

NOTES

APPLICABILITY OF CORPORATE CHARTER PROVISIONS IN READJUSTMENTS UNDER THE HOLDING COMPANY ACT*

In applying the "fair and equitable" standard to reorganization plans as required by Section 11(e) of the Public Utility Holding Company Act,¹ the Securities and Exchange Commission has had to determine the effect of corporate charter provisions describing the redemption and liquidation rights of security holders. In *The United Light and Power Company*,² the SEC held that participation of preferred and common stockholders in a plan was not to be measured exclusively by the liquidation provisions of the charter, but by an equitable calculation of all rights surrendered, based on the investment value of the securities held. Justification for this approach was the avoidance of the supposed inequity of adding value to one class of securities at the expense of another in the course of a liquidation enforced by a government agency.³

On appeal in *Otis v. SEC*,⁴ preferred stockholders contended that the plan as approved by the Commission was not "fair and equitable", because, in allowing participation by common stockholders before preferred stockholders had been fully compensated according to the charter liquidation provisions, it violated the "strict priority" rule of *Northern Pacific Railway v. Boyd*⁵ and cognate cases.⁶ The Court, however, held that charter liquidation provi-

* American Waterworks and Electric Co., SEC Holding Co. Act Release No. 7208, February 17, 1947.

1. 49 STAT. 803 (1935), 15 U.S.C. § 79 (1940). Section 11(e) provides for voluntary submission by utility holding companies of reorganization plans and for SEC review to determine if such plans are "necessary to effectuate" the Act and "fair and equitable." Section 11(b) prescribes the standards which plans must meet and empowers the SEC to issue appropriate enforcement orders, including liquidation or reorganization.

2. 13 S.E.C. 1 (1943), *enfd* 51 F. Supp. 217 (D. Del. 1943), *aff'd sub nom. Otis v. SEC*, 323 U.S. 624 (1945).

3. *Id.* at 9. As evidenced earlier in *United Light and Power Co.*, 10 S.E.C. 1215 (1942), *aff'd sub nom. N.Y. Trust Co. v. S.E.C.*, 131 F.2d 274 (C.C.A. 2d 1942), this principle was first evolved in response to protests that 11(e) plans forced by the Act should not include payment of premiums specified in corporate charters for voluntary redemption or liquidation of debentures. Early decisions mainly concerned whether within terms of corporate charters, such plans were "voluntary" or "involuntary"; ultimately, the Commission concluded that they were neither, but were outside the scope of charter terms. *North American Light and Power Co.*, 11 S.E.C. 820 (1942), *aff'd sub nom. City National Bank v. SEC*, 134 F.2d 65 (C.C.A. 7th 1943).

4. 323 U.S. 624 (1945).

5. 228 U.S. 482 (1913).

6. *Consolidated Rock Products Co. v. Du Bois*, 312 U.S. 510 (1941); *Case v. Los*

sions were not conclusive in evaluating the priority of preferred stock because they were not "applicable" to a corporate readjustment made in compliance with the mandate of a regulatory act not in existence at the time the security contract was drawn.⁷ By this rationale the Court avoided any discussion of the more basic question raised in the case: if the charter liquidation provisions do "apply" in a given situation, may it nevertheless be "fair and equitable", within the *Boyd* rule, to adopt some other method of measuring the priority of competing classes of security holders?

Although the *Otis* rule depends upon a finding that the particular corporate readjustment is compelled by the Act,⁸ there is no authoritative judicial formula for determining whether a given plan was advanced in response to statutory compulsion or was evolved from normal business considerations.⁹

Angeles Lumber Products Co., 308 U.S. 106 (1939); *In re* 620 Church Street Bldg. Corp., 299 U.S. 24 (1936); *In re* Chicago Great Western Ry., 29 F. Supp. 149 (N.D. Ill. 1939); *In re* Utilities Power & Light Corp., 29 F. Supp. 763 (N.D. Ill. 1939); *In re* National Food Products Corp., 23 F. Supp. 979 (D. Md. 1938).

7. Considerable disagreement has arisen over the reasoning and holding of the *Otis* case. Commissioner Healy, having referred in his dissent in *United Light & Power Co.*, 13 S.E.C. 1, 31 (1943) to "The Supreme Court's premise that in a liquidation and dissolution compelled by federal law the rights of preferred and common stockholders *inter se* are to be determined by *their contract*," continued to interpret the *Otis* rule as an element in evaluation techniques for reorganizations of "going concerns." See Healy dissenting in *American Light & Traction Co.*, SEC Holding Co. Act Release No. 6603, May 7, 1946; and in *American Power & Light Co.*, SEC Holding Co. Act Release No. 6176, November 1, 1945, insisting that equitable measure of liquidation rights was an innovation in that case. However, the *Otis* rule seems definitely to be based in, and to be a rule of, contract law. See *American Power and Light Co.*, SEC Holding Co. Act Release No. 6176, November 1, 1945; *In the Matter of Engineers Public Service Co.*, D. Del., May 15, 1947; *In re* Interstate Power Co., 71 F. Supp. 164, 169 (D. Del. 1947). *But see* p. 48, *Northern States Power Co.*, SEC Holding Co. Act Release No. 5745, April 27, 1945 (dissent) for a series of quotations illustrating the ambiguity of the *Otis* opinion.

8. Confusion over the *Otis* rule has been intensified by refusal to concede that it rests on statutory compulsion, and by continued adherence to arguments raised by Mr. Chief Justice Stone in his *Otis* case dissent in which he attacked the holding as a breach of the reorganization rule of "strict priority." However, the *Otis* rule concerns measurement of stock rights in contract law as a preliminary to application of the strict priority rule, which concerns the order of recognizing rights already ascertained. See *United Light & Power Co.*, 10 S.E.C. 1215, 1223 (1942) ("The rule of absolute priority, applied by the Supreme Court in the *Los Angeles Lumber* and *Consolidated Rock* cases, is not relevant to the point at issue. The rule does not create rights, but merely requires that such rights and priorities as the senior claimants possess must be . . . compensated . . . before awards are made to junior claimants"). See also *In re* Interstate Power Co., 71 F. Supp. 164, 169 (D. Del. 1947) ("I have always thought that it serves no useful purpose, but rather merely tends to confuse the issues to cite cases in the bankruptcy sense, involving the full priority rule, to support certain arguments in cases involving attempts to comply with the Public Utility Holding Co. Act . . ."). Comment in legal publications on the *Otis* case centered on the strict priority rule and gave little attention to the problem of when the *Otis* principle applied. See Comment, 54 YALE L.J. 840 (1945); Notes, 31 VA. L. REV. 928 (1945), 57 HARV. L. REV. 295 (1945), 33 GEO. L.J. 346 (1945).

9. Lack of detailed discussion of the problem by courts or the Commission partly ac-

From a review of SEC opinions, two theories seem to emerge, furnishing different bases for effecting this determination. One doctrine appears to utilize one or more of three criteria to be used to ascertain factually if a readjustment is advanced under the impact of the Act, or by the kind of corporate decision contemplated by the charter. In other cases the Commission appears to have gone beyond the limitations of these criteria, suggesting that all 11(e) plans are compelled by the Act, and hence that charter liquidation provisions never should control.

The first of the three criteria, suggested by the *Otis* case, would hold liquidation provisions of the charter inapplicable when the proposed corporate action has been specifically covered by a prior order of the SEC issued under section 11(b). This concept appears to have been extended to apply to an 11(e) plan where the only prior order or opinion called generally for a "substantial resetting"¹⁰ of the system without specifying the particular corporate action to be taken.¹¹

In the absence of an SEC order, a second criterion is suggested by cases in which the charter was held inapplicable because the motive underlying the Company's proposed system change was satisfaction of the requirements of the Act.¹² For example, the SEC measured participation in an 11(e) plan

counts for the absence of clarity. Such justification for waiving charter provisions as is given in SEC opinions, is usually contained in a brief paragraph regarding the plan's "necessity." Similar language, however, is frequently used in reviewing the plan as "fair and equitable." Factors listed here separately for discussion are frequently considered simultaneously in SEC opinions.

10. *Western Public Service Co.*, 12 S.E.C. 804, 807 (1943), "As early as July 23, 1941, we made clear our view that the act required a substantial resetting of the Engineers system. . . . The proposed reacquisition can not be regarded as an isolated transaction, it must be viewed with reference to the future scope of its activities." *United Public Utilities Corp.*, SEC Holding Co. Act Release No. 4625, October 16, 1943 (prior SEC opinion indicated need of general reorganization of System).

11. This rule appears also to apply to actions which are alternative or supplemental to prior SEC 11(b) orders. See *Northern States Power Co.*, SEC Holding Co. Act Release No. 5745, April 27, 1945, referring to a prior order and stating, p. 22, "The present plan is but a further step in the process of bringing the Northern States system into compliance with that section, and these steps must be viewed together." See also *American Light and Traction Co.*, SEC Holding Co. Act Release No. 6603, May 7, 1945, p. 11, ("As has been indicated, we have consistently held that a plan to be 'necessary' within the meaning of Sections 11(d) and (e) need not be the only plan capable of effectuating the provisions of Section 11(b), but is 'necessary' if it will be a suitable means of achieving results required thereby.")

12. *Consolidated Gas and Electric Co.*, SEC Holding Co. Act Release No. 4900, February 21, 1944, citing other decisions and stating, p. 5, "In each of the cited cases we had entered an order that the obligor upon the securities involved must be liquidated and dissolved by reason of the provisions of Section 11(b) of the Act. We have not, as yet, entered any such order in respect of Consolidated. However, it has been recognized by the Consolidated management that its capital structure is incompatible with the corporate simplification standards of Section 11(b)(2) of the Act. . . ." *Laclede Gas Light Co.*, SEC Holding Co. Act Release No. 5062, May 24, 1944, p. 26 (rule stated that charter provi-

on a "fair investment value" basis upon admission by the submitting company that its reorganization was designed to correct existing Section 11(b) violations within the utility system and was not primarily dictated by independent business judgment.¹³

Other cases suggest as a third criterion, that when the means required to effectuate an 11(e) plan are derived from the Act or were created by its operation, the SEC may calculate security participation according to the practice approved in the *Otis* case. While perhaps not included within the literal holding of that case, this criterion merely extends its reasoning to place reorganizations necessitating use of governmental machinery on a par with those where the government has directly intervened. As a result charter liquidation provisions do not apply to 11(e) reorganizations which can be effectuated only through powers vested by the Act in the SEC or the courts,¹⁴ or which require the use of cash surplus¹⁵ or voting power¹⁶ resulting from prior changes compelled by the statute.

That inapplicability of liquidation features of security contracts to 11(e) plans depends upon actual compulsion or impact of the Act as measured by these criteria was recently stated by two of the Commissioners in separate opinions. Dissatisfied with the majority opinion's unexplained disregard of the charter, Commissioner Caffrey described substantially the criteria outlined above as tests required for such action and concluded that charter liquidation clauses would control "where liquidation can reasonably be demon-

sions are inapplicable in plans filed "to meet a Section 11(b) order or in anticipation thereof . . ."). New England Gas and Electric Corp., SEC Holding Co. Act Release No. 6729, June 24, 1946, p. 9 ("As heretofore noted, the stated purpose of the plan now before us is to effectuate the provisions of Section 11(b) (2) . . .").

13. Southern Colorado Power Co., SEC Holding Co. Act Release No. 4501, August 24, 1943, *aff'd sub nom.*, *Disman v. SEC*, 147 F.2d 679 (C.C.A. 10th 1945); Washington Railway and Electric Co., SEC Holding Co. Act Release No. 6410, February 15, 1946; Tidewater Power Co., SEC Holding Co. Act Release No. 6407, February 14, 1946 [prior 11(b) order to another part of system concerning same violation of Act, given as motive].

14. Jacksonville Gas Co., 11 S.E.C. 449 (1942); Puget Sound Power & Light Co., 13 S.E.C. 226, 229 (1943) [*Otis* rule applied although no 11(b) order required action taken; plan contained request that the SEC "apply to a court . . . to enforce its provisions"]; see also American Light & Traction Co., SEC Holding Co. Act Release No. 6603, May 7, 1945, p. 16 ("For if, aside from the Act, the common stockholders could liquidate the enterprise . . . then the liquidation preference provision of the charter would be the controlling measure of value.")

15. Western Public Service Co., 12 S.E.C. 804 (1943); Cities Service Co., SEC Holding Co. Act Release No. 4944, March 15, 1944, p. 16 [no prior 11(b) order, but "Over \$22,000,000 of the cash (needed) . . . consists of proceeds from the sale of its interests . . . disposed of as part of its program of compliance with Section 11 and our orders thereunder"].

16. Northern States Power Co., SEC Holding Co. Act Release No. 5745, April 27, 1945, p. 22, "The preferred stock now has more than two-thirds of the voting power only by reason of the 1938 recapitalization which was carried out . . . under the 'fair and equitable' standard of Section 11."

strated to have commended itself to management for reasons not related to the act."¹⁷

Aside from concurring or minority opinions, however, the language of the cases does not clearly indicate whether the criteria are used to determine charter applicability, or to assist in measuring fair investment value under the assumption that charter provisions never completely control. The equivocal status of these criteria is illustrated by the *El Paso* case,¹⁸ in which Engineers Public Service Company, owner of all the common stock of El Paso, was attempting to dissolve the latter under the terms of a corporate charter which did not require payment of a premium to preferred stockholders upon liquidation. Preferred stockholders opposed the plan, contending that the fair investment value of their stock exceeded par, and that charter liquidation provisions should not control. In approving the plan as proposed by Engineers the SEC pointed out that the motive for reorganization was economic benefit to the system wholly apart from Section 11(b); that there was no outstanding 11(b) order compelling liquidation; and that the means to take the step were provided in the corporate charter.¹⁹ This reasoning may have been given as a test to demonstrate that this transaction, unlike that in the *Otis* case, was a "liquidation" within the purview of the charter which, therefore, controlled.²⁰ On the other hand, the Commission may have assumed

17. Commissioner Caffrey concurring in *Engineers Public Service Co.*, SEC Holding Co. Act Release No. 7119, January 9, 1947. Commissioner Hanrahan concurred with Caffrey, but stated separately that he believed the "discussion of investment value of the preferred [in the majority opinion] is wholly unnecessary," in that liquidation was voluntary and covered by appropriate charter provisions. The full history of this plan shows the ephemeral quality of charter provisions. In SEC Holding Co. Act Release No. 7041, December 5, 1946, Engineers declared that their 11(e) plan was involuntary, hoping to gain advantage of the company charter which did not require premiums to be paid in involuntary liquidation. In Release No. 7119 *supra* the SEC insisted that since the plan was involuntary, participation would be measured in fair investment value terms and that the premium would be paid on an investment value basis. This "valuation" requiring payment of the premium was set aside, but the holding that charter provisions were not per se controlling was confirmed. In the *Matter of Engineers Public Service Co.*, D. Del., May 15, 1947.

18. *El Paso Electric Co.*, SEC Holding Co. Act Release No. 5499, December 15, 1944.

19. The *El Paso* opinion indicated strongly that liquidation was being governed by the charter as such: (p. 8) "We regard the proposed transaction as a liquidation within the meaning of the charter. . . . In the circumstances of this case we are satisfied that action taken by Engineers to liquidate El Paso will constitute a bona fide exercise of its voting rights, existing wholly apart from Section 11, and that the proposed liquidation properly brings into operation the rights and limitations prescribed by the certificate of incorporation for just such a contingency. The investment interests of the preferred and common stock are being terminated pursuant to existing contract provisions, and are being compensated as provided in the contract." No question was raised regarding motive of the plan, although it appeared to be advanced by desire to adjust unfavorable conditions resulting from prior working of the Act.

