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JUDICIAL SOLECISM REPEATED: AN ANALYSIS OF THE OKLAHOMA SUPREME COURT'S REFUSAL TO RECOGNIZE THE ADJUDICATIVE NATURE OF PARTICULARIZED RATEMAKING

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Repeating a judicial solecism that Professor Maurice Merrill thought had been laid to rest in Oklahoma thirty years ago,¹ the Oklahoma Supreme Court, in *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*,² characterized ratemaking as legislative in nature rather than adjudicative.³ This mislabeling is not merely a matter of abstract legalistic semantics; instead, it has practical and far-reaching consequences. Concretely, for Southwestern Bell (Bell), it meant that it was not entitled to a rate hearing before an unbiased tribunal. In broader terms, significant to all parties to rate hearings, the case signals the Oklahoma court's unwillingness to recognize the right to "due process of law" in ratemaking proceedings. In this article, which analyzes the court's treatment of particularized ratemaking against the backdrop of Oklahoma administrative law and federal due process law, I argue that the Oklahoma court erred egregiously in its approach and conclusion.⁴

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1. See Maurice Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 9 (1964).

2. 873 P.2d 1001 (Okla.), cert. denied, 115 S. Ct. 191 (1994).

3. *Id.* at 1007.

4. For criticism of the court's treatment of the bias issue, see Bernard Schwartz, *Bias in Webster and Bias in Administrative Law — The Recent Jurisprudence*, 30 TULSA L.J. 461 (1995).

I. Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission

A. Background

On October 2, 1992, Corporation Commissioner Robert Anthony announced that he had acted in concert with the FBI in investigating alleged wrongdoing by Bell or its representatives.⁵ After Commissioner Anthony refused to recuse himself from sitting in judgment in a Bell rate case,⁶ Bell sought his disqualification in an original proceeding before the state supreme court, contending that Anthony could not be "a neutral and unbiased adjudicator of its rights and interests before the Commission."⁷ Originally, in May 1993, the court disqualified Anthony on the grounds that he lacked "the *cold neutrality and detachment*" required of "administrative adjudicators."⁸ Almost a year later, rehearing was granted, the original opinion withdrawn, and the court reversed itself, holding that since rate hearings are "legislative" and not "adjudicative" in nature, disqualification was not warranted.⁹

5. *Southwestern Bell*, 873 P.2d at 1003. Anthony's complete statement said:

As Chairman of this Commission, I feel compelled by judicial ethics to advise the parties to *Southwestern Bell* case PUD 260 that there have been serious irregularities and unethical conduct involving this matter while it has been before the Commission. There is evidence that one or more commissioners were involved in improper conduct, and I have given this evidence to the FBI. Furthermore, I have filed a bar complaint against two attorneys who have been associated with *Southwestern Bell* and who may have been engaged in improper activities. The parties to this case should pursue whatever remedies are necessary to protect their rights.

As an additional matter which has at least partial bearing on the PUD 260 case or other *Southwestern Bell* cases, I am advising the parties that since late 1988 I have worked with the FBI to investigate corruption at the Corporation Commission. On numerous occasions since I became a commissioner in 1989, individuals associated with regulated companies have offered me cash inducements.

With the FBI advised in advance, on several occasions, I have received thousands of dollars in cash which I immediately gave to the FBI as evidence in their investigation. In cases where cash was received, a utility attorney, a utility lobbyist, and/or a utility officer was involved.

Furthermore, I will report that more than a year ago I separately advised a *Southwestern Bell* senior corporate officer and then later a senior corporate attorney with *Southwestern Bell* of conduct associated with their firm.

Id. at 1003 n.1 (statement of Anthony).

6. See *Henry v. Southwestern Bell Tel. Co.*, 825 P.2d 1305 (Okla. 1992). The Tax Reform Act of 1986 resulted in a decrease in *Southwestern Bell's* corporate tax rate. *Id.* at 1308. "SWB, a public service corporation, undisputably accumulated over \$30 million in surplus funds, which are attributed solely to the federal income tax law change." *Id.* at 1311. The rate case, PUD-260, was held to determine how *Southwestern Bell* would use the funds generated by the tax savings. *Id.* at 1307. In determining the standard of review (substantial evidence), the court referred to the rate hearing as an adjudication. *Id.* at 1319 ("Every finding of the Corporation Commission made in matters it frequently adjudicates . . .").

7. *Southwestern Bell*, 873 P.2d at 1004.

8. See *Southwestern Bell's* Petition for Writ of Certiorari at app. B 60a, 64a, *Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n*, 873 P.2d 1001 (Okla. 1994) (No. 94-73) (reproduction of case).

9. *Southwestern Bell*, 873 P.2d at 1007.

B. The Majority Opinion

Justice Simms, writing for the court, recognized the tripartite nature of the Oklahoma Corporation Commission's duties; "it has been clothed with legislative, executive and judicial powers."¹⁰ The standards to which the Commission should be held "depend on the character of the particular power being exercised."¹¹ When the Commission exercises adjudicative power, it should "be treated as the 'functional analogue of a court of record.'"¹² "Judicial concerns and standards, including due process," are, however, inapplicable to Commission action that is legislative in nature.¹³ The pivotal issue for the court, therefore, was whether the rate hearing fell under a legislative or adjudicative rubric.

Relying on precedent from the United States Supreme Court¹⁴ and the Oklahoma court's prior cases,¹⁵ the court labeled ratemaking as legislative in nature.¹⁶ From this, the Oklahoma court, in a clear departure from United States Supreme Court precedent, found the label "determinative" of the due process issue since "proceedings which are legislative in nature do not implicate judicial processes and do not require application of the judicial standards."¹⁷ Therefore, since "Commissioner Anthony was acting in a legislative capacity" he was not required "to comply with judicial standards of conduct."¹⁸

10. *Id.* at 1004.

