabirthinjury.com (last visited Mar. 9, 2009).

40 *See* Farrell, *supra* note 38, at 13; *see also* Matthew Hitzhusen, Note, *Crisis and Reform: Is New Zealand's No-Fault Compensation System a Reasonable Alternative to the Medical Malpractice Crisis in the United States?*, 22 ARIZ. J. INT'L & COMP. L. 649, 687 (2005) (detailing the Virginia program).

41 VA. CODE ANN. § 38.2-5003 (West 2001).

of a birth-related neurological injury *shall exclude* all other rights and remedies of such infant."[42] Florida, too, has shifted jurisdiction of such matters to an administrative agency.[43] The Florida Birth-Related Neurological Injury Compensation Association is structured like the Virginia program—a legislatively created entity provides the exclusive remedy for birth-related neurological injury claims.[44] While the Florida and Virginia programs are limited in scope, they provide certain evidence that states are creating an administrative judiciary to take over some functions that were traditionally held by state court systems.[45]

The Florida and Virginia programs likely reflect states' desire to reap the benefits of agency adjudication. Agencies are known for their "expertise, efficiency, low cost to the claimant, and [their ability to handle] high case volumes."[46] States recognize that certain kinds of disputes are well-suited to permit exploitation of these benefits, and consequently they elect to transfer those claims from courts to agencies. The transfer of some claims to agencies can be understood as a policy choice driven by the desire to capitalize on the benefits of agency adjudication.

If we assume that a primary reason states direct some claims to an administrative agency instead of a court is the state's desire to capitalize on the benefits of administrative adjudication, then it becomes difficult to argue that there is an inherent difference between the disputes adjudicated by agencies as opposed to courts. Suppose a chain of events giving rise to a cause of action for birth-related neurological injury occurs in Virginia, and also in Michigan, which has not passed legislation handing such claims over to an administrative agency. Suppose further that the parties are diverse and the jurisdictional amount is met, such that a federal court would have original jurisdiction over both the Virginia and Michigan claims. Under the formalist analysis, the defendant in the Virginia action would not be entitled to removal—the claim against him was commenced in admin-

42 *Id.* § 38.2-5002(B) (emphasis added). The program constitutes the exclusive remedy except in cases where there is "clear and convincing evidence" of intentional wrongdoing by the physician or hospital. *Id.* § 38.2-5002(C).

43 *See* Farrell, *supra* note 38, at 13.

44 FLA. STAT. ANN. §766.303 (West 2005); Hitzhusen, *supra* note 40, at 687–88.

45 For a concise overview of matters now handled by state administrative agencies which were traditionally handled by state judiciaries, see Farrell, *supra* note 38, at 7–15. Moreover, there are those who advocate for administrative agencies to take over even more functions from the judiciary. *See id.* at 18–26.

46 Robin J. Arzt, *Recommendations for a New Independent Adjudication Agency to Make Final Administrative Adjudications of Social Security Act Benefits Claims*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 267, 280 (2003).

istrative agency, which is not a "State court" under the removal statute. The defendant in the Michigan action, having been sued in a Michigan state court, would be entitled to removal. The defendant in the Michigan action can seek removal since Michigan has not seen fit to shift adjudication of the particular type of claim to an agency. The defendant in the Virginia action, on the other hand, has no chance of removal as Virginia has sought to capitalize on many pluses of administrative adjudication by placing the claim against him before an agency. These similar disputes end up before both agencies and courts as a result of state policy choice, and that policy choice determines whether the defendant can remove.

As demonstrated above, in some situations, the placement of a dispute before a state agency rather than a court may be the result of a state policy choice. There are other situations in which states have not elected to shift jurisdiction over a type of dispute entirely to an administrative agencies; instead states permit agencies to exercise "concurrent jurisdiction" with traditional state courts over certain matters. In such situations the fact that an agency is adjudicating the matter is a result of the plaintiff's choice. The plaintiff could seek relief from a traditional state court or an agency, but, for whatever reason the plaintiff chose an administrative forum.

BellSouth Telecommunications, Inc. v. Vartec Telecom, Inc.[47] is one such example where the plaintiff was presented with the option of either state court or an administrative agency. The case involved a contract dispute between telecommunications carriers; BellSouth claimed Vartec underpaid access charges over a six-year period.[48] BellSouth sought relief from the Florida Public Service Commission, an administrative agency granted authority under Florida law to resolve disputes between carriers.[49] However, as the court expressly indicated, nothing prevented BellSouth from seeking relief in a Florida circuit court.[50] Moreover, since the parties were diverse and the amount in controversy exceeded the jurisdictional minimum, a federal court could have entertained original jurisdiction over the action.[51]

While the *BellSouth* court adopted the functional test for removal, discussed in Part II, it is worth pausing to consider how removal would

47 185 F. Supp. 2d 1280 (N.D. Fla. 2002).

48 *See id.* at 1281.

49 *See id.* at 1283.

50 *See id.* at 1281 ("Had BellSouth sought resolution of this same dispute by filing a civil action in a Florida circuit court, removal . . . would have been proper.").

51 *See id.* ("It is undisputed that BellSouth is a citizen of Georgia, Vartec is a citizen of Texas, and the amount in controversy exceeds $75,000.").

be handled under the formalist approach. Under the formalist approach, the availability of removal would be predicated on the plaintiff's forum choice. The plaintiff chose an administrative forum, entirely ruling out removal under the formalist approach. (Recall that the formalist approach only permits removal from entities denominated "courts."[52]) Had the plaintiff elected a Florida trial court, removal would have been available under the formalist approach. Thus, under the formalist approach, the availability of removal may rest on the plaintiff's choice of forum, even though the underlying dispute remains the same regardless of the plaintiff's election.

As the neurological injury programs and *BellSouth* demonstrate, disputes handled by state agencies are not necessarily distinct from those handled by state courts. State policy choices may result in an agency handling a particular type of dispute as opposed to a court, as in the Florida and Virginia programs. Also, the plaintiff's choice of forum may lead to an agency adjudicating the dispute. So, at least in some circumstances, it is not possible to distinguish an "agency dispute," that is, a matter heard by an agency, from a "court dispute," one heard in a traditional judicial forum. Disputes take on such categorization as an "agency dispute" or "court dispute" due to state policy choice and the plaintiff's forum choice; otherwise the disputes are indistinguishable.

If "court disputes" and "agency disputes" are indistinguishable at least in some circumstances, then the formalist approach is arguably flawed. The formalist approach is premised on a hard-line distinction between courts and agencies, and wholly rejects removal of cases from agencies. But if "agency disputes" are not distinguishable from "court disputes," then why disallow removal in the former instance, but permit it in the latter?

2. Similarity in Institutional Structuring

The prior section discusses how the *matters* themselves heard by state agencies are sometimes indistinguishable from disputes heard by state courts. This section discusses how the *institutional structures* states use to carry out administrative adjudication have developed a striking similarity to the judiciary. The institutional structuring of state administrative agencies is an evolving matter. Recently, there has been a nation-wide movement toward central panels, an institutional structure that removes state administrative law judges (ALJs) from posts in

52 *See supra* Part I.A.

specific state agencies, and places them in their own separate body, to insulate the ALJs from agency influence.[53] Additionally, perhaps as a result of the central panel movement, in many states the decision of the ALJ is considered final—the agency is powerless to override the ALJ's decision or may only override the ALJ's decision in narrow circumstances. Below I discuss these developments, and how they might influence the manner in which removal from state agencies should be handled.

a. Central Panels: Judicializing the Administrative Decisionmaker

States have increasingly placed control of administrative adjudication in the hands of a central panel of ALJs as opposed to housing ALJs within particular agencies.[54] Louisiana opted for a central panel in 1996, followed by Oregon and Michigan in 2000 and Alaska in 2004.[55] All told, twenty-seven states now use central panels.[56] The central panel movement has the effect of insulating administrative adjudication from executive influence.[57] Consequently, administrative adjudication is carried out by an independent body, paralleling adjudication by the judiciary.

Sketching a brief history of how administrative adjudications were carried out in the past illuminates how the central panel movement has extracted administrative adjudication from agency control and radically "judicialized" it. In the past, agencies traditionally assigned the "hearing function" to their own subordinate employees.[58] It was an informal process:

> The responsibility for deciding who would preside over the proceedings at which evidence would be taken, testimony heard and (perhaps) a transcript made, was not exercised with any great amount of care or concern. The persons so chosen might or might not have been lawyers; they might or might not have been independent of peer or staff influence, and they might or might not have

53 John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419, 419–20 & app. (2001).

54 *See* John Hardwicke & Thomas E. Ewing, *The Central Panel: A Response to Critics*, 24 J. NAT'L ASS'N ADMIN. L. JUDGES 231, 231 (2004).

55 *See id.*

56 *See id.* For an overview of the states which currently employ central panels, see Nat'l Ass'n of the Admin. Law Judiciary, Central Panel States, http://www.naalj.org/panel.html (last visited Feb. 26, 2009).

57 *See infra* notes 64–68 and accompanying text.

58 Frederick Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 DUKE. L.J. 389, 391.

> been previously involved in investigative or prosecutorial phases of the proceeding. The sole function of the early presiding officer was simply to monitor or supervise that phase of the proceeding wherein the data, information and arguments which the agency had been told it was required to consider were to be adduced.[59]

The cavalier attitude toward the proceedings and the officers presiding before them was justified by the limited influence that the officer had over the result of the proceedings.[60] The officer "merely monitored the various materials submitted by interested parties, organized them, and submitted the resulting 'record' to the agency heads whom the legislature had charged with the responsibility for action or nonaction."[61] Thus, initially, the presiding officer was hardly analogous to an independent judge with the ability to determine the outcome of the adjudication.

