REMOVAL TO FEDERAL COURTS FROM STATE ADMINISTRATIVE AGENCIES*

THE availability of federal removal jurisdiction may frustrate a state's purpose in establishing administrative agencies for the primary determination of certain issues. Federal courts have original jurisdiction over cases arising "under the Constitution, laws or treaties of the United States" without regard to the parties' citizenship, and over state causes of action when citizenship is diverse.[1] State courts have concurrent jurisdiction over most "federal-question" and all diversity cases,[2] but section 1441 of the Judicial Code,[3] with certain exceptions, gives defendants a right to remove to federal court any state-court action which could have been brought in the federal forum originally.[4] Procedurally, the defendant petitions a district court [5] to accept jurisdiction of the action, and the case is thereupon lodged in that court sub-

*Tool & Die Makers Ass'n v. General Elec. Co., 170 F. Supp. 945 (E.D. Wis. 1959).

1. 28 U.S.C. §§ 1331-32 (1958).

2. U.S. CONST. art. III, § 2 gives Congress the power to withdraw jurisdiction from state to federal courts in certain cases; except when Congress has expressly provided for exclusive jurisdiction in federal courts, state jurisdiction is retained. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 25-27 (1820); Note, 70 HARV. L. REV. 509 (1957); see 1 MOORE, FEDERAL PRACTICE ¶ 0.6[3] (2d ed. 1959) [hereinafter cited as MOORE]; Sternberg, *Diversity Jurisdiction*, 10 NOTRE DAME LAW. 219, 225-27 (1935).

3. 28 U.S.C. § 1441 (1958).

4. See 1 MOORE ¶ 0.60[9], at 662; *cf.* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 348 (1816) (removal implied, not express, constitutional right).

Cases in which the basis of federal jurisdiction would be diversity of citizenship may be removed only if the defendant is not a citizen of the state in which the action is initiated. Thus, a plaintiff can prevent determination in a federal court by bringing his action in the courts of the defendant's state. See 28 U.S.C. § 1441 (1958).

If the state court had no proper jurisdiction of the action the federal court may not accept jurisdiction on removal even though the action could originally have been brought in the federal court. See Venner v. Michigan Cent. R.R., 271 U.S. 127, 131 (1926); Lambert Run Coal Co. v. Baltimore & O.R.R., 258 U.S. 377, 382 (1922). *But see* Union Terminal Ry. v. Chicago, B. & Q.R.R., 119 Fed. 209 (W.D. Mo. 1902). The underlying theory is that the federal court's jurisdiction on removal is derivative and dependent on proper jurisdiction in the state court. Southern States Oil Co. v. Standard Oil Co., 26 F. Supp. 633 (E.D.S.C. 1939).

Removal is expressly denied in certain classes of cases. 28 U.S.C. § 1445 (1958); see S. REP. No. 1768, 35th Cong., 1st Sess. (1957); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 517 (1928).

5. Prior to the recodification of title 28 in 1948, most petitions for removal had to be filed with the state court from which removal was sought. Act of March 3, 1911, ch. 231, § 29, 36 Stat. 1095. If removal was denied from the state court the defendant could nonetheless petition for removal again in the federal court, that court determining the validity of defendant's jurisdictional allegations. See Missouri, Kan. & Tex. Ry. v. Missouri R.R. & Warehouse Comm'rs, 183 U.S. 53 (1901); Removal Cases, 100 U.S. 457, 471-76 (1879).

ject to remand on the judge's own motion [6] or at the request of the plaintiff.[7] When defendants have attempted to remove from tribunals not conforming to usual conceptions of a court, such as tax review boards and boards evaluating property in eminent domain proceedings, plaintiffs, relying on that language in section 1441 limiting removal to actions initiated in "state courts," have maintained that such state forums are administrative, therefore not "courts" for removal purposes.[8]

Federal courts have long recognized such a functional distinction between "administrative agencies" and "courts," but have never formulated satisfactory standards for its application. One early case held that substitution of a board of freeholders for a jury in eminent domain proceedings did not transform a "court" into an "agency."[9] Similarly, state courts reviewing agency determinations are still courts, despite plaintiffs' contentions that review is no more than a continuation of an admittedly administrative proceeding.[10] But a forum labeled a "county court" was found to be actually an administrative agency because, in reviewing tax assessments, it was "only authorized to determine

6. 28 U.S.C. § 1447 (1958); see Barnes v. Parker, 126 F. Supp. 649, 650 (W.D. Mo. 1954); Mayner v. Utah Const. Co., 108 F. Supp. 532, 534 (W.D. Ark. 1952); Dynamic Mfrs., Inc. v. Local 614, Gen. Drivers, 103 F. Supp. 651, 652 (E.D. Mich. 1952).