20. *Id.*, at 7, "The proposed liquidation of the company being necessary to effectuate

the inapplicability of charter liquidation provisions and advanced these factors merely as considerations relevant to a measurement of all security rights in terms of "fair investment value." The latter rationale finds support in the fact that this part of the opinion follows a discussion of earnings, dividend rights, and other factors pertinent to valuation.²¹

In other cases, corporate charter liquidation provisions have been dismissed by the Commission as inapplicable with little explanation beyond the statement that they do not govern in Section 11 plans.²² While the detailed history of the proposals usually discloses one of the above listed criteria, these cases might be construed as implying a presumption apropos all 11(e) plans. Some cases, moreover, affirmatively suggest a doctrine in basic conflict with use of selective criteria.²³ For example, although not related to any prior SEC order or opinion, an 11(e) proposal is considered to be advanced under the Act's pressure if the action could have been within the scope of an over-all Section 11(b) order, had such been issued.²⁴ Under this concept all 11(e) re-

the provisions of Section 11(b) . . . retirement of . . . stock, therefore, is not an exercise of a privilege by El Paso within the provisions of its certificate of incorporation relating to calls for redemption, and charter provisions . . . are not brought into operation. . . . [T]hat there is no Section 11(b) (2) order presently outstanding against El Paso does not alter this rule."

21. Commissioner Healy's concurring opinion and Commissioner McConnaughey's dissent in the *El Paso* case suggest from their differing points of view that these two Commissioners believed the majority to be considering the charter liquidation provisions as only one of a group of factors in an equitable evaluation of security rights.

22. Consolidated Electric and Gas Co., SEC Holding Co. Act Release No. 5630, February 26, 1945 [bonds retired in 11(e) plan without payment of redemption premium although no 11(b) order was outstanding; no reason for waiver of charter given, but plan was held compelled by the Act]; Great Falls Gas Co., SEC Holding Co. Act Release No. 4631, October 18, 1943 [11(e) plan approved with participation of preferred and common stock before full payment to debentures. Record shows plan highly desirable for business reasons to company, no 11(b) order]; International Utilities Corp., SEC Holding Co. Act Release No. 4896, February 15, 1944, p. 7 (unqualified statement that "we have repeatedly held, however, that reorganizations under Section 11 . . . do not operate to mature liquidation claims . . ."; supporting citations sometimes contain recognizable criteria). Although unmentioned, there was a prior 11(b) order in this case, see 13 S.E.C. 226 (1943), cited *supra* note 13; General Gas and Electric Corp., SEC Holding Co. Act Release No. 5950, July 26, 1945.

23. American Utilities Service Corp., SEC Holding Co. Act Release No. 5114, June 22, 1944; Georgia Power and Light Co., SEC Holding Co. Act Release No. 5568, January 25, 1945; North Continent Utilities Corp., SEC Holding Co. Act Release No. 4686, November 18, 1943.

24. Northern States Power Co., SEC Holding Co. Act Release No. 7148, January 30, 1947, p. 2 ("A Section 11(b) order . . . is merely the Commission's findings . . . of what ultimate objectives need to be attained . . . to which plans under Section 11(e) must be addressed if they are to be approved as 'necessary' . . ."); Central States Utilities Corp., SEC Holding Co. Act Release No. 5351, October 14, 1944; Virginia Public Service Co., SEC Holding Co. Act Release No. 4618, October 16, 1943, p. 37 ["If the plan is amended in accord with our findings, it will coincide in most respects with the action we would require under Section 11(b) (2) if we were proceeding independently of the plan";

organizations would be held to be under the Act's coercion because all plans filed under Section 11(e) concern standards, which, within the broad area of administrative discretion, presumably could have been enforced by an 11(b) order, and in fact must be found "necessary to effectuate the requirements of the Act" as a prerequisite to SEC approval.²⁵

This doctrine does not seem to be derived from the *Otis* principle, since it would provide equitable discharge of contracts adjusted or terminated for reasons not related to government action.²⁶ Such a rule renders useless dicta the statements in SEC opinions concerning distinctions between 11(e) plans instigated by business judgment apart from the Act, and those formed by the SEC or by the companies under an 11(b) order.²⁷

The lack of a firm rule for determining charter applicability produced an impasse in the principal case, *American Waterworks and Electric Company*,²⁸ in which the proposed self-liquidation scheme included a cash payment to

no 11(b) order here, but approval withheld until plan amended to distribute assets in shares conflicting with charter preferences.] Engineers Public Service Corp., SEC Holding Co. Act Release No. 7041, December 5, 1946.

25. While many of the cases cited in notes 22 through 24 *supra* suggest that a plan will be found to be under the impact of the Act if it can be called "necessary" in being initially reviewed by the SEC, other opinions seem to suggest an even more lax rule; Midland Utilities Co., SEC Holding Co. Act Release No. 7054, December 14, 1946, p. 20 ("It thus seems clear that Section 11(e) permits a company to propose particular transactions which under our ordinary practice we would not, or perhaps in any event could not, specifically require by order under Section 11(b). Since we are dealing with a plan filed under Section 11(e), we need not consider precisely what might be ordered under Section 11(b) . . . but need merely consider whether the plan as filed . . . is necessary to effectuate the provisions of Section 11(b), i.e., appropriate . . ."); Standard Gas and Electric Co., SEC Holding Co. Act Release No. 5070, May 31, 1944 [power to modify security rights stated not to depend on prior 11(b) order, but to be applicable in voluntary plans at the SEC's discretion].

26. 6 WILLISTON, CONTRACTS §§1759, 1938-9 (Rev. Ed. 1938), after recognizing that contracts interrupted by statutory compulsion should be discharged without liability, states that details regarding interruption by administrative agencies are not clearly established. Section 1967A suggests that such compulsion must be the effective element in ending the contract to justify waiver of liability under the contract's terms.

27. Other SEC opinions suggest no material difference exists between voluntary and involuntary action. Commonwealth and Southern Corp., 11 S.E.C. 138, 165-6 (1942), "We adhere to our remarks in those cases, which are to the effect that compliance with Section 11(b) may frequently be best accomplished by voluntary action. . . . Indeed, compulsion along broad and general lines, such as that inherent in our proposed order, is not inconsistent with but is designed to precipitate voluntary plans defining the methods and processes to be used in complying with the mandate of the statute."; Electric Bond and Share Co., 11 S.E.C. 1146, 1208-16 (1942). See also SEN. REP. NO. 621, 74th Cong., 1st Sess. 58-60 (1935), "Voluntary action by Companies should be encouraged as much as possible, but the Commission should be empowered to issue orders compelling necessary divestments, dissolutions, and reorganizations . . . the devices . . . to effect that continual pressure to compel that continual dismantling process. . . ."

28. SEC Holding Co. Act Release No. 7208, February 17, 1947. For earlier opinions concerning this case see Releases 7091, December 24, 1946; and 7171, January 31, 1947.

preferred holders of the par value of their stock, the amount specified in the charter liquidation provisions. As in the *El Paso* case, the preferred stockholders objected to the plan on the ground that the charter provisions should not measure the value of their priority.²⁹ Despite American's insistence that the proposal was advanced apart from the Act, the SEC refused to approve the plan as "fair and equitable." To avoid delay a compromise was reached, providing for an immediate payment of the amount specified in the charter and the establishment of a \$2,200,000 escrow fund to insure payment of any additional amount the SEC might finally determine to be due.³⁰ The management reserved the right to contest any final finding by the SEC and the amount to be paid to the preferred stock remains to be decided.

From further consideration of the principal case it appears that the criteria previously suggested are not satisfied. First, instead of an order or opinion compelling liquidation, there is a prior SEC opinion, issued in 1937,³¹ stating that continued existence of American, including the water enterprises whose elimination motivated this liquidation, was satisfactory under the Act.³² Secondly, the purpose or motive of American's proposal does not seem to show compulsion of the Act. In this connection the company testified that

29. Controversy centered over amount to be paid the 199,686 shares of \$6 preferred stock. The corporate charter provided that in the event of any liquidation or dissolution of the corporation, whether voluntary or involuntary, the holders of outstanding first preferred stock should be entitled to \$100 per share. The stock was redeemable at the corporation's option at \$110. SEC Holding Co. Act Release No. 7171, January 31, 1947.

30. While the SEC did not contend the \$10 redemption premium should be paid per se, the escrow amount was openly calculated at \$10 per share plus administrative expenses. For an interesting comment on validity of such "calculations" see Northern State Power Co., SEC Holding Co. Act Release No. 5745, April 27, 1945 (dissent).

31. American Waterworks and Electric Co., 2 S.E.C. 973 (1937). Within the broad range of an administrative agency's discretion this decision could be recalled by the SEC and a new finding issued holding discontinuance of the system's water enterprises to be necessary. Section 11(b) of the Act states, "The Commission may by order revoke or modify any order previously under this sub-section, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist." See North American Co., SEC Holding Co. Act Release No. 5657, March 15, 1945; Northern States Power Co., SEC Holding Co. Act Release No. 6987, November 9, 1946. Logically, such a new order could hardly be considered effective compulsion to take action which the Company had already voluntarily proposed to do. But see Northern States Power Co., SEC Holding Co. Act Release No. 7148, January 30, 1947, in which the SEC states that upon issuance of an 11(b) order duplicating an 11(e) plan which the SEC had previously approved, the action proposed by the company becomes compelled by the Act.

32. While the original 1937 order provided for internal adjustments within the structure of the gas, electric and transportation system, including liquidation of its top holding company as a necessary step to comply with provisions of §11(b), the current plan is not proposed as an alternative or substitute to that order; and the Company has stated and the SEC agreed that further plans for the necessary internal adjustments within this system will be forthcoming. Brief for American Waterworks and Electric Co. (1946).

the continued existence of American as head-holding company over two subsidiary holding companies (one dealing in water only and the other dealing in gas, electricity, and transportation) was no longer desirable since for business reasons the management had decided to dispose of all of the system's water enterprises.³³ Finally there is no basis for holding that the means proposed to effectuate the liquidation involved reliance on the Act,³⁴ since American originally proposed that after SEC approval, liquidation would proceed according to charter provisions and pertinent state law.³⁵

The *American Waterworks* case is important because it presents squarely the problem of the applicability of charter liquidation provisions in Holding Company Act reorganizations. Since none of the three criteria previously suggested is present, a decision that American's preferred stockholders should receive the liquidation amount specified in the charter will support the theory that charter provisions control, absent a factual showing of statutory compulsion in the particular case. Experience has demonstrated that this requires, in many cases, a hair-splitting analysis of the motives underlying the promulgation of a plan by the corporate management—an almost impossible task for even the most expert of administrative bodies. On the other hand, measuring the preferred participation in terms of "fair investment value" will affirm the theory that the mere existence of the Act offers sufficient compulsion to invoke the *Otis* case doctrine of measuring the priority of preferred stock without being exclusively bound by the liquidation features of the charter. Although adoption of this second alternative will obviate the difficulties imposed by the first, it may lead one to question the logic of treating preferred stockholders differently in Holding Company Act reorganiza-

33. American is head company over the West Penn. Electric Co., which controlled the system's gas, electric and transportation companies, and over Waterworks Holding Co. which controlled only water companies. While American actually controlled some water companies directly, these were to have been transferred to Waterworks Holding Co. under a separate plan, leaving American with direct ownership in the two subsidiary holding companies only. Brief for American Waterworks and Electric Co. (1946).

34. Neither funds nor voting power existing as a result of the Act are to be used in this liquidation. Sale of the system's waterworks assets will produce the required funds; and as required under applicable state law (Delaware), the original plan provided for submission to the common stockholders for approval.

35. In this connection, it should be noted that § 11(e) provides that "... the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18 . . . to enforce and carry out the . . . plan." Since such a request on its face is voluntary, it should not be held to bring a plan under the impact of the Act. Only when a plan actually cannot be effected without such aid would use of power of the act seem to furnish that degree of statutory compulsion justifying waiver of charter provisions. This is important in view of the SEC's policy of encouraging companies to request aid in enforcing 11(e) plans, Mississippi River Power Co., SEC Holding Co. Act Release No. 5776, May 5, 1945; Kings County Lighting Co., SEC Holding Co. Act Release No. 7060, December 14, 1946 [refusing approval of 11(e) plan unless amended to include request for SEC and court aid in enforcing plan; original plan was to be effected by state law and charter requirement].

tions than in reorganizations under the Bankruptcy Act. The idea that a proposal is any more compulsory because undertaken within the framework of the former statute, rather than the latter, hardly stands analysis. Nor is it any more persuasive to contend that corporate charters drafted in the 'twenties "contemplated" a reorganization under provisions of the Bankruptcy Act first adopted in 1934, but not a reorganization under the Holding Company Act, promulgated in 1935. The ultimate problem, in seeking fair and equitable plans under either statute, is the determination of the extent to which holders of senior securities are to be compensated for their actual loss of priority. Whether the measurement is made according to the appropriate terms of the corporate charter or on the basis of "fair investment value," it is difficult to see any reason for applying different standards in the two situations.

PROFIT-SHARING BONUSES AS PART OF THE OVERTIME BASE UNDER THE FAIR LABOR STANDARDS ACT*

Under Section 7(a) of the Fair Labor Standards Act of 1938,¹ an employee engaged in interstate commerce² may work more than forty hours per week only if paid one and one-half times the "regular rate at which he is employed" for each hour of overtime.³ In *Walling v. Garlock Packing Co.*,⁴ the Second Circuit recently ruled that an employer's payments to its employees under a profit-sharing bonus plan are part of the employees' "regular rate" of compensation within the meaning of the statute, a holding particularly significant because of its applicability to the enormous number of profit-sharing plans instituted during the war years.⁵ It would seem to subject sponsors of

* *Walling v. Garlock Packing Co.*, 159 F.2d 44 (C.C.A. 2d 1947), *cert. denied*, 67 Sup. Ct. 1310 (1947).

1. 52 STAT. 1060 (1938), 29 U.S.C. § 201 *et seq.* (1940) (hereinafter referred to as the FLSA).

2. For discussion of this term as used in the FLSA, see Davisson, *Coverage of the Fair Labor Standards Act*, 41 MICH. L. REV. 1060 (1943), 43 MICH. L. REV. 867 (1945); Note, 55 YALE L. J. 421 (1946).

3. Latitude for industries operating intensively only during short periods is afforded by §§ 7(b) (c) and 13. See 52 STAT. 1063 (1938), 29 U.S.C. § 207 *et seq.* (1940).

4. 159 F.2d 44 (C. C. A. 2d 1947), *cert. denied*, 67 Sup. Ct. 1310 (1947).

5. This note is concerned primarily with profit-sharing bonus plans, through which the employee receives direct payments determined by the profits, as distinguished from the trust arrangement, where the employer contributes either a percentage of the profits or a stipulated sum to a fund from which employees later receive benefits. The latter device is most commonly used for pension plans.

No accurate measure is available of the number of profit-sharing bonus plans in existence. Indicative of the growth in popularity of the profit-sharing concept, however, are the cumulative figures on all types of plans in P-H PENSION AND PROFIT-SHARING SERV.

many such programs to suits by their workers claiming that overtime compensation paid them was calculated on an insufficient base and demanding the liquidated double damages which the FLSA provides.⁶

While infinite variations on the basic theme have been developed,⁷ the typical profit-sharing plan distributes to employees direct payments determined by the size of the firm's profits, the worker's seniority and similar factors. The Wage and Hour Division of the Department of Labor, enforcement agency of the FLSA, has made regularity of bonus payments its primary criterion of the Act's applicability to profit-sharing plans, asserting that where "the payment and the amount of the bonus are solely in the discretion of the employer"—*e.g.* a cash Christmas gift—the payment is not part of the overtime base.⁸ But, the Division maintains, where the employer "promises,

¶ 902.1 (1946) and the annual report of the Commissioner of Internal Revenue on the number of trust plans approved under § 165 of the Internal Revenue Code. *REP. COMM'R INT. REV.* 22 (1945) and 28 (1946).

