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DOES "LEGISLATIVE REVIEW" BY COURTS IN APPEALS FROM PUBLIC UTILITY COMMISSIONS CONSTITUTE DUE PROCESS OF LAW?

MAURICE H. MERRILL *

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers or either of them, to the end it may be a government of laws and not of men."¹

Thus did the men of Massachusetts phrase the classical expression of the doctrine of the separation of governmental powers among three departments. Enunciated in various forms in the American Constitutions and regarded as implicit therein when not expressly set forth,² this doctrine has exerted tremendous influence upon our public law. When conceived to require that every function of the state shall be tagged as either legislative, executive, or judicial in nature, assigned to its proper department and thereafter be regarded as *verboten* to either of the other two, it has frequently played havoc with the practical and efficient organization of public affairs. Today we tend to regard it as requiring no more than a practical division of labor among governmental bodies based upon considerations of functional expediency, but there remain traces of the stricter view in our judicial decisions.³ This discussion deals with a particular

*See Biographical note p. 271.

¹ Massachusetts Constitution (1780) Pt. 1, Sec. 30.

² See *Kilbourn v. Thompson* (1881) 103 U. S. 168, 36 L. Ed. 377; *State v. Johnson* (1900) 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662; *Western Union Tel. Co. v. Myatt*, (1899, Circ. Ct. Kan.) 98 Fed. 335 and cases there cited.

³ An interesting contrast is presented by the following:

"That the important powers of government differing so widely in their essential characters might lawfully be vested in a single board or tribunal, to be exercised upon the life or property of a person, is a startling proposition, and it would suggest the inquiry whether our plan of government has not insensibly drifted far away from its ancient moorings." Hook, District Judge, in *Western Union Tel. Co. v. Myatt*, Note 2, *surpa*.

"There is much discussion whether rate-fixing is in its nature a 'judicial' or a 'legislative' function. This was a period in the history of American

situation, not yet specifically dealt with by the courts, wherein a strict application of the doctrine of the separation of powers, based upon a technically logical adherence to past precedents, would produce a particularly unfortunate result.

In accordance with the criterion, attractive, if inaccurate, that legislation establishes rules for the future while adjudication passes upon controversies arising under existing rules,⁴ the American courts have, for the most part, held that the fixing of rates to be charged by a railroad or other public utility for service to be rendered in the future, must be assigned to the legislative compartment in our threefold classification of governmental power.⁵ Courts may not, therefore, acting in a judicial capacity, prescribe future rates as between the utility and its customers.⁶ Likewise, rules governing for the future, the administration of such enterprises and the extent and character of service to be rendered by them are thought of as falling within the legislative domain.⁷

On the other hand, there are occasions in which the administration of public utilities, the services to be rendered by them and the rates to be charged therefor present questions whose solution is recognized by the courts as coming within the proper sphere of judi-

jurisprudence when discussions of this sort were popular. The separation of powers into executive, legislative, and judicial was looked upon as more than a mere differentiation of functions based upon practical considerations; it was thought to be the manifestation of an inherent truth. The pseudo-philosophy of the period regarded certain governmental acts as in their nature judicial, and hence never to be exercised, under the constitution, by either the legislative or the executive branch." Gerard C. Henderson, "Railway Valuation and the Courts," 33 Harv. L. Rev. 902, 904.

See also upon this point, Roscoe Pound, "Justice According to Law," 14 Col. L. Rev. 1, 5.

⁴ "The distinction between a judicial and a legislative Act is well defined. The one determines what the law is, and what the rights of parties are with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it." Dissenting opinion of Mr. Justice Field in *Sinking Fund Cases*, (1879) 99 U. S. 700, 25 L. Ed. 496.

⁵ *Munn v. Illinois* (1876) 94 U. S. 113, 24 L. Ed. 77; *Reagan v. Farmers' Loan & Trust Co.*, (1894) 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047; *McChord v. Louisville & Nashville R. Co.*, (1902) 183 U. S. 483, 46 L. Ed. 289, 22 Sup. Ct. 165; *Missouri Southern R. Co. v. Public Service Commission*, (1919) 279 Mo. 484, 214 S. W. 379.

⁶ *Hodge v. Alabama Water Co.*, (1921) 205 Ala. 472, 88 So. 585; *City of Madison v. Madison Gas & Electric Co.*, (1907) 129 Wis. 249, 108 N. W. 65, 8 L. R. A. (N. S.) 529. See also cases cited in note to preceding case in 8 L. R. A. (N. S.)