7. The plaintiff would move to remand under FED. R. CIV. P. 7(b). See Steingut v. National City Bank, 36 F. Supp. 486 (E.D.N.Y. 1941).

Two opinions exist as to the proper action to be taken by a district court in doubt as to whether it can properly assume jurisdiction. One view is that since an order remanding a case is not appealable, the district court should assume jurisdiction; otherwise the defendant will be denied a federal forum. McLaughlin v. Western Union Tel. Co., 7 F.2d 177, 184 (E.D. La. 1925). The other, the majority view, is that "where the jurisdiction of the federal court is doubtful, good judgment requires remand to the District Court of the state, the jurisdiction of which is beyond dispute." Pabst v. Roxana Petroleum Co., 30 F.2d 953, 954 (S.D. Tex. 1929); *accord*, Lorraine Motors, Inc. v. Aetna Cas. & Sur. Co., 166 F. Supp. 319 (E.D.N.Y. 1958); Smith v. Voss Oil Co., 166 F. Supp. 905 (D. Wyo. 1958); Babb v. Paul Revere Life Ins. Co., 102 F. Supp. 247 (W.D.S.C. 1952).

8. See, *e.g.*, Upshur County v. Rich, 135 U.S. 467 (1890); Searl v. School Dist. No. 2, 124 U.S. 197 (1888); Colorado Midland Ry. v. Jones, 29 Fed. 193 (D. Colo. 1886).

9. Searl v. School Dist. No. 2, *supra* note 8.

10. *E.g.*, City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24 (1934); Range Oil Supply Co. v. Chicago, R.I. & Pac. R.R., 140 F. Supp. 283 (D. Minn. 1956); see *In re* Judicial Ditch No. 24, 87 F. Supp. 198 (D. Minn. 1949) (state court acts administratively in approving drainage plan but judicially in reviewing its own order); 3 DAVIS, ADMINISTRATIVE LAW TREATISE § 23.16, at 370-71 (1958) [hereinafter cited as DAVIS]. See also Wallace, *Are Workmen's Compensation Cases Triable in Federal District Courts?*, 7 LA. L. REV. 350, 356-57 (1947).

In two recent cases involving condemnation of land by private corporations, however, removal was denied on the grounds that judicial review of administrative orders was an integral part of condemnation proceedings, and that no "original" jurisdiction existed in a federal court. Chicago, R.I. & Pac. R.R. v. Stude, 346 U.S. 574 (1954) (alternative holding); Collins v. Public Serv. Comm'n, 129 F. Supp. 722 (W.D. Mo. 1955). Similar results have been reached in cases involving attempts to remove appeals of orders of state workmen's compensation boards. *E.g.*, Snook v. Industrial Comm'n, 9 F. Supp. 26 (E.D. Ill. 1934).

questions of quantity, proportion and value," and had no "judicial powers."[11] A state "commission" empowered to determine riparian rights of competing claimants was also not a court,[12] principally because such judicial procedures as the filing of a formal complaint and answer were not used[13] and the commission had no authority to grant affirmative relief.[14] Aside from revealing an unwillingness to be bound by the wholly semantic analysis or by the name which the state has given the forum in question, such cases provide little aid to a judge faced with an attempted removal from a doubtful state forum. Since state legislatures have increasingly granted to administrative agencies functions formerly exercised by courts,[15] attempts to remove from these bodies will probably become more frequent, and the federal courts, in deciding whether a state forum is a "court" for removal purposes, will in all likelihood attempt to formulate new and more meaningful standards.

The problem of a state forum's nature for removal purposes confronted the court in *Tool & Die Makers Ass'n v. General Elec. Co.*[16] There, a union filed complaints with the Wisconsin Employment Relations Board, alleging that General Electric had violated the parties' collective bargaining agreement by failing to pay proper vacation benefits, changing seniority rights and incentive rates, and unilaterally altering work rules.[17] This board was empowered, concurrently with state courts, to hear breach-of-contract claims, but, unlike the courts, had no authority to award damages and could only issue cease-and-desist orders.[18] Three weeks before the date set by the board for a hearing, General Electric filed removal petitions in federal court; jurisdiction was claimed under section 301(a) of the Taft-Hartley Act, which provides that a breach-of-contract action between an employer and a labor

11. Upshur County v. Rich, 135 U.S. 467 (1890). See also *In re* Jarnecke Ditch, 69 Fed. 161 (D. Ind. 1895).

12. *In re* Silvies River, 199 Fed. 495 (D. Ore. 1912), *aff'd sub nom.* Pacific Live Stock Co. v. Lewis, 241 U.S. 440 (1915).

13. *In re* Silvies River, *supra* note 12, at 501-02; see Fuller v. County of Colfax, 14 Fed. 177 (D. Neb. 1882).

14. *In re* Silvies River, *supra* note 12, at 499.