"It would be unrealistic not to recognize that the high wartime profits and corporate tax rates, accompanied by high individual rates together with wartime wage and salary controls, have contributed to this enormous growth. . . ." *Cann, How the Commissioner Handles Pension Plans*, 23 *TAXES* 918 (1945).

As was done by the employer in the instant case, full tax deduction may be taken on profit-sharing bonuses as a normal business expense. *INT. REV. CODE* § 23(a). *See* *Moline Dispatch Publishing v. Commissioner*, 11 B.T.A. 934 (1928); *Commercial Electrical Supply Co. v. Commissioner*, 8 B.T.A. 986 (1927). The demarcation between deductible and taxable, so far as trust plans are concerned, is drawn by § 165 of the Internal Revenue Code, 53 *STAT.* 67 (1939), 26 *U.S.C.* § 165 (1940), as amended, 56 *STAT.* 862 (1942), 26 *U.S.C.* § 165 (Supp. 1946).

Continuation of the profit-sharing bonus plans now in existence and institution of new ones would seem to depend considerably on prolongation of the present economic boom. *See* *BALDERSTON, PROFIT-SHARING FOR WAGE EARNERS* 9, 31-2 (1937). That pension and similar trust programs are somewhat harder is evidenced by study of their record under the impact of the 1929-32 depression, 2 *LATIMER, INDUSTRIAL PENSION SYSTEMS* 841-76 (1932). Efforts to increase the durability of trust plans have led to introduction of the profit-sharing principle by varying employer contributions across the business cycle, thus permitting maximum tax deductible contributions in highly profitable years and complete suspension in poor years.

6. 52 *STAT.* 1069 (1938), 29 *U.S.C.* § 216(b) (1940). Suit to recover damages may be maintained in any court of competent jurisdiction, but while the original Act permitted a variety of representative actions, suit may now, under the amendment to § 16(b) made by the Portal-to-Portal Act of 1947, be brought only by an employee, with other employees permitted to be represented as parties plaintiff only on giving written consent. *Pub. L. No. 49*, 80th Cong., 1st Sess., § 5(a) (May 14, 1947).

7. Illustrative of the ingenious modifications which have been made on the basic model is the plan in the instant case. *Balderston, op. cit. supra* note 5, at 71-131, catalogues 93 separate plans, each tailored to the requirements of its sponsor.

8. Bonus Payments, Wage and Hour Div. Press Release, No. A-13, Feb. 5, 1945. Determination of whether a sum paid an employee is compensation or a "gift" arises in numerous contexts other than that of the FLSA. Indeed, the Administrator ruled on the status of employer contributions to pension funds, *see infra* note 37, by accurately paraphrasing a section of the Social Security Act, 49 *STAT.* 639 (1935), 26 *U.S.C.* § 1426(a) (1940). And in considering whether certain bonuses were such an integral part of the

agrees or arranges to pay a bonus" the size of which is fixed or determinable mathematically, the amount paid must be regarded as part of the "regular rate" of compensation.⁹

Although there has been much litigation of Section 7(a)'s applicability to incentive bonus arrangements,¹⁰ the *Garlock* case is the first to test the full extent of the Division's stand on profit-sharing.¹¹ In 1937, defendant corporation promulgated a plan under which each hourly-paid employee received a quarterly cash bonus equal to the concurrent dividend on a certain number of shares of stock. The number of fictitious shares allocated varied

wage structure that failure to pay them violated the wage freeze of Exec. Order 9250, 7 F.R. 7871 (1942), the Chairman of the War Labor Board forecast an aspect of the rationale of the instant case, saying: "... the employee's conception of his wage ... arises not only from the obligatory practice of the employer, but from the latter's voluntary acts as well. ... To the extent that the employer by repeated voluntary action has raised the reasonable expectations of his employee he has fettered his own discretion. An element of compulsion, albeit self-imposed compulsion, necessarily emerges which governs the employer in the continued exercise of his discretion." *Nineteen Hundred Corp.*, 12 WAR LABOR REPORTS 417, 418 (1943).

9. Bonus Payments, Wage and Hour Div. Press Release, No. A-13, Feb. 5, 1945.

10. Rulings were obtained from the Supreme Court in two cases decided simultaneously, *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, and *Walling v. Harnischfeger Corp.*, 325 U. S. 427 (1945). In the former, the employee was paid on an hourly basis unless his earnings computed on a piece-work formula were greater, in which case he received the latter sum. The employment contract provided for time and one-half for overtime if the worker were paid at the hourly rate, but stipulated that the piece-work payments covered both straight time and overtime. The Court, granting the requested injunction, found that the piece-work rate was actually the "regular rate," inasmuch as the hourly rate bore no relation to the payments normally received by the employee. The *Harnischfeger* case, also a victory for the Administrator, differed primarily in that its result required the employer to include bonuses paid for meeting production goals when virtually all employees did so.

The touchstone of these decisions would seem to be that §7(a) is violated by the establishment of a wage rate not related to the employee's actual income as a basis for overtime. It might be expected that a corollary of this rule would be that an employee whose working hours vary above and below the statutory maximum must receive additional pay for weeks in which his work exceeds forty hours. In *Walling v. Belo Corp.*, 316 U. S. 624 (1942), however, the Court held valid a plan antithetical to this proposition. Under the *Belo* scheme, the employee was paid on an hourly basis. But regardless of the number of hours worked, he was guaranteed a flat sum weekly, usually 60 times the hourly figure, with a proviso that the flat payment covered both regular time and overtime. The result was that (at the time the statutory maximum workweek was 44 hours) the employee had to work 54½ hours before becoming entitled to any pay above his weekly guarantee.

Recently reaffirming the *Belo* decision, the Court endeavored to refute its alleged contradiction of later doctrine but finally retreated to the veneration due aged precedents not legislatively disavowed, concluding: "Even if we doubted the wisdom of the *Belo* decision as an original proposition, we should not be inclined to depart from it at this time." *Walling v. Halliburton Oil Well Cementing Co.*, 67 Sup. Ct. 1056, 1060 (1947). See Feldman, *Algebra and the Supreme Court*, 40 ILL. L. REV. 489 (1946).

11. The Division had prevailed in an earlier case involving a monthly bonus scheme. *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780 (C.C.A. 2d 1946), *cert. denied*, 323 U. S. 870 (1946).

with the worker's length of service, but full payment depended on his having worked forty hours weekly during the quarter for which the dividend was declared. Should the employee have worked fewer than forty hours during any week, he received such proportion of the bonus as his average number of hours worked weekly bore to forty. Overtime work added nothing to the size of the payment.

The Wage and Hour Administrator sought to enjoin operation of the plan, asserting that exclusion of payments under it from the "regular rate" violated Section 7(a) and that to permit this exclusion would lead to evasion of the statutory requirements through payment of lower hourly rates supplemented by periodic bonuses.¹² Recognizing that the exact amount of any particular bonus could not be determined by the employee prior to declaration of the dividend,¹³ and that any payment was, therefore, *ex post facto* compensation, the Second Circuit nonetheless reversed the District Court¹⁴ and remanded for the issuance of an injunction. Speaking for the court, Clark, J.,¹⁵ employed the pragmatic test laid down by the Supreme Court in *Walling v. Youngerman-Reynolds Hardwood Co.*: "The regular rate . . . is not an arbitrary label chosen by the parties; it is an actual fact."¹⁶ Although that case might have been distinguished on the ground that it involved an incentive-bonus plan under which the zealous employee received his premium as part of his weekly paycheck,¹⁷ Judge Clark ignored the distinction and held that the employee's knowledge of the bonus and his certainty of benefit under it were such inducements to employment as to be determinative of the plan's compensatory nature. In like fashion, the court denied defendant's argument that the plan lacked regularity in that it was subject to withdrawal at any

12. In view of the Garlock plan's inception before the passage of the Act and the consequent difficulty of proving attempted circumvention of the statute, the Administrator made no attempt to show bad faith. No such demonstration has been considered necessary by the Supreme Court. See *Walling v. Harnischfeger Corp.*, 325 U. S. 427 (1945), *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419 (1945).

13. The dividend rate varied between \$.25 and \$1.25 per share but for three years prior to institution of the action was fixed at \$.50.

14. Since the payment of any bonus depended on the declaration of a dividend, an action wholly discretionary with the company's directors, the District Court had found that any bonus paid was more gift than compensation. *Walling v. Garlock Packing Co.*, 18 LAB. REL. REP. (6 Wage & Hour Cases) 46 (S. D. N. Y. 1946). Judge Clark made clear the illusory nature of such discretion, saying: ". . . the passing of a dividend is so grave a confession of financial weakness that it is unthinkable that defendant's directors would take that action just to pass a bonus payment." *Walling v. Garlock Packing Co.*, 159 F.2d 44, 45 (1947).

15. Augustus N. Hand, J., joined in the opinion. Swan, J., "reluctantly" concurred separately, noting that authoritative decisions precluded adoption of his personal belief that the profit shares should be treated as gifts. *Walling v. Garlock Packing Co.*, 159 F.2d 44, 47 (1947).

16. 325 U. S. 419, 424 (1945).

17. See note 10 *supra*.

time, pointing out that all but contractual wages are subject to termination.¹⁸

The prospective effect of the decision is to require defendant, if it wishes to continue the plan in operation, to modify it by allotting stock on the basis of overtime as well as regular time. While at first impression this would seem to call for repetitive calculation of overtime,¹⁹ the Administrator has pointed out that the aim can be achieved by basing any bonus or profit share on a percentage of each employee's net earnings, in which case the bonus itself would include both straight time and overtime.²⁰

18. Authority for the court's refusal to consider the power of withdrawal as negating regularity was *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780 (C.C.A. 2d 1946), *cert. denied*, 328 U.S. 870 (1946), where defendant had paid pre-arranged bonuses monthly, subject to withdrawal, but Frank, J., had said: "... the undenied, crucial fact here is that in fact they were regularly paid." *Id.* at 784.

Making clear that the employer had benefited from the profit-sharing plan as he would have from any pay raise, Judge Clark also struck down defendant's contention that the bonus should not be considered compensation since it depended on neither time worked nor production.

19. On the ground that employer, having paid overtime and wishing to pay a bonus, would then have to recalculate the overtime worked to make allowance for the additional compensation. Viewing this as the sole possible method, the court in *Walling v. Frank Adam Electric Co.*, 66 F. Supp. 811, 815 (E.D. Mo. 1946) stigmatized the Administrator for requiring an employer to "... march down the hill, start the overtime process all over and march back up. . . ."

20. Bonus Payments, Wage and Hour Div. Press Release No. A-13, Feb. 5, 1945.

E.g., in the case of an employee working 50 hours weekly at a "regular rate" of \$1.00 per hour, the total wage is calculated:

Straight time pay:	40 hrs. at \$1.00—\$40.00
Overtime pay:	10 hrs. at 1.50— 15.00
Total wage:	<u>\$55.00</u>

Assuming that the employer wishes to pay employees a bonus of 10% on their earnings, it is violative of the FLSA to base it on straight time exclusively:

Straight time pay:	40 hrs. at \$1.00—\$40.00
Bonus of 10% of straight time pay:	4.00
Overtime pay:	10 hrs. at 1.50— 15.00
Total wage (illegal):	<u>\$59.00</u>

Instead, the bonus must be based on overtime as well as regular time. This can be done by repetitive calculation of overtime:

Straight time pay:	40 hrs. at \$1.00—\$40.00
Overtime pay:	10 hrs. at 1.50— 15.00
Total initial payment:	<u>\$55.00</u>
Plus 10% of regular pay:	4.00
Recomputation of overtime based on \$1.10 hourly wage:	<u>1.50</u>
Total over-all payment:	<u>\$60.50</u>

The decision may be regarded, evidently, as judicial approval of the Administrator's interpretation of Section 7(a), in which "regularity" is the basic determinant of the need to include profit-sharing additions to the base wage in computing the "regular rate."²¹ Motivated by considerations of administrative efficiency, the Wage and Hour Division has declared that for purposes of enforcement its fundamental criterion of "regularity" will be payment of bonuses at quarterly or more frequent intervals;²² but if "regularity" is the key, it would seem that bonuses paid at any interval might partake of this quality.²³

Although suits by the Administrator to enjoin plans where payments are made less frequently than quarterly are apparently precluded, there seem few legal obstacles to actions by employees for damages. This distinction arises from the legislative history of Sections 9 and 10 of the Portal-to-Portal Act of 1947,²⁴ which afford an employer a good defense if he can prove good faith compliance with an administrative enforcement policy. According to the report of the conference committee,²⁵ action by the Administrator is barred where his conduct has led the employer to believe that no suit will be instituted by the United States; but the defense is available against an employee's suit only where the employer believed in good faith, as a result of the enforcement policy, that his action was not a violation of the FLSA.²⁶ The Division's announced intention to limit enforcement action to profit-sharing plans of quarterly or more frequent interval contains specific notice that it is not meant to preclude suits by employees attacking plans where bonuses are paid

But, by the Administrator's method, the same result can be reached by calculating the bonus on the employee's net earnings, thus saving the recomputation of overtime necessary under the method used above:

Regular pay:	40 hrs. at \$1.00—\$40.00
Overtime pay:	10 hrs. at 1.50— 15.00
Total initial payment:	\$55.00
Bonus of 10% of total initial payment	5.50
Total over-all payment:	\$60.50

21. *Ibid.*

22. "Such considerations as the recognized bookkeeping difficulty confronting employers in allocating a bonus paid less often than once each quarter to the hours in which the bonus was earned, the time-consuming burden placed upon the inspection staff when confronted with the task of making such allocations and the benefit to employees of having a current knowledge of the hourly rate upon which their overtime will be calculated motivate this administrative policy." *Ibid.*

23. A plan involving monthly payment of 25% of a company's profits to its employees, with payment of any residue at the end of the year, was recently enjoined by the Sixth Circuit in a decision which favorably cites the instant case. *Walling v. Wall Wire Products Co.*, 161 F.2d 470 (C.C.A. 6th 1947).

24. Pub. L. No. 49, 80th Cong., 1st Sess. (May 14, 1947).

25. See H. R. REP. No. 326, 80th Cong., 1st Sess. 16 (1947).

26. *Ibid.*

less often.²⁷ So definite a caveat would almost certainly, in a suit by an employee, negate a defense based on reliance in good faith upon the Administrator's policy.²⁸ The broad language employed by the court²⁹ makes equally unlikely, in future cases, a successful attempt by an employer to limit the *Garlock* doctrine to its specific facts.

That the *Garlock* rule will eventually be extended to cover most profit-sharing plans may, in consequence, scarcely be doubted. But it need not be anticipated that modification of existing plans to comply with the rule will be accomplished only after litigation of a substantial number of employee suits for damages. The Portal-to-Portal Act imposes a two-year-maximum Statute of Limitations on all actions arising under the FLSA³⁰ and places stringent restrictions on the liquidated damages clause,³¹ thus striking at the profitability of actions for unpaid overtime. From the paucity of suits of this type filed by employees even prior to the enactment of these statutory handicaps,³² it may be inferred that the few unions³³ concerned would rather rely on bar-

27. "This enforcement policy, of course, does not and cannot affect the independent right of employees under Section 16(b) of the Fair Labor Standards Act to bring their own suits to recover wages that are due them." Bonus Payments, Wage and Hour Div. Press Release, No. A-13, Feb. 5, 1945.