Later, systems were created in which presiding officers not only were fact-finders, but also recommended a disposition in the matters before them.[62] With this step, "an important threshold had been crossed: instead of assuming the passive role of receiving and organizing submissions for appraisal by the responsible authority, the presiding officer was assigned the active role of making a significant contribution to the decisional process."[63] Thus, the presiding officer became more judge-like in one respect; he (at least partially) determined the outcome of the proceedings.

Having the decisionmaker embedded within the agency posed problems. Unlike an Article III–type judge, the decisionmaker was not perceived to be impartial.[64] Concerns with agency influence over the presiding officer became a driving force behind the current movement toward central panels.[65] The central panel movement thus addressed "concerns that an employee of a substantive agency could not be trusted to render a fair and impartial decision in cases involving controversy between the agency and a citizen."[66] Today, more

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59 *Id.* at 391–92.

60 *Id.* at 392.

61 *Id.*

62 *Id.*

63 *Id.*

64 *See* Hardwicke & Ewing, *supra* note 54, at 232 (arguing that any system in which decisionmakers are embedded within the agency creates the potential for "pressure on [decisionmakers] to produce decisions favorable to the agency").

65 *See id.* (stating the mission of a central panel is to combat the bias inherent in the "old system" where the agency was "simultaneously the policeman, prosecutor, judge, and jury of its own action").

66 *See* Hardwicke, *supra* note 53, at 422.

than half of states have implemented the central panel design.[67] This design removes the ALJ from the agency, and, consequently, the ALJ is "freed from the risk of *ex parte* influence and bias in favor of the agency and against the respondent."[68] Thus, the central panel ALJ not only determines the outcome of the proceedings like a traditional judge, but is also shielded from influence like a traditional judge. To a certain extent, administrative adjudication carried out by an independent central panel mirrors the structure of traditional adjudication carried out by an independent judiciary. This further undermines treating actions before administrative agencies as inherently distinct from those before courts and permitting removal only in the latter case.

b. Finality of the Administrative Law Judge's Decision

Treating the administrative law judge's decision as final is another development which brings administrative adjudication closer in line with traditional court proceedings. Until recently, nearly all state administrative procedure acts permitted agencies "to amend the ALJ's findings of fact and conclusions of law with relative ease."[69] Thus, in the past, the agency could exert its influence and effectively overrule the ALJ's decision. Recently some states have made the ALJ's decision final.[70] Some states have given the ALJ's decision final effect via statute,[71] others have provided for "de facto ALJ finality" by restricting agency review of the decision.[72] De facto ALJ finality is accomplished by placing substantial burdens on the agency should it wish to modify or reject an ALJ's factual findings or conclusions of law.[73] Through these methods, states have increasingly put control in

67 *See id.* at 420.

68 Christopher B. McNeil, *The Model Act Creating a State Central Hearing Agency: Promises, Practical Problems, and a Proposal for Change*, 53 ADMIN. L. REV. 475, 476 (2001).

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

70 *Id.* at 1374.

71 *See id.* at 1374–75. Professor Flanagan identifies two states that have enacted statutes making the ALJ's decision final, Louisiana and South Carolina. *See id.* South Carolina's system makes most cases which are heard by its central panel subject to a final ALJ decision. *See id.* at 1375. Louisiana's system also features a central panel of ALJs who issue "final orders, unreviewable by the agency." *Id.*

72 *See id.* at 1376–77.

73 Professor Flanagan's discussion of the modifications made to Florida's system provides insight into this increased burden. *See id.* Florida has "strengthened the protection accorded ALJ findings" by placing the burden on the agency to prove that

the hands of the ALJ to make the final decision in an administrative adjudication. With the ALJ charged to render the final disposition in the case, administrative adjudication further parallels traditional judicial process.

The formalist methodology to agency removal draws a sharp distinction between state courts and state agencies. If the claim comes before a court, removal is permissible. However, if the claim comes before an agency, removal is not permissible.[74] I have questioned whether it makes sense to draw this distinction in light of the fact that courts and agencies on the state level may handle indistinguishable disputes. Policy choices and the plaintiff's discretion over the forum explain how otherwise indistinguishable disputes may end up before courts in some instances and before agencies in others. Moreover, state courts and state agencies share a growing resemblance in their institutional structuring. In many states ALJs have been placed in a central panel, isolated from outside influence, and their decisions have been accorded finality, paralleling structural features of the state judiciary.[75]

In sum, the developments sketched here suggest that modern administrative adjudication has much in common with the traditional judicial process, both in terms of the matters heard and adjudicatory structure. Certainly, these developments do not render state agencies courts in a formal sense, but they suggest that disallowing removal of *all* actions commenced in agencies perhaps is not in line with the increasingly "judicial" character of state agencies. If state courts and state agencies handle like disputes and are structured similarly, why permit removal in the first case and deny in the latter? Such reasoning underlies the functional approach to agency removal, discussed below.

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the ALJ's findings of fact and conclusions of law are incorrect. *Id.* The agency may not unilaterally change a finding of fact or conclusion of law; to modify a factual finding, the agency must show that the finding was not premised upon "'competent substantial evidence'" and must state its reasoning "with particularity in [its] order" modifying the ALJ decision. *Id.* (quoting FLA. STAT. ANN. § 120.57(1)(l) (West 2000)). To modify an ALJ's conclusion of law, the agency must find that its interpretation of the law is "more reasonable than that which was rejected or modified" and "must state with particularity its reasons for rejecting or modifying such conclusion of law." FLA. STAT. ANN. § 120.57(1)(l) (West 2008); *see also* Flanagan, *supra* note 69, at 1377 (discussing the agency's burden should it wish to modify an ALJ's conclusion of law).

74 *See supra* Part 1.A.

75 *See supra* Part 1.B.1.

II. THE FUNCTIONAL TEST: LOOKING TO THE SUBSTANCE OF THE AGENCY

The formalist tack adopted by the Ninth Circuit is not the only approach to agency removal. Perhaps in recognition of the increasingly "judicial" character of state agencies, several courts have adopted a functional approach to the question of whether removal from a state administrative agency is proper. This Part examines the functional approach to agency removal. It first lays out the functional tests adopted the Seventh and First Circuits in *Floeter v. C. W. Transport, Inc.*[76] and *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board.*[77] The remainder of this Part explores the conceptual and practical problems presented by using a functional approach to agency removal.

A. The Functional Approach: Examining the Agency

In stark contrast to the formalist approach to agency removal examined in Part I is the functional approach. The formalist approach attempts to draw a hard line between state courts and agencies, permitting removal in the former instance, but not the later.[78] The functional approach, on the other hand, does not rely on such a hard and fast distinction. Instead, the functional approach utilizes a several-pronged inquiry to determine if the agency is sufficiently court-like to warrant removal.

One oft-cited example of the functional approach is found in *Floeter v. C.W. Transport, Inc.* In *Floeter*, a group of truck drivers claimed their employer had violated the terms of their collective bargaining agreement.[79] The employees took their complaint to the Wisconsin Employment Relations Commission (WERC),[80] a state administrative body established under Wisconsin law to handle employment disputes.[81] The defendant-employer removed to the District Court for the Western District of Wisconsin.[82] The district court

76 597 F.2d 1100 (7th Cir. 1979) (per curiam).

77 454 F.2d 38 (1st Cir. 1972).

78 *See supra* Part I.A.

79 *See Floeter*, 597 F.2d at 1101.

80 *See id.*

81 *See* WIS. STAT. § 15.58 (2008) (providing for creation of the Wisconsin Employment Relations Commission); *id.* § 111.01(4) ("It is the policy of the state, in order to preserve and promote the interests of the public, the employee, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.").

82 *Floeter*, 597 F.2d at 1101.

properly had federal question jurisdiction over the matter as it was an "action to enforce a collective bargaining agreement."[83] The sticking point was whether WERC could be considered a state court for the purposes of removal.[84] In *Floeter*, the Seventh Circuit applied a two-step functional test, first evaluating the "functions, powers, and procedures" of the administrative body, and then considering the "respective state and federal interests . . . in the provision of a forum."[85] Applying the two prongs of the functional test to WERC, the Seventh Circuit found that the agency's procedures were "substantially similar to those traditionally associated with the judicial process."[86] Further, the state's interest in providing a specialized tribunal to adjudicate issues presented by labor disputes was "not substantially greater than the state's interest in maintaining any court system" and did not "outweigh the defendant's right to remove the action to federal court."[87]

The First Circuit has also adopted a functional approach to determine the propriety of removal from state administrative bodies. In *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board*[88] the court used the same factors used in *Floeter*—the functions, powers, and procedures of the state agency and the respective state and federal interests—but also considered an additional factor, the "locus of traditional jurisdiction"[89] with respect to the kind of claim to be adjudicated by the agency. The "locus" factor considers whether the type of claim presented before the agency is one which courts would typically hear. In other words, according to *Volkswagen*, a matter which happens to fall within a court's jurisdiction favors removal. Thus, in deciding whether the defendant could remove a dispute before the Puerto Rico Labor Relations Board, the First Circuit found that "ordi-

83 *Id.* Federal question jurisdiction was founded upon 29 U.S.C. § 185(a) (2006), which provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ."

84 *See Floeter*, 597 F.2d at 1101 ("The only question, then, is whether the Wisconsin Employment Relations Commission was a 'state court' from which the action could be removed.").