15. GELLHORN & BYSE, ADMINISTRATIVE LAW—CASES 4 (1954); Burton, *Administrative Procedure Before Certain Agencies of the State*, 17 ALA. LAW. 125 (1956); Newman, *Two Decades of Administrative Law in California: A Critique*, 44 CALIF. L. REV. 190, 194 (1956); *cf.* 1 DAVIS § 1.09. In fact, assumption of judicial power by administrative agencies has been attacked as violating separation of power clauses in state and federal constitutions. In New Hampshire a plan for administrative handling of litigation arising from automobile accidents was abandoned when the justices of that state declared that the proposed agency would violate the state constitution. N.H. S. Bill No. 37, Jan. 1935 Sess., in 110 A.L.R. 820; *Re* Opinion of the Justices, 87 N.H. 492, 179 Atl. 344 (1935). For the view that administrative officers are not competent to perform judicial functions, see Katcher, *Are Administrative Agencies Usurping Judicial Powers?*, 30 N.Y.S.B. BULL. 442, 445 (1958).

16. 170 F. Supp. 945 (E.D. Wis. 1959).

17. *Id.* at 949.

18. WIS. STAT. ANN. §§ 111.06(1)(f), 111.07(1) (1957).

organization can be brought in a federal court.[19] The union moved to remand the case on the ground that the board was not a "state court" within the meaning of section 1441.[20]

The district judge denied remand. He first stressed the nature of the action, noting that the complaint was based on breach of contract and that the union could have initiated its suit in a Wisconsin trial court;[21] had that procedure been followed the defendant could unquestionably have removed. The court then looked to the procedures employed by the board and found that they revealed its "judicial character."[22] The board's inability to enforce its own orders was not considered significant.[23] A state cannot, the court reasoned,

19. Labor Management Relations Act (Taft-Hartley Act) § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

20. 170 F. Supp. at 948; See Brief of Wisconsin Employment Relations Board, Amicus Curiae in Support of Respondent's Motion for Remand, pp. 2-4.

The union also resisted removal on the ground that Westinghouse Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437 (1955), foreclosed federal jurisdiction. That case held § 301(a) inapplicable to alleged contract breaches affecting only individual rights as distinct from breaches affecting the union as an entity. The court questioned the validity of *Westinghouse* in the light of subsequent cases, but held that the breaches alleged by the union were within the scope of § 301(a) even as interpreted in *Westinghouse*.

21. "Any controversy concerning unfair labor practices may be submitted to the Board, . . . but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction." WIS. STAT. ANN. § 111.07(1) (1957).

22. 170 F. Supp. at 950. Thus, a proceeding before the board is commenced with the filing of a complaint to which the person complained of has a right to file an answer; the board has a subpoena power; depositions may be taken; a record of proceedings kept; the rules of evidence used in equity courts govern the hearings; and witnesses are paid fees and mileage allowances identical with those paid in court actions. *Ibid.*; WIS. STAT. ANN. § 111.07(2) (1957).

The Wisconsin Employment Relations Board has conceded that *Tool & Die Makers* establishes its status as a court. "While a question may remain as to whether a State Labor Board is a court having the right of concurrent jurisdiction, we believe that the issue has been settled . . . by Judge Tehan in Machinist Lodge 78 v. General Electric Co." John Deere Horicon Works of Deere & Co., 2 LAB. L. REP. (45 L.R.R.M.) 1171, 1173 (Wis. Empl. Rel. Bd. Nov. 23, 1959).

23. See WIS. STAT. ANN. § 111.07(7) (1957); 170 F. Supp. at 950.

The tribunal's authority to issue binding orders and to enforce them has, to most courts, been a crucial factor in determining the tribunal's status as administrative or judicial. In Commissioners of Rd. Improvement Dist. No. 2 v. St. Louis Sw. Ry., 257 U.S. 547 (1922), nonjudicial proceedings were employed, but because the forum's order was binding, conclusive, and incontestable, except by direct attack on appeal, it was held to be exercising judicial powers.

Most agencies must seek enforcement through state courts. See 3 DAVIS § 23.07. *But see* N.H. S. Bill No. 37, Jan. 1935 Sess., in 110 A.L.R. 820. This should not be the sole criterion, however. If all the state court does is rubber-stamp the agency's orders, the rights of the parties are, for all practical purposes, determined solely by that agency. See note 56 *infra*.