11. *Id.*

12. *Id.* (quoting from *Monson v. State ex rel. Oklahoma Corp. Comm'n*, 673 P.2d 839 (Okla. 1983)). Although the Corporation Commission is exempt from complying with the adjudicatory provisions of Oklahoma's Administrative Procedures Act, the Oklahoma Supreme Court has used those provisions as proxies for the dictates of due process. "[D]ue process standards embodied in the Administrative Procedures Act apply to all state agencies," including exempt agencies. See *Lincoln Bank & Trust v. Oklahoma Tax Comm'n*, 827 P.2d 1314, 1319 (Okla. 1992) (review of agency order compelling production of documents); *State ex rel. Henry v. Southwestern Bell Tel. Co.*, 825 P.2d 1305, 1317 (Okla. 1991) (official notice); *Amoco Prod. Co. v. Oklahoma Corp. Comm'n*, 751 P.2d 203, 207 n.6 (Okla. 1986); *Henry R. Carlile Trust v. Cotton Petroleum Corp.*, 732 P.2d 438, 442-43 n.21 (Okla. 1986); *Teleco, Inc., v. Oklahoma Corp. Comm'n*, 653 P.2d 209, 214 (Okla. 1982); *C.F. Braun & Co. v. Oklahoma Corp. Comm'n*, 609 P.2d 1269, 1273 (Okla. 1980).

13. *Southwestern Bell*, 873 P.2d at 1006.

14. The court cited *New Orleans Pub. Serv. v. Council of New Orleans*, 491 U.S. 350 (1989); *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581 (1945); and *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908).

15. The court cited *State v. Southwestern Bell Tel. Co.*, 662 P.2d 675 (Okla. 1983); *Chickasha Cotton Oil Co. v. Oklahoma Corp. Comm'n*, 562 P.2d 507, 509 (Okla. 1977); and *Wiley v. Oklahoma Natural Gas Co.*, 429 P.2d 957 (Okla. 1967).

16. *Southwestern Bell*, 873 P.2d at 1005.

17. *Id.*

18. *Id.* at 1007. The court, in dicta, went on to suggest that Anthony would not have been disqualified even if he had been acting in a judicial capacity. Relying on the Rule of Necessity, the court stated that if Anthony had been performing a judicial function, he "would not be disqualified but would be allowed to continue to hear the matter despite assertions of bias or prejudice." *Id.* According to the Court, the Rule of Necessity would compel this result "because the concurrence of a majority of the Commissioners is necessary for a decision, and there is no mechanism in the law for appointment of a replacement commissioner." *Id.* at 1009. These issues, the Rule of Necessity and replacement of commissioners are beyond the scope of this article.

C. The Dissent

Justice Opala, the author of the original majority opinion, wrote a lengthy dissent on behalf of himself and three other members of the court.¹⁹ In determining the due process requirements, Opala, correctly in my view, focused his analysis on the task actually undertaken by the Commission in *individualized ratemaking* proceedings rather than on the descriptive categorization of ratemaking as legislative.²⁰ In his opinion, "[l]abeling ratemaking as legislative or adjudicative should be the beginning of [the] inquiry into the reach of protections that are due in an individual ratemaking proceeding," not the end.²¹

To reach his end, Opala laboriously waded through the history of ratemaking, its historical classification as "legislative," and modern interpretations that, even while at times retaining the "legislative" label, require "*adversarial, trial-type hearings*."²² He concluded that "[l]ike an ostrich that hides its head in sand to escape the unpleasant consequences of reality, the court . . . chooses to foist on Oklahoma *dated federal and state jurisprudence* long relegated to antiquarian lore by the more recent expressions from the U.S. Supreme Court."²³ Exploring the developments in administrative law over the past half century, the dissent, in contrast, looked upon ratemaking as "*sui-generis* — a *genre* of legislation that bears procedural characteristics which implicate due process."²⁴ Therefore, the "*individual ratemaking inquiry must be surrounded with the full panoply of due process guarantees*."²⁵

II. Cause for Confusion

The majority's confusion stems from the inherent limitations present when one takes the language developed in one system and imports it into another and different system.²⁶ From the administrative state's beginnings, its designers and those

19. *Id.* at 1010.

20. *See id.* at 1010 (Opala, J., dissenting). Opala defined individualized ratemaking as "agency action for the establishment of rates which is directed at particular parties." *Id.* at 1010 n.1 (citing BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 5.8 (3d ed. 1991)).

21. *Id.* at 1011.

22. *Id.* at 1015.

23. *Id.* at 1011.

24. *Id.* at 1016. "The essence of business profitability, the extent of capital investment, and the return rate for each utility, are *elements of proof*, all of which call for a *different analysis* and for a different fact finding process (for individual ratemaking) from that of ordinary general rulemaking." *Id.*

25. *Id.* The dissenting opinion proceeded to a discussion of the requirements of due process in the case and to mechanisms for replacing a disqualified Corporation Commissioner. These topics are beyond the scope of this article, which focuses exclusively on the nature of individualized ratemaking. Briefly, however, the dissent concluded that the due process requirement of an impartial adjudicator was breached by Anthony's service in Bell's rate case. *Id.* at 1022. Additionally, the dissent would have obviated the application of the Rule of Necessity by employing one of two possible replacement mechanisms. In the interest of equal protection and uniformity of law, the Oklahoma Administrative Procedures Act's (OAPA) replacement provision, which allows gubernatorial appointment of temporary replacements, applies. *Id.* at 1026. Alternatively, the court could view the disqualification as creating a temporary vacancy, activating an Oklahoma constitutional provision authorizing "the Governor to fill vacancies in the office of a Corporation commissioner." *Id.* at 1027.