⁷ See *Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, (1911) 221 U. S. 400, 55 L. Ed. 786, Sup. Ct. 537; *Wedley Southern R. Co. v. Georgia*, (1915) 235 U. S. 531, 59 L. Ed. 405, 34 Sup. Ct. 214; *Appeal of Norwalk St. Ry. Co.* (1897) 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794; *Wabash C. & W. Ry. Co. v. Commerce Commission*, (1923) 309 Ill. 412, 141 N. E. 212; *Fishback v. Public Service Commission of Indiana*, (1923) Ind. 138 N. E. 346.

cial activity. A detailed enumeration thereof would be out of place in this article. One such "judicial function," however,—the power to pass up the legality and the constitutionality of "legislative" regulations—gives rise to the problem here considered.

Legislative regulation of public utilities must, under our social order, be made subject to the constitutional limitations imposed upon legislative action. When the regulation is made by an administrative body exercising delegated powers, the additional requirement arises that the action taken be within the grant of power to the regulating agency. That the decision of the question whether a particular rule complies with these requisites is within the judicial competence is now so well settled as virtually to need no citation.⁸ But even in such proceedings fear of passing the bounds appointed as meet for a judicial action is apparent, and the courts hold that they may not, in upholding or striking down regulations because of illegal or unconstitutional characteristics, arrogate to themselves the legislative function of prescribing rules for future observance. "Rate making is no function of the courts, and should not be attempted, either directly or indirectly."⁹ Hence courts may not establish new tariffs in the place of those they strike down.¹⁰ There is a similar refusal to substitute judge-made regulations as to the service to be rendered for those prescribed by the regulating agencies.¹¹

This judicial inquiry into the constitutional infirmities of regulatory measures may not be escaped. As to claims that the particular requirement infringes the constitutional rights of the utility, including all those rights which have been created by judicial construction of the due process clause of the Fourteenth Amendment, the courts must be permitted to decide. Whether the regulation be

⁸ See upon this point *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462; *Reagan v. Farmers' L. & T. Co.*, Note 5, *supra*; *Denver & S. L. R. Co. v. Chicago, B. & Q. R. Co.* (1918) 64 Colo. 229, 171 Pac. 74. See also Ray A. Brown, "The Functions of Courts and Commissions in Public Utility Rate Regulation," 38 Harv. L. Rev. 141, 152-158.

⁹ *Newton v. Consolidated Gas Co.*, (1922) 258 U. S. 165, 66 L. Ed. 538, 42 Sup. Ct. 264.

¹⁰ See *Alton & S. R. Co. v. Illinois Commerce Commission*, (1925) 316 Ill. 625, 147 N. E. 417; *East Ohio Gas Co. v. City of Cleveland*, (1922) 106 Oh. St. 489, 140 N. E. 410. But compare the practice adopted in some cases of enjoining enforcement of an alleged confiscatory rate upon condition that the plaintiff charge no more than a maximum named in the decree, pending the establishment of another rate by the proper authorities.

See as to this: *Newton v. Consolidated Gas Co.* Note 9 *supra*; *City of Toledo Rys. & Light Co.*, (1919, 6th Circ.) 259 Fed. 450, 170 C. C. A. 426; *Augusta-Aiken Ry. & Electric Corporation v. Railroad Commission of South Carolina*, (1922, 4th Circ.) 281 Fed. 977.

¹¹ See *Blackledge v. Farmers' Independent Telephone Co.*, (1921) 105 Neb. 713, 181 N. W. 709.

embodied in a statute enacted by the legislature itself¹² or in an order of an administrative board,¹³ "due process" requires that the state permit those affected a judicial review of its constitutional phases, a review in which the court shall be permitted to exercise "its own independent judgment as to both law and facts."¹⁴ If the regulation is one prescribed by an administrative tribunal, it is not necessary that the review be afforded by means of an appeal directly from the administrative proceedings to a reviewing court.¹⁵ It is sufficient if the judicial review may be had upon a proceeding to enjoin the enforcement of the order,¹⁶ or by contesting its legality in a prosecution for its violation, providing in the latter instance the penalties prescribed are not so severe as to deter a contest.¹⁷ But, in some manner, the review must be accorded.

The cases speak of the requisite review as a "judicial review"¹⁸. We may assume that this means a review by courts, "under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy,"¹⁹ that is, acting in the manner in which courts are accustomed to act, and applying the traditional technique of the judiciary²⁰ to the solution of the problems before them rather than the rough and ready methods sometimes characteristic of administrative tribunals. Does it mean more? Is the conception that the making of rules for the future is the exclusive attribute of the legislature so fundamentally embedded in our juristic theory that, if the reviewing court may—as it may in some of our states—substitute its own order for that of the commission, the review afforded is not a judicial

¹² *Ex parte Young*, (1907) 209 U. S. 123, 52 L. Ed. 714, 28 Sup. Ct. 441, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764

¹³ *Chicago, M. & St. P. R. Co. v. Minnesota*, (1890) 134 U. S. 418, 33 L. Ed. 970, 10 Sup. Ct. 462.

¹⁴ *Ohio Valley Water Co. v. Ben Avon Borough*, (1920) 253 U. S. 287, 64 L. Ed. 908, 40 Sup. Ct. 527.