Another factor which commentators have considered significant is that the agency can regulate prospectively as well as retrospectively. GELLHORN & BYSE, *op. cit. supra* note 15, at 4. The determination of future, as opposed to present, rights has been thought to reveal an administrative rather than a judicial function. See Holsinger, *Procedures and*

defeat a defendant's right to remove by creating an administrative agency and dividing the judicial function between that agency, which is to determine questions of law and fact, and a court, which is to enforce the board's ruling.[24] Moreover, the court felt that its holding was strengthened by the fact that, under *Lincoln Mills*,[25] the state agency would have had to apply federal substantive law to the alleged contract breach.[26]

The court took account of the congressional policy behind removal jurisdiction and apparently attempted to fashion generally applicable principles for determining when an agency is to be deemed a "court"; but the opinion, on its face, failed to consider the state's purpose in partially jettisoning traditional notions of the judicial process through the establishment of an administrative agency—a purpose which removal might thwart. Of possible purposes, most important is the expertise which can be developed by the members of an agency as a result of extensive experience with case law, statutes, and technical facts in a particular area.[27] This expertise permits the legislature to delegate more discretion in passing upon violations and tailoring remedies than is usually accorded a court.[28] Or, an administrative structure may have been erected to enable the decisionmaker to conduct independent factual investigations so that all relevant information will be available;[29] many cases in-

Practice Before the California State Water Rights Board, 45 CALIF. L. REV. 676, 677 (1957).

24. 170 F. Supp. at 950-51.

> But the legislature of a state cannot, by making special provisions for the trial of particular controversies, nor by declaring such controversies to be special proceedings and not civil suits at law or in equity, deprive the federal courts of jurisdiction nor prevent a removal .... Courts will look beyond forms to the substance, and from it determine whether a controversy, in its essential nature, is a suit at law or in equity, as understood by courts of the United States.

In re Jarnecke Ditch, 69 Fed. 161, 163 (D. Ind. 1895). See also Union Terminal Ry. v. Chicago, B. & Q.R.R., 119 Fed. 209, 215 (W.D. Mo. 1902); Colorado Midland Ry. v. Jones, 29 Fed. 193, 196 (C.C.D. Colo. 1886).

25. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

26. 170 F. Supp. at 951.

27. "The need to bring 'to bear upon difficult social and economic questions the attention of those who have time and facilities to become and remain continuously informed about them' is a major reason for the creation of agencies." Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?*, 1959 WIS. L. REV. 95, 106; see 1 DAVIS § 1.05, at 37-39; GELLHORN & BYSE, *op. cit. supra* note 15; Katcher, *supra* note 15; Wiegel, *Preliminary Report on Plans for Inquiry Into the Wisdom of a California Automobile Accident Commission*, 34 CAL. S.B.J. 393 (1959); *cf.* Frankfurter, *supra* note 4, at 520.

28. See, *e.g.*, WIS. STAT. ANN. § 101.10(5) (1957), charging the Wisconsin Industrial Commission with the duty to "ascertain, fix and order such reasonable standards, rules or regulations for the construction, repair and maintenance of places of employment and public buildings as shall render them safe." See Emmerglick, *A Century of the New Equity*, 23 TEXAS L. REV. 244, 248, 255 (1945).

29. See, *e.g.*, *In re* Willow Creek, 74 Ore. 592, 613-14, 144 Pac. 505, 514 (1912):

> In a proceeding before the board, provision is made for an impartial examination and measurement of the water in a stream . . . and for the gathering of other

volve a public interest beyond that of the immediate parties, which may be overlooked in a wholly adversary proceeding. Legislatures have also established agencies so that claimants may avoid the delay usually attending judicial proceedings.[30] These advantages will be lost whenever an action is removed to a federal court. On the other hand, the fact that an agency has some advantage over a court should not automatically defeat removal. While the right to remove has been limited, and in some situations eliminated, Congress has always believed it important enough to be retained in most cases.[31] And removal from an agency would seem justified by the same principles which allow removal from a court.[32] Thus, a determination of whether a state agency is a 1441 "state court" should be reached by weighing the state's reason for creating the agency against Congress' purposes in granting the right to remove.

The *Tool & Die Makers* court's invocation of *Lincoln Mills* may have been an attempt to strike that balance. Perhaps the court used this case for the proposition that removal should be readily granted when questions of federal labor law are involved, either because federal courts are more competent than state courts to formulate such law or because federal decisions will promote uniformity. But nothing in *Lincoln Mills*, nor the gloss that has developed on

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> essential data by the state engineer . . . all to be made a matter of record in the office of the state engineer, as a foundation for such hearing and to facilitate a proper understanding of the rights of the parties interested. Under the old procedures such information was often omitted. When measurements were made by the various parties to a suit they were nearly always made by different methods and were conflicting. The . . . evidence . . . being mere estimates, rendered a determination extremely difficult for the court and of questionable accuracy and value when made . . . . By proceeding in accordance with the statute, when the matter is presented to the court for judicial action, it is in an intelligible form.

See Harper, *Administrative Procedure Before the State Oil and Gas Board*, 29 MISS. L.J. 82, 89 (1957); LANDIS, THE ADMINISTRATIVE PROCESS 37-40 (1938).