26. *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980). After defining "the

commenting upon it have employed terms taken from our preexisting governmental experience. Recognizing that agencies would perform functions similar to those performed by legislatures and courts, the terms "quasi-legislative" and "quasi-judicial" were added to the administrative law vocabulary.²⁷ For the most part, this made sense; agencies, at times, act in ways that mirror the work of the judiciary, and, at other times, agencies act in ways that resemble the labor of the legislative branch.²⁸

This combination of functions, which makes the use of terms legislative, judicial, and executive so useful for labeling the various tasks of the agency, creates gaps in the vocabulary. A few examples will illustrate. When Congress acts on a private bill, it is acting as only it can, pursuant to its constitutionally assigned role as legislature even though it bases its decision on facts particular to the bill before it — a functional analogue of adjudication.²⁹ Likewise, when a court branches far afield from the statute or constitution it is interpreting, the court is accused, by some, of legislating from the bench.³⁰ Even here, the court acts in its constitutionally defined judicial role,

essence of a metaphor" as "understanding and experiencing one kind of thing in terms of another," the authors describe the limitations of a metaphor. *Id.* at 5. The authors state:

The very systematicity that allows us to comprehend one aspect of a concept in terms of another will necessarily hide other aspects of the concept. In allowing us to focus on one aspect of a concept, a metaphorical concept can keep us from focusing on other aspects of the concept that are inconsistent with that metaphor.

Id. at 10. For example, using the metaphor "ratemaking is legislative" hides important aspects of the ratemaking process. Cf. Daniel J. Gifford, *The Separation of Powers Doctrine and the Regulatory Agencies After Bowsher v. Synar*, 55 GEO. WASH. L. REV. 441, 446-47 (1987) (stating that confusion arises when the terms "legislative," "executive," and "judicial" are used to describe the work of administrative agencies without taking care to distinguish "the constitutional use of these terms from their use in describing administrative action analogous to the constitutional power"). The "constitutional use of these terms," with its separation of powers debate, is not the focus of this article. Instead, this article explores the limitations inherent in drawing analogies between the constitutional power of one of the three enumerated branches (i.e., legislative, executive, and judicial) and the action of an administrative agency. In *Southwestern Bell*, analogizing the Corporation Commission's ratemaking to the work of the legislature had constitutional consequences — no right to an impartial adjudicator.

27. See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

28. See *id.*; see also Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578-79 (1984) ("Although the resulting theoretical confusion has certainly been noticed, we accept the idea of potent actors in government joining judicial, legislative, and executive functions.").

29. See, e.g., *Plaut v. Spendthrift Farm, Inc.* 115 S. Ct. 1447, 1463 n.9 (1995) ("The premise that there is something wrong with particularized legislative action is of course questionable. While legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common."); David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 825 n.300 (1994) ("[D]espite Marshall's later insistence that the sole province of legislation was 'to prescribe general rules for the government of society,' no one seemed to doubt Congress' power to grant individual patents. Indeed the First Congress enacted several private bills.").

30. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 1 (1990). Bork stated:

In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held view of justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution. He must then choose

using (or misusing) its adjudicative power. But what of agencies, which have the power to exercise authority using both models? When is an agency exercising its adjudicative power as opposed to its legislative power?³¹ Individualized ratemaking provides the quintessential example of the complexities involved in answering these questions.

Both labels, judicial and legislative, are in some sense appropriate to describe the ratemaking process. Under a time test, most ratemaking can be considered legislative. An impact test, however, implicates the adjudicative label. And, an historical approach, although usually considered to lend support to the legislative label, leaves an ambiguous trail.

Justice Opala, citing *Munn v. Illinois*,³² roots ratemaking's legislative label in history: the British Parliament, in a tradition that continued in the post-revolutionary United States, set rates.³³ He rejected this characterization as merely an outmoded "relic of our British heritage."³⁴ Although it is certainly true that the British Parliament and the various American governments have set rates (providing a basis for referring to ratemaking as legislative),³⁵ support exists for the proposition that ratemaking was not exclusively legislative, even in precolonial Britain.

In *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co.*,³⁶ those challenging, as unconstitutional, the delegation to a commission of the power to set rates for gas and electric use, argued: "It cannot be gainsaid that until very recently the duty (that of imposing rates) was at all times a legislative one. For many centuries Parliament has directly legislated as to the price of products . . . The

between his version of justice and abiding by the American form of government. Yet the desire to do justice, whose nature seems to him obvious, is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels unsatisfying. To give in to temptation, this one time solves an urgent human problem, and a faint crack appears in the American foundation. A judge has begun to rule where a legislator should.

Id.

31. "The growth of the administrative state . . . produced governmental agencies that both made rules and conducted adjudications. As a result, the distinction between these two basic modes of governmental action could no longer be based on the nature of the actor, and a more theoretical solution became necessary." Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1117 (1984). Confusion often abounds in attempting to demarcate the lines between agency action considered legislative, executive, and judicial. Compare *Bowshar v. Synar*, 478 U.S. 714, 733 (1986) (characterizing the Comptroller General's functions as "executive") with *id.* at 748 (Stevens, J., concurring) (concluding that the Comptroller's duties "may appropriately be labeled 'legislative,'" and stating that the conclusion that the Comptroller's responsibilities were "executive" in nature "is not only far from obvious but also rests on the unstated and unsound premise that there is a definite line that distinguishes executive power from legislative power").

32. 94 U.S. 113, 123-26 (1876).

33. *Southwestern Bell*, 873 P.2d at 1012. At one time, Parliament possessed the power to grant a divorce. See *Trustees of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co.*, 83 N.E. 693, 696 (N.Y. 1908). Certainly, we do not label a divorce action legislative simply because of its origin. See *Southwestern Bell*, 873 P.2d at 1013 n.25 (Opala, J., dissenting).

34. *Id.* at 1012.