¹⁵ *Louisville & N. R. Co. v. Garrett*, (1913) 231 U. S. 298, 58 L. Ed. 229, 34 Sup. Ct. 48. See also *Plymouth Coal Co. v. Pennsylvania*, (1914) 232 U. S. 531, 58 L. Ed. 713, 34 Sup. Ct. 359.

¹⁶ *Louisville & N. R. Co. v. Garrett*, Note 15, *supra*.

¹⁷ *Wadley Southern R. Co. v. Georgia*, (1915) 235 U. S. 531, 59 L. Ed. 405, 34 Sup. Ct. 214, containing a summary of the ways in which judicial review may be afforded. That, when the only method of review provided is to raise the alleged invalidity of the order as a defense to a prosecution for its violation, prescription of such excessive penalties as to deter a contest render the order unconstitutional, see *Oklahoma Operating Co. v. Love*, (1920) 252 U. S. 331, 64 L. Ed. 596, 40 Sup. Ct. 338.

¹⁸ See *Ohio Valley Water Co. v. Ben Avon Borough*, Note 14, *supra*, and cases cited therein.

¹⁹ Blatchford, J. in *Chicago, M. & St. P. R. Co. v. Minnesota*, note 13, *supra*.

²⁰ See Roscoe Pound, "The Theory of Judicial Decision," 36 Harv. L. Rev. 641, 645, 646, 651.

one? If such a review is the only one permitted by the laws of the state, has the utility been denied due process for want of a judicial review? It is submitted that these questions ought to be answered in the negative, but there is reason to apprehend that, by process of abstract reasoning from past decisions of the Supreme Court of the United States, a contrary result may be reached.

The cases in which the Supreme Court of the United States has had occasion to consider whether a state court, in reviewing the orders of a public utility commission was acting in a judicial capacity have involved two types of questions: When may a utility resort to the federal courts to enjoin the enforcement of an order? Is the decision of a state court sustaining an order on appeal from the commission *res judicata* as to the validity of the order?

In *Prentis v. Atlantic Coast Line Co.*,²¹ the Supreme Court was confronted with the contention that the Corporation Commission of the State of Virginia was invested with judicial powers and that a proceeding before it to establish rates was a proceeding in a state court which the federal courts were by statute forbidden to enjoin.²² The court denied this contention on the ground that the character of the proceeding was to be determined by the "nature of the final act" and that the act of rate making "is the making of a rule for the future, and therefore is an act legislative in kind." The court then proceeded to decide that the injunction issued by the Circuit Court was improvidently granted and that the decree should therefore be reversed. The reasoning upon which this result was reached may thus be briefly summarized: The plaintiff railroads had brought their action in the federal court immediately upon the promulgation of the commission's order without invoking the appeal to the state Supreme Court of Appeals vouchsafed them by the state constitution.²³ If upon such an appeal, the state court should reverse the order of the commission, it was required to "substitute therefor such order as, in its opinion, the commission should have made at the time of entering the order appealed from."²⁴ Therefore said Mr. Justice Holmes, the state court upon appeal acted in a legislative and not a judicial capacity. The legislative process was not complete until the final disposition of the appeal or until the time for appeal had expired. "Comity" between state and federal authority requires that the federal courts should not intervene until the legislative process is complete. Hence the bills "were brought too soon." To the extent indicated, therefore, the *Prentis* case holds that a review by a court having power to substitute its own orders for those of the

²¹ (1908) 211 U. S. 210, 53 L. Ed. 150, 29 Sup. Ct. 67.

²² U. S. Rev. Stat. Sec. 720.

²³ Va. Const. 1902, Sec. 156.

²⁴ Va. Const. 1902, Sec. 156 (g).

commission is a review by a tribunal exercising powers not judicial, but legislative.

The doctrine of the *Prentis* case has been invoked by the Supreme Court in several subsequent cases to show that, as the review provided by the several states involved did not permit the state court to substitute its own order for that of the commission, the review was judicial, not legislative, in kind, and that, therefore, the application to the federal courts for protection might properly be made upon the promulgation of the commission's order, without invoking the appellate jurisdiction of the state courts.²⁵ Similar use of this test may be observed in opinions of the lower federal tribunals.²⁶ On the other hand, in holding that, since "Rules of Comity or convenience must give way to constitutional rights," a failure to exhaust the "legislative" procedure does not bar a resort to the federal courts when, pending an appeal, suspension of a confiscatory schedule of rates has been denied,²⁷ or cannot be granted²⁸, the Supreme Court has characterized the review by the courts of rate-fixing orders in Oklahoma²⁹ and of valuation proceedings in Washington³⁰ as legislative in character.