30. 1 DAVIS § 1.05; GELLHORN & BYSE, *op. cit. supra* note 15, at 3, 7. *But see* Wines, *Congestion and Privation*, 34 CAL. S.B.J. 409 (1959).

Other advantages sought by federal and state legislatures have been in the administrative agency's ability to: initiate action on its own behalf, provide continuous supervision over the regulated area, relieve the judiciary and legislature of additional responsibilities and avoid judicial bias against new programs of social reform. 1 DAVIS § 1.05; GELLHORN & BYSE, *op. cit. supra* note 15, at 1-7; LANDIS, *op. cit. supra* note 29, at 30-40; Auerbach, *Should Administrative Agencies Perform Adjudicatory Functions?*, 1959 WIS. L. REV. 95; Kuchman, *The Role of the Hearing Officer*, 44 CALIF. L. REV. 212 (1956).

31. See notes 4 *supra*, 36 *infra*.

32. Judicial review of administrative determinations, whether in state or federal courts, may not be adequate to protect a litigant from bias before the agency. In most states the courts, on review, are restricted to determining whether the agency's findings are reasonable. Note 55 *infra*. Removal, at the review stage, probably will not enlarge the federal court's scope of inquiry. Note 54 *infra*. It is possible that if bias exists it will affect the agency's determination yet will not be so blatant as to make that determination unreasonable. See generally Note, *The Problem of Bias in the Administrative Process*, 4 ST. LOUIS L. REV. 183 (1956).

it, compels this conclusion. In that case the Supreme Court construed section 301(a) of the Taft-Hartley Act as requiring federal courts to apply federal substantive law to breaches of collective bargaining agreements,[33] and subsequent cases have held that state courts are also required to apply federal law to such suits.[34] The *Lincoln Mills* decision, however, has not been interpreted, either by courts or commentators, as ousting the jurisdiction of state courts,[35] which must, therefore, be deemed competent to formulate and apply federal law in this area. Conceivably, the court did not intend to focus only on labor law, but meant to suggest that federal-question cases should be removed more easily than diversity cases. But the policies behind federal-question removal do not support this favored status. A federal forum is granted in diversity cases to protect out-of-state litigants from possible bias in state courts.[36] When jurisdiction is founded on a federal question and the

33. 353 U.S. at 451.

34. Ingraham Co. v. Local 260, Int'l Union of Elec. Workers, 171 F. Supp. 103 (D. Conn. 1959); McCarrol v. Los Angeles County Dist. Council, 49 Cal. 2d 45, 315 P.2d 322 (1957), *cert. denied*, 355 U.S. 932 (1958); see Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542, 557-58 (1959).

35. McCarrol v. Los Angeles County Dist. Council, *supra* note 34, 58 COLUM. L. REV. 278 (1958), 26 GEO. WASH. L. REV. 474 (1958), 71 HARV. L. REV. 1172 (1958), 106 U. PA. L. REV. 1070 (1958), 44 VA. L. REV. 258 (1958); see Wellington, *supra* note 34, at 558.

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

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.). "The constitution has presumed (whether rightly or wrongly we do not inquire), that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice." Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 345 (1816) (Story, J.). See also Chicago, M. & St. P. Ry. v. Drainage Dist. No. 8, 253 Fed. 491, 497 (S.D. Iowa 1917); Union Terminal Ry. v. Chicago, B. & Q.R.R., 119 Fed. 209, 216-17 (W.D. Mo. 1902); Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 512-14 (1928); Sternberg, *Diversity Jurisdiction*, 10 NOTRE DAME LAW. 219 (1935).

Another reason for the existence of diversity jurisdiction is the alleged inadequacy of state courts and state remedies. Professor Moore finds validity in this reason even today. "This should suffice as continual support of diversity, irrespective of whether the reason—possible discrimination by a state court against a non-resident citizen—has validity today." 1 MOORE ¶ 0.1, at 4.

With the mounting volume of litigation clogging the dockets of the federal courts, diversity jurisdiction has been under steady attack. In 1928 Professor Frankfurter felt that fear of local prejudice was no longer justified.

> Whatever may have been true in the early days of the Union, when men felt the strong local patriotism of the *nouveaux riches*, has not the time come now to reconsider how justifiable the apprehensions, how valid the fears? The Civil War, the Spanish War, and the World War have profoundly altered national feeling, and the

defendant is a citizen of the forum-state, the possibility of such bias does not exist. Nor does the grant of removal in federal-question cases imply that Congress believed the state courts incompetent to interpret federal law; when Congress has desired to preclude state determinations of specific federal questions it has granted exclusive jurisdiction to federal courts.[37] Guaranteeing defendants access to federal courts can only be explained, therefore, as an indication that Congress believes federal courts to be somewhat more qualified than state courts but is nonetheless willing to have federal questions determined by state courts if litigants so desire. The "possibly less qualified" state court would seem to present no greater risk of harm to a defendant than the "possibly biased" state court, and, therefore, no greater need for removal. Behind the court's citation of *Lincoln Mills*, then, was probably an idea that when a state must apply federal substantive law no particular state interest will be defeated by removal. In the usual case, state agencies are established to facilitate enforcement of state substantive policies and removal would, therefore, inhibit these policies. When federal law must be applied, only the state's procedure for applying such law is superseded.