35. See *id.*

36. 83 N.E. 693 (N.Y. 1908).

earliest known regulation of rates of carriage was by an act of Parliament in 1692.³⁷ The court, in upholding the delegation, rejected this view of history. Its research ("which is necessarily limited") found that as early as 1562, Parliament delegated to justices of the peace the power to fix wages.³⁸ In 1692, Parliament delegated to justices of the peace the power "to assess and rate the prices of all land carriage of goods whatsoever to be brought into . . . their . . . jurisdictions, by any common carrier or wagoner."³⁹ Characterizing ratemaking as legislative in some sense,⁴⁰ the *Saratoga Springs* court recognized that the ratemaking "proceeding should assume a quasi judicial aspect."⁴¹ With no conclusive answer given by an historical approach, we now turn to the time test and then to an impact analysis.

As enunciated by the Court, in *Prentis v. Atlantic Coast Line Co.*,⁴² the time test distinguishes between proceedings that look backward and those that look forward:

A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed to already exist. . . . Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial.⁴³

Pursuant to this "frequently" used test,⁴⁴ the Court correctly characterizes most ratemaking as legislative.⁴⁵ Particularized ratemaking's other characteristics, however, warrant consideration under an adjudicative model.

Particularized ratemaking, unlike rulemaking and generalized ratemaking, decides factual issues specific to certain individuals or corporations. For example, in PUD-

37. *Id.* at 698.

38. *See id.* The court stated:

The statute (5 Eliz., ch.4, §15 (1562) (Eng.)) made it the duty of the justices of the peace in every shire to meet with the sheriff . . . and with the mayor . . . after Easter in each year, and limit, rate, and appoint the wages of all artificers, handicraftsman, husbandman, or other laborer servant, or workman. . . . Wages were fixed, not by an act of Parliament, but by the justices of the peace. This must have been the most extensive, if not also the most important, field of rate making upon which the government has ever entered.

Id.

39. *Id.* at 699 (quoting 3 W. & M., ch. 12, § 24 (1692) (Eng.)).

40. *See id.* ("It is doubtless true . . . that the power to prescribe a tariff of rates . . . is legislative and not an administrative or judicial function").

41. *Id.* at 701; *cf.* Rubin, *supra* note 31, at 1048 n.20 (stating that, prior to the administrative state, ratemaking was governed by common law).

42. 211 U.S. 210 (1908).

43. *Id.* at 226; *e.g.*, *ICC v. Railway Co.*, 167 U.S. 479 (1897).

44. *See* SCHWARTZ, *supra* note 20, § 5.8.

45. PUD-260 could have been characterized as "adjudicative," even under the time test. Unlike the typical rate case, which looks forward, establishing rates for the future, in PUD-260 the relevant facts were in the past. Between 1987 and 1989, Bell had realized a substantial tax savings under the Tax Reform Act of 1986, and the questions before the Commission centered on the amount of and method by which these savings would be passed on to Bell's customers. *See supra* text accompanying note 6.

260,⁴⁶ the Commission was not developing general policy regarding utilities' tax savings under the Tax Reform Act of 1986. Instead, the Commission was deciding the amount and form Bell would expend on behalf of its customers.⁴⁷ This company specific factual inquiry shares, in this sense, a closer kinship with adjudication, not legislation.⁴⁸ As Professor Bernard Schwartz has said: "[E]ven if agency action is legislative under the time test, if it is particular in its applicability, its effect may be much the same as that of an adjudicatory decision."⁴⁹

III. Labels: Attempts at Clarifying the Complexities

The United States Supreme Court has added to the confusion by continuing to refer to ratemaking as legislative in nature.⁵⁰ State courts, in addition to the Oklahoma Supreme Court, have followed this lead.⁵¹ On the legislative front, however, the

46. See *supra* note 6.

47. See *State ex rel. Henry v. Southwestern Bell Tel. Co.*, 825 P.2d 1305 (Okla. 1991).

48. "The essence of an adjudicative action is the application of established rules to particularized facts for the purpose of making a decision affecting one or a very small number of parties." *E.g.*, John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 NEW ENG. L. REV. 657, 683 (1994). In a puzzling manner, Allison follows the just quoted sentence with this statement: "In other words, an adjudicative decision is one that attaches legal or other consequences to specific past conduct." *Id.* He appears to state that the time test for the legislative/adjudicative demarcation necessarily follows from the affects test. It is unclear to me why this is true. Particularized ratemaking provides a good example of an action that is both forward looking and affects only a few in a special way, based on particularized facts. See, *e.g.*, SCHWARTZ, *supra* note 20, § 5.8.

49. See, *e.g.*, SCHWARTZ, *supra* note 20, § 5.8. Dickinson said:

What distinguishes . . . [rule making] from adjudication is that the former affects the rights of individual's in the *abstract* and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates *concretely* upon individuals in their individual capacity.

JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 21 (1927) (emphasis added), quoted in ARTHUR BONFIELD, STATE ADMINISTRATIVE RULE MAKING § 3.3.1 (1986); Charles E. Daye, *North Carolina's New Administrative Procedure Act: An Interpretative Analysis*, 53 N.C. L. REV. 833, 868 (1975).

50. See *New Orleans Pub. Serv. v. New Orleans*, 491 U.S. 350, 351 (1989); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989). In a tradition from which the Oklahoma court departed, this label has not been determinative of due process issues decided by the United States Supreme Court. See *infra* text accompanying notes 96-106.