²⁵ *Bacon v. Rutland R. Co.*, (1914) 232 U. S. 134, 58 L. Ed. 538, 34 Sup. Ct. 233 (Vermont Pub. Stat. 1906, Secs. 4599, 4600). *Prendergast v. New York Telephone Co.*, (1923) 262 U. S. 43, 67L. Ed. 853, 43 Sup. Ct. 466, referring to New York procedure: "Upon the making by the commission of the orders in question the proceedings had reached the judicial stage entitling the company to resort to the court for relief. ***Here the commission is vested with the final legislative authority of the state in the rate-making process; the authority exercised by the state courts upon a review by certiorari (citing case) being purely judicial and having no legislative character (Laws New York 1920, Chap. 925, Secs. 1304, 1305, pp. 437, 438)." *Pacific Telephone & Teleg. Co. v. Kuykendall* (1924) 265 U. S. 196, 68 L. Ed. 975, 44 Sup. Ct. 553, holding judicial review of rate-making under Washington statute (Rem. Comp. Stat. 1922. Sec. 10, 428) to be judicial in character.

²⁶ *Delaware, L. & W. R. Co. v. Stevens*, (1909, Circ. Ct. N. Y.) 172 Fed. 595; *Wilmington City Ry. Co. v. Taylor*, (1912, D. Ct. Del.) 198 Fed. 159; *Northwestern Bell Tel. Co. v. Hilton*, (1921, D. Ct. Minn.) 274 Fed. 384; *Helena Water Co. v. City of Helena*, (1921, D. Ct. Ark.) 277 Fed. 66; *Van Wert Gaslight Co. v. Public Utilities Commission*, (1924, D. Ct. Oh.) 299 Fed. 671; *Northwestern Bell Tel. Co. v. Spillman*, (1925, D. Ct. Neb.) 6 F. (2d) 663. See also *Colorado Power Co. v. Haldeman*, (1924, D. Ct. Colo.) 295 Fed. 178.

²⁷ *Oklahoma Natural Gas Co. v. Russell*, (1923) 261 U. S. 290, 67L. Ed. 659, 43 Sup. Ct. 453.

²⁸ *Pacific Teleph. & Teleg. Co. v. Kuykenhall*, note 25, *supra*.

²⁹ *Oklahoma Natural Gas Co. v. Russell*, note 27, *supra*. The Oklahoma provision for appeals from rate making orders is a duplicate of that obtaining in Virginia. Oklahoma Constitution, Art. IX, Sec. 23.

³⁰ *Pacific Teleph. & Teleg. Co. v. Kuykendall*, note 25 *supra*. The superior court, on writ of review, if it holds the findings of the commission to be "unjust, incorrect, unreasonable, unlawful, or not supported by the

In the *Prentis* case,³¹ the court took occasion to say: "If the rate should be affirmed by the Supreme Court of Appeals and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the circuit court without fear of being met by a plea of *res judicata*." In other words, since the review in the state court is legislative in character, the judgment rendered cannot be regarded as a binding judicial determination of the legal question involved. On the other hand, where the state court's function is restricted to an approval or reversal of the commission's order, with no power of modification or substitution, the Supreme Court has been quite willing to accord to its decision, unappealed from, the character of *res judicata*.³²

In respect to these two problems—"Comity" and *res judicata*—the Supreme Court has definitely decided that a review of commission action by a state court having power to substitute an order of its own making for that of the commission cannot be regarded as a judicial review. Will it also hold that it does not constitute such a judicial review as the state is required to vouchsafe the utility under the due process clause of the Fourteenth Amendment?

A strictly logical extension of the past decisions would seem to call for such a holding. If due process requires opportunity for "judicial" review of commission action, and if a review in which the court may revise the orders of the commission is legislative and not judicial in character, then it would seem that such a review does not afford due process. Some such view as this may be indicated by the language of the learned justice who wrote the majority opinion in the *Ben Avon* case when he said, speaking of the law there under consideration:

"Without doubt the duties of the courts upon appeals under the act are judicial in character,—not legislative, as in *Prentis v. Atlantic Coast Line R. Co.*, *supra*. This is not disputed; but their jurisdiction, as ruled by the supreme court, stopped short of what must plainly be intrusted to some court in order that there may be due process of law."³³

In other words, the Pennsylvania legislation under fire in that case might be regarded as affording the requisite judicial review insofar as it restricted the courts to purely "judicial" functions; its essential

evidence," is to make "new and correct findings." On appeal from the superior court, the supreme court exercises the same authority. Rem. Comp. Stat. Wash. 1922, Sec. 10, 441.

³¹ Note 21, *supra*.

³² *Detroit & Mackinac Ry. Co. v. Michigan Railroad Commission* (1914) 235 U. S. 402, 59 L. Ed. 288, 35 Sup. Ct. 126; *Napa Valley Electric Co. v. Railroad Commission of California* (1920) 251 U. S. 366, 64 L. Ed. 310, 40 Sup. Ct. 174.