85 *Id.* at 1102.

86 *Id.*

87 *Id.*

88 454 F.2d 38 (1st Cir. 1972). In *Volkswagen*, the First Circuit initially considered the issue of whether the Puerto Rico Labor Relations Board was a court for the purposes of removal. *Id.* at 45. Determining the Board to be a court for the purposes of removal then allowed the court to find that the Board had jurisdiction to adjudicate the alleged violation of a collective bargaining agreement. *Id.*

89 *Id.* at 44.

narily courts have adjudicated breaches of contract," such as collective bargaining agreements.[90] Ultimately the proceeding was deemed removable; the *Floeter* factors of the agency's powers and procedures as well as the respective state and federal interests all pointed toward permitting the defendant to have its day in federal court.[91]

B. Flaws in the Functional Methodology

The functional approach carries with it several flaws and difficulties. One, its consideration of the agency's powers, functions, and procedures is highly elastic and runs the risk of becoming an unprincipled analysis. Two, the test leaves unanswered questions regarding how the agency should be analyzed and which prong of the test should predominate. Three, it creates an opportunity for unequal treatment of diversity and federal question cases even though such disparate treatment is not sanctioned by the removal statute. I consider each of these concerns below.

1. Elasticity of the Functional Factors

The first part of the functional test used by the *Floeter* court considers the "functions, powers, and procedures" of the administrative body.[92] This part of the test is designed to measure the "courtness" of a particular administrative body; if the body sufficiently resembles a court, it is considered a "State court" within the meaning of the removal statute. However, the functions, powers, and procedures prong is problematic in that it opens the door to an unconstrained consideration of factors.

This critique becomes more apparent through a survey of the factors invoked by courts applying the functions, powers, and procedures prong of the functional test. A whole host of factors have been considered relevant to an agency's "State courtness." Some factors appear to be directly relevant to how judicial the administrative proceeding is. For instance, courts have taken into consideration the scope of the agency's enforcement power, examining such factors as: the ability of

90 *Id.*

91 *See id.* at 44–45. Regarding the agency's powers, the court held that the fact that the proceeding was "*inter partes*" provided the necessary "threshold characteristic of a 'civil action [brought] in a State court.'" *Id.* at 44 (quoting 28 U.S.C. § 1441(a) (1970)). As to the respective state and federal interests, the court found federal interests had clearly won out—prior cases had chipped away at the state's interest and the substantive law to be applied was purely federal. *See id.* ("The state interest after *Lincoln Mills*, *Dowd Box*, and *Avco* is indeed a limited one.").

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

the administrative body to "enforce subpoenas through a contempt power";[93] the fact that the administrative body must file a separate action in a traditional court to enforce its decisions;[94] and the fact that the administrative body may only suspend the license of a party—it may not provide "declaratory relief, injunctive relief, or monetary damages."[95]

Beyond the agency's enforcement powers, courts have also taken into account the nature of the procedures employed by the agency in conducting the hearing. The pleadings paralleling those utilized in a traditional court proceeding was a relevant factor in one agency removal determination.[96] Other cases considered whether there were discovery procedures and pre-hearing motions.[97] Courts have also considered the parties' right to "present documentary evidence and call witnesses," to "cross-examine adverse witnesses," and to "present summation and argument" as relevant factors to guide the determination of whether an agency acts as a "State court" for the purposes of removal.[98]

Further, this prong of the functional test considers the qualifications and positioning of the decisionmaker in the proceeding. For example, cases have taken into consideration the legal expertise of the decisionmaker.[99] They have also looked to whether the decisionmaker is disinterested in the process and whether the decisionmaker is isolated from the executive branch.[100]

While these factors seem relevant to whether the agency is court-like, many factors considered seem less probative of the agency's "courtness." For instance, one agency removal determination took into account the mileage paid to witnesses appearing before the

93 Gottlieb v. Lincoln Nat'l Life Ins. Co., 388 F. Supp. 2d 574, 580 (D. Md. 2005).

94 *Id.*

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

96 Tool & Die Makers Lodge No. 78 v. Gen. Elec. Co. X-Ray Dep't, 170 F. Supp. 945, 950 (E.D. Wis. 1959) ("The action is commenced by a complaint alleging the violation of the contract, the person complained of has the right to file an answer, and the [Wisconsin Employment Relations] Board sets the time for the hearing of the complaint.").

97 *Rockville*, 217 F. Supp. 2d at 677.

98 *See id.*

99 *Compare* McDowell v. Wetterau, Inc., 910 F. Supp. 236, 238 (W.D. Pa. 1995) (finding decisionmaker showed "learnedness in the law" and permitting removal), *with* BellSouth Telecomms., Inc. v. Vartec Telecom, Inc., 185 F. Supp. 2d 1280, 1284 (N.D. Fla. 2002) (finding decisionmakers lacked legal qualifications and remanding to agency).

100 *See McDowell*, 910 F. Supp. at 238.

agency and to witnesses appearing before a traditional court.[101] The same level of reimbursement favored finding that the agency acted as a state court for removal purposes.[102] Another removal determination took into account whether the agency awarded attorneys' fees.[103] Still another took into account whether the agency followed a generally "adjudicative format,"[104] a factor which seems too vague to hold much value in distinguishing agencies that should be state courts for removal purposes from those that should not.

Consideration of the agency's functions, powers, and procedures invites the court to examine whatever factors it deems interesting in an attempt to understand the nature of the agency and proceeding. It is questionable whether any sort of principled determination of whether the agency is a state court for removal purposes can be made from such an inquiry. Where, precisely, the threshold lies remains a mystery. Does "representation by counsel" plus "disinterested decisionmaker who has legal expertise" plus "awarding of attorneys' fees" equal state court? What about "generally adjudicative format" plus "enforcement powers"? There perhaps is no definite answer. Adding enforcement powers into the mix also complicates the question as there has been considerable disagreement over the probative value of this particular factor; enforcement powers are key to whether the agency operates as a "State court" in some cases, and in others the agency's lack of enforcement powers is dismissed as insignificant.[105]

Thus the functional approach considers such a wide realm of factors that it leaves litigants with little certainty. It is not possible to

101 *Tool & Die Makers*, 170 F. Supp. at 950.

102 *See id.*

103 Wirtz Corp. v. United Distillers & Vintners N. Am., Inc., 69 F. Supp. 2d 1063, 1068 (C.D. Ill. 1999), *rev'd*, 224 F.3d 708, 713 (7th Cir. 2000).

104 Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd., 454 F.2d 38, 44 (1st Cir. 1972); *see also* Floeter v. C.W. Transp., Inc., 597 F. 2d 1100, 1102 (7th Cir. 1979) (per curiam) (relying on the fact that the procedures used by the Wisconsin Employment Relations Commission are "substantially similar to those traditionally associated with the judicial process" without further consideration of what those procedures are).

105 *Compare* Gottlieb v. Lincoln Nat'l Life Ins. Co., 388 F. Supp. 2d 574, 580 (D. Md. 2005) (finding that the Maryland Insurance Administration's lack of enforcement powers counseled against treating it as a court for purposes of removal), *and* BellSouth Telecomms., Inc. v. Vartec Telecom, Inc., 185 F. Supp. 2d 1280, 1284 (N.D. Fla. 2002) (finding that the Florida Public Service Commission's lack of enforcement powers counseled against treating it as a court for removal purposes), *with Volkswagen*, 454 F.2d at 44 (finding that the Puerto Rico Labor Relations Board functions as a state court for removal purposes despite the fact that it lacks enforcement powers), *and Floeter*, 597 F.2d at 1102 (finding that the Wisconsin Employment Relations Commission functions as a state court for removal purposes despite lacking enforcement powers).

predict with reasonable accuracy whether a district court faced with an agency removal question will keep the case or remand it. This lack of predictability may give rise to "substantial mischief," in the words of the *BellSouth* court:

> To the extent possible, removability should be governed by clear rules, so that improper removals (with their attendant delay and interference with state proceedings) may be minimized. An approach that made removability turn on a federal court's after-the-fact, case-by-case analysis of whether an administrative agency would be acting in the same manner as a court in resolving a particular dispute would have the capacity to create substantial mischief in the administrative arena, by encouraging parties to take a shot at removal, with inevitable delays and disruptions. Given the number and variety of administrative proceedings that take place . . . on a daily basis—many involving out-of-state respondents—this is a matter of no small moment.[106]

And the *BellSouth* court is far from alone on the point. Many have commented on the potential for mischief in the removal process.[107] If functional factors become the touchstone for agency removal determinations, hundreds of removal notices may lie ahead, potentially wreaking havoc on the federal judiciary.[108]

By way of summary, the functional approach includes a consideration of the functions, powers, and procedures of the administrative body where the action was commenced. This consideration of functional factors is highly elastic, and leaves room for courts to consider practically any aspect of the agency in deciding whether it is sufficiently court-like to warrant removal. The elasticity of the functional

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106 *BellSouth*, 185 F. Supp. 2d at 1283.

107 *See, e.g.*, Haiber, *supra* note 12, at 610 (asserting that removal is ripe for gamemanship).

108 The *BellSouth* court was certainly of the opinion that functional determinations of whether removal of a particular dispute from an agency was warranted had the potential to flood the federal courts:

> Many [administrative] proceedings involve a governmental entity, not merely private parties. [Because states are] not . . . citizen[s] of any state for diversity purposes[,] administrative proceedings initiated by the state and not arising under federal law would create no issue of removability. But cities and many other governmental entities *are* citizens of the state for diversity purposes. If the proceeding at issue here were held removable based on a case-specific analysis of the nature of the function the agency would perform to resolve the matter, then the number of other administrative proceedings that also would be rendered removable—or at least would create an arguable issue sufficient to allow removal and require a case-specific determination of a motion to remand—would be significant.