51. See, *e.g.*, *20th Century Ins. Co. v. Garamendi*, 32 Cal. Rptr. 2d 807, 845 (Cal. 1994); *Office of Consumer Counsel v. Colorado Pub. Serv. Co.*, 877 P.2d 867, 870 (Colo. 1994); *Eagle Peak Farms, LTD. v. Colorado Ground Water Comm'n*, 870 P.2d 539, 544 (Colo. Ct. App. 1993) (cert. granted Apr. 4, 1994) (stating that ratemaking is legislative, and that "the proceeding is, nevertheless, party-specific and, unlike the principles applied in rule-making cases, the agency's decision in a rate-making case must be based upon the evidence presented at the hearing"); *Hayden Pines Water Co. v. Idaho Pub. Utils. Comm'n*, 834 P.2d 873, 876 (Idaho 1992); *Office of Consumer Advocate v. Utilities Bd.*, 486 N.W.2d 586, 588 (Iowa 1992); *South Cent. Bell Tel. Co. v. Louisiana Pub. Serv. Corp.*, 594 So. 2d 357, 359 (La. 1992); *Southeast Miss. Legal Servs. Corp. v. Mississippi Power Co.*, 605 So. 2d 796, 798 (Miss. 1992); *Knutson Tugboat Co. v. Oregon Bd. of Maritime Pilots*, 885 P.2d 746, 754 n.1 (Or. Ct. App. 1994); *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Corp.*, 844 S.W.2d 151, 158 (Tenn. Ct. App. 1992); *Mountain Fuel Supply Co. v. Utah Pub. Serv. Comm'n*, 861 P.2d 414, 424 (Utah 1993) (holding that "ratemaking is largely a legislative function"); *Central W. Va. Refuse, Inc., v. West Virginia Pub.*

states have generally recognized the complex and unique status of particularized ratemaking.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has adopted three Model State Administrative Procedures Acts: in 1946, 1961, and 1981. Each model act excises particularized ratemaking from the rulemaking nomenclature, placing it, instead, within the adjudicative rubric. The drafters of the 1946 Model Act had intended to place particularized ratemaking within the "contested case" framework,⁵² which was defined as a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing."⁵³ By defining "contested case" in this manner, the Act's drafters recognized and expected that the constitutional issue, not an arbitrary label, would drive the analysis of the procedures required. Since particularized ratemaking involves "the legal rights, duties, or privileges of specific parties," the Constitution requires a hearing,⁵⁴ and the 1946 Model Act labels it as a "contested case."

Not all courts followed this logic. For example, two federal courts in Nebraska, one district and one appellate, concluded that particularized ratemaking under the Nebraska Administrative Procedure Act was a rulemaking proceeding rather than a contested case.⁵⁵ To "evade the possibility of other courts following that unfortunate precedent,"⁵⁶ the drafters of the 1961 revision specifically included ratemaking within the definition of "contested case."⁵⁷ In fact, "rulemaking" was juxtaposed to "contested case" in the state model act instead of being juxtaposed to "adjudication," as in the Federal Administrative Procedure Act,⁵⁸ to underscore this intent.⁵⁹

Serv. Comm'n, 438 S.E.2d 596, 597 (W. Va. 1993). *But see contra* Business & Professional People for Pub. Interest v. Barnich, 614 N.E.2d 341, 345 (Ill. Ct. App. 1993) (holding that ratemaking is "quasi-judicial"); Hibbing Taconite Co. v. Minnesota Pub. Serv. Comm'n, 302 N.W.2d 5, 9 (Minn. 1980) (holding that ratemaking has both legislative and judicial characteristics); Office of Consumer's Counsel v. Nebraska Pub. Util. Comm'n, 638 N.E.2d 550, 554 (Ohio 1994) (holding that ratemaking is "quasi-judicial").

52. See REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT, Proceeding in the Committee of the Whole, Aug. 23, 1960, at 8 (comments of Professor Maurice Merrill) [hereinafter Comments of Merrill].

53. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(3) (1946).

54. See Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 303-05 (1937) (holding that "fundamentals of a fair trial" are required "when rates previously collected were ordered refunded"); cf. Trustees of Saratoga Springs v. Saratoga Gas, Elec. Light & Power Co., 83 N.E. 693, 699-700 (N.Y. 1908) (stating that ratemaking involves "an investigation into the particular facts in each case," and that "[w]hat is entrusted to the commission is the duty of investigating the facts, and, after a public hearing, of ascertaining and determining what is a reasonable maximum rate").

55. See Mogis v. Lyman-Richey Sand & Gravel Corp., 189 F.2d 130 (8th Cir. 1951), *aff'g* Mogis v. Lyman-Richey Sand & Gravel Corp., 90 F. Supp. 251 (D. Neb. 1950), *reh'g denied*, 190 F.2d 202 (8th Cir. 1951); see also Merrill, *supra* note 1, at 9; Comments of Merrill, *supra* note 52, at 8.

56. Comments of Merrill, *supra* note 52, at 8.

57. See REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(2) (1961) (defining "contested case" as "a proceeding, including but not limited to ratemaking, . . . in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing").

58. See generally 5 U.S.C. § 551 (1977) (defining "rule," "rulemaking," "adjudication," and "order").

59. The commentary states:

The 1961 drafters, in their zealous effort to ensure that particularized ratemaking was viewed as a "contested case," failed to provide a distinction between particularized ratemaking and general ratemaking. The third revisers, in 1981, examined more closely the nuances between an agency's legislative and adjudicative roles. The 1981 Model Act defines "Order," which replaced the term "contested case," as "an agency action of *particular applicability*" affecting "one or more specific persons."⁶⁰ In contrast, "Rule" is defined as "an agency statement of general applicability."⁶¹ Particularized ratemaking requires an "Order" and ratemaking of general applicability can be created by "Rule."⁶² In scanning the previous half century, it is clear that the drafters of the model acts, and the state legislatures that adopted them, consciously sought to reject the historical notion that particularized ratemaking was a legislative function of an agency.

Oklahoma adopted a modified version of the 1961 Model Act in 1963.⁶³ Instead of employing the Model Act's "contested case" terminology, the Oklahoma APA uses the terms "order" and "individual proceeding."⁶⁴ In conformity with the Model Act, however, the Oklahoma Act explicitly excludes ratemaking from rulemaking: "'Rule' . . . does not include . . . the approval, disapproval or prescription of rates."⁶⁵ The purpose of this definitional provision was to make clear that "a modern rate fixing

The term "contested case" is used in the Model Act, instead of the word "adjudication" as found in the Federal Act, to avoid the possible confusion in terminology that might result from the fact that *ratemaking* under the Federal Act is classified as "rule making" with special procedures applicable to it, whereas under the Model Act it is desired to apply the contested case procedures to ratemaking.

REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(2) commentary at 11 (1961).

60. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1-102(5) (1981) (emphasis added). With few exceptions, agencies "conduct an adjudicative proceeding as the process for formulating and issuing an order." *Id.* § 4-101(a).

61. *Id.* § 1-102(10).

62. The 1981 Model Act follows the 1961 Model Act to the extent that it treats "rate-making and licensing determinations of particular applicability, addressed to named or specified parties such as a certain utility company . . . [as] "orders" subject to the adjudication procedures of" the Model Act. BONFIELD, *supra* note 49, § 3.3.1. It differs in that it treats "rate-making . . . actions of *general applicability*" as rulemaking. *Id.*

63. Administrative Procedures Act, 1963 Okla. Sess. Laws ch. 371 (originally codified at 75 OKLA. STAT. §§ 301-325 (Supp. 1963)). For an overview of the Oklahoma APA and the history of its enactment, see Merrill, *supra* note 1.

64. See 75 OKLA. STAT. § 250.3(5)-(6) (Supp. 1994). According to Merrill:

It is evident that, in the development of these definitions, the Oklahoma act formally is more influenced by the federal act than by the Model Act. However, one must also note the dissimilarities between the [Federal Act] and the Oklahoma statute. Under the former, a rule may have particular applicability. Under the latter, it may not. Under the former, rate and price fixing . . . are rules. Under the latter, they are not. . . . In short, the substance of the act's classification of function is in harmony with the Revised Model State Act, though in form it derives from the federal act.

Merrill, *supra* note 1, at 12.

65. 75 OKLA. STAT. § 250.3(2)(b) (Supp. 1994).

proceeding, with its specified parties, its adversary procedure . . . preeminently is adjudicative."⁶⁶

The Corporation Commission received a legislative exemption from complying with the Oklahoma APA's "individual proceeding" provisions.⁶⁷ This exemption, which resulted from "practical politics," was not cause for concern, according to Professor Maurice Merrill, because the Commission "operate[s] under very fully developed and sophisticated procedures."⁶⁸ In addition to procedures developed by the Commission, the Oklahoma Constitution, which created the Commission, provides a very clear distinction between particularized ratemaking and general ratemaking. "Before the Commission shall prescribe or fix any rate . . . directed against one or more companies by name, the company or companies to be affected by such rate . . . shall first be given notice . . . and shall be afforded a reasonable opportunity to introduce evidence and be heard thereon."⁶⁹ By contrast, in the process for promulgating "any general order, rule, requirement, not directed against any specific company or companies by name" only newspaper notice with a general opportunity to object is all that is required.⁷⁰ The drafters of the Oklahoma Constitution clearly envisioned differentiated proceedings depending on the nature (general or particular) of the proceeding before the Commission.

The foregoing discussion does not answer the critical issue of whether parties to a particularized ratemaking, whether it is labeled a species of rulemaking or not, are cloaked with the protections found in the constitution's due process guarantee. It, instead, was intended to illuminate the simplistic and inadequate way in which the Oklahoma Supreme Court arrived at its conclusion that ratemaking is legislative in nature. The Oklahoma court looked solely to a federal characterization of ratemaking, failing to examine the rich developments at the state level, particularly in Oklahoma. We now turn to the decisive question: are particularized ratemaking proceedings shrouded with the guarantees of due process?

IV. Due Process Implicated

Contrary to the Oklahoma court's conclusion, the implication of the due process guarantee depends upon the nature of the proceeding not its historical and artificial label. Two early cases established parameters for analyzing this issue.⁷¹ *Londoner*

66. Merrill, *supra* note 1, at 9.

67. 75 OKLA. STAT. § 250.4B(4) (Supp. 1994).

68. Merrill, *supra* note 1, at 4 ("The [Oklahoma APA] provides minimal standards of fair procedure. A large part of the procedural requirements of [the Corporation Commission] go beyond these minima."). Professor Merrill saw "certain advantages" to applying the Oklahoma APA to the Commission. *See id.* at 5. This case highlights the need for the legislature to subject the Commission to the requirements of the APA.

69. OKLA. CONST. art. IX, § 18.

70. *Id.*

71. "The Supreme Court drew a line distinguishing the political process of policymaking from the judicial process of adjudication in a pair of cases decided early in the twentieth century." Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from Chevron and Mistretta*, 57 U. CHI. L. REV. 481, 484 (1990).

v. *Denver*⁷² involved the city of Denver's tax assessment against certain landowners for paving done on adjacent streets.⁷³ The Court held that the City had violated the landowners' right to due process by denying them an oral hearing on the assessment.⁷⁴ In contrast, in *Bi-Metallic Investment Co. v. State Board of Equalization*,⁷⁵ when the State of Colorado, through its State Board of Equalization and the Colorado Tax Commission, sought a forty percent increase in the valuation of property in Denver, the Court rejected a land owner's claim that before any revaluation could take place he was entitled to a hearing.⁷⁶ In rejecting this due process claim, Justice Holmes, for the Court, said:

Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.⁷⁷

Londoner v. Denver was distinguished factually because in that case only "[a] relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds."⁷⁸

These two cases symbolize the distinction between an agency's adjudicative and legislative functions for due process purposes in administrative proceedings.⁷⁹ At least three theories have been articulated to explain this distinction.⁸⁰ The first, articulated in *Bi-Metallic*, is that it is impracticable to litigate issues involving large numbers of people.⁸¹ In today's world of complex litigation, rules have been devised to minimize or eliminate the problems associated with litigation involving many parties.⁸² Still,

72. 210 U.S. 373 (1908).