³³ McReynolds, J. in *Ohio Valley Water Co. v. Ben Avon Borough*, note 14, *supra*.

vice lay in not giving them a sufficiently free rein in exercising those functions. There is implicit in the language used the suggestion that a purely "legislative" review, though given by a court, would not satisfy the demands of due process.³⁴ The question thus implicitly raised seems reserved for future consideration by *Keller v. Potomac Electric Power Co.*³⁵ There the precise point passed upon was the validity of a congressional act providing for a review of decisions of the public utilities commission of the District of Columbia by the Supreme Court of the District with the right of appeal therefrom to the Court of Appeals of the District and thence to the Supreme Court of the United States. As construed by that tribunal, the statute gave all these courts the power to substitute orders of their own for those of the commission.³⁶ It is said in the opinion that Congress, because of its plenary power over the District, may thus confer "legislative" power upon the local courts. On the other hand, since nonjudicial powers may not be vested in the Supreme Court of the United States, it was held that the provision for a final appeal to that body was invalid and the appeal was dismissed for that reason. A contention seems to have been raised that the statute, by forbidding other resort to the courts than by the prescribed review, amounted to a denial of the judicial review required by due process, but a decision on this point was denied.³⁷ It is apparent, therefore, that the question whether due process is afforded through review of the commission orders by a court exercising the "legislative" power of substituting its own order for that appealed from remains open although a technically logical application of past decisions and *dicta* indicates that there is a possibility that a negative answer may be given when the question is finally passed upon.

But will any useful purpose be served by such a holding? Are the constitutional rights of the utility any more adequately preserved through a review by a court which has power only to affirm or to reverse the order under consideration than they are when the reviewing court is permitted, if it decides that the order is erroneous, to remould it so as to make it unobjectionable? In both instances the review is by a tribunal of lawyers, trained in the traditional technique

³⁴ For a similar view, deduced by a state judge from the language of *Prentis v. Atlantic Coast Line Co.*, note 21, *supra*, see the opinion of the court per Williams J. in *Pionere Telephone & Telegraph Co. v. State*, (1914) 40 Okla. 417, 138 Pac. 1033.

³⁵ (1923) 261 U. S. 428, 67 L. Ed. 731, 43 Sup. Ct. 445.

³⁶ For the statutory provision involved, and for the vigorous expression by the chief Justice of the view that the powers conferred must be regarded as legislative in character the reader is referred to the opinion.

³⁷ As to this point the Chief Justice says: "Some question has been made as to the validity of ¶ 65 which forbids all recourse to courts to set aside, vacate, and amend the orders of the commission after one hundred and twenty days, and of ¶ 69, which puts the burden upon the party adverse to the commission to show, by clear and satisfactory evidence,

of the common law; applying to the order, in accordance with this technique, the judicially imposed and judicially defined content of due process of law; making such application in the light of its "own independent judgment as to both law and fact."³⁸ The insistence upon judicial review as essential to due process surely means no more than that the utility shall have all questions affecting the constitutionality of the particular action taken,—perhaps also as to its validity under the statute from whence the commission draws its authority,—determined by a court, acting in the manner in which courts are accustomed to act in deciding such questions.³⁹ If these questions are considered and decided in accordance with this time-honored technique, "provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy,"⁴⁰ by a court, what difference does it make that the court, after answering the contention of the utility in the affirmative and after holding the order to be inoperative because transgressing the constitutional rights of the utility itself enters an order which does not, in its judgment, violate those rights? Such an order would be sustained on review if made by the commission in place of that which was set aside. Are

the inadequacy, unreasonableness, or unlawfulness of the order complained of. It is suggested that this deprives the public utility of its constitutional right to have the independent judgment of a court on the question of the confiscatory character of an order, and so brings the whole law within the inhibition of the case of *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287, 64 L. Ed. 908, 40 Sup. Ct. 527. It is enough to say that, even if ¶¶ 65 and 69 were invalid, the whole act would not fail, in view of ¶ 92 (providing that the invalidity of any paragraph or part thereof shall not affect the validity of the rest of the act) already referred to. It will be time enough to consider the validity of those sections when it is sought to apply them to bar or limit an independent judicial proceeding raising the question whether a rate or other requirement of the commission is confiscatory." See 261 U. S. 445, 67 L. Ed. 737.

³⁸ In view of the extensive development of "legislative" review under the Oklahoma constitutional provision heretofore referred to (see note 29, *supra*) the reader is referred to the following Oklahoma cases as exemplifying the effective character of the protection afforded by such a review: *Atchison, T. & S. F. Ry. Co. v. State* (1909) 23 Oklahoma. 510, 101 Pac. 262; *Twin Valley Telephone Co. v. Mitchell*, (1910) 27 Okla. 388, 113 Pac. 914; *Missouri, O. & G. Ry. Co. v. State*, (1916) 53 Okla. 341, 156 Pac. 1155; *Oklahoma Natural Gas. Co. v. State*, (1923) 90 Okla. 84, 216 Pac. 917; *McAlester Gas & Coke Co. v. State*, (1924) 102 Okla. 118, 227 Pac. 83; *Fred Harvey v. Corporation Commission*, (1924) 102 Okla. 266, 229 Pac. 428.