28. Possible, however, is treatment of the Administrator's warning as valueless dicta—inasmuch as the FLSA, prior to the Portal-to-Portal Act, gave him no binding interpretive power—in which event, proof of reliance in good faith would be greatly facilitated.

29. Perhaps most indicative of the tenor of the opinion is the conclusion that to permit the plan "would give defendant an advantage over competitors in labor costs derived not from efficiency of utilization of labor, but from differences in details of draftsmanship in their respective bonus plans." *Walling v. Garlock Packing Co.*, 159 F.2d 44, 46 (1947).

30. Pub. L. No. 49, 80th Cong., 1st Sess., § 6 (May 14, 1947). Suits brought under the FLSA in state courts prior to the enactment of the Portal-to-Portal Act were subject to the applicable state Statute of Limitations, *Cannon v. Miller*, 22 Wash.2d 227, 155 P.2d 500 (1945); see *Walsh v. 515 Madison Ave. Corp.*, 181 Misc. 219, 42 N.Y.S.2d 262 (Sup. Ct. 1943), *aff'd* 293 N.Y. 826, 59 N.E.2d 183 (1944); as were actions brought in a federal court, *Culver v. Bell & Loffland*, 146 F.2d 29 (C.C.A. 9th 1944) (by implication); see *Caldwell v. Alabama Dry Dock & Shipbuilding Co.*, 161 F.2d 83, 85 (C.C.A. 5th 1947). But a state statute aimed specifically at the FLSA is unconstitutional, violating the supremacy clause and denying equal protection of the laws. *Caldwell v. Alabama Dry Dock & Shipbuilding Co.*, *supra*.

31. Pub. L. No. 49, 80th Cong., 1st Sess., § 11 (May 14, 1947). Courts trying suits for unpaid overtime may in their discretion deny liquidated damages, see note 6 *supra*, if the employer shows that his action was taken in good faith and on reasonable grounds. Protection is thus given the employer who cannot demonstrate reliance on an administrative ruling, see discussion in text, *supra*, p. 1434, but who had other valid reasons for his belief.

32. Despite the virtual invitation to sue for damages extended by the Administrator in his release on bonus plans, *supra*, note 27, in only one recorded case has an employee filed a suit definitely based on a profit-sharing plan. *Adams v. Macklin Co.*, 69 F. Supp. 262 (E.D. Mich. 1946). Defendant's motion for judgment was granted, plaintiff apparently having neglected to note the Administrator's ruling that bonuses based on total earnings comply with the Act.

33. Profit-sharing plans have long been anathema to the great majority of organized labor. See *Balderston, op. cit. supra* note 5, at 14-7, and *Hearings before Committee on*

gaining to accomplish long-term gains than seek swift but transitory triumphs through legal action, while unorganized employees might well consider the revocable nature of most plans³⁴ before commencing attack on them. Finally, it is doubtful that suits based on future violations will arise, in view of the ease with which plans may be modified to comply with the FLSA.³⁵

In addition to its applicability to profit-sharing, the *Garlock* definition of "compensation" has conjectural implications for vacation and holiday pay and employer contributions to employee retirement, sickness, hospitalization and death benefit plans.³⁶ The Administrator does not regard such payments as "compensation," declaring that "since the benefits . . . are payable only at a time when the employee performs no work, the employer's contributions . . . may be regarded as compensation for hours not worked."³⁷ In the *Garlock* decision, however, the court specifically rejected the argument that a sum paid, and expected by, an employee at a date removed from the date of his work must be regarded as a mere "gift" solely because of its separation, in point of time, from a specific workweek. Rather, the court declared in effect that the return to an employee for his work, however denominated, is wages.³⁸ Such reasoning, relentlessly pursued, would denounce as specious an attempt to term any consideration regularly and by arrangement passing between employer and employee anything other than "compensation," whether in the form of cash in hand or deferred payments.

Under Sections 9 and 10 of the Portal-to-Portal Act, however, suits based upon this extension of the *Garlock* doctrine³⁹ are seemingly doomed. The

Finance pursuant to S. Res. 215, 75th Cong., 3d Sess. 104-9, 189-99 (1938) (statements by William Green and John L. Lewis). Primary bases for this sentiment are the employment of profit-sharing to forestall unionization or to encourage company unions, the use of shared profits as an apology for below-scale wages, and labor suspicion of management's custody of the books. See Balderston, op. cit. supra note 5, at 12.

34. Except in the rare instances where profit-sharing plans result from collective bargaining, *Walling v. Wall Wire Products Co.*, 161 F.2d 470 (C. C. A. 6th 1947), or are included in collective agreements, *Adams v. Macklin Co.*, 69 F. Supp. 262 (E. D. Mich. 1946), they are revocable at the employer's wish, a point which has been unsuccessfully urged as indicative of their status as "gifts." *Walling v. Garlock Packing Co.*, 159 F.2d 44 (C. C. A. 2d 1947); *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780 (C. C. A. 2d 1946).

35. See note 20 *supra*.

36. These plans are commonly operated through insurance companies or independent trust funds, employers and employees contributing jointly to the payments. See note 5 *supra*. For detailed treatment of such plans, see LATIMER, *INDUSTRIAL PENSION SYSTEMS* (1932).

37. Employer's Part in Pensions Need Not Affect Regular Rate of Pay, Wage and Hour Div. Press Release No. R-1743, Feb. 12, 1942. Exclusion of contributions from the "regular rate" is permitted only so long as the employee does not have the option to receive direct cash payments in lieu of the funds paid into the plan and provided he may not assign the benefits or receive a cash consideration upon termination of his interest.

38. *Walling v. Garlock Packing Co.*, 159 F.2d 44, 46 (1947).

39. No case has yet been recorded on this point. Cf. *Social Security Board v. Nie-*

Wage and Hour Division's stand on this type of compensation,⁴⁰ quite unlike the efficiency-dictated enforcement policy on profit-sharing, is a substantive interpretation of the FLSA that contains no warning of possible attack by employees, thus making quite credible an employer's allegation of reliance in good faith.

While perhaps unjustifiable in terms of absolute logical consistency, and certainly entirely fortuitous so far as the voiced intent of Congress is concerned,⁴¹ the foreseeable consequences of blending the Portal-to-Portal Act and the FLSA as interpreted in the *Garlock* case need scarcely be regarded as undesirable. Compliance is obtained with the mandate of the FLSA to the point where profit-sharing as a device for circumventing the statute is rendered valueless. Beyond that point, in the comparable areas of pensions and vacation payments, the employee is left to secure whatever benefits he may obtain either individually or collectively, with small danger that contracts thus negotiated will be attempted evasions of the FLSA by the self-seeking employer.⁴²

The necessity of invoking the *deus ex machina* of the Portal-to-Portal Act to resolve these potential problems does, however, underscore heavily the fundamental inadequacy of the prevailing judicial approach to cases arising under Section 7(a). Doctrinaire application of the formulae evolved to determine the "regular rate" has resulted in decisions permitting an employer to violate the spirit of the FLSA although technically complying with its terms.⁴³ Similarly, in contravention of the FLSA's intended integration with the National Labor Relations Act,⁴⁴ grasping employees have been allowed to prosecute successfully suits for unpaid overtime based on collateral payments

rotko, 327 U.S. 358 (1946); *McMillan v. Wilson & Co.*, 212 Minn. 142, 2 N.W.2d 838 (1942).

40. Employer's Part in Pensions Need Not Affect Regular Rate of Pay, Wage and Hour Div. Press Release, No. R-1743, Feb. 12, 1942.

41. The legislative histories of the FLSA and the Portal-to-Portal Act nowhere indicate Congress' intent to legislate regarding profit-sharing or pension plans.

42. Had the Administrator, presumably in the most advantageous position for discovering illegal schemes, believed that pensions and vacation payments were being used to violate the Act, it may be assumed that he would have acted to prevent such circumvention.

43. See *Walling v. Belo Corp.*, 316 U.S. 624 (1942) and *Walling v. Halliburton Oil Well Cementing Co.*, 67 Sup. Ct. 1056 (1947), discussed note 10 *supra*.

44. 49 STAT. 449. (1935), 29 U.S.C. § 151 (1940). Evidence of this intention is found in § 7(b) (1) and (2) of the FLSA, 52 STAT. 1063 (1938), 29 U.S.C. § 207 (1940). Although the tumultuous legislative history of the FLSA precludes any definite statement on the degree to which Congress desired to interweave the two statutes, see *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 161, 168, 175-80 (1945), the record is studded with statements expressing the concern of both houses over the need for reconciliation. See, e.g., SEN. REP. NO. 884, 75th Cong., 1st Sess., 3-4 (1937); 83 CONG. REC. 7285, 7290, 7291 (1938); 82 CONG. REC. 1391, 1395 (1937); 81 CONG. REC. 7650 (1937).

made in accordance with collectively bargained agreements entered into in good faith by employers and unions.⁴⁵

Such aberrational consequences of conceptual approach to essentially factual problems could be avoided were the courts to consider, in determining the "regular rate," the motives underlying the scheme of compensation and the mechanism by which it is achieved. On this basis, the merely facile wording of an employer's *ex parte* attempt to circumvent the FLSA would not make its approval mandatory,⁴⁶ while determination of the conditions of employment, once minimum standards are achieved, could be left to collective bargaining.⁴⁷

With the Portal-to-Portal Act, Congress moved quickly to extricate itself from one predicament caused by judicial interpretation of the "regular rate." Should the courts remain adamant in their doctrinaire attitude, further legislation may be necessary, directed not at one specific consequence of that approach, but at the approach itself.

ATTORNEY VERSUS ACCOUNTANT: A PROFESSIONAL JURISDICTIONAL DISPUTE IN THE FIELD OF INCOME TAX PRACTICE*

Jurisdictional disputes are not exclusively the problem of labor. Adjustment of professional areas of interest may be no less vexatious. The vigorous

45. *Aaron v. Bay Ridge Operating Co.*, 162 F.2d 665 (C.C.A. 2d 1947), *reversing* *Addison v. Huron Stevedoring Corp.*, 69 F. Supp. 956 (S.D.N.Y. 1947); *Ferren v. Waterman S. S. Corp.*, 70 F. Supp. 1 (D. P. R. 1947). In the *Aaron* case, plaintiff, asking unpaid overtime, claimed that (1) where a union contract provided for overtime pay to begin after 36 hours of work, the premium to the fortieth hour should be considered part of the "regular rate"; and (2) where the same contract provided for the overtime rate to be paid for all work done at night, the overtime rate should be considered the "regular rate." Ruling for the defendant in the district court, Judge Rifkind held that collectively bargained agreements take precedence over pedantic interpretation of the FLSA, having "freedom to move unhampered above the floor that the F.L.S.A. establishes." *Addison v. Huron Stevedoring Corp.*, *supra* at 959. At the trial, Joseph B. Ryan, president of the International Longshoremen's Association, testified for the defendant that his union opposed the suit "as it might wipe out all of the gains we had made for our men over a period of 25 years."

46. For an apt excoriation of the Supreme Court's willingness to accept verbalistic compliance with the FLSA, see Mr. Justice Reed, dissenting in *Walling v. Belo Corp.*, 316 U. S. 624, 635 (1942).

47. The Supreme Court's refusal to accept collectively bargained contracts as determinative of the rights of the parties, *Tenn. Coal, Iron & R. R. v. Muscoda L. No. 123*, 321 U.S. 590, 602 (1944), was seemingly one of the reasons for enactment of the Portal-to-Portal Act. Pub. L. No. 49, 80th Cong., 1st Sess., §§ 1-2 (May 14, 1947).

* *New York County Lawyers Association v. Bercu*, 188 Misc. 406, 69 N. Y. S. 2d

campaign of the American Bar Association to stamp out the unauthorized practice of law by laymen¹ has not been directed solely against depredations by unlicensed "quack" practitioners, but has also sought to delimit the spheres of activities of responsible professions and quasi-professions which engage daily in tasks bearing close relation to legal matters.² Particularly controversial has been the problem of delineating the relative status of the lawyer and

730 (Sup. Ct. 1947). Compare 13 UNAUTH. PRAC. NEWS, No. 2 at 18 (1947), with 83 JOURNAL OF ACCOUNTANCY 453 (1947) *re* the principal case.

1. The following are among the outstanding sources of general information on the subject of illegal practice of law and the drive to suppress it: AMERICAN BAR ASSOCIATION, COMPENDIUM ON UNAUTHORIZED PRACTICE OF THE LAW (1942) (cited "COMPENDIUM"); BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937); CHEATHAM, CASES AND MATERIALS ON THE LEGAL PROFESSION (1938); COHEN, THE LAW: BUSINESS OR PROFESSION? (Rev. ed. 1924); HICKS AND KATZ, UNAUTHORIZED PRACTICE OF LAW (1934); Symposium: *The "Unauthorized Practice of Law" Controversy*, 5 LAW & CONTEMP. PROB. 1 (1938); Baldwin, *The Unauthorized Practice of the Law*, 5 LA. L. REV. 596 (1944); Hicks and Katz, *The Practice of Law by Laymen and Lay Agencies*, 41 YALE L. J. 69 (1931); Comment, *Attorney and Client: What Constitutes the Practice of Law?* 29 CALIF. L. REV. 603 (1941); Notes, 151 A.L.R. 781 (1944), 125 A.L.R. 1173 (1940), 114 A.L.R. 1506 (1938), 111 A.L.R. 19 (1937), 105 A.L.R. 1364 (1936), 100 A.L.R. 236 (1936), 94 A.L.R. 359 (1935), 73 A.L.R. 1327 (1931), 36 A.L.R. 533 (1925). UNAUTHORIZED PRACTICE NEWS, published quarterly by the American Bar Association Committee on Unauthorized Practice of the Law, and the reports of the local and national committees in their respective journals afford current information.

2. These twin but not identical objectives have called for variant techniques of attack. The campaign against the "quack" has concentrated on court action in the form of injunction, quo warranto, and contempt proceedings; that directed toward circumscribing the services of banks, insurance companies, trust companies, etc. has had resort to judicial sanction after attempts at voluntary compromise through the Conference Plan. See Maxwell, *Techniques in Preventing the Unauthorized Practice of the Law*, 31 IOWA L. REV. 301 (1946); Resh, *Unauthorized Practice of Law—Activities of the State Bar Association*, [1945] WIS. L. REV. 163; Sanders, *Procedures for the Punishment or Suppression of Unauthorized Practice of Law*, 5 LAW & CONTEMP. PROB. 135 (1938); *Pest-war Plan for the Suppression of Unauthorized Practice of Law*, 8 TEX. B. J. 501, 526 (1945); 13 UNAUTH. PRAC. NEWS, No. 2 at 17 (1947). Examples of the results obtained by the Conference Plan technique are collated in *Agreement or Statements of Principles or Policies*, COMPENDIUM 94 *et seq.* (1942); and see Maxwell and Charles, *Joint Statement as to Tax Accountancy and Law Practice*, 32 A.B.A.J. 5 (1946).

The American Bar Association has also sought to sharpen the teeth in the state laws prohibiting the practice of law by laymen, and to increase the scope of proscription. The statutes are collected in Appendix B to *Laymen Seek Amendment to Permit Them to Practice Law Before Judicial Court*, 13 UNAUTH. PRAC. NEWS, No. 2 at 5 (1947); HICKS AND KATZ, UNAUTHORIZED PRACTICE OF LAW 15 (1934). See note 29 *infra* in connection with the Association's efforts in the federal field, and with particular reference to the statutory background for the principal case, see Recent Statutes, 39 COL. L. REV. 1448 (1939).