Even if the court's partial reliance on *Lincoln Mills* demonstrates a deeper analysis, the opinion rests primarily on the procedures employed by the board and the nature of the union's action. While *Tool & Die Workers* was concerned with a federal question, these tests would seem as applicable in a diversity suit, and their use in the instant case may give them precedent value for future decisions. Reliance on procedures alone would be improper. How an agency operates is at best only one factor to be considered; more important are the functions performed. Additionally, procedures can easily be altered; thus, under this test, a state legislature could determine the removal status of a forum. In this respect procedures are similar to the name given the forum by the state legislature, a standard which federal courts have consistently held

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> mobility of modern life has greatly weakened state attachments. Local prejudice has ever so much less to thrive on than it did when diversity jurisdiction was written into the Constitution.

Frankfurter, *supra* at 521. Mr. Justice Frankfurter continues in this belief. Lumbermen's Mutual Cas. Co. v. Elbert, 348 U.S. 48, 60 (1954) (concurring opinion). See also Statement of Hon. William M. Tuck, Hearings Before Subcommittee No. 3 of House Committee on Judiciary, 85th Cong., 1st Sess., ser. 5, at 4-5 (1957). *But see id.* at 11-12, 35-36.

In 1958 Congress partially responded to attacks on diversity jurisdiction by increasing the jurisdictional amount to $10,000 and prohibiting the removal of actions in state workmen's compensation cases. 28 U.S.C. §§ 1332, 1445 (1958).

37. Congress has granted the federal courts more-or-less exclusive jurisdiction in several areas, including patents, copyrights, and trademarks, 28 U.S.C. § 1338 (1958), and bankruptcy, 28 U.S.C. § 1334 (1958). In addition to the fear that in these areas state courts are less qualified, Congress sought to obtain a more uniform body of law. Although the circuits are often in conflict, it is felt that there will be less disagreement among eleven circuits than among fifty states. Additionally, it is possible that the federal courts might be more sympathetic toward new federal legislation than the states. Note, 70 HARV. L. REV. 509 (1957). Exclusive primary jurisdiction in certain areas is vested in federal agencies rather than courts. 3 DAVIS §§ 19.01-.09.

cannot govern construction of the federal removal statute.[38] Moreover, a procedural test would include practically all administrative agencies since, today, courtlike procedures are widely employed.[39] In Wisconsin, for example, both the Public Service Commission, which regulates railroads and public utilities, and the Industrial Commission, which supervises industrial working conditions, use the same procedures as the Wisconsin Employment Relations Board.[40] But a proceeding before an agency such as the Public Service Commission may not constitute a "case or controversy," since the Supreme Court has held that ratemaking is a legislative, not a judicial function.[41] Federal courts would have no jurisdiction over such a proceeding, and the proceeding would not be removable, regardless of whether the commission is a "court." The second test relied on by the court was that the substantive basis of the complaint—breach of contract—traditionally has been judicially cognizable. While this test would eliminate the "case or controversy" problem, it would again include most administrative agencies; in recent decades these bodies have often assumed functions formerly exercised by courts.[42] Thus, the *Tool & Die Workers* criteria would allow removal from a wide variety of administrative agencies without focusing on the policies underlying the establishment of a specialized forum and the relevance of the purposes of removal in a particular case.

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38. Chicago, R.I. & Pac. R.R. v. Stude, 346 U.S. 574 (1954); Mason City & Ft. D.R.R. v. Boynton, 204 U.S. 570 (1907). The nonresident's removal rights cannot be defeated by state procedures requiring him to be docketed as "plaintiff" when in fact he is defendant nor by designating the first judicial action following an administrative proceeding an "appeal." Chicago, M. & St. P. Ry. v. Drainage Dist. No. 8, 253 Fed. 491 (S.D. Iowa 1917); Wallace, *Are Workmen's Compensation Cases Triable in Federal District Courts?*, 7 LA. L. REV. 350, 355-57 (1947).