³⁹ Cf.: "The United States Constitution does not require a state to separate judicial from other state functions, but it probably does require a tribunal fair, unbiased, and reasonably fitted to pass on the matter submitted to it in order that its decisions may be due process, but does the affixing of the name court add anything to its potentialities?" J. B. Cheadle, "Judicial Review of Administrative Determinations," 3 S. W. Pol. Sci. Quar. 1, 13.

⁴⁰ See *Chicago M. & St. P. R. Co. v. Minnesota* note 8, *supra*.

rights more adequately protected when the court reverses the order and remands the case to the commission with an opinion clearly indicating the course which the commission should take⁴¹ than when, after a careful consideration of the case the court itself enters the order which it deems proper?⁴² To say that in the first case the utility receives due process of law which is denied it in the second case seems to the writer to exalt form over substance and to ignore the realities of the situation in favor of a useless mechanical application of the doctrine of the separation of powers.⁴³

The undesirability of such a subordination of substance to form⁴⁴ is accentuated by the fact that there are several very material advantages which are possessed by "legislative" as distinguished from judicial review. In the first place, the entering of a final order by the reviewing court, possible under a system of "legislative" review makes for an expedition in the disposal of the controversy not always possible under review of the other type.⁴⁵ Such a speeding up of

⁴¹ See for example *Blackledge v. Farmers' Independent Telephone Co.*, (1921) 105 Neb. 713, 181 N. W. 709; *Public Service Ry. Co. v. Board of Public Utility Commissioner*, (1921) 96 N. J. L. 54, 114 Atl. 323; *Ben Avon Borough v. Ohio Valley Water Co.*, (1921) 75 Pa. Super. Ct. 290, affirmed, *Ben Avon Borough v. Ohio Valley Water Co.*, (1921) 271 Pa. St. 346, 114 Atl. 369, P. U. R. 1921 E. 471. The latter case is the sequel of the famous *Ben Avon* case in the Supreme Court of the United States (see note 14, *supra*) and presumably affords the utility due process of law.

⁴² See *Oklahoma Natural Gas Co. v. Corporation Commission*, (1923) 90 Okla. 84, 216 Pac. 917 and *Consumers Gas Co. v. Corporation Commission*, (1923) 95 Okla. 57, 224 Pac. 698.

⁴³ Compare the painstaking and thorough attention given the claims of the utility in such cases as *Pioneer Telephone & Telegraph Co. v. Westenhaver*, (1911) 29 Okla. 429, 118 Pac. 354; *McAlester Gas & Coke Co. v. Corporation Commission*, (1924) 102 Okla. 118, 227 Pac. 83; *Petersburg Gas Co. v. City of Petersburg*, (1922) 132 Va. 82, 110 S. E. 533 with the review available in a court exercising solely "judicial" functions.

⁴⁴ How artificial is the reasoning which would deny to "legislative" review the character of "due process" may be thus illustrated: Since "due process" is satisfied by the existence of one proper form of judicial review (see *Louisville R. Co. v. Garret*, note 15, *supra*.), a state which had limited the utility's recourse to a "legislative" review in the highest state court might cure this defective (?) procedure by permitting a "judicial" review through an injunction issuing out of one of the state courts of first instance. (See *Pioneer Telephone & Telegraph Co. v. State*, note 34 *supra*.) We might then be edified by the spectacle of the supreme court of the state, in its appellate "judicial" capacity, reviewing a decree of one of the inferior courts enjoining an order of the public utility commission which the supreme court in its "legislative" capacity had theretofore affirmed! Will anyone claim that the essential constitutional rights of the utility would be made in any way more secure by such a process?

⁴⁵ Note the following decisions under systems providing for purely "judicial" review. The Colorado Supreme Court holds itself unable to enter an order for the division of rates between two carriers, on setting aside the commission's order, and therefore remands the cause to the commission "for further proceedings not inconsistent with the views herein ex-

the final determination of regulatory proceedings is desirable alike from the standpoint of the utilities of the patrons and of the regulatory bodies.⁴⁶ If the court must set aside an entire order merely because one phase thereof cannot be sustained⁴⁷, needed relief to the public is unnecessarily delayed, with no permanent advantage to the utility. The commission, by subsequent proceedings, may correct its error. The proper regulation will then be imposed upon the utility. The same result is finally obtained as if the court had corrected the order and affirmed it as corrected. The sole substantial difference between the two processes is the needless delay and added cost imposed by the restricted powers of the court in administering a "judicial" review.