For a refreshing and constructive analysis suggesting that repressive measures may not be the panacea either for the protection of the public or for the economic ills of the legal profession, consult Llewellyn, *The Bar's Troubles, And Poultices—And Cures?*, 5 LAW & CONTEMP. PROB. 104 (1938). A similar approach is revealed in Morris, *Legal*

the certified public accountant in the field of income tax practice.³ Professional friction recently ignited into litigation in the Supreme Court of New York County where the Committee on Unlawful Practice of Law of the New York County Lawyers Association lost a preliminary skirmish in the drive to restrict income tax practice to the legal profession.⁴

In a conference between a corporation's lawyer and Bercu, an experienced certified public accountant, subsequently enrolled as a Treasury Department practitioner,⁵ a difference of opinion arose as to the proper method for making certain deductions from the corporation's 1943 federal income tax return,⁶ and Bercu offered to substantiate his position by locating certain rulings with which he was familiar. He made a study of the point at issue and submitted a memorandum to the corporation citing the ruling which he had recalled⁷ and

Service, 1 LAW. GUILD REV. No. 4 at 35 (1941); *Philadelphia Neighborhood Law Office Plan*, *id.* at 30. Cf. Elson, *The Rushcliffe Report*, 13 U. OF CHI. L. REV. 131 (1946).

3. *E.g.*, Bentley, *Relationship Between the Lawyer and Accountant*, 12 FLA. L. J. 359 (1938); Bilder, *The Lawyer and the Accountant*, [1941] N. J. STATE BAR ASS'N. YEAR BOOK 155; Brooker, *Rip Van Winkle Awoke, Federal Tax Practice and the Lawyer*, 18 FLA. L. J. 134 (1944); Donaldson, *The Interrelationship of the Lawyer and the Certified Public Accountant*, 18 N. Y. STATE BAR ASS'N. BULL. 67 (1946) (a treatment of specific problems); Fernald, *Cooperation of the Accountant With the Attorney*, [1941] N. J. STATE BAR ASS'N. YEAR BOOK 137; Hastings, *Exploring the Common Field*, *id.* at 147; Kripke, *A Case Study in the Relationship of Law and Accounting*, 57 HARV. L. REV. 433, 693 (1944) (a technical treatment); Maxwell and Charles, *supra* note 2; May, *Accounting and the Accountant in the Administration of Income Taxation*, 47 COL. L. REV. 377 (1947); Seidman, *Cooperation Between Attorneys and Accountants*, 17 TENN. L. REV. 43 (1941); "Tax Service" Practice by Laymen, 28 MASS. L. Q. No. 4 at 36 (1943); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E. 2d 27 (1943); Notes, 31 CALIF. L. REV. 228 (1943), 13 FORD L. REV. 135 (1944), 42 MICH. L. REV. 1122 (1944), 15 OKLA. STATE B. J. 1562 (1944), 7 U. OF DETROIT L. J. 93 (1944); *Report of the Standing Committee on Unauthorized Practice of the Law*, 63 A.B.A. REP. 323, 325 (1938); 3 UNAUTH. PRAC. NEWS, No. 10 at 116 (1937); 4 UNAUTH. PRAC. NEWS, No. 9 at 98 (1938); 4 UNAUTH. PRAC. NEWS, No. 11 at 130 (1938).

4. *New York County Lawyers Association v. Bercu*, 188 Misc. 406, 69 N.Y.S.2d 730 (Sup. Ct. 1947). The case is to be argued in the Appellate Division, First Department, in the fall of 1947.

5. He had been engaged in practice as a certified public accountant in New York City since 1924 and had been a member in good standing of the New York State Society of Certified Public Accountants since 1942. In 1945 Bercu was admitted to practice before the Treasury Department of the United States. *Id.* at 409, 69 N.Y.S.2d at 732. In connection with practice before the Treasury Department, see note 29 *infra*.

6. A contest regarding payment by the corporation of a city sales tax for past years had ended in a settlement, and the question was whether the company, which kept its books on an accrual basis, could deduct the amount from its 1943 income or whether such payment had to be allocated pro rata over the previous years when no profits were made. *Id.* at 188 Misc. 406, 409, 69 N.Y.S.2d 730, 732 (Sup. Ct. 1947).

7. Bercu did not restrict his search to the tax services. *Id.* at 410, 69 N.Y.S.2d at 733. The record on appeal does not reveal the precise extent of his research. The precedent cited in his memorandum however was an I.T.; such rulings are made by the Income Tax Unit of the Treasury Department, and are reported in the Internal Revenue

which would permit the company to effect a substantial saving. The accountant tendered a bill for these services.⁸ The Lawyers Association brought suit to enjoin Bercu from such "illegal practice of law"⁹ and to have him adjudged in contempt of court.

Denying the injunction on a procedural point,¹⁰ but admitting its jurisdiction on the contempt issue,¹¹ the court reaffirmed the New York rule that the legislature, not the judiciary, holds the power to define and regulate the practice of law,¹² and indicated that respondent's actions were not specifically

Bulletin with the qualification that they only "show the trend of official opinion." Principal case, Exhibit I to Petition, Papers on Appeal, p. 20.

8. The corporation did not pay this bill, and in the suit brought by Bercu in the Municipal Court it defended on the grounds that he had practiced law illegally. Judgment was for defendant, and Bercu did not prosecute his appeal. (Decision unreported). 188 Misc. 406, 410, 69 N.Y.S.2d 730, 733 (Sup. Ct. 1947).

9. Bercu conceded that he had formerly rendered services of this kind, and petitioner also felt it to be of significance that he was not actually auditing the books or preparing the tax forms for the corporation. *Id.* at 410, 69 N.Y.S.2d at 733-4.

10. N. Y. Civ. PRAC. Acr §§ 1221a-c provide that action to restrain the activities of one illegally practicing law may be brought by the Attorney General or by a bar association upon proof of a written request delivered to the Attorney General at least twenty days before. Petitioner failed to comply with this provision, and the court held that wherever the inherent power to define the practice of law may be vested, the legislature is competent to establish procedures whereby the injunction is to be obtained. 188 Misc. 406, 412, 69 N.Y.S.2d 730, 735 (Sup. Ct. 1947).

11. Petitioner was faced with contrary precedents on this point. It had seemed settled doctrine in New York that contempt would not lie unless the layman's activities "directly involved" the court. *Matter of Rotwein*, 291 N.Y. 116, 51 N.E. 2d 669 (1943); *Matter of New York County Lawyers Ass'n. v. Lehman*, 256 App. Div. 677, 11 N.Y.S.2d 429 (1st Dep't. 1939); *Matter of New York County Lawyers Ass'n. v. Clark*, 256 App. Div. 674, 11 N.Y.S.2d 432 (1st Dep't. 1939). However, *Matter of New York County Lawyers Association v. Cool*, 181 Misc. 718, 47 N.Y.S.2d 397 (Sup. Ct. 1944), *aff'd*, 268 App. Div. 901, 51 N.Y.S.2d 640 (1st Dep't. 1944), *aff'd*, 294 N.Y. 853, 62 N.E.2d 398 (1945), seems to abandon this minority position and the principal case offers another precedent to the same effect. See COMPENDIUM 36; Resh, *supra* note 2; Sanders, *supra* note 2; 13 UNAUTH. PRAC. NEWS, No. 2 at 17 (1947); Recent Statutes, 39 COL. L. REV. 1448 (1939).

12. Though one of the important holdings of the case, this point is outside the scope of the present Note. The New York rule is in a distinct minority, and has been severely criticized on historical grounds as unrepresentative of the common law relation between the bar and the judiciary. Lee, *The Constitutional Power of the Courts over Admission to the Bar*, 13 HARV. L. REV. 233 (1899). The decisions upon which the New York doctrine is predicated have also been attacked as inconclusive, fortuitously decided as a result of their *ex parte* nature, and undermined by subsequent decisions. See Kennedy, *Has the New York Legislature the Paramount Right to Regulate the Admission of Attorneys?* 99 N.Y.L.J. 1658, 1678 (1938); 99 N.Y.L.J. 434 (1938); In the *Matter of Cooper*, 22 N.Y. 67, *sub nom.* *Matter of the Graduates*, 11 Abb. Pr. 301 (1860) (see brief appended in footnotes in 11 Abb. Pr.); In *re Percy*, 36 N.Y. 651 (1867); *People ex rel. Karlin v. Culk* 248 N.Y. 465, 162 N.E. 487 (1928).

The diametric position, that the judiciary has exclusive inherent power to regulate the practice of law, is likewise a minority view. Illinois and Nebraska are among these

proscribed by the statute.¹³ Even assuming that the statute could be read to prohibit any practice of law by laymen, however, the court concluded that respondent's conduct could not be considered to constitute the practice of law.¹⁴

In analysing the conclusion reached in the principal case, it may be well first to inquire by what right the legal profession may lay claim to social protection of its monopoly as against lay intruders.¹⁵

The monopoly charter granted to licensed members of the bar is predicated upon protection of the public interest.¹⁶ Certain minimal standards of skill must be maintained in the field of law, for fraud, error and needless litigation

jurisdictions which adopt this position. *E.g.*, *In re Day*, 181 Ill. 73, 54 N.E. 646 (1899); *People ex rel. The Chicago Bar Ass'n. v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937); *State ex rel. Johnson v. Childe*, 23 N.W.2d 720 (Neb. 1946). See also note 29 *infra*.

The majority rule is that the judiciary possesses inherent power to regulate and define the practice of law, but that this may be supplemented by the legislature by virtue of its police power. *See, e.g.*, *In re Opinion of the Justices*, 279 Mass. 607, 180 N.E. 725 (1932); *Clark v. Austin*, 340 Mo. 467, 101 S. W.2d 977 (1937).

The subject is excellently treated in 36 MICH. L. REV. 82 (1937); Shanfeld, *The Scope of Judicial Independence of The Legislature in Matters of Procedure and Control of the Bar*, 19 ST. LOUIS L. REV. 163 (1934); Consult COMPENDIUM 60 where the cases on the court's inherent power are collected and *Bump v. District Court of Polk County*, 232 Iowa 623, 5 N.W.2d 914 (1942), another leading case wherein an imposing mass of authority is reviewed.

13. Prior to passage of the Piper Act, N. Y. JUDICIARY LAW § 750(7), illegal practice of law was punishable by criminal proceedings only. 188 Misc. 406, 416, 69 N.Y.S.2d 730, 739 (Sup. Ct. 1947). This statute added the remedy of criminal contempt, but the principal case holds that it does not broaden the substantive law, and that since the court has not the power to define what shall constitute the practice of law, respondent's actions must fall within the narrow proscriptions of the N. Y. PENAL LAW §§ 270-1, 280, if he is to be adjudged in contempt. These provisions forbid laymen to appear in court, to misrepresent or hold themselves out as attorneys, to prepare certain enumerated legal instruments, to make a business of practicing before a court or magistrate or, to furnish attorneys or counsel. It is not entirely clear whether the court concludes as an alternative ground for the decision that Bercu's actions cannot be fitted into one of the forbidden categories, or whether it is content not to decide the point definitively in view of the *a fortiori* nature of the final argument. Enumerative statutes, such as that in the principal case, are not common, the majority simply forbidding the "practice of law" by laymen. HICKS AND KATZ, UNAUTH. PRACTICE OF LAW 8 (1934); note 2 *supra*.

14. 188 Misc. 406, 421, 69 N.Y.S.2d 730, 743 (Sup. Ct. 1947).

15. It is possible to proceed in terms of historical or analogic demonstrations that certain services or types of services have been traditionally reserved to the legal profession, and that the bar holds an exclusive franchise in the nature of a property right which the courts should protect against lay infringement. *E.g.*, *Hobson v. Kentucky Trust Co. of Louisville*, 303 Ky. 493, 197 S.W.2d 454 (1946); cases collected at COMPENDIUM 24. It is suggested that this approach is not adequate in a social climate where all monopoly is suspect.

16. An excellent treatment of the public's interest in the success of the campaign against the unauthorized practice of law is in 28 IOWA L. REV. 116 (1942), where the bar's position is persuasively argued. *See CHEATHAM, op. cit. supra*, note 1 at 55; 59 A.B.A. REP. 531 (1934); 36 MICH. L. REV. 82 (1937).

are the inevitable consequences of permitting untrained, unlicensed persons to advise clients in the highly technical matters which comprise today's legal lore. Moreover, the lawyer must be held to a standard of absolute responsibility and adherence to an exacting code of ethics as a correlative to the peculiar trust which is placed in him in his capacity as counselor, advocate and "officer of the court."¹⁷ Thus, the technical and representative nature of the services rendered by the lawyer demands particularized skill in the execution, and unimpeachable responsibility in the performance. To assure these, society has decreed through its legislatures and courts that an area of activities shall be reserved to a qualified licensed group denominated "lawyers."¹⁸

But to decide that public policy requires that a certain group of services be reserved to members of the bar is not to determine what shall be incorporated within this area. The courts and legislatures have repeatedly sought to give definition to the phrase "practice of law",¹⁹ but *a priori* generalizations have proved of little assistance in determining whether a particular service should be reserved to the lawyer and denied to the layman.²⁰

The real question would not seem to be whether certain conduct can by analogy be categorized into a definition of "practice of law", but whether the service in question is such that the public interest requires a particular skill possessed only by the trained lawyer, and a standard of personal responsibility which the lawyer alone can guarantee.²¹

17. The phrase is the common one and the United States Supreme Court has recently approved it. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). See the historical treatment in footnote to *In the Matter of Cooper*, in the 11 Abb. Pr. 301 (N. Y. 1869) reprint *sub nom.* *Matter of the Graduates*, and *COHEN, op. cit. supra* note 1, cc. 4-6. The term is perhaps considerably less literally accurate today than when applied to the common law English courts, but it remains true that the lawyer is an important cog in the machinery through which justice is administered.

18. To observe that some lawyers are not remarkable for their skill nor exemplary as paragons of responsibility is not to confute the policy underlying the creation of the monopoly, but to question the effectiveness of the machinery now employed in its enforcement.

19. Consult, *e.g.*, for definitions frequently approved, *Eley v. Miller*, 7 Ind. App. 529, 535, 34 N.E. 836, 837-8, (1893) ["(I)t includes legal advice and counsel, and the preparation of legal instruments . . . by which legal rights are secured, although such matter may or may not be depending [*sic*] in a court"]; *In re Eastern Idaho Loan and Trust Co.*, 49 Idaho 280, 286, 288 Pac. 157, 159 (1930) ["(W)here . . . the legal effect [of a mass of facts and conditions] must be carefully determined by a mind trained in the existing laws in order to insure a specific result and guard against others . . ."]. Cases defining the phrase are collected at COMPENDIUM 50; and see Notes, 151 A.L.R. 781 (1944), 125 A.L.R. 1173 (1940), 111 A.L.R. 19 (1937); 33 WORDS AND PHRASES 193; 5 AM. JUR. 262 *et seq.*

20. *E.g.*, *Grievance Committee of Bar of New Haven County v. Payne*, 128 Conn. 325, 22 A.2d 623 (1941); *Creditors' Service Corp. v. Cummings*, 57 R.I. 291, 190 Atl. 2 (1937); *In the Matter of the Shoe Mfrs. Protective Ass'n.*, 295 Mass. 369, 3 N.E.2d 746 (1936). Most of the authorities simply concede that each case must be decided on the particular facts involved.