See BellSouth, 185 F. Supp. 2d at 1283 n.2.

factors results in uncertainty as to whether removal from an agency will be warranted, and this uncertainty in turn invites scheming defendants to take their chances and file notices of removal. Enter a dark cloud of swirling removal notices closing in on the federal judiciary—or at least, so the critique would go.

2. Unresolved Difficulties

But for now, let us leave behind the notion of district courts papered over with the removal notices from enterprising defendants facing adjudication in a state agency. Assume that it would be possible to constrain the realm of possible factors that determine an agency's "State courtness" such that a flooding of the federal courts would not pose a problem. Still, other conceptual problems with the functional test would remain unresolved. Below I examine two such problems: one, whether the inquiry should focus on the agency as a whole or the particular dispute; and two, as the functional approach is a multi-pronged inquiry, which prong should hold the most weight in the removal determination.

a. The Dispute-Specific and Global Approaches

The functional approach leaves many problems unresolved. For instance, should the functional approach look only to the agency's handling of the particular proceeding which the defendant seeks to remove? Under a "dispute-specific" approach, removal would be permitted if the agency handled the particular *dispute* in a court-like way. Or, should the functional approach broaden its focus and take a "global view" of the agency's operations? Under this view, removal is permitted if and only if the *entirety* of the agency's functions are court-like. The functional tests of *Floeter* and *Volkswagen* have spawned cases which take both the global and dispute-specific views.[109]

109 *Floeter* and *Volkswagen* themselves would arguably be "dispute-specific" cases. Both look to the way the agency will handle the current dispute. In *Floeter*, the court emphasized that its holding is limited to the particular facts of the case. *See Floeter*, 597 F.2d at 1102 ("Other actions brought before the agency may involve different state and federal interests, or a *different agency role*, and a weighing of the competing interests in those cases might well result in a determination that those cases cannot be properly removed." (emphasis added)). Similarly, in *Volkswagen* the court's holding that removal from the Puerto Rico Labor Relations Board is proper appears to be limited to the particular type of dispute. *Volkswagen*, 454 F.2d at 45 ("[W]e conclude that the Board in conducting unfair labor practice proceedings for breach of collective bargaining agreements under § 301 acts as a court and that *such proceedings* are removable to federal court." (emphasis added)).

One such example in the dispute-specific realm is *Southaven Kawasaki-Yamaha v. Yamaha Motor Corp.*[110] The case involved a dispute between Southaven, a Yamaha dealership, and the Yamaha Motor Corp., stemming from allegations that Yamaha had not supplied Southaven with sufficient inventory to meet consumer demand and had entered into a dealership agreement with a another dealer just a few miles away from Southaven.[111] The dealership initially lodged its complaint with the Mississippi Motor Vehicle Commission (MMVC).[112] Yamaha removed to the District Court for the Southern District of Mississippi, which promptly remanded to the MMVC.[113] Citing *Floeter* and *Volkswagen*, the court found that "even if there might be instances in which the MMVC might be deemed a 'state court' . . . this is not one of them."[114] The fact that the court looked to *instances* of the MMVC's functioning properly places this case in the dispute-specific realm.

Some *Floeter-Volkswagen* progeny have come to the opposite conclusion—that the functional test should focus on the entirety of the agency's functions, powers, and procedures rather than the nature of the particular dispute being adjudicated by the agency. *BellSouth Telecommunications, Inc. v. Vartec Telecom, Inc.* is one such example.[115] Defendant Vartec asserted that the court should not focus on the "usual or dominant functions in the many matters [the Florida Public

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For an overview of cases dealing with removal from state agencies and naming *Floeter* and *Volkswagen* as illustrative of "jurisdictions that apply the functional test but only look at the way the agency will handle the current dispute" see Johnston, *supra* note 14, at 451. Johnston subdivides courts applying functional tests into three discrete groups. *Id.* The first group applies the functional test focusing on the "way the agency will handle the *current dispute*." *Id.* (emphasis added). The second group applies the functional test with an eye to the "*overall purpose* of the agency." *Id.* (emphasis added). The third group applies the functional test, but puts "more emphasis on the state and federal interest than on the agency's function." *Id.*

110 128 F. Supp. 2d 975 (S.D. Miss. 2000). *Kawasaki* can properly be treated as progeny of *Floeter* and *Volkswagen* as it cites and relies on both cases. *See id.* at 981.

111 *Id.* at 976.

112 *Id.*

113 *See id.* at 982.

114 *Id.*

115 *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259 (3d Cir. 1994), might be another such example. The *Sun Buick* court considered removal from the Pennsylvania Board of Vehicles. *See id.* at 1261. The court left open the question of "whether removal under section 1441(a) from an administrative agency is ever permissible in an exceptional case, because it [was] clear that the Pennsylvania Board of Vehicles would not qualify under any circumstances." *Id.* at 1264. The fact that the court determined that the Board of Vehicles would not qualify in any instance suggests it was looking to the whole of the agency's functioning.

Service Commission] addresses, but instead solely on how it would function in resolving the specific dispute at issue in the case at bar."[116] The court rejected the dispute-specific approach out of hand, concluding that "the issue is not just how the Florida Public Service Commission would act in resolving [the] particular dispute."[117] Rather, the relevant issue was how the Commission generally functions.[118] The court ultimately found that "[d]ay in and day out, the Commission functions as an administrative agency, not as a court."[119] Thus, the functional approach has left open the question of whether the analysis should center on the agency itself or on the proceeding.

b. Relative Weight of the Functional Test's Prongs

Whether the analysis should be global or dispute-specific is not the only question the functional test has left unresolved. The relative weight of each of the functional test's prongs is also an open question. There is dissensus among courts as to which prong of the test predominates in the inquiry. Several cases state that the evaluation of the state and federal interests at play is more important than other aspects of the test. *Rockville* calls the state-federal interest prong the "'more critical inquiry.'"[120] *Ginn v. North Carolina Department of Corrections*[121] came to the same conclusion, calling the state-federal interest prong the "more important test for removability."[122] *Wirtz* also arguably fits in this category,[123] and there are additional cases which suggest that

116 BellSouth v. Telecomms., Inc. v. Vartec Telecom, Inc., 185 F. Supp. 2d 1280, 1282 (N.D. Fla. 2002).

117 *Id.* at 1283. The court rejected the dispute-specific approach for two reasons. One, it drained any separate meaning out of the removal statute's requirement that the dispute come from a "State court," given that the statute also has an independent requirement that the dispute be a "civil action." *See id.* at 1282–83. Two, practical difficulties abound with the dispute-specific approach. An "after-the-fact, case-by-case analysis of whether an administrative agency would be acting in the same manner as a court . . . would have the capacity to create substantial mischief in the administrative arena, by encouraging parties to take a shot at removal, with inevitable delays and disruptions." *Id.* at 1283.

118 *See id.*

119 *Id.*

120 Rockville Harley-Davidson, Inc. v. Harley-Davidson Motor Co., 217 F. Supp. 2d 673, 679 (D. Md. 2002) (quoting Ford Motor Co. v. McCullion, Nos. C2-87-1459, C2-88-142, 1989 WL 267215, at *3 (S.D. Ohio Apr. 14, 1989)).

121 829 F. Supp. 804 (E.D.N.C. 1993).

122 *Id.* at 806.

123 *See* Wirtz Corp. v. United Distillers & Vintners N. Am., Inc., 224 F.3d 708, 713 (7th Cir. 2000). *Wirtz*'s discussion of *Floeter* makes this point clear. *See id.* *Wirtz* distinguishes *Floeter* (which found removal from an administrative agency proper, *see* Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1102 (7th Cir. 1979) (per curiam)) not

the state-federal interest prong predominates.[124] Meanwhile, other cases use a more even-handed approach to the various prongs.[125] At the opposite end of the spectrum are cases which do not enter into the state-federal interests inquiry at all, instead relying solely on the functions, powers, and procedures prong.[126] Thus, there is not a uniform approach as to which of the functional test's prongs should predominate in the inquiry. In some cases, whether an agency is a state court from which removal is proper has been determined by state and federal interests; in other cases it was determined by the agency's functions, powers, and procedures.

The functional approach is an untidy one. There is a lack of uniformity in the manner the test is applied. In some cases, the functions, powers, and procedures prong is applied with an eye to the specific dispute which is to be removed. In others, the functions, powers, and procedures prong focuses not on the dispute to be removed, but rather on the agency as a whole. Additionally, the functional approach leaves unresolved the relative weight of the functions, powers, and procedures prong as to the state-federal interests prong.

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on the basis that the agency's functions, powers, and procedures are any less "court-like," but rather because the "weighing of the competing [state and federal] interests results in a different conclusion not sanctioning removal to federal court." *See Wirtz*, 224 F.3d at 713. Thus, the state-federal interest prong predominated, as the Court reasoned that even if two agencies are functionally indistinguishable, the state and federal interests may operate to make removal possible from one agency, but not the other. Additionally, Judge Ripple wrote separately in *Wirtz* to emphasize that the propriety of removal *should have* turned on the agency's functions, powers, and procedures, which hints that under the majority's analysis, removal turned on the respective state-federal interests. *See id.* at 714 (Ripple, J., concurring).