Moreover, a "legislative" review, wherein the court is compelled to substitute the order which should have been made for the order which is set aside, requires judges to give to the public side of the controversies over regulation a consideration which is not demanded

pressed." *Denver & S. L. R. Co. v. Chicago B. & Q. R. Co.*, (1918) 64 Colo. 229, 171 Pac. 74. In Illinois, "The Circuit Court, in reviewing an order of the Commerce Commission, has no authority to revise or modify it," and to do so is error. *Alton & S. R. Co. v. Illinois Commerce Commission*, (1925) 316 Ill. 625, 147 N. E. 417. In Nebraska, when the Railway Commission ordered a physical connection between two telephone systems with a provision that new business should be divided between the two in a certain proportion, the Supreme Court held the order unexceptionable except as to the latter provision. Feeling unable as a judicial body to modify the order by striking out the faulty portion, the court had no recourse but to reverse the whole order, leaving the parties free to engage in "further proceedings before the commission for the purpose of arriving at some reasonable regulation for the exchange of service, under such conditions, if they can be found in this case, as will be legally justifiable and within constitutional limits." *Blackledge v. Farmers' Independent Telephone Co.*, (1921) 105 Neb. 713, 181 N. W. 709. Cf. *Pioneer Telephone & Telegraph Co. v. State*, (1919) 71 Okla. 305, 177 Pac. 580. The Missouri Supreme Court, though convinced that the petitioner before the commission is not entitled to any relief, may not direct the commission to dismiss the proceedings. It can only reverse the order. *Chicago B. & Q. Ry. Co. v. Public Service Commission*, (1915) 266 Mo. 333, 181 S. W. 61. See also *Chicago I. & L. Ry. Co. v. Railroad Commission* (1911) 175 Ind. 630, 95 N. E. 364. In New Jersey, the Supreme Court found that an order requiring a railway to maintain flagmen at certain crossings was proper except that such maintenance should not be required at hours when no trains were operated over the crossings. HELD, that it was error to remand the case to the commission with directions to reform the order to that extent, as **** the order **** should have been set aside *in toto*, without directing or ordering the board of public utility commissioners to either revise or modify the order. What order should be made in lieu of the one set aside rests exclusively within the jurisdiction of the board of public utility commissioners." *Erie R. Co. v. Board of Public Utility Com'rs.* (1917) 90 N. J. L. 271, 100 Atl. 346.

⁴⁶ Cf. Bauer, *Effective Regulation of Public Utilities*, 45.

⁴⁷ See *Blackledge v. Farmers' Independent Telephone Co.*, note 45, *supra* and other cases cited in that note.

by a purely "judicial" review. In "judicial" review, the court is for the most part concerned with the problem whether the regulation complained of infringes constitutional or legal rights of the persons subjected thereto.⁴⁸ For relief from any mistake which the regulatory body may make in favor of the utilities, the people are referred to the instrumentalities of political control.⁴⁹ The doors of the courts are closed to them.⁵⁰ That it is undesirable to stimulate a feeling that the courts are available for the relief of the utilities only, would seem to need no argument.⁵¹ The alleged tendency of courts to place undue emphasis upon private rights at the expense of public interests has been the ground of much of the criticism directed at judicial supervision of the order of regulatory bodies. But judicial supervision of some sort we must have. That being so, it seems that much may be said in favor of a process which makes court review available to both sides to the controversy and which requires judges, in overturning administrative orders, to give consideration to the public interests involved and to frame new orders to take their place. Such a process makes the function of the court something more than merely to "uphold the guaranties which inhibit the taking of private property for public use" or to "protect the constitutional rights of

⁴⁸ "Our concern is with confiscation. Rate making is no function of the courts; their duty is to inquire concerning results, and uphold the guaranties which inhibit the taking of private property for public use under any guise." *Pacific Gas & Electric Co. v. San Francisco*, (1924) 265 U. S. 403, 68 L. Ed. 1075, 44 Sup. Ct. 537. "It was not intended that the courts should interfere with the commission or review its determinations further than to keep it within the law and protect the constitutional rights of the public service agencies over which it has been given control." *Steamboat Canal Co. v. Garson*, (1919) 43 Nev. 298, 185 Pac. 801. "Rates fixed by the legislature cannot be interfered with by the courts except for the purpose of protecting private property from confiscation. If the rates are fixed sufficiently high to enable the utility to earn a reasonable return upon the capital invested, there is no ground for judicial interference." *City of Eau Claire v. Railroad Commission*, (1922)

⁴⁹ "The remedy of the public in case rates are fixed too high is to elect a legislature that is more considerate of the public interest." *City of Eau Claire v. Railroad Commission*, note 41, *supra*. The undesirability of making the decisions of utility commissions political issues in the manner suggested is manifest.