21. *Llewellyn, supra* note 2; 42 MICH. L. REV. 1122 (1944). Decisions wherein the

An approach cast in terms of functional criteria, however, offers no mechanical solution to the problem of lay practice in the tax field. Tax questions peculiarly require varying degrees of legal and non-legal expertise,²² and virtually the only certain statement that can be made is that sufficient qualification for the solution of one problem does not necessarily imply competence in all aspects of the next. The practical impossibility of an *a priori* determination of the limits of permissible activities of lay tax consultants in general is reflected in the present inconclusive state of the law on the point.²³ The specific role of the accountant in the capacity of tax consultant has been little litigated and the cases are equally unsusceptible of rationalization, but the court's position in the principal case does not appear to mark a radical departure from existing precedent.²⁴ Moreover, the instant decision would ap-

court explicitly recognizes the policy criteria underlying the lawyer's monopoly include *Liberty Mutual Ins. Co. v. Jones*, 344 Mo. 932, 130 S. W.2d 945 (1939) (a particularly extensive treatment of the precedents); *Crawford v. McConnell*, 173 Okla. 520, 49 P.2d 551 (1935); *R. I. Bar Ass'n. v. Automobile Service Ass'n.*, 55 R. I. 122, 179 Atl. 139 (1935).

It is necessary, of course, that such criteria be applied in terms of the qualifications of a class, not an individual. The administrative burden would be intolerable if the courts were left to assess *post hoc* the individual qualifications of each layman assertedly engaged in the practice of law. For an interesting example of the operation of this principle see *In re Brainard*, 55 Idaho 153, 39 P.2d 769 (1934), where a former probate judge, not a member of the bar, was enjoined from rendering legal advice regarding wills.

22. On this point at least, all are agreed. Virtually every discussion of the subject is prefaced by a statement that tax problems represent a seamless web of legal precepts, accounting principles and factual contexts. See note 2 *supra*.

23. Laymen's activities in the tax field held not to constitute illegal practice of law: *Merrick v. Am. Sec. & Trust Co.*, 107 F.2d 271 (App. D.C. 1939) ("incidental" activities in advising on tax problems); *Groninger v. Fletcher Trust Co.*, 220 Ind. 202, 41 N.E.2d 140 (1942) (assistance in preparing forms, and issuance of tax information pamphlets); *Tanenbaum v. Higgins*, 190 App. Div. 861, 180 N.Y. Supp. 738 (1st Dep't. 1920) (appearance before tax commissioner).

Laymen's activities held to constitute illegal practice: *People ex rel. Courtney v. Ass'n. of Real Estate Tax-payers of Ill.*, 354 Ill. 102, 187 N.E. 823 (1933) (corporate legal services offered in tax claims); *Bump v. Dist. Ct. of Polk County*, 232 Iowa 623, 5 N.W.2d 914 (1942) (solicitation for assignments of tax refund claims); *N. Y. County Lawyers Ass'n. v. Standard Tax and Management Corp.*, 181 Misc. 632, 43 N.Y.S.2d 479, (Sup. Ct. 1943) (opinions on tax laws); *N. Y. County Lawyers Ass'n. v. Dawkins*, 262 App. Div. 56, 27 N.Y.S.2d 797 (1st Dep't. 1941), *aff'd* 289 N.Y. 553, 43 N.E.2d 530 (1942) (appearance before Board of Assessors); *People ex rel. Trojan Realty Corp. v. Purdy*, 174 App. Div. 702, 162 N.Y. Supp. 56 (1st Dep't. 1916) (protests on tax assessments); *In re Durham*, 190 Okla. 588, 126 P.2d 69 (1942) (tax actions procured and notices filed); *Crawford v. McConnell*, 173 Okla. 520, 49 P.2d 551 (1935) (taxpayers' association contracts to investigate possible refunds); *Blair v. Motor Carriers Service Bureau*, 40 Pa. D. & C. 413 (1939) (tax statute interpretations).

The current temper of some members of the bar would suggest that this problem may be the subject of increasing clarification through litigation. 49 *Com. L. J.* 186 (1944); note 3 *supra*.

24. Accountants' activities in the tax field held not practice of law: *Wardman v. Leo-*

pear to be supported by application of the suggested functional criteria of skill and responsibility even though the services performed by respondent can doubtless be easily analogized to the "practice of law."

Many considerations would appear to lead to the conclusion that in point of specialized skill, the certified public accountant is competent to advise on the usual questions that arise in connection with income taxation.²⁵ It was inevitable that the income tax laws should adopt to a considerable extent the techniques and concepts by which the accountant arrives at computation of income,²⁶ with the consequence that ever since the ratification of the Sixteenth Amendment it has been the established custom of the business community to entrust to the accountant the bulk of its taxation problems.²⁷ Aspirants to the

pold, 85 F.2d 277 (App. D.C. 1936) (contract by accountant to handle tax claims before Tax Court); Dunlap v. Lebus, 112 Ky. 237, 65 S.W. 441 (1901) (compromise on tax suit negotiated); Elfenbein v. Luckenbach Terminals, Inc., 111 N.J.L. 67, 166 Atl. 91 (1933) (devising of tax savings plan for client); see Humphries v. Comm'r. of Int. Rev., 88 F.2d 430, 432 (C.C.A. 2d 1937) (lawyers-accountants tax consultants), approving in a different context. For two Federal cases which appear to approve of accountants' rendering advice on taxation, see Girard Investment Co. v. Comm'r of Int. Rev., 122 F.2d 843, 848 (C.C.A. 3rd 1941), cert. denied, 314 U.S. 699 (1942); Arnold v. Comm'r of Int. Rev., 14 B.T.A. 954, 970-6 (1928), appeal dismissed, 38 F.2d 1011 (C.C.A. 8th 1929).

Accountants' activities held to constitute illegal practice of law: Chicago Bar Ass'n. v. United Taxpayers of America, 312 Ill. App. 243, 38 N.E.2d 349 (1941) (accountant's corporation to handle tax matters before Finance Department); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); 13 FORD. L. REV. 135 (1944), 28 MASS. L. Q. No. 4 at 36 (1943), 42 MICH. L. REV. 1122 (1944), 15 OKLA. STATE BAR J. 1562 (1944), 7 U. DETROIT L. J. 93 (1944) (advice on tax law interpretation and advertising legal counsel; the court, however, permitting respondent to fill out income tax forms); Mandelbaum v. Gilbert & Barker Mfg. Co., 160 Misc. 656, 290 N.Y. Supp. 462 (City Ct. of N.Y. 1936) (interpretation of statutes for clients).

25. That certain cases regarding taxation manifestly require the dual services of the lawyer and the accountant is undeniable, but this argument does not seem to substantiate the contention that lawyers should be given a monopoly of the practice any more than should accountants.

26. Blough, *The Role of Accounting in the Taxing Process*, 22 THE ACCOUNTING REV. 248 (1947); May, *supra* note 3; ROBERTS, ACCOUNTING METHODS IN INCOME TAXATION (1940); Ballantine, *Taxable Income*, 40 JOURNAL OF ACCOUNTANCY 349 (1925).

It may, indeed, be argued that a major source of the present confusion in this country's tax laws has been the injection of the legal approach at the expense of accounting principles. It has been said that "The collection of the revenues is primarily an administrative not a judicial proceeding. As far as the Federal income tax is concerned, a field of administration has been turned into a legal battlefield." 3 JOINT COMMITTEE REPORT ON INTERNAL REVENUE TAXATION 2, 3 (1927), cited in May, *supra* at 386. To the extent that this is true, the solution would not seem to lie in further extension of the role played by the legal profession.

27. May, *supra* note 3; Report of the Standing Committee on Unauthorized Practice of the Law, 70 A.B.A. REP. 257, 259 (1945); Vernon, *American Bar Association to Sponsor Tax Courses for General Practitioners*, 29 A.B.A.J. 516 (1943); 7 ASS'N. OF THE BAR OF N.Y., LECTURES ON LEGAL TOPICS 3 (1929); principal case, app. I to Affidavit of Wm. R. Donaldson, Papers on Appeal, p. 248.

status of certified public accountant must familiarize themselves with the principles of income taxation in order to pass the stringent examinations for admission to the profession.²⁸ Furthermore, in recognition of the rigid skill standards of the profession and its relevancy to taxation questions, the Federal government has for years permitted approved certified public accountants to appear in behalf of clients before the Treasury Department and the United States Tax Court.²⁹ The successful experience of these agencies with ac-

28. Communication from the American Institute of Accountants to the Yale Law Journal, July 24, 1947. Principal case app. C to Affidavit of Wm. R. Donaldson, Papers on Appeal, p. 147.

29. Treas. Circ. 230, 1 FED. REG. 1413 (1936); Tax Court of the United States Rules of Practice, 26 CODE FED. REGS. § 701.2 (1938). If such representation be considered to constitute the practice of law, and if it be assumed that the judiciary is vested with inherent power to define and regulate the practice of law, it can then be argued that, under the doctrine of separation of powers, the legislative and administrative branches are under a disability to authorize appearance by laymen in a representative capacity before these quasi-judicial bodies. This argument by the bar associations has been effective in some states. *Chicago Bar Ass'n. v. United Taxpayers of America*, 312 Ill. App. 243, 38 N. E.2d 349 (1941) (Finance Dep't.); *People ex rel. Chicago Bar Ass'n. v. Goodman*, 366 Ill. 346, 8 N. E.2d 941 (1937) (Workman's Compensation Board); *State ex rel. Johnson v. Childs*, 23 N. W.2d 720 (Neb. 1946) (Railway Commission); 31 MINN. L. REV. 288 (1947), 95 U. PA. L. REV. 218 (1946); note 12 *supra*. The result, of course, is that only members of the bar may engage in practice before these agencies. For a reaction from the layman, see Zoll, *The Childs Case and Its Significance to the Non-Lawyer Practitioner*, 14 I.C.C. PRACT. J. 38 (1946).

It is frequently said that the U. S. Supreme Court has held that Federal administrative agencies may permit lay practitioners to appear before them. *Goldsmith v. U. S. Bd. of Tax Appeals*, 270 U.S. 117 (1926). The Court in that case, however, merely upholds the power of the agency to *exclude* those whom it considers unqualified and declines to issue a writ of mandamus ordering petitioner's admission to practice. It has been suggested that the bar should press a test case to a conclusive result. Micon, *The Case of Unauthorized Practice of Law*, 32 A.B.A.J. 684 (1946); Brooker, *supra* note 3.

On the legislative front too, the American Bar Association has supported measures designed to restrict the latitude given federal agencies in the choice of their practitioners. The results so far have not been successful. Attempts include H.R. 4798, 76th Cong., 1st Sess. (1939), and amendments proffered to the Federal Administrative Procedure Act 60 STAT. 240, 5 U.S.C.A. § 1005(a) (Supp. 1946) but all such proposals have died in committee. Micon, *supra*; *Report of Standing Committee on Unauthorized Practice of Law*, 70 A.B.A. REP. 257 (1945).

The current effort is H.R. 2657 "Administrative Practitioners Act," now before the Committee on the Judiciary. *Administrative Practitioners Act: Association Offers Bill to Regulate Admissions*, 33 A.B.A.J. 307 (1947); Otterbourg, *Statement on Administrative Practitioners Act*, 13 UNAUTH. PRAC. NEWS No. 2 at 1 (1947). For a different view, see *Statement of American Institute of Accountants Before the Committee on the Judiciary Urging Amendment of H.R. 2657*. See also *Laymen Seek Amendment to Permit Them to Practice Law Before Judicial Court*, 13 UNAUTH. PRAC. NEWS No. 2 at 5 (1947), where it is argued that the Tax Court has become a *de facto* judicial body, that H.R. 3214 will make it a court *de jure*, and that laymen should not be permitted to appear before it.

countant practitioners³⁰ and the longer experience in income tax administration in England, where the accounting profession occupies the field of taxation to the virtual exclusion of the bar, would clearly appear to attest to the qualifications of the accountant in this respect.³¹

The requirement of responsibility would also seem to be fulfilled insofar as the certified public accountant is concerned. Although the profession is a relative newcomer³² it has earned for itself a prestige of reliability which ranks with that of the time-honored callings, for the essence of the function of the certified public accountant is the reliance which others may place upon his word. Admission to the profession is limited to those of approved character, and the American Institute of Accountants exacts adherence to a canon of ethics which in many respects parallels that for the lawyer.³³ In a business economy which operates on confidence in the reliability of certification by the public accountant it would be difficult to enjoin the accountant from rendering advice in the income tax field on grounds of lax ethical standards.

Clearly the accountant is not to be given *carte blanche* to advise clients on matters outside the purview of his specialty.³⁴ The presumption, however,

30. Evidence that the present system is satisfactory would seem to lie in the consistent refusal of Congress to close this field to the accountant. Note 29 *supra*. It is also of significance to note that non-accountant laymen seeking to practice before the Treasury Department are examined for their knowledge of accounting subjects, questions being drawn from the American Institute of Accountants examinations. Principal case, Appendix G to Affidavit of Wm. R. Donaldson, Papers on Appeal, p. 232; Communication to the YALE L. J. from the American Institute of Accountants, July 24, 1947. The consistent opinion of tax administrators and students of tax administration has been that accountants are qualified for this type of practice. See 1 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 117-8; 4 *id.* 36-8, 283-4 (1942). As to the public's satisfaction with the accountant's services, see *Annual Report of the Committee on Unlawful Practice of the Law for 1943-44*, [1944] ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, YEAR BOOK 300.

31. MAGILL, PARKER AND KING, A SUMMARY OF THE BRITISH TAX SYSTEM, WITH SPECIAL REFERENCE TO ITS ADMINISTRATION (1934); Halsey, *The Position of the Public Accountant in relation to Business and Government in Great Britain*, [1943] DICKINSON LECTURES IN ACCOUNTING 51; principal case Appendix B to Affidavit of Wm. R. Donaldson, Papers on Appeal, p. 129.

32. The status of certified public accountant was first established in New York by statute in 1896. May, *supra* note 3. A brief history of the profession is given in Appendix B to Affidavit of Wm. R. Donaldson, Papers on Appeal (principal case) p. 129.

33. CAREY, PROFESSIONAL ETHICS OF PUBLIC ACCOUNTING (1946); Carey, *The Realities of Professional Ethics*, 22 THE ACCOUNTING REV. 119 (1947); Maxwell and Charles, *supra* note 2 at 7; and see *R. W. Hart & Co. v. Harris*, 183 Okla. 588, 83 P.2d 565 (1938), where judicial recognition is given to the fact that accountants practicing before the Treasury Department are held to the lawyer's code of ethics.

34. This problem of circumscribing the accountants' activities will probably become even more difficult as tax considerations become increasingly enmeshed with fiscal and legal considerations in the making of daily business decisions. The difficulty of such separation, however, does not seem to justify the exclusion of the accountant from performing those services for which he is qualified.

always operates against monopoly, and the bar, when seeking to invoke judicial sanction to prohibit laymen from performing certain services, must shoulder the burden of demonstrating that those services can be properly rendered by the legal profession alone. Tested by the criteria of skill and responsibility, an experienced certified public accountant would seem amply qualified to advise his clients on a taxation point which the Supreme Court of the United States has expressly characterized as primarily a problem in accounting.³⁵

While the result in the specific case can be approved on the basis of a functional analysis, it must be recognized that the court, in refusing to categorize Bercu's activities as constituting the "practice of law", thereby commits itself to the position that *all* non-lawyers, regardless of qualification, are privileged to perform similar services. But this result is rendered inevitable only because it is beyond the power of the court to limit its decision to the competency of the certified public accountant where the statute treats the problem solely in terms of a lawyer-layman dichotomy: *i.e.*, forced to choose one of the alternatives, the court is not at liberty to classify further and to discriminate within the generic classification of "laymen" so as to deny to one group of non-lawyers that which it grants to another. The legislative department is under no such disability. If the public interest is found to be threatened by the activities of unqualified persons in the tax field, it is competent for the legislature to prohibit unqualified laymen from engaging in tax practice while recognizing the special qualifications of other laymen. But in the absence of such legislative action, the policy of excluding from tax practice those who are incompetent should not be crudely effectuated by judicial exclusion of those who are competent.