73. *Id.* at 374.

74. *Id.* at 386.

75. 239 U.S. 441 (1915).

76. *Id.* at 445.

77. *Id.*

78. *Id.* at 446.

79. These two cases continue to frame the debate:

The *Londoner/Bi-Metallic* distinction remains viable today. The Court continues to rely upon that distinction in many of its most important modern decisions. . . . The principles announced in *Londoner* and *Bi-Metallic* lie at the core of administrative procedure. [They] form the basis for the modern relationship between agency rules and agency adjudications, and they remain critical to legislative and judicial determinations of the types of procedural safeguards that should be provided in various decisionmaking contexts.

2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 9.2 (1994).

80. See, e.g., *id.*; Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 263 n.119 (1990).

81. *Bi-Metallic*, 239 U.S. at 445. "This explanation fits well with the Court's frequent emphasis on pragmatic considerations." DAVIS, *supra* note 79, § 9.2.

82. See, e.g., Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10

Justice Holmes has a point. The "pragmatic underpinnings of *Bi-Metallic*" were "reemphasized" recently,⁸³ when the Court said: "Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard."⁸⁴

The second theory, most closely associated with Professor Davis, examines the difference between legislative facts and adjudicative facts.⁸⁵ "[T]he *Londoner/BiMetallic* distinction can be explained based on the nature of the disputed facts on which a government action is based."⁸⁶

An individual has a constitutional right to be heard only with respect to resolution of a disputed fact . . . concerning the individual. Courts refer to facts of this type as adjudicative facts . . . Facts related to the individual are intrinsically the kind of facts that should not be resolved to the individuals detriment without giving the individual an opportunity to be heard with respect to those facts. An individual knows more about the facts Thus, an individual is uniquely well-positioned to rebut or explain evidence.

Legislative facts do not describe the individual who is uniquely affected by the government action. . . . Rather, legislative facts are the general facts that help a government institution decide questions of law, policy, and discretion. An individual is not uniquely well-positioned to contribute to the resolution of a dispute with respect to a legislative fact.⁸⁷

Whether for pragmatic reasons or because of the nature of the facts in dispute, agency action that affects a small number of people based on characteristics unique to the group, clearly requires "some kind of hearing."⁸⁸ Third, the adjudicative/legislative

REV. LITIG. 231 (1991) (offering a comprehensive analysis of the policy debates over the "movement to reshape federal civil procedure to enhance aggregation of related cases for joint disposition").

83. See DAVIS, *supra* note 79, § 9.2.

84. *Minnesota Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984).

85. See DAVIS, *supra* note 79, § 9.2.

86. *Id.*

87. *Id.* Professor Davis' approach has been criticized. See, e.g., Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and the Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 521-25 (1970); Rubin, *supra* note 31, at 1124 (stating that Davis' approach, which "focuses on the nature of the facts," fails to focus sufficiently on "the nature of the government action"); cf. SCHWARTZ, *supra* note 20, § 5.8 ("[T]he legislative-adjudicative fact distinction appears but another way of stating the traditional rulemaking-adjudication distinction."). For my purposes, the exact contours of this internal debate are unimportant because all appear to agree that where the government attempts to single out an individual for a detriment based on a factual determination particular to the individual, the guarantees of due process must be afforded. See, e.g., Rubin, *supra* note 31, at 1125 ("General action, to which due process protection is not applicable, can now be operationally defined as action that neither makes factual determinations about a particular individual that have direct consequences for that individual, nor determines how the law is to be applied to a particular individual. If these elements are present, however, the action is an adjudication and must be analyzed in due process terms.").

88. This phrase is taken from the title of an article by Judge Friendly in which he explores the

distinction articulated in *Bi-Metallic* can arise from the singling out function of the adjudicative process.⁸⁹ Professors Davis and Pierce view this as "process-oriented protection" along the lines of that developed by Professor John Ely in *Democracy and Distrust*.⁹⁰ "When . . . government singles out an individual for adverse action, the political process provides little protection. Individuals singled out for adverse action can be protected only by forcing the government to use a decisionmaking process that ensures fairness to the individual."⁹¹ According to Davis, "[t]hat is the purpose of the Due Process Clause."⁹² Others argue that "human dignity" underlies the requirement for due process when the government singles out an individual for adverse treatment because being singled out "activates the special concern about being personally *talked to* about the decision rather than simply being *dealt with*."⁹³

Whether pragmatism, the distinction between general and specific facts, or the singling out function lie at the heart of the adjudicative/legislative dichotomy, for due process purposes, the distinction between adjudicative functions and legislative functions depends not upon the labels applied to them by statute or a court, but on the nature of the proposed governmental action, the nature of the issues in dispute, and

complexities of the modern administrative state. Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975) (Judge Friendly took his title from *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974)). In this article, Judge Friendly argues that even if one can always distinguish legislative from adjudicative facts, "with the vast increase in the number . . . of hearings required . . . in which the government and the individual interact, common sense dictates that we must do with less than full trial-type hearings even on what are clearly adjudicative issues." Friendly, *supra*, at 1268. In calling for some "new thinking" in this area, *id.* at 1317, he suggested looking at the attributes of a "fair hearing." *Id.* at 1278. In rough order of priority, he viewed "an unbiased tribunal," *id.* at 1279, "notice of the proposed action and the grounds asserted for it," *id.* at 1280, "an opportunity to present reasons why the proposed action should not be taken," *id.* at 1281, "the rights to call witnesses, to know the evidence against one, and to have decision based only on the evidence presented," *id.* at 1282, the right to "counsel," *id.* at 1287, "the making of a record and a statement of reasons," *id.* at 1291, "public attendance," *id.* at 1293, and "judicial review," *id.* at 1294, as elements of a fair hearing. Some combination of these elements, short of full trial type hearing, may satisfy the constitutional command of due process. *See id.* at 1279.