The Wisconsin board, in its brief as amicus curiae, urged the district court to accept the Wisconsin Supreme Court's view that the board is administrative and does not perform judicial functions. Brief of Wisconsin Employment Relations Board, Amicus Curiae in Support of Respondent's Motion for Remand, p. 3. The board relied on Dairy Employees Union v. Wisconsin Employment Relations Bd., 262 Wis. 280, 55 N.W.2d 3 (1952), also cited in the district court's opinion. The removal statute is federal law, however, and construction cannot be delegated to state courts. While state court decisions characterizing the forum may be accepted, Pacific Live Stock Co. v. Lewis, 241 U.S. 440 (1915), they are never binding, Commissioners of Rd. Improvement Dist. No. 2 v. St. Louis Sw. Ry., 257 U.S. 547 (1922).

39. See Burton, *Procedure Before Certain Agencies of the State*, 17 ALA. LAW. 125, 126 (1956); Wallace, *supra* note 38, at 354; Harper, *Administrative Procedure Before the State Oil and Gas Board*, 29 MISS. L.J. 82 (1957).

40. WIS. STAT. ANN. §§ 101.11, 101.20-.22, 195.03, 196.26, 196.32-.34, 196.36 (1957).

41. Keller v. Potomac Elec. Power Co., 261 U.S. 428, 443 (1923); Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 225 (1908); Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902). The Constitution in no way limits or restricts the power of the states to combine legislative and judicial functions in a single body. The judicial power of the federal court, however, is limited to "cases" and "controversies." U.S. CONST. art. III, § 2; *cf.* Muskrat v. United States, 219 U.S. 346 (1911).

42. See note 15 *supra* and accompanying text. See generally GELLHORN & BYSE, *op. cit. supra* note 15, at 1-7.

The state's view of the agency's importance may be persuasive evidence of whether its work is peculiarly suited to nonjudicial proceedings. Occasionally, for example, an administrative is an alternative to, and does not supplant, existing judicial forums. In the principal case, for example, the union forwent the opportunity to obtain breach-of-contract damages in a time-consuming court action to seek immediate relief from the board. Thus the state has provided plaintiffs with tactical options which removal would eliminate. But since the state has not made the agency the exclusive forum no overriding state interest requiring administrative determinations may exist; this possibility would be less likely if the agency is the exclusive forum in practice, if not in theory. Official state opinion of an agency's status may also be revealed by the powers granted it and the weight given its findings upon judicial review. Unless the agency has been provided with broad investigatory powers, the right to initiate proceedings on its own motion, and the authority to participate actively in the hearings, the state has not fully utilized its potential advantages.[43] Similarly, provision for de novo review seems to imply that the agency performs no function which could not be performed as well by a court.[44] In most cases, however, no factors suggesting that the agency in question is not important in the state's eyes will be present, and the federal court will have to rely on other grounds in deciding whether to allow removal.

Most significant is the complexity of the subject matter dealt with by the agency; federal courts are necessarily less expert in certain areas than administrative agencies.[45] The states have long deemed administrative bodies more competent than courts to supervise land condemnation, public utilities, natural resources, and railroads.[46] More recently, many states have established agencies in the areas of industrial working conditions, workmen's compensation, and labor relations.[47] That these problems have, by many states as well as by the federal government,[48] been delegated to administrative bodies is indicative of the need for an administrative determination. But this factor cannot be conclusive, because the agency may have been created only to relieve

43. See notes 27-30 *supra* and accompanying text.

44. See note 57 *infra*.

45. *Cf.* Burford v. Sun Oil Co., 319 U.S. 315 (1943) (exceedingly complex problems involved in allocating resources of particular oil-pool justify federal court's refusal to hear suit seeking to enjoin action of Texas Railroad Commission, which is charged with broad responsibility of regulating Texas oil and gas industry).

46. See cases cited notes 8, 10, 12 *supra*.

47. See, *e.g.*, CAL. LAB. CODE ANN. §§ 50-104; CONN. GEN. STAT. §§ 31-101 to -128 (1958); DEL. CODE ANN. tit. 19, §§ 101-09 (1953); OHIO REV. CODE ANN. §§ 4101.00-.99, 4121.17 (Page 1954); PA. STAT. ANN. tit. 77, §§ 101, 131-34 (1952); TEXAS CIVIL CODE ANN. art. 8307 (1956); WASH. REV. CODE ANN. §§ 43.17.010, 43.22.050, 51.04.010-.020 (1951); W. VA. CODE ANN. § 2494 (1955).

48. See 24 Stat. 383 (1887), as amended, 49 U.S.C. § 11 (1958) (creation of Interstate Commerce Commission); 61 Stat. 136 (1947), 29 U.S.C. § 153 (1958) (National Labor Relations Board); 64 Stat. 1265 (1950), 16 U.S.C. 792 (1958) (Federal Power Commission).

state trial dockets or deprive litigants of jury trials; neither of these reasons seems sufficient to defeat the right of removal.[49] On the other hand, federal courts should not allow removal from a new type of agency only because it is novel. Such a policy would too severely restrict state innovation and experimentation.[50] For example, agencies may be created to hear automobile negligence cases. While these actions have traditionally been heard by courts, proponents of such agencies argue that problems such as damages could be more competently handled by a body of experts.[51] Federal courts should hesitate to extend the disrupting affects of removal jurisdiction before considering whether the administrative process offers unique advantages in the cases before them.