Such services as those performed by respondent Bercu fall within an area held in common tenancy by the legal and accounting professions. Where there is such an overlap in professional jurisdictions, the proper forum for the arbitration of competing skills is the market place, not the court room.

35. Questions of accounting are questions of fact and not of law. *Dobson v. Comm'r of Int. Rev.*, 320 U.S. 489 (1943); Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact*, 57 HARV. L. REV. 753 (1944); 9 MERTENS, LAW OF FEDERAL INCOME TAXATION § 51.19 (Supp. 1947). "Accrual" is an accounting question, and principles of accounting lead to the conclusion that tax liability does not accrue while being contested, but only upon adjudication. *Dixie Pine Products Co. v. Comm'r of Int. Rev.*, 320 U.S. 516 (1944). It may be noted, too, that this was the opinion ventured in Bercu's memorandum in 1943.

DECLARATORY JUDGMENTS TO FORESTALL JURISDICTION OF ADJUDICATIVE AGENCIES*

The private litigant's most effective method for challenging the jurisdiction of an administrative agency is to prevent the assumption of such jurisdiction *ab initio*. Two important advantages are gained thereby: the arduous process generally required by statutory provisions for judicial review¹ is bypassed, and the usual rule that administrative findings of fact are conclusive if supported by substantial evidence² is avoided. While devices like the injunction³ have long been used to forestall jurisdiction, the declaratory judgment has recently emerged as a weapon equally effective and more readily available because free from the technical requirements⁴ which encrust older remedies. Like injunctions, declaratory judgments challenging jurisdiction *ab initio* have

* N. Y. Post Corp. v. Kelley, 296 N. Y. 178, 71 N.E. 2d 456 (1947).

This Note deals only with the facet of the problem presented by agencies acting adjudicatively; questions of rule-making and of other actions allegedly *ultra vires* lie beyond its scope. While the dividing line between "adjudicative" and "rule-making" activities is admittedly obscure, it may be generally described as the difference between "judicial" and "legislative" functions, as these words have been used by the courts. See H.R. REP. NO. 1980, 79th Cong., 2d Sess. (1946) concerning the Administrative Procedure Act, 60 STAT. 237, 5 U.S.C.A. §1001 (Supp. 1946), and §1001(c), (d) of that Act; Comment, 56 YALE L. J. 670, 679-81 (1947).

1. For example, review of certification orders under both the original National Labor Relations Act, 49 STAT. 453 (1935), 29 U.S.C. §160 (1940) (hereinafter cited by U.S.C. section number only) and the New York State Labor Relations Act, N. Y. LABOR LAW §707 (1937) (hereinafter cited by section number only) may be obtained only after the certified union has filed against the employer a charge of unfair labor practices for refusal to bargain with it, and the Board has issued a "cease and desist" order. *AF of L v. NLRB*, 308 U.S. 401 (1939) (national Act); and see note 11 *infra* (N. Y. Act). The Taft-Hartley Act, Pub. L. No. 101, 80th Cong., 1st Sess. (June 23, 1947) apparently makes no change in the federal rule.

2. *E.g.*, §160 (e) of the original NLRA, *supra* note 1, as interpreted in *Washington, V. & M. Coach Co. v. NLRB*, 301 U.S. 142, 147 (1937), and as amended by §101 of the Taft-Hartley Act, *supra* note 1. Section 160(e) now in terms requires that findings be supported by "substantial" evidence. See also §707 (2) of the N. Y. Act (conclusive "if supported by evidence") which is usually construed in similar terms; *N. Y. Labor B'd. v. Select Operating Corp.*, 183 Misc. 480, 49 N.Y.S.2d 294 (Sup. Ct. 1944) (scintilla of evidence not enough).

3. In federal courts and in most states the injunction is the standard remedy; in New York, however, other remedies such as writs of prohibition are more frequently used. See 1 BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN NEW YORK* 350-65 (1942).

4. Irreparable injury and lack of adequate remedy at law must be shown in order to obtain an injunction. In addition to sharing these requirements, writs of prohibition or mandamus are generally restricted to clear breaches of duty. A declaratory judgment, on the other hand, is not thus encumbered. See BORCHARD, *DECLARATORY JUDGMENTS* 358-67, (2d ed. 1941). And administrative agencies may be expected to comply with such declarations as completely as where a coercive writ is granted. *Id.* at §75-6.

frequently been permitted to "construe statutes" but are refused by most courts when "facts" determining an agency's jurisdiction are disputed. In *New York Post Corporation v. Kelley*,⁵ however, the New York Court of Appeals has given its approval to a highly questionable doctrine permitting a declaratory judgment on "jurisdictional facts."

In the *Post* case, plaintiff newspaper publishers requested a declaratory judgment that defendant New York State Labor Relations Board had no jurisdiction over a dispute concerning union representations of licensed newsdealers. Plaintiffs claimed that (1) the newsdealers were "independent merchants" and not "employees" and (2) that rival unions petitioning for certification were both affiliated with the A. F. of L. within the prohibition of the statute's "sister-union" clause.⁶ Rejecting the Board's claim that it should be permitted to hold a formal hearing to determine initially its own jurisdiction, the trial court held that a declaratory judgment was appropriate and ordered a trial on the merits.⁷ Over vigorous dissents, its action was upheld by both the Appellate Division⁸ and the Court of Appeals.⁹

Statutory obstacles to judicial review, not present in the *Post* case, have often led courts to grant declaratory judgments on jurisdictional issues. Where, for example, court review of agency jurisdiction can be obtained only by risking heavy damages or criminal penalties, a prior judicial determination is obviously desirable.¹⁰ But where no such risks are incurred, courts have

5. 296 N. Y. 178, 71 N. E.2d 456 (1947).

6. "... provided, however, that the board shall not have authority to investigate any question or controversy between . . . organizations affiliated with the same parent labor organization." N. Y. LABOR LAW §705(3).

7. 61 N.Y.S.2d 264 (Sup. Ct. 1946). The court also suggested that the unions be joined as defendants so that any judgment on the merits would be binding on them as well as on the Board. *Id.* at 268.

8. 270 App. Div. 916, 61 N.Y.S.2d 762 (1st Dep't 1946). Affirmance was per curiam without opinion; Peck, J., dissented.

9. 296 N.Y. 178, 71 N.E. 2d 456 (1947). Desmond and Fuld, JJ., dissented on grounds that the Board had exclusive jurisdiction to determine its own jurisdiction in the first instance. *Id.* at 190, 71 N.E. 2d at 460. Clear-cut decision on the issues by the Court of Appeals was possibly befogged by statutory provisions placing jurisdiction over actions for declaratory judgments within the exclusive discretion of the Supreme Court. The Court of Appeals may have been reluctant to reverse the decision of the Appellate Division in such action in the absence of a finding of abuse of discretion as a matter of law. N. Y. CIVIL PRACTICE ACT §473; RULES OF CIVIL PROCEDURE, Rule 212; *Post* case, *supra* at 189, 71 N.E.2d at 460.

10. For example, it is often necessary to pay a disputed tax or post a bond before securing judicial review of a tax commission decision and sometimes before securing even a commission hearing. These burdens have led many state courts to grant declaratory judgments on jurisdictional issues. *E.g.*, *Booth v. City of New York*, 296 N.Y. 573, 68 N.E.2d 870 (1946); *Donoghue v. Bunkley*, 247 Ala. 423, 25 So.2d 61 (1946). *Contra*: *Williams v. Tawes*, 179 Md. 224, 17 A.2d 137 (1941). Declaratory judgments on federal taxes, however, are barred by a 1935 amendment to the Federal Declaratory Judgment Act. 49 STAT. 1027 (1935), 28 U. S. C. §400(1) (1940). As to state taxes, the Supreme Court has held that the declaratory judgment is available in a federal court only where

been more hesitant to interfere with the administrative process.¹¹ In these cases the propriety of a prior judicial determination often depends upon the theoretical basis of the attack upon jurisdiction. Attacks are based either on the claim that proper "statutory construction" deprives the agency of jurisdiction, or that the dispute does not involve the necessary "jurisdictional facts"—a term which includes both the naked "evidentiary facts," *e.g.*, whether a newsboy receives a salary, and the "ultimate" facts which contain legal conclusions drawn from the evidence,¹² *e.g.*, whether the newsboy is an "employee." While in theory "statutory construction" includes only those rare instances where the scope of a statute may be determined without reference to the specific factual situations—*e.g.*, whether a provision prohibiting an agency from assuming jurisdiction under certain conditions also precludes agency investigation to determine whether these conditions exist¹³—in practice, courts have found the distinction difficult to maintain. As a result, cases which appear to involve disputed "jurisdictional facts" have frequently been classified as "statutory construction" problems.¹⁴

the relief available in a state court is inadequate. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293 (1943) (state relief held adequate); *Hillsboro Township v. Cromwell*, 326 U.S. 620 (1946) (state relief held inadequate). For discussion of the federal policy see BORCHARD, *op. cit. supra* note 4 at §25; Note, 50 YALE L. J. 927 (1941). Cf. Johnson Act of 1937, 50 STAT. 738 (1937) 28 U.S.C. §41 (1) (1940) (restricts use of injunction in similar situation).

Similarly, where action incurring criminal penalties is a prerequisite to judicial review, state courts are likely to permit declaratory judgments. *E.g.*, *New York Foreign Trade Zone Operators v. State Liquor Authority*, 285 N.Y. 272, 34 N.E.2d 316 (1941), and see Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 YALE L. J. 445 (1942).

11. An example is afforded by the instant case. Violation of the Act, *e.g.*, employer refusal to bargain with a certified bargaining agent, results only in a Board cease and desist order and such a final order is, of course, subject to judicial review. N. Y. Labor Law. §707. Penalties can be imposed only for violation of a court decree enforcing a Board order.

12. Although the distinction between "law" and "fact" remains hazy, the categories of evidentiary and ultimate fact propounded in THAYER, A PRELIMINARY TREATISE ON EVIDENCE 197 (1898), appear useful in clarifying the problem. See Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899 (1943).

13. Section 705 (3) of the New York Labor Law contains a provision of this type, see page 1450 and note 6 *supra*, but the meaning of this section was not decided in the *Post* case. The court held that regardless of whether the Board had such jurisdiction, the court possessed concurrent jurisdiction. For an argument that declaratory judgments on an agency's jurisdiction should be limited to this type of problem, see 1 BENJAMIN, *op. cit. supra* note 3, at 364. For less clear-cut examples of "statutory construction" see *State ex rel. Public Service Comm'n v. Blair*, 347 Mo. 820, 146 S.W. 2d 865 (1940) (whether suburban truckers are within intra urban exemption to Bus and Truck Act) and *Bank of Yorktown v. Boland*, 280 N.Y. 673, 21 N.E.2d 191 (1939) (whether N.Y. Labor Relations Act gives Board jurisdiction over bank employees).

14. *E.g.*, *Inland Empire Rural Electrification, Inc. v. Wash. Dep't Public Service*, 199 Wash. 527, 92 P.2d 258 (1939) (whether corporation a "public service corporation" under a utilities regulation act).

The *Post* decision, which permits a declaratory judgment on both evidentiary and ultimate jurisdictional facts, represents an extreme position which has been rejected by the United States Supreme Court and by most state courts. Equating the declaratory judgment with the injunction,¹⁵ the Supreme Court has adhered strictly to its rule requiring exhaustion of administrative remedies¹⁶ and has therefore denied both devices in all but the most exceptional circumstances.¹⁷ In *Myers v. Bethlehem Shipbuilding Corp.*,¹⁸ where both evidentiary and ultimate facts were disputed, the Court upheld the exclusive right of the National Labor Relations Board to determine initially whether a company was engaged in interstate commerce. That this doctrine applies even where no evidentiary facts are disputed was emphasized in *Macaulay v. Waterman Steamship Co.*¹⁹ where the Court held that "questions of coverage [should not be judicially determined] when the administrative agencies authorized to do so have not yet made their determination."²⁰ Lower federal courts have generally adhered to the Supreme Court doctrine,²¹ although occasional decisions have deviated from the norm.²² And,

15. *Great Lakes Dredge and Dock Co. v. Huffman*, 319 U.S. 293 (1943).

16. See *FTC v. Claire Furnace Co.*, 274 U.S. 160, 174 (1927); applied now as a cardinal principle of judicial administration, this rule antedates even *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1909), the case with which its origin is commonly associated. See Berger, *Exhaustion of Administrative Remedies*, 48 YALE L. J. 981 (1939). The rule has also been applied to prevent judicial determination of an agency's jurisdiction in court proceedings which are initiated solely for the purpose of enforcing administrative subpoenas. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 212 (1946) (Fair Labor Standards Act); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) (Walsh-Healey Public Contracts Act).

17. *Order of Ry. Conductors of America v. Swan*, 67 Sup. Ct. 405 (1947) (declaratory judgment granted where administrative boards unable to reach decision because of deadlock between employer and employee representatives); cf. *Hillsboro Township v. Cromwell*, 326 U.S. 620 (1946) (state statutory relief inadequate).

18. 303 U.S. 41 (1938). Although the primary relief demanded was injunctive, in both the *Myers* case and its companion case, *Newport News Shipbuilding and Drydock Co. v. Schauffer*, 303 U.S. 54 (1938), declaratory relief was also sought and refused.

19. 327 U.S. 540 (1946) (applicability of federal renegotiation statute to shipping contracts signed by British officials). This case seems to modify the earlier doctrine of *Great Northern Railway v. Merchants' Elevator Co.*, 259 U.S. 285 (1922), on "primary jurisdiction," in so far as the latter case permitted judicial interpretation of an interstate tariff rule (where no administrative expertness was required) in spite of the ICC's exclusive jurisdiction in the field.

20. 327 U.S. 540, 544 (1946). That the prescribed judicial review might prove inadequate, moreover, was termed a future contingency which did not justify an exception to the rule requiring exhaustion of administrative remedies. *Ibid.* The case is strengthened, moreover, by the fact that no question of administrative expertise was involved.

21. *Bradley Lumber Co. v. NLRB*, 84 F.2d 97 (C.C.A. 5th 1936), *cert. denied*, 299 U.S. 559 (1936) (NLRA); *Bucklin Coal Mining Co. v. Unemployment Compensation Comm'n*, 53 F. Supp. 484 (W.D.Mo. 1943) (validity of insurance fund tax under state unemployment compensation law); *London Guarantee & Accident Co. v. Rhoades*, 39 F. Supp. 589 (W.D.La. 1941) (Longshoremen's Compensation Act); *accord*, *Miles Laboratories Inc. v. FTC*, 140 F.2d 683, 685 (App. D.C. 1944), *cert. denied*, 322 U.S. 752 (1944)

although the problem of initial "statutory construction" has not yet been decided, the fact that no dispute has been so classified, coupled with the broad language as to "coverage" used in the *Waterman* case, makes doubtful any exception to the federal policy of judicial restraint.

State courts have been less consistent in forbidding such declaratory judgments. A few make them unavailable on either law or fact.²³ Many permit initial "statutory construction," but refuse to consider any "jurisdictional fact";²⁴ frequently the dividing line remains extremely hazy²⁵ and may be shuttled expediently.²⁶ Only a few courts will avowedly draw the legal con-

(determination of false advertising); *Aron v. FTC*, 50 F. Supp. 289 (E.D.Pa. 1943) (determination of unfair trade practices).