124 *See* Gottlieb v. Lincoln Nat'l Life Ins. Co., 388 F. Supp. 2d 574, 581 (D. Md. 2005) ("[C]onsideration of the respective state and federal interests also supports remand. This second component of the functional test has been called the 'more critical inquiry.'" (quoting *Rockville*, 217 F. Supp. 2d at 679)); Ford Motor Co. v. McCullion, Nos. C2-87-1459, C2-88-142, 1989 WL 267215, at *3 (S.D. Ohio Apr. 14, 1989) ("The second and more critical inquiry centers upon the respective federal and state interests implicated in the controversy."); *see also* Johnston, *supra* note 14, at 451–52 (identifying jurisdictions which "put more emphasis on the state and federal interest than on the agency's function").

125 *See* Volkswagen de P.R., Inc. v. P.R. Labor Relations Bd., 454 F.2d 38, 43–45 (1st Cir. 1972) (relying on functions, procedures, and powers of the agency, the locus of traditional jurisdiction, and the respective state and federal interests).

126 *See, e.g.*, McDowell v. Wetterau, Inc., 910 F. Supp. 236, 238 (W.D. Pa. 1995) (considering only functions, powers, and procedures).

3. Diversity Jurisdiction: The Functional Test's "Back Door Bias"

Finally, the functional test is problematic in that it favors removal of federal question cases over diversity cases. This unequal treatment of federal question and diversity cases is problematic because it is not sanctioned by the removal statute in its current form. While varying treatment of federal question and diversity cases would have been permissible under prior versions of the removal statute, such varying treatment is not permitted under the current statute. Thus, the functional test, by treating federal question and diversity cases unequally, lets a bias in the back door.

Historically, the federal removal statute left the door open to disparate treatment of federal question and diversity cases. In the removal statute enacted in 1911,[127] federal question cases were removable without a further showing (essentially as they are today[128]), whereas diversity cases required additional showings, giving the court considerably more discretion to remand diversity cases. The 1911 enactment made diversity removal subject to two requirements. One, the defendant could not be a resident of the state where the suit was brought (same as removal today).[129] Two, the defendant was required to present affirmative proof that "prejudice or local influence" would prevent him from obtaining justice in the state court where the action was commenced.[130] The case would be subject to remand if the district court determined that the "suit [could] be fully and justly determined . . . without being affected by such prejudice or local influence."[131]

This second requirement would justify treating federal question and diversity cases differently because, in the latter instance, the district court is permitted to consider in a practical manner whether the state court would provide a fair adjudication to the defendant.

127 Act of Mar. 3, 1911, ch. 231, § 28, 36 Stat. 1087, 1094 (codified as amended at 28 U.S.C. § 1441 (2006)).

128 *See* 28 U.S.C. § 1441.

129 § 28, 36 Stat. at 1094.

130 *Id.* at 1094–95. Removal on grounds of diversity jurisdiction was only permitted when it was "*made to appear* to [the] district court that from prejudice or local influence [the defendant] will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right . . . to remove said cause." *Id.* at 1095 (emphasis added). The affirmative proof was an affidavit demonstrating that the defendant will not be able to obtain a fair adjudication in the state forum. *See id.*

131 *Id.* The district court is directed to "examine into the truth of [the defendant's] affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that [the defendant] will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto." *See id.*

Indeed, under prior enactments of the removal statute, courts did inquire whether there was genuine local bias to support a petition for removal on the basis of diversity,[132] and cases were remanded for failure to show the requisite local prejudice.[133] Therefore, prior enactments justified different results in "removal success" between federal question and diversity cases because a case presenting a question of diversity removal was subject to the district court's discretion regarding the ability of the defendant to obtain a fair adjudication in the state court where the action was commenced.[134]

The current federal removal statute does not provide a basis for vastly differing treatment. Under § 1441(a), cases premised on either diversity and federal question jurisdiction are removable.[135] Section 1441(b) provides additional limitations.[136] A diversity case is removable provided that the defendant is not a citizen of the state where the action was brought.[137] Federal question cases are removable without regard to the parties' citizenship.[138] Thus, removability requires that the district court be able to exercise some brand of original jurisdiction, either federal question or diversity,[139] and in the case of diversity, there is an additional hurdle in that the defendant cannot be a citizen where the suit was brought. However, this additional hurdle does not afford the district court much discretion—either the defen-

132 *See* P. Schwenk & Co. v. Strang, 59 F. 209, 210–11 (8th Cir. 1893) (considering removal under the 1887 enactment). In *Strang*, removal was inappropriate because the in the affidavit "[n]ot a fact [was] stated, from which prejudice or local influence could be inferred." *See id.* at 209. Courts took seriously the duty to examine whether there was a factual basis supporting the existence of bias. *See* Ellison v. Louisville & N.R. Co., 112 F. 805, 809 (6th Cir. 1902) ("Unless the exercise of the duty devolved upon the court is perfunctory merely, it necessarily involves the agitation of the *question of the existence of facts which will prevent a fair and impartial trial in the state courts.* However delicate this duty may be, it is one that may not be avoided, but must be discharged to the full measure of the obligation imposed." (emphasis added)); *see also* Fisk v. Henarie, 142 U.S. 459, 468 (1892), *superseded by statute*, Act of June 25, 1948, Ch. 646, 62 Stat. 939 ("[T]he prejudice or local influence must be made to appear to the Circuit Court, that is, the Circuit Court must be *legally satisfied, by proof suitable to the nature of the case*, of the truth of the allegation that, by reason of those causes, the defendant will not be able to obtain justice in the state courts . . . ." (emphasis added)).

133 *See Strang*, 59 F. at 211 (remanding to state court as defendant's affidavit only stated the conclusion that there was local prejudice).

134 *See* § 28, 36 Stat. at 1095.

135 28 U.S.C. § 1441(a) (2006).

136 *See id.* § 1441(b).

137 *Id.*

138 *Id.*

139 Or, of course, any other brand of original jurisdiction.

dant is (or is not) a citizen of the state where the action was commenced.

Thus, the federal removal statute in its current form only calls for consideration of the type of jurisdiction at one juncture, in the measuring of citizenship of the defendant. (One minor exception might be for the one-year time bar which applies to diversity cases).[140] After that point, whether original jurisdiction is based on a federal question or diversity of citizenship does not play a role in the removal calculus. The general removal right is phrased in jurisdiction-blind terms, applying to "*any* civil action brought in a State court of which the district courts of the United States have *original* jurisdiction."[141]

Contrast this premise with the functional approach to removal from agencies. Under the functional approach the type of jurisdiction *does* make a difference in the removal calculus. By considering the respective federal and state interests in the provision of a forum, the functional test helps removal of federal question cases while hindering removal of diversity cases. In a federal question case, there will naturally be strong federal interests, as the claim calls for application of federal law, whereas with a diversity case, the state will likely have strong interests since the dispute will naturally center upon application of its administrative law. Thus, the fact that the defendant is involved in a diversity case *weighs against* removal despite the fact that the statutory text provides for a removal right largely independent of the *species* of original jurisdiction which the district court would have exercised.

This unequal treatment of federal question and diversity cases is evident in jurisdictions which apply the functional test. The existence of a federal question weighs heavily toward removal from the agency whereas the "mere" existence of diversity jurisdiction gives way to the state interests in establishing a coherent policy to be carried out by its administrative body. Both *Floeter* and *Volkswagen* show how the existence of a federal question tips the scales in favor of allowing removal. *Floeter* involved a collective bargaining dispute governed by federal law.[142] Because a federal question was presented, state interests in "providing a 'convenient and expeditious tribunal to adjudicate the rights and interests of parties to a labor dispute'" were overshad-

140 *See* 28 U.S.C. § 1446(b).

141 *Id.* § 1441(a) (emphasis added).

142 *See* Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1102 (7th Cir. 1979) (per curiam) ("The complaint filed with the WERC was basically a breach of contract . . . ; it could have been brought in either state or federal court as alternative forums, but would have been determined by federal law . . . .").

owed.[143] Similarly, in *Volkswagen*, where the substantive law to be applied was "purely federal,"[144] the existence of a federal question outweighed the state's interest in utilizing the "specialized expertise of its Board or in [its] expedited procedures."[145] *Floeter* and *Volkswagen*, then, reveal the ease with which a federal question case "passes" the federal-state interest inquiry.

Wirtz Corp. v. United Distillers & Vintners North America, Inc.[146] provides the corollary to *Floeter* and *Volkswagen*—diversity jurisdiction hinders the administrative body from passing the federal-state interest inquiry. The case originated in the Illinois Liquor Control Commission (ILCC),[147] an agency empowered to license liquor retailers and handle certain kinds of disputes among retailers. The defendant sought to remove on the basis of diversity.[148] Regarding the federal and state interests at play, the court baldly states that the "diversity jurisdiction process is *outweighed* by the state's interest in administering its own alcoholic beverages program."[149] The statutory text does not sanction such weighing of the *kind* of jurisdiction versus against any other kind of interest—the statute in effect says, once a showing has been made that there is original jurisdiction of *any kind* the defendant's removal right is only premised on there being a "civil action brought in a State court."[150] Sneaking a bias against the defendant's removal right premised on the kind of jurisdiction to be exercised by the district court back into the calculus as a part of the determination of what is a state court is altogether inconsistent with the statute.[151] *Wirtz* exemplifies how the functional test permits a bias against diver-

143 *Id.* (quoting Layton Sch. of Art & Design v. Wis. Employment Relations Comm'n, 262 N.W.2d 218, 226 (Wis. 1978)).

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

145 *Id.* at 45.

146 224 F.3d 708 (7th Cir. 2000).