It might be argued that removal should never be allowed before the agency has made a determination, since removal would always be available at the judicial-enforcement stage. Invariably review of administrative orders is provided as of right in state courts.[52] And despite arguments that a district court would be exercising appellate, rather than original, jurisdiction, removal has usually been allowed from a reviewing state court.[53] But removal at this stage may not fully protect defendants' right to a federal forum. The scope of review

49. *Cf.* Byrd v. Blue Ridge Rural Elec. Co-op., 356 U.S. 525 (1958). For an analogous situation in another context, see 1 MOORE ¶ 0.317[6], at 3538 (1959).

50. *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 311 (1933) (dissenting opinion of Brandeis, J.).

51. See Wiegel, *supra* note 27; N.H. S. Bill No. 37, Jan. 1935 Sess., in 110 A.L.R. 820.

But the primary purpose in establishing agencies in the area seems to be to relieve greatly overcrowded trial dockets by eliminating jury trials. See Wiegel, *supra* note 27; N.Y. Times, Oct. 26, 1959, p. 5, col. 6. Many individuals will undoubtedly seek removal just so they may have a jury trial in a federal court, and removal would apparently be proper. *Cf.* Lumbermen's Mutual Cas. Co. v. Elbert, 348 U.S. 48 (1954); McLaughlin v. Western Union Tel. Co., 7 F.2d 177 (E.D. La. 1925); Otis, *"Governor of the Trial" or "Referee at the Game,"* 21 J. AM. JUD. SOC'Y 105 (1937); 29 TUL. L. REV. 788 (1955).

52. *E.g.*, WIS. STAT. ANN. § 227.16 (1957); see 1 DAVIS § 1.09, at 74; Netterville, *Judicial Review: The "Independent Judgment" Anomaly*, 44 CALIF. L. REV. 262 (1956); Wallace, *Are Workmen's Compensation Cases Triable in Federal District Courts?*, 7 LA. L. REV. 350 (1947).

53. Removal is available only in actions "of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441 (1958). Quite often, when removal is sought at the enforcement level, the party seeking remand argues that the proceeding is an appeal and that the district court has no authority to act in an appellate capacity. The courts' answer to this argument is that the proceeding before the board was administrative and became judicial only when appealed to the state court. Thus the filing of a petition for review in the state court was the first, original act of a judicial nature. The courts reach this conclusion regardless of whether the state has designated the state court review an "appeal." See note 38 *supra*; Range Oil Supply Co. v. Chicago, R.I. & Pac. R.R., 140 F. Supp. 283 (D. Minn. 1956); *In re* Judicial Ditch No. 24, 87 F. Supp. 198 (D. Minn. 1949). But this response is unsatisfactory in one respect; it does not answer the argument that the review proceeding is not original in that it could not have been brought in the federal court in the first instance. See note 10 *supra*; Collins v. Public Serv. Comm'n, 129 F. Supp. 722 (W.D. Mo. 1955).

in federal courts is usually limited to that prescribed by the state;[54] while this review varies from near-total acceptance of the agency's findings to complete substitution by the court of its own conclusions, in most states the court scrutinizes agency findings of fact only to ensure their reasonableness.[55] Should the federal court also adopt a "substantial evidence" test, removal only at the enforcement stage would defeat whatever policies underlie removal. For example, the bias against out-of-state litigants which diversity removals seek to remedy may be incorporated in what appear to be reasonable findings.[56] A federal court could afford full protection by granting a trial de novo, with little or no weight given the administrative determination. But this procedure would render nugatory the advantages contemplated by the state in establishing the agency and restricting review of its orders.[57] Thus, the scope of federal review, as well as the right to remove from the agency itself, should turn upon the importance of these advantages.

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54. This was the basic premise in Railroad Comm'n v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940). See also *In re* Chicago, M., St. P. & Pac. Ry., 50 F.2d 430 (D. Minn. 1931); Day v. Chicago, M. & St. P. Ry., 45 Fed. 82 (N.D. Iowa 1891).

55. 4 DAVIS § 29.01, at 114.

56. See Katcher, *Are Administrative Agencies Usurping Judicial Powers?*, 30 N.Y.S.B. BULL. 442, 445 (1958); see note 32 *supra*.

57. "Even if a de novo judicial review is held to cure administrative deficiencies from the standpoint of due process, the resulting system is not necessarily sound or desirable. Administrative hearings are often to be preferred to judicial hearings on review." 1 DAVIS § 7.10, at 451. "A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." Unemployment Compensation Comm'n v. Aragan, 329 U.S. 143, 155 (1946).