⁵⁰ In addition to the case cited in note 48, see *Lewistown Borough v. Public Service Commission*, (1923) 80 Pa. Super. Ct. 523; *City of Scranton v. Public Service Commission*, (1923) 80 Pa. Super. Ct. 549; *Salt Lake City v. Utah Light & Traction Co.*, (1918) 52 Utah 210, 173 Pac. 556. An exception must be made in respect to those cases in which it is claimed that the commission has acted *ultra vires*. See for example *City of Lima v. Public Utilities Commission*, (1919) 100 Oh. St. 416, 126 N. E. 319.

⁵¹ For a very striking illustration, in respect to the United States Commerce Court, of the unfortunate effect of making tribunals available for the relief of but one class of parties to controversies over regulation, see Felix Frankfurter, "The Business of the Supreme Court of the United States," part IV, 39 Harv. L. Rev. 537, 608, 611.

the public service agencies."⁵² It tends to focus attention more directly upon the public interest involved in the controversy and to the fundamental problem of adjusting all the varied interest involved.⁵³ To that extent it cuts the ground from under the claim that the courts are available for the protection of the interests of the utilities alone.

At any rate, such states as Virginia,⁵⁴ Oklahoma,⁵⁵ Arizona,⁵⁶ Washington,⁵⁷ and Arkansas⁵⁸ have seen fit to establish such a review of the orders of their public utility commissions,⁵⁹ as to some or all of the matters under their jurisdiction. Congress has seen fit to provide for it in the public utility law of the District of Colum-

⁵² See note 48, *supra*.

⁵³ Compare such cases as *St. Louis-S. F. R. Co. v. State*, (1921) 81 Okla. 298, 198, Pac. 73 and *McAlester Gas & Coke Co. v. Corporation Commission*, note 43, *supra*, with cases cited in notes 48 and 50, *supra*.

⁵⁴ See Constitutional provisions cited in note 23, *supra*.

⁵⁵ See Constitutional provisions cited in note 29, *supra*.

⁵⁶ Arizona Revised Stat. 1913, Sec. 2343. The Supreme Court of Arizona does not seem to have passed upon the duties of the courts under this section but the provision that "judgment shall be rendered affirming, modifying or setting aside such original order," seems clearly to provide for a "legislative" review. It may be held unconstitutional as in violation of the dogma of separation of powers, but the Arizona Constitution, Art. XV, Sec. 17, seems to permit provision for such an appeal.

⁵⁷ As to valuation orders. Rem. Comp. Stat. Wash. 1922, Secs. 10, 44, 10, 448. The constitutionality of this legislation under the Washington Constitution seems not to have been passed upon.

⁵⁸ The Arkansas Supreme Court, notwithstanding the pronouncements of the Supreme Court of the United States, holds that the substitution by the court of its own order for that set aside in a rate proceeding is the exercise of judicial and not legislative power. It has said: "A judicial review necessarily involves a correction of the erroneous judgment else complete justice would not be accomplished.*** The same method must be adopted to ascertain whether the rate is confiscatory or fair and reasonable, and when one is ascertained the other is implied; therefore a declaration of the conclusion reached is the result of the judicial review and not the ascertainment of the rate growing out of the exercise of a legislative function." *Coal Dist. Power Co. v. City of Booneville*, (1923) 161 Ark. 638, 256 S. W. 871. *Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co.*, (1921) 148 Ark. 260, 230 S. W. 897; *St. Louis Southwestern Ry. Co. v. Stewart*, (1922) 150 Ark. 486, 235 S. W. 1003; *Van Buren Waterworks v. City of Van Buren*, (1922) 152 Ark. 83, 237 S. W. 697; *Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co.*, (1923) 161 Ark. 12, 255 S. W. 903. Compare *Helena Water Co. v. City of Helena* (1921, D. Ct. Ark.) 277 Fed. 66. It seems clear that, so far as the Federal question of due process is concerned, the powers exercised by the Arkansas courts would be regarded as legislative, under the principles heretofore discussed. For statutory provisions involved, see cases cited above.

⁵⁹ In Arkansas, city councils have regulatory jurisdiction over local utilities and the review provided applies to their regulations as well as to those of the railroad commission. See cases cited in note 58, *supra*, and statutory provisions therein referred to.

bia.⁶⁰ Since it has met with such substantial approval from constitutional conventions and lawmakers, it is to be hoped that the highest court of the land will not find itself so closely held "in the grip of a 'jurisprudence of conceptions'"⁶¹ as to feel required to hold that it does not constitute "due process of law."

⁶⁰ See statutory provisions discussed in *Keller v. Potomac Power Co.*, note 35, *supra*.

⁶¹ Ray A. Brown, "The Functions of Courts and Commissions in Public Utility Rate Regulation," 38 Harv. L. Rev. 141.