22. In *Ark. Power & Light Co. v. Federal Power Comm'n*, 156 F. 2d 821 (App. D.C. 1946), the circuit court held that a potential jurisdictional conflict between the FPC and the Arkansas Public Service Commission justified the use of a declaratory judgment; but the Supreme Court reversed because of plaintiff's failure to exhaust its administrative remedies, 67 Sup. Ct. 963 (1947). In *Interstate Natural Gas Co. v. La. Pub. Serv. Comm'n*, 34 F. Supp. 980 (E.D.La. 1940), the court, apparently influenced by the heavy expenses to the Gas Co. of a scheduled rate investigation, allowed a declaratory judgment but this decision seems contrary to the Supreme Court policy as expressed in *Petroleum Exploration, Inc. v. Ky. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938).

23. *Williams v. Tawes*, 179 Md. 224, 17 A.2d 137 (1941) (validity of state income tax); *Provident Mut'l Life Ins. Co. v. Unemployment Compensation Comm'n*, 126 N.J.L. 348, 19 A.2d 630 (Ct. Err. & App. 1941) (whether certain insurance agents were "employees" under state unemployment compensation law); *Judge of Probate v. National Surety Corp.*, 49 A.2d 635 (N.H. 1946) (surety's liability upon probate bond); *Black v. Utter*, 300 Ky. 803, 190 S.W. 2d 541 (1945) (jurisdiction of Director of Motor Transport). *But cf. Barnes v. Indian Refining Co.*, 280 Ky. 811, 134 S.W. 2d 620 (1939) (statutory applicability of unemployment insurance tax).

24. Compare *California Physicians' Serv. v. Garrison*, 172 P.2d 4 (Cal. 1946) (whether plaintiff agency constituted an insurance business under supervision of insurance commissioner treated as statutory construction) and *Cobb v. Harrington*, 144 Tex. 360, 190 S.W. 2d 709 (1945) (whether truck company was a "carrier" under state occupation tax termed statutory construction, but court influenced by absence of any special taxation tribunal) with *State ex rel. Pub. Serv. Comm'n v. Padberg*, 346 Mo. 1133, 145 S.W. 2d 150 (1940) (whether certain trucks were within load weight exemption to bus and truck: Act termed a jurisdictional fact); *Idaho Mut'l Benefit Ass'n v. Robison*, 65 Idaho 793, 154 P. 2d 156 (1944) (employee status under unemployment compensation act termed jurisdictional fact), and *Prudential Insurance Co. v. Powell*, 217 N.C. 495, 8 S.E.2d 619 (1940) ("employee" status under unemployment state compensation act termed jurisdictional fact).

25. *E.g.*, the issues in the *Blair*, *Cobb*, and *Garrison* cases, cited *supra* notes 13 and 24, were declared to involve "statutory construction," although it would have been equally persuasive to categorize them as matters of "jurisdictional fact."

26. *E.g.*, while the Oregon Supreme Court has denied declaratory judgments on jurisdictional facts [*Weyerhaeuser Timber Co. v. Galloway*, 163 Ore. 85, 121 P.2d 469 (1942)], it has escaped from its doctrinal meshes by labeling as "statutory construction" the ultimate-fact-laden question of whether certain rates were "new" rates within the jurisdiction of the Public Utilities Commission; *Union Pac. R.R. v. Bean*, 167 Ore. 535, 119 P. 2d 575 (1941) (a compelling factor in the decision may have been the Commission's practice of revoking its order each time the company sought judicial review).

clusions which are properly components of ultimate facts,²⁷ and, except in New York, no case has been found permitting declaratory judgments on an agency's jurisdiction where evidentiary facts are not established.²⁸ The *Post* decision, therefore, is far beyond the customary state doctrine and at the opposite end of the judicial spectrum from federal policy.²⁹

Permitting *ab initio* attacks on an agency's jurisdiction, whether the issue is "statutory construction" or disputed "jurisdictional facts", indicates an unrealistic application of the criteria for private litigation where declaratory judgments have long been utilized to settle disputed facts, to avoid delay, and to construe statutes.³⁰

Administrative agencies—unlike private litigants—possess full authority to construe statutes. That the legislature intended agency determination of jurisdiction to precede judicial determination may be inferred from statutory provisions giving an agency exclusive powers in a specialized field³¹ and mak-

27. *Inland Empire Rural Electrification, Inc. v. Wash. Dep't of Pub. Serv.*, 199 Wash. 527, 92 P. 2d 258, 261 (1939) (declaratory action determining whether corporation was "public service corporation" under state public utility law). See also note 26 *supra*. Such decisions are more frequently found where taxes are involved, and where the commission has already reached its conclusion. See note 10 *supra*; cf. *Texas Company v. Bryant*, 178 Tenn. 1, 152 S.W. 2d 627 (1941) and *Barnes v. Indian Refining Co.*, 280 Ky. 811, 134 S.W. 2d 620 (1945) (both cases involve "employee" status under unemployment compensation act) (but see note 23 *supra*). *Wash. Recorder Pub. Co. v. Ernst*, 199 Wash. 176, 91 P. 2d 718 (1939) ("employee" status of newspaper carriers under unemployment compensation act termed question of law), approximates the *Post* case closely. It may be distinguishable, however, since an agency ruling on the question had been made prior to the court action.

28. Cases forbidding declaratory judgments on ultimate facts necessarily preclude them on evidentiary facts; decisions permitting such judgments on legal conclusions carefully specify that no "facts" (*i.e.*, evidentiary facts) are disputed. See cases cited notes 26 and 27 *supra*, and see BORCHARD, *op. cit. supra*, note 4 at 342-5.

29. However, even prior to this decision, New York courts had authorized extensive use of declaratory judgments to challenge administrative jurisdiction. Tax cases: *All American Bus Lines Inc. v. City of New York*, 296 N.Y. 571, 68 N.E. 2d 869 (1947); *Richfield Oil Corp. v. City of Syracuse*, 287 N.Y. 234, 39 N.E. 2d 219 (1942); *Dun & Bradstreet, Inc. v. City of New York*, 276 N.Y. 198, 11 N.E. 2d 728 (1937). Cases involving New York Labor Relations Board: *Allegheny Ludlum Steel Corp. v. Kelley*, 295 N.Y. 607, 64 N.E. 2d 352 (1945), *rev'd*, 67 Sup. Ct. 1026 (1947) (propriety of using declaratory judgment action not discussed); *Bank of Yorktown v. Boland*, 280 N.Y. 673, 21 N.E. 2d 191 (1939); *Rubel Corp. v. Boland*, 177 Misc. 683, 31 N.Y.S.2d 572 (Sup. Ct. 1941) (declaratory judgment permissible to determine power of Board to act at all under N.Y. LABOR LAW § 705 (3); see note 6 *supra*). But cf. *In re Zone Oil Trucking Corp.*, 27 N.Y.S.2d 61 (Sup. Ct. 1941) (Board should not be forced to discuss merits of controversy before investigation).

30. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937) (settlement of disputed facts, see BORCHARD, *op. cit. supra* note 4, at 393); *Wirtz v. Nestos*, 51 N.D. 603, 200 N.W. 524 (1924) (statutory construction, see BORCHARD, *op. cit. supra* note 4, at 788-801); see *List's Estate*, 283 Pa. 255, 257, 129 Atl. 64 (1925) (avoidance of delay). For other advantages of declaratory judgments, see BORCHARD, *supra* at 279-89.

31. *E.g.*, §160(a) of the National Labor Relations Act ("This power shall be exclu-

ing its findings of fact conclusive if supported by substantial evidence.³² The granting of a declaratory judgment on jurisdictional issues undermines that intent by demoting the agency from the role of a respected arbiter to that of an ordinary litigant.

Where the facts are disputed, moreover, the technical knowledge and special experience possessed by administrative agencies may often make them more familiar with customary practices, and hence, more competent fact finders than the ordinary judge or referee. Furthermore, in determining such issues as whether a newsboy is an "employee", administrative agencies are less likely to be handicapped by *stare decisis* or swayed by criteria developed for the solution of other problems,³³ and, rather than eliminating delay, the unfortunate effects of which are particularly important in union certification proceedings,³⁴ judicial intervention may only serve to increase it.³⁵ The presumption must be that the agency will make a correct decision on its jurisdiction,³⁶ and where the court reaches the same conclusion that the agency would have reached, needless delay may have been caused.³⁷ Furthermore, a declaratory

sive . . ."). Jurisdiction of the New York State Labor Relations Board to conduct hearings on questions of union representation is not specifically termed exclusive, but the Board in this field possesses special powers (see N.Y. Labor Law §§705-6) which no other tribunal has claimed, so that the word "exclusive" would seem superfluous. See Desmond, J., dissenting in the *Post* case at 193, 71 N.E. 2d at 462.

32. See note 2 *supra*. In considering the *Post* case, it should also be remembered that in a 1938 election the people of New York rejected a proposed amendment to the state constitution which would have permitted judicial review of an agency's decision on both law and facts. Considerations of comity, moreover, should be particularly persuasive where, as in the *Post* case, the agency has actually scheduled a hearing on the disputed question. See Berger, *supra* note 16 at 1006.

33. *E.g.*, in determining "employee" status under a labor relations act, the standards of respondeat superior developed for vicarious liability problems should not be conclusive. *Accord*, NLRB v. Hearst Publications, 322 U.S. 111, 124-6 (1944). As to the importance of administrative expertise in matters of this kind see the *Hearst* case *supra* at 130.

34. Although a union may represent a majority of employees at the time when certification is sought, the natural loss of interest produced by inaction and the opportunity thus provided for pressure against union adherents can do serious damage to its chance of becoming a certified bargaining agent. *Cf.* 5 BENJAMIN, *op. cit. supra* note 3, at 179 n.20 of Report on Labor Board.

35. Indiscriminate application of the *Post* rule to workmen's compensation and unemployment insurance, where thousands of cases hinge on the existence of an employer-employee relationship, would be particularly productive of delay. See Desmond, J., dissenting in the *Post* case at 194, 71 N.E. 2d at 463, and Berger, *supra* note 16 at 1006.

36. See, *e.g.*, Dalton Machine Co. v. Virginia, 236 U.S. 699, 701 (1915); Kane v. Walsh, 295 N.Y. 198, 206, 66 N.E. 2d 53, 56 (1946).

37. Where jurisdiction is upheld, initiation of administrative proceedings may have been delayed; where it is denied, similar denial by the agency would have terminated the controversy far more expeditiously in those situations where, as in the *Post* case, no appeal from such an agency order is authorized. See 5 BENJAMIN, *op. cit. supra* note 3, at 180 of Report on Labor Board. Only in a minority of instances, where the court denies jurisdiction and the agency would have found that it existed, has delay in final disposition been avoided.

judgment upholding agency jurisdiction can be appealed; and such appeal does not preclude the possibility of appeal from a final agency order on some other ground, *e.g.*, abuse of discretion, thus producing a double set of appeals and further delay. If judicial action is limited to reviewing an agency's final order, jurisdiction as well as other phases of the order can be challenged, thus providing adequate protection for private rights³⁸ without producing an inordinate delay in the ultimate decision.

Admittedly, in those rare instances where the applicability of a statute can be determined without regard to particular facts, the case against declaratory judgments is less compelling: there is less need for agency expertise and it is impossible to find any legislative intent that agency action should precede judicial decision.³⁹ On the other hand, interruption of the administrative process is an objection as cogent here as where facts are disputed. Moreover, the confusion resulting from efforts to segregate "statutory construction" from "jurisdictional facts" offers an inviting loophole to any trial court desirous of limiting administrative action, and breeds that uncertainty which leads to increased litigation.⁴⁰

These considerations,⁴¹ plus the fact that agency errors can be corrected

38. Nor would the increased cost of litigation seem to justify the use of a declaratory judgment to test jurisdiction, any more than where a party seeks judicial review of an agency intermediate order. In the latter case, judicial review is usually denied. *Petroleum Exploration, Inc. v. Pub. Serv. Comm'n of Ky.*, 304 U.S. 209, 222 (1938) (plaintiff corporation's investigation costs of \$25,000 termed "part of the social burden of living under government" and held not to justify issuance of injunction against agency's assuming jurisdiction). See also 5 BENJAMIN, *op. cit. supra* note 3, at 178-9 of Report on Labor Board and SEN. REP. No. 573, 74th Cong. 1st Sess. 5, 6 (1935).

39. It is only agency findings of fact that are to be accorded deference on judicial review (see note 2 *supra*). See also BORCHARD, *op. cit. supra* note 4, at 878.

40. See Berger, *supra* note 16, at 1004 for discussion of the desirability of agency interpretation of its own statute; Desmond, J., dissenting in the *Post* case at 199, 71 N.E.2d at 465; and BORCHARD, *op. cit. supra* note 4, at 878. Where an agency itself desires guidance as to the correct interpretation of the statute, of course, a declaratory judgment is highly desirable. See BORCHARD, *id.* at 888-96. Such a judgment is particularly useful to settle disputes between governmental agencies, *e.g.*, *Kirby v. Nolte*, 351 Mo. 525, 173 S.W. 2d 391, (1943) (dispute between St. Louis civil service commission and Board of Aldermen).

41. Other objections to initial judicial determination of agency jurisdiction may be an initial lack of uniform decisions among lower tribunals, particularly where a federal statute is involved, *NLRB v. Hearst Publications*, 322 U.S. 111, 123 (1944), and the danger that judicial hostility to the statute may impair its enforcement.

Another factor which renders the declaratory judgment undesirable is the dilemma which it poses for agencies which must decide between adversary parties: if the agency does give an opinion on facts which it has not officially ascertained, it abdicates the role of impartial umpire and becomes an adversary in the dispute which it is supposed to adjudicate; if it does not take a stand on the disputed facts, it cannot defend its jurisdiction. See Desmond, J., dissenting in the *Post* case at 198, 71 N.E.2d at 465. Nor does the possibility that agency assumption of jurisdiction might contravene existing judicial doctrine constitute grounds for permitting a declaratory judgment; conditions might have changed or a

freely on judicial review, indicate the desirability of a state rule limiting, rather than expanding, the use of declaratory judgments to decide jurisdictional issues.⁴² Allowing agency determination of jurisdiction *ab initio*—the federal rule—provides adequate protection of private rights and insures more effective and more expeditious statutory enforcement.

special problem justifying agency action might be presented. *Matcovich v. Cal. Employment Comm'n*, 64 Cal. App.2d 40, 148 P.2d 118 (Dist. Ct. App. 1944). Thus, in the *Post* case the fact that an existing decision, *People v. Masiello*, 177 Misc. 603, 31 N.Y.S. 2d 512 (Sup. Ct. 1941), held that newsdealers were not "employees" within the meaning of the state anti-injunction act should not have prevented the Board from examining the status of the employees six years later and under a different statute. Furthermore, the fact that the *Masiello* decision was that of a *nisi prius* court tends to minimize its value, as does the fact that the United States Supreme Court had held that newsboys are "employees" within the meaning of the National Labor Relations Act. *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

42. Judicial limitation appears preferable to legislation because of the possible propriety of declaratory judgments in exceptional instances. See note 17 *supra*. If legislation is found necessary, prohibition of declaratory judgments in cases involving specific statutes like the NLRA would be preferable to an inflexible general amendment to the Declaratory Judgment Act like that removing from federal courts the power to issue declaratory judgments on federal tax problems (see note 10 *supra*).