147 *Id.* at 709–10.

148 *See id.* at 710 ("In this present case there is diversity under 28 U.S.C. § 1332(a) . . . . The issue quickly becomes whether or not the [state agency] qualifies as a court for removal purposes.")

149 *Id.* at 713 (emphasis added).

150 28 U.S.C. § 1441(a) (2006). As previously discussed, in the case of diversity jurisdiction, a showing that the defendant is a nonresident is also required. *See id.* § 1441(b). Still, however, it is hardly arguable that this requirement sanctions weighing of the type of jurisdiction against other interests such that diversity removal from administrative agencies becomes more difficult.

151 Interestingly, *Wirtz* makes its anti-diversity bent even clearer by citing a report prepared by the *judicial branch* which advocates that Congress should take steps to reduce the "number of federal court proceedings in which jurisdiction is based on diversity of citizenship." *See Wirtz*, 224 F.3d at 713 n.3 (quoting JUDICIAL CONFERENCE

sity in the "back door," where the statutory language calls for no such prejudice.[152]

Moreover, *Wirtz* is far from an isolated incident.[153] *Rockville Harley-Davidson, Inc. v. Harley-Davidson Motor Co.*[154] provides an additional example of the diversity bias phenomenon.[155] *Rockville* involved a dealership's claim that Harley-Davidson's distribution practices violated state law. In *Rockville*, removal was not permitted from the Motor Vehicles Administration, a unit within the Maryland Department of Transportation, because diversity jurisdiction was not adjudged to be a sufficient federal interest: "The sole federal interest at stake . . . is in providing a forum to diverse parties. Such an interest is inadequate in light of the state's substantial interest in administering a state program and preserving the oversight role of a state agency."[156]

Thus, cases like *Wirtz* and *Rockville* demonstrate a complication implicit in application of the functional approach. It causes disparate

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OF THE U.S., THE LONG RANGE PLAN FOR THE FEDERAL COURTS 29–30 (1995), *available at* http://www.uscourts.gov/lrp/CH04.PDF).

152 My goal here is not to question the propriety of a plan to reduce the number of diversity cases, but rather to question its unseemly implementation in the context of removal, which does not provide for a wholly qualified removal right in the case of diversity jurisdiction.

153 Research uncovers no *diversity* case begun in administrative agency removed successfully. *See also infra* note 155 (citing cases that exhibit the bias against diversity jurisdiction in the context of removal from agencies).

154 217 F. Supp. 2d 673 (D. Md. 2002).

155 There are other cases exhibiting the diversity bias phenomenon. *See, e.g.*, Gottlieb v. Lincoln Nat'l Life Ins. Co., 388 F. Supp. 2d 574 (D. Md. 2005). *Gottlieb* found removal from the Maryland Insurance Administration improper where "[n]o issue of federal law [was] involved"; ultimately, the "federal interest at stake in [the] dispute, . . . providing a forum to diverse parties, [was] 'inadequate in light of the state's substantial interest in administering a state program and preserving the oversight role of a state agency.'" *Id.* at 582 (quoting *Rockville*, 217 F. Supp. 2d at 680). *Southaven Kawasaki-Yamaha v. Yamaha Motor Corp.* arguably provides a further example, though the court's very limited discussion of the state and federal interests at play make it difficult to tell. *See* 128 F. Supp. 2d 975, 982 (S.D. Miss. 2000). The court found that its interest in adjudicating the dispute was not greater that the interest held by the Mississippi Motor Vehicles Board. *See id.* It is unclear what the court's interest was—the court did not say that its interest in adjudicating the dispute was to provide a forum to diverse parties, but that may well be the implication.

156 *Rockville*, 217 F. Supp. 2d at 680. Moreover, the *Rockville* court's recital of the functional test also elucidates the test's underlying bias against diversity jurisdiction: "The federal court should assume jurisdiction only if the agency functions as a court and *federal interests predominate* over state interests." *Id.* at 676 (emphasis added). As previously stated, federal interests naturally predominate in a federal question case—but do not in a diversity jurisdiction case.

treatment of federal question cases and diversity cases—federal question cases are favored in the state-federal interests prong of the inquiry while diversity cases are disfavored. This varying treatment allows a bias into the removal calculus that is not sanctioned by the statutory text.

III. Toward a New Approach to Removal from Administrative Agencies

Neither of the current approaches provides a satisfactory resolution to the problem of whether proceedings may be removed from state administrative bodies. The formalist treatment of agency removal is dissatisfying in its refusal to consider the "true nature" of the agency—no matter how closely the agency parallels a traditional court in terms of its functioning and the matters it hears, removal will not be permitted.[157] As the *Volkswagen* court pointed out, considering functional factors is "far more satisfactory than to be content with a Steinian rendering of 'a board is a board is a board.'"[158]

Considering functional factors may be more satisfactory, but the functional approach remains far from perfect. As *Oregon Bureau* points out,[159] the functional approach is removed from the statutory language.[160] Thus, in many cases it leads to removal determinations which are hard to square with the statutory text itself. For instance, the functional approach's consideration of the respective state and federal interests opens the door to disparate treatment of diversity and federal question cases in a way which is not contemplated by the removal statute.[161] Furthermore, the functional test's consideration of the agency's functions, powers, and procedures risks becoming an unprincipled analysis,[162] and the functional approach is undeveloped

157 *See supra* Part I.B.

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

159 *See supra* notes 19–28 and accompanying text.

160 *See also* Johnson v. Albertson's LLC, No. 3:08cv236, 2008 WL 3286988, at *1 (N.D. Fla. Aug. 6, 2008) ("There is nothing in the text of § 1441 which suggests that Congress intended to authorize the removal of cases from state administrative agencies to federal court under the statute, even where the agency performs ordinary judicial functions."); Civil Rights Div. v. Asplundh Tree Expert Co., No. 08-60493-CIV, 2008 WL 2616154, at *5 (S.D. Fla. May 15, 2008) ("[T]he functional view goes beyond the language of Section 1441 . . . .").

161 *See supra* Part II.B.3.

162 *See supra* Part II.B.1.

in some senses as the proper mechanics of its application remain unresolved.[163]

My contention is simple: there must be a better way. Below, I outline an alternative approach to the current formalist and functional tests. I contend that removal, generally, can be seen as a mechanism which preserves the essential role of the federal courts. It supplies a link between the federal courts and those cases which fall within the original jurisdiction of the district courts. The test for agency removal must take this into account—its goal should be to prevent a complete disconnect between the federal courts and "federal" cases when state legislatures elect to delegate jurisdiction to agencies. The inquiry developed in *Commodity Futures Trading Commission v. Schor* is of use. While this inquiry was originally developed with congressional delegations to non–Article III adjudicators in mind, it can be adapted to the agency removal context. I conclude that modifying the *Schor* inquiry supplies a better approach to agency removal; it balances the competing concerns at play and resolves some of the problems presented by the other tests.

A. Removal as Preserving the Role of the Federal Courts

In handling the agency removal question, courts should draw inferences from the role removal is meant to play. The role of removal is often discussed in terms of fairness to defendants; removal jurisdiction is said to embody the "belief that both the plaintiff and the defendant should have the opportunity to benefit from the availability of a federal forum."[164] While explaining removal in terms of fairness to defendants is undoubtedly correct, it is more helpful in this context to couch removal in terms of its role in preserving the structural facets of our tripartite government. At its core, removal provides a "mechanism for transferring to federal court those cases in which both the Constitution and Congress have authorized original federal jurisdiction."[165] Removal jurisdiction can be seen as preserving the essential role of the federal courts. It assures a link between the federal courts and their domain, cases falling within Article III's jurisdictional heads, even if those cases happen to originate in state courts. Simply put, removal jurisdiction allows the federal court system to carry out the purposes behind its jurisdictional grants. For instance, with federal question jurisdiction, the removal "link" allows the federal court to guard "against state hostility to federal law or interests,"

163 *See supra* Part II.B.2.

164 ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.5, at 354 (5th ed. 2007).

165 *See* Haiber, *supra* note 12, at 611.

to take advantage of its own expertise in federal law matters, and to develop "uniformity in the interpretation and application of federal law."[166] The same can be said for diversity jurisdiction—removal permits federal courts to carry out the purpose behind the jurisdictional grant. In a diversity suit where the plaintiff has commenced the action in his home state court, "removal by the defendant to a federal court effectuates a primary purpose of diversity jurisdiction in providing a seemingly more neutral forum."[167] Thus, removal jurisdiction can be seen as preserving the essential role of the federal courts.

If the goal of removal jurisdiction more generally is to preserve the essential role of the federal courts, this same goal should inform the approach to removal from state agencies. However, preserving the essential role of the federal courts is not an easy task in the context of agency removal. Any allocation of jurisdiction must be done with an eye to both separations of powers concerns and federalism concerns as state agencies and the federal courts are stratified both horizontally and vertically. Separation of powers provides a horizontal division between state agencies and federal courts, and federalism supplies a vertical division. Here I seek a test that will take into account both the horizontal and vertical dimensions of agency removal in order to preserve the role of the federal courts. For a moment, however, I will set aside federalism concerns and focus solely on separation of powers principles.

B. Preserving the Federal Courts through the Schor *Inquiry*

The Supreme Court has before faced the issue of what *must* stay the province of Article III courts, and what may be constitutionally delegated to non–Article III tribunals at Congress' election.[168] The Court has "declined to adopt formalistic and unbending rules" with regard to sorting out the separation of powers concerns presented when Congress lodges jurisdiction outside of the federal judiciary.[169]

166 *See* John F. Preis, *Jurisdiction and Discretion in Hybrid Law Cases*, 75 U. CIN. L. REV. 145, 180 (2006).