89. Due process is required when "the government singles out and acts on identifiable individuals." Bone, *supra* note 80, at 263 n.119 (stating this is a more plausible theory).

90. "John Ely argues persuasively that the Constitution is principally concerned with providing process of two types: . . . with procedural fairness in the resolution of individual disputes (process writ small), and . . . with what might capaciously be designated process writ large — with ensuring broad participation in the process and distributions of government." DAVIS, *supra* note 79, § 9.2 (quoting JOHN ELY, *DEMOCRACY AND DISTRUST* 87 (1980)).

91. *Id.* Rubin states:

The force of the general-specific distinction is that it reflects the values that underlie procedural due process: action against specified individuals carries with it the potential for particularized abuse. This potential is due to both the nature of the interaction, which permits illegitimate motives to arise, and the lack of other protections for the individual.

Rubin, *supra* note 31, at 1119.

92. DAVIS, *supra* note 79, § 9.2.

93. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-7 (2d ed. 1988). For a recent summary of the "intrinsic value theory" of due process, which emphasizes "the dignity of the individual," and the "instrumentality of process-sensitive theory," with its emphasis on accuracy, see Jack F. Williams, *Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention*, 79 MINN. L. REV. 325, 355-56 (1994).

the specificity of the parties before the agency. "Where an agency action is not based on individual grounds, but is a matter of general policy, no hearing is constitutionally required."⁹⁴ However, administrative actions directed toward or affecting particularly a person or a small group of persons "upon individualized grounds," may require a hearing "'in order to afford the aggrieved individuals due process,' and that regardless of the nature of the proceeding."⁹⁵

The United States Supreme Court has recognized this distinction between individualized proceedings and general proceedings within the context of ratemaking. While continuing to refer to ratemaking as rulemaking,⁹⁶ the Court has embedded the guarantees of due process, including the right to a hearing before a fair and impartial tribunal, within the particularized ratemaking structure. In *Ohio Bell Telephone Co. v. Public Utilities Commission*,⁹⁷ the Court concluded that "[t]he fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record."⁹⁸ In reversing the decision of the Ohio Supreme Court upholding the Commission's rate order, the Court said that especially in these quasi-judicial administrative proceedings "the 'inexorable safeguard' of a fair hearing and open hearing be maintained in its integrity. The right to such a hearing is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement."⁹⁹

More recently, the Court reaffirmed its guidelines for determining when a ratemaking proceeding is judicial in nature for purposes of the due process analysis. In *United States v. Florida East Coast Railway Co.*,¹⁰⁰ the Court said the *Londoner/Bi-Metallic* distinction and its progeny "represent a recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type

94. *Yassini v. Crosland*, 618 F.2d 1356, 1363 (9th Cir. 1980), quoted in SCHWARTZ, *supra* note 20, § 5.8.

95. SCHWARTZ, *supra* note 20, § 5.8 (quoting *Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council*, 435 U.S. 519, 542 (1978)); see also DAVIS, *supra* note 79, § 9.2. Davis states:

The Due Process Clause requires a hearing of some kind only when government deprives an individual of 'life, liberty, or property' based on resolution of contested factual issues concerning that individual. . . . The distinction between individualized deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process, is central to an understanding of the U.S. legal system").

Id.

96. See *supra* note 50.

97. 301 U.S. 292 (1937).

98. *Id.* at 300.

99. E.g., *id.* at 304-05 (citations omitted); *West Ohio Gas Co. v. Public Utils. Comm'n*, 294 U.S. 63, 70 (1935) (stating that "fundamentals of a fair hearing" must be afforded utilities in particularized rate cases). From the dawn of the modern administrative state, the Court has applied these principles to ratemaking. See *Spring Valley Water-Works v. Schottler*, 110 U.S. 347, 354 (1884) (stating that municipal agency charged with setting water rates had "duties [that] are judicial in nature"); *id.* at 383 (Field, J., dissenting) (stating that parties before the agency are entitled to "an impartial tribunal"); see also Schwartz, *supra* note 4, at 462.

100. 410 U.S. 224 (1973).

rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other."¹⁰¹ The particularized ratemaking of *Ohio Bell*, where the "fundamentals of a trial" were required, was distinguished from "across the board" or generalized rate orders, which involved "the formulation of a basically legislative-type judgment."¹⁰²

Justice Rehnquist, writing for the majority in *Florida East Coast*, placed *Ohio Bell* in company with *ICC v. Louisville & Nashville Railroad Co.*¹⁰³ because *Ohio Bell* involved an agency determination of the amount and terms of a rate refund, which requires individualized factual development leading to an individualized determination.¹⁰⁴ *Louisville & Nashville* involved judicial review of an agency determination of whether certain rates charged by a carrier were unreasonable. The Court characterized the agency action as "quasi-judicial."¹⁰⁵ The adjudicative hearings in *Louisville & Nashville* and *Ohio Bell* were distinguished from the agency proceedings in *Florida East Coast* because the ratemaking in that case was "applicable across the board to all of the common carriers by railroad. . . . No effort was made to single out any particular railroad for special consideration based on its own peculiar circumstances."¹⁰⁶

The characteristics of the ratemaking involved in *Southwestern Bell*¹⁰⁷ closely resemble those present in *Louisville & Nashville* and *Ohio Bell*. Certainly, pursuant to an affects test all three cases fall on the adjudicative side of the dichotomy because in all three the utility or common carrier is "exceptionally affected . . . upon individual grounds."¹⁰⁸ All three also qualify under the *Prentis*¹⁰⁹ time test because each case involves an examination of "past facts."¹¹⁰ Although the Oklahoma Court erroneously treated PUD-260, the rate case at issue in *Southwestern Bell*, as legislative under a *Prentis* time test analysis, I do not want to belabor that point because the broader and more important issue is whether the time test has any relevance to the due process question in particularized ratemaking. The United States Supreme