167 *See* CHEMERINSKY, *supra* note 164, at 354–55.

168 *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986) (considering constitutionality of an administrative agency empowered to hear certain state law counterclaims); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63–76 (1982) (considering constitutionality of an act utilizing the bankruptcy courts as adjuncts to Article III courts); Crowell v. Benson, 285 U.S. 22, 45–49 (1932) (considering constitutionality of an administrative agency empowered to determine maritime employee compensation claims).

169 *Schor*, 478 U.S. at 851.

Instead, in *Schor*, the Court settled upon a functional analysis.[170] This functional analysis considers four factors, namely:

> [T]he extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[171]

Through these four factors, the *Schor* inquiry resolves the separation of powers concerns at play when Congress vests adjudicatory power outside of the judiciary. In simple terms, *Schor* balancing either endorses or bars a particular delegation of judicial authority to a non-judicial entity. In essence, if the delegation impermissibly "threatens the institutional integrity of the Judicial Branch," it will be barred under the *Schor* inquiry.[172] Conversely, if the delegation does not threaten the institutional integrity of the judiciary, then the *Schor* inquiry will endorse it. Thus, the inquiry seeks to preserve the essential role of the federal courts, preventing excessive delegation of judicial functions to other branches.

The inquiry was developed, of course, with primarily *horizontal* separation of powers principles in mind.[173] *Schor* examined Congress' delegation of adjudicatory authority to the Commodities Futures Trading Commission.[174] Schor, a litigant who had proceeded before the Commission, contended that the Commission, a *legislatively* created entity, could not exercise jurisdiction over certain state law counterclaims—they were the province of the federal *judiciary* alone.[175] The inquiry, thus, is founded upon concerns regarding allocation of power among the branches of the federal government. It attempts to prevent too much "sideways" vesting of federal judicial power in other branches of the federal government.

Even though the *Schor* inquiry was developed with mostly horizontal concerns in mind, it also has potential for application to the agency removal question, which features both horizontal separation of powers and vertical federalism dimensions. The *Schor* inquiry and removal align in their aim to preserve the essential function of the

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170 *See id.*

171 *Id.* (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 585 (1985)).

172 *See id.* at 851.

173 *See id.* at 850–51 (introducing the inquiry with a discussion of the structural principles underlying Article III).

174 *See id.* at 855–56.

175 *See id.* at 853.

federal judiciary. *Schor* seeks to protect the essential function of the federal judiciary against excessive delegation by the national legislative power. Removal, too, can be seen as protecting the essential function of the judiciary. As noted above, removal permits federal courts to take cognizance over claims falling within its jurisdiction, as authorized by the Constitution and Congress, even though those claims are brought initially before state courts. Thus, *Schor* preserves the federal judiciary's role vis-à-vis the national legislature and removal preserves the federal judiciary's role vis-à-vis the states.

Before proceeding to explain how *Schor* can be applied to solve the agency removal problem, I wish to underscore one distinction which illustrates why the *Schor* inquiry makes particular sense in the context of agency removal. Removal jurisdiction, as a general proposition, provides a link between the federal judiciary and state *courts*. Because of this link, a defendant may shift a case cognizable under a federal district court's original jurisdiction from state court to federal court. Thus, removal jurisdiction is in effect a "check" on the concurrent jurisdiction exercised by the state *courts*, ensuring federal courts may play a role in adjudicating "federal" claims.

Removal jurisdiction should also operate as a "check" against state *agencies* when they are exercising jurisdiction over claims which fall within the original jurisdiction of the federal courts. If removal jurisdiction does not operate as a "check" against state agencies handling "federal" claims, then a state has carte blanche to shift jurisdiction of any and every claim to an agency.[176] Once the claims are before state agencies, removal provides no link back to the federal court system. Thus a state legislature's decision to shift adjudication of the bulk of claims to state agencies would cut off the federal courts from those claims completely. There is, therefore, special potential for enterprising states to chip away at the core role of the federal judiciary, without removal as "recourse." The *Schor* inquiry is responsive to this concern. It recognizes that separation of powers principles protect the essential role of the federal courts, and it prevents excessive delegations of judicial power.

While the *Schor* inquiry readily handles horizontal separation of powers concerns, ensuring that excessive federal legislative delegations of judicial power do not infringe upon the core role of the federal judiciary, it must be adapted to function in the state agency removal context. Adaptation is necessary because the agency removal

176 Provided, of course, the state legislature conforms to any requirements of its own Constitution with regard to delegation of judicial authority to nonjudicial entities.

problem concerns allocation of judicial power not only horizontally, among the branches of government, but vertically, among the state and federal systems. In particular, three significant adaptations are required. One, the "subject" of the inquiry must be changed from a delegation by Congress to one by a state legislature. Two, the "effect" of the inquiry must be changed. In the agency removal context, the goal is not to strike down excessive state delegations of judicial power, but to allow removal to federal court in the case of excessive delegation. Lastly, one of the original inquiry's factors, "the extent to which the 'essential attributes of judicial power' are reserved to Article III courts"[177] will not apply. These adaptations are explained more fully below.

In its original context, *Schor* balancing refers to whether *Congress* can delegate certain adjudicatory power outside the *federal* judiciary—as stated, either endorsing or barring those delegations. By contrast, in the agency removal context, a *Schor*-like inquiry will operate not upon congressional delegations, but on a *state legislature*'s delegations of adjudicatory power outside the *state* judiciary. Thus, adapting *Schor* to the agency removal context, the state legislature's delegation of adjudicatory authority to a state administrative agency becomes the relevant delegation to be tested.

Beyond changing the "subject" of the *Schor* inquiry, an additional adaption is required. In its original context, *Schor* either endorses or bars congressional delegations of judicial power to non–Article III courts. If the delegation fails the *Schor* inquiry, it is struck down as unconstitutional: Congress *may not* effect such a delegation. However, in the agency removal context, the effect of the balancing is not to strike down a state's excessive delegation of judicial power to an agency. If excessive delegation is found under the *Schor* framework, the conclusion is that the action before the state agency is removable (provided, of course, that the case is cognizable under a federal court's original jurisdiction). Therefore the inquiry has no effect on the state's ability to vest jurisdiction where it deems appropriate, in either agencies or courts. The inquiry merely provides that if the state legislature's delegation of "federal" cases to state agencies is excessive, removal from those agencies will be permitted.

Lastly, the *Schor* test, in its original form, includes considering the "extent to which the 'essential attributes of judicial power' are reserved to Article III courts" within the context of a congressional

177 *Schor*, 478 U.S. at 851 (quoting Thomas v. Union Carbide Agric. Prods., 473 U.S. 568, 585 (1985)).

delegation of jurisdiction to a non–Article III entity.[178] Stated more concretely, the factor measures the "level of judicial review retained over . . . decisions" made by the non–Article III adjudicator, for instance a federal administrative law judge, magistrate, or bankruptcy judge.[179] If sufficient review is retained in Article III courts, the delegation poses no threat to essential functions of the judiciary.

This factor, while certainly informative in the context of congressional delegations of judicial power outside of Article III, is not very helpful in the context of agency removal. State agencies do not occupy a similar role to the federal "adjuncts" which are typically the subjects of the *Schor* inquiry.[180] With these federal "adjuncts," there is frequently review as of right in an Article III court.[181] With a state agency, however, there is no such review as of right in an Article III court. So, for the purposes of the agency removal problem, this inquiry is largely a static one. The result will always be: when a state agency is exercising jurisdiction over "federal" cases, a role for the federal judiciary has *not* been reserved by the delegation. Thus, in the context of agency removal, this first factor acts not as a true part of the inquiry, but a backdrop consideration. It is a reminder that a state's choice to lodge jurisdiction over "federal" cases in an agency isolates these cases from the federal judiciary.

C. Applying the Modified Schor *Inquiry*

Now having demonstrated the modifications required to adapt *Schor* to the agency removal problem, below I proceed to illustrate in more detail how the modified *Schor* inquiry would be applied.

1. Limited Jurisdiction Assigned to Administrative Agency

This factor measures the "breadth" of jurisdiction granted to the administrative agency. If the agency exercises jurisdiction only over a "'particularized area of law,'"[182] this weighs for nonremovability. Conversely, if the agency is granted a broad swath of jurisdiction,

178 *Id.*

179 Noriega-Perez v. United States, 179 F.3d 1166, 1176 (9th Cir. 1999).

180 *See, e.g.*, *id.* (utilizing the *Schor* inquiry to determine the constitutionality of delegating certain judicial functions to an administrative law judge).

181 *See* Crowell v. Benson, 285 U.S. 22, 37 (1932); *see also* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 748 (2004) ("Article III adjuncts, as recognized in *Crowell*, must undergo relatively searching review [in an Article III court] essentially comparable to direct appellate review.").

182 *Schor*, 478 U.S. at 852 (quoting N. Pipeline Constr. Co. v. Marathon Pipeline Co. 458 U.S. 50, 83 (1982).

removal would be favored. The underlying rationale is simple: the greater the range of "federal" cases entrusted to a state agency, the more isolated the federal judiciary becomes from its protectorate. This section of the inquiry acknowledges that a limited delegation of jurisdiction to an agency is less dangerous than a broad delegation. Accordingly, if the state determines that efficiency, expertise, or other interests (examined more closely in the third section of the inquiry) necessitate a *limited* delegation of jurisdiction to an agency, such a limited delegation will not be subject to removal. On the other hand, because the inquiry favors removal in the case of a *broad* delegation of jurisdiction, the state will be prevented from shielding an unduly broad range of "federal" cases from removal by vesting jurisdiction in agencies.

2. Nature of the Right To Be Adjudicated

The second part of the inquiry would examine the nature of the right to be adjudicated by the state agency. This section distinguishes public rights from private rights. Private rights are seen as belonging to the individual; they include an "individual's common law rights in property and bodily integrity, as well as in enforcing contracts."[183] Public rights, by contrast, are not seen as belonging to the individual, but rather to the "body politic."[184] These public rights "may include interests generally shared, such as those in the free navigation of waterways, passage on public highways, and general compliance with regulatory law."[185]

Under this second section of the inquiry, whether removal is favored is dependent upon this distinction between private rights and public rights. If the agency is adjudicating a private-rights dispute, removal is favored. Conversely, if the agency is adjudicating a public-rights dispute, removal is not favored. The ultimate rationale is to preserve the essential role of the federal courts. Because private-rights disputes are at the "'core' of matters normally reserved to Article III courts,"[186] keeping the route from the state agency to federal court open makes sense when the agency is handling such a dispute.

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183 Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693 (2004).

184 *See id.*

185 *Id.*

186 *Schor*, 478 U.S. at 853.

3. Concerns Which Drove the State Legislature to Depart from Use of a State Court

Finally, the inquiry will examine the concerns which drove the state legislature to depart from use of a state court and to vest jurisdiction in an agency. If the state has valid reasons for using an administrative forum, removal will not be favored. On the other hand, if the state lacks valid reasons for shifting jurisdiction to an agency as opposed to a court, then removal will be favored. In *Schor*, the Supreme Court recognized efficiency-based concerns as legitimate.[187] This suggests that when state legislatures employ agencies as "inexpensive and expeditious"[188] fora, removal will not lie. Beyond efficiency-based concerns, other considerations should be recognized as legitimate state concerns—for instance, the desire to capitalize on agency expertise and to create innovative remedial schemes. The goal is to permit removal from state agencies only in those relatively narrow circumstances in which the delegation of jurisdiction to the agency poses a threat to the core role of the federal judiciary. Limited delegations supported by legitimate state concerns such as efficiency, expertise and innovation will be left untouched by removal.

D. Advantages of the Schor *Approach*

The modified *Schor* inquiry presented here offers several advantages. It effectively sorts through both the separation of powers and federalism concerns presented by the agency removal problem. Moreover, it resolves some of the uncertainty presented by the current functional approach; no longer do courts have to wonder whether the test is meant to be a global or dispute-specific one. Lastly, in one sense, the modified *Schor* inquiry looks deeper into the agency removal problem than the current functional approach—the new inquiry swaps consideration of state agencies' "surface features" for consideration of structural principles.

The new approach aids in disentangling the horizontal separation of powers concerns and vertical federalism concerns that run through the agency removal problem. With regard to separation of powers concerns, the inquiry recognizes that too much "sideways" shifting of jurisdiction to state agencies from state courts has implications for the federal courts. When this "sideways" shifting of jurisdic-

187 *See id.* at 855 (noting that in passing legislation delegating jurisdiction to the Commodities Trading Futures Commission, Congress "intended to create an inexpensive and expeditious alternative forum").

188 *Id.*

tion to agencies occurs, the federal courts potentially become cut off from many "federal" cases, as removal generally does not provide an effective link between state agencies and federal courts.

The inquiry also responds to the federalism concerns presented by the agency removal problem. Courts have hesitated to read the removal statute to permit removal from state agencies for fear of preventing states from instituting innovative administrative remedies whenever original jurisdiction in a federal court would lie.[189] In the words of one court, a reading of the removal statute which foreclosed such opportunities for innovative remedies in the state administrative arena would be a "bold and bizarre" one.[190] Accordingly, the modified inquiry recognizes that there are valid reasons to shift a limited range of jurisdiction to a state agency. Such a limited delegation of judicial power to state agencies when supported by legitimate state concerns will not be subject to removal, thereby encouraging state innovation. Federalism is thus served by leaving limited delegations of judicial power, which are supported by legitimate state concerns, untouched by removal. Ultimately, the state is left relatively free to craft its own distribution of disputes among courts and agencies. The modified inquiry will only subject agency adjudications to removal where, on balance, there is a broad transfer of jurisdiction to a state agency involving private-rights disputes and unsupported by legitimate state concerns.

The modified *Schor* inquiry proposed in this Part remains a functional one, but solves some of the practical difficulties of the current functional approach.[191] As discussed above, the current functional approach has not been applied in a uniform manner—in some cases, courts ask whether the agency as a whole functions as a state court; in others, courts ask whether the agency in adjudicating the particular dispute functions as a state court.[192] In short, there is disagreement as to whether the approach should be global or dispute specific.[193] The modified *Schor* inquiry solves this problem; the first factor expressly designates the subject of the inquiry. The court is to look to the nature of the jurisdictional grant—a broad grant favors removal, a narrow one does not.[194] Thus, the ambiguity presented by the current

189 *See, e.g.*, BellSouth Telecomms., Inc. v. Vartec Telecom, Inc., 185 F. Supp. 2d 1280, 1284 (N.D. Fla. 2002).

190 *See id.*

191 *See supra* Part II (examining the current functional test and cataloging difficulties which are presented by the test).

192 *See supra* notes 109–19 and accompanying text.

193 *See id.*

194 *See supra* Part III.C.1.

functional approach is resolved. Courts need not question whether they should look to the whole of the agency or to how the agency handles the particular dispute. The subject of the inquiry is clear—the breadth of the jurisdictional grant.

Moreover, the modified inquiry permits courts to probe the agency removal problem more deeply than the current functional approach. The current functional approach is occupied, at least partially, with "surface considerations."[195] The test, by considering the state agency's functions, powers, and procedures, is largely asking: Does this agency "look" like a court? Does it use an adversarial approach? Are parties represented by counsel? Does the adjudicator have legal expertise similar to that of a judge? While the current inquiry is concerned with whether the agency "looks" like a court, the modified *Schor* inquiry moves beyond surface considerations to structural considerations. The modified inquiry asks: Does the state's delegation of jurisdiction to a state agency detract from core functions of the federal judiciary? With this new approach, removal does not rest on whether agencies "look" like courts, but rather on whether agencies are unreasonably supplanting courts, to the detriment of the federal judiciary.

While it hardly could be argued that the modified *Schor* inquiry provides a perfect resolution to the agency removal problem, the new approach is an improvement over the current tests. The *Schor* inquiry recognizes federal courts become cut off from cases which are shifted "sideways" by a state legislature to a state agency, and so it provides for removal from agencies—but only in limited circumstances. Removal will only be permitted where there is a broad delegation of private-rights disputes to an agency, without legitimate concerns necessitating the use of an agency. Further, the new approach solves the "global" or "dispute specific" problem presented by the current functional approach by expressly making the subject of the inquiry the breadth of the jurisdictional grant. Lastly, the new approach is capable of probing the agency removal problem more deeply; the removal determination now rests not upon surface considerations, but rather structural considerations.

Conclusion

The federal courts have developed two distinct approaches to removal from state administrative agencies. The formalist approach expressly disallows removal of any action commenced in an agency

195 *See supra* notes 100–104 and accompanying text.

based on the plain text of the removal statute, which permits removal only from a "State court."[196] The opposing approach is premised on a functional definition of "State court"; a state agency may meet this definition if its functions, powers, and procedures are court-like and the respective state and federal interests suggest that a federal court is a proper forum for resolution of the dispute.[197]

Neither approach completely resolves the issue of removal from state agencies. The formalist approach's complete disallowance of agency removal is difficult to reconcile with modern agencies that are structured similarly to courts and do much the same work as courts, hearing the same types of matters.[198] The functional approach recognizes that modern agencies can parallel courts, but presents unresolved difficulties in how to assess if a particular state agency is truly functioning as a "State court" for the purposes of the removal statute.[199]

A better resolution of the agency removal problem is possible. The problem, by its nature, involves allocation of jurisdiction, not only among different branches of government on the state level, but allocation of jurisdiction among the respective state and federal systems. The modified *Schor* inquiry embraces this multi-dimensional aspect of the agency removal problem and seeks to provide a proper resolution. Facing removal from an agency, the court will look to whether the state has elected to shift a sizeable amount of "federal" cases to agencies, whether the right being adjudicated is a private one, and lastly whether the legitimate concerns justify the shift of jurisdiction.

This inquiry resolves many competing concerns. Agency removal will be permitted in relatively narrow circumstances, leaving states free to create innovative administrative schemes and to craft their own distributions of jurisdiction among agencies and courts. The states are thus left unhindered by excessive removal from agency adjudications, but the interests of the federal judiciary are also served. Removal from an agency will be a relative rarity, preventing a "flooding" of the federal courts, yet removal will remain an effective "link" from the state system, preventing isolation of the federal courts.

Application of the new approach presented here will largely retain the status quo. Few sitting on the federal bench will be required to adjudicate a dispute originating in a state administrative

196 *See* 28 U.S.C. § 1441(a) (2006). For a discussion of the formalist approach, see *supra* Part I.A.

197 *See supra* Part II.A.

198 *See supra* Part I.B.

199 *See supra* Part II.B.

agency. Moreover, no revolution in our thinking will result—we will continue to perceive federal courts and state administrative agencies as entities secluded from one another. However, when the *Schor* factors do happen to align, the new approach ensures a needed link between state agencies and the federal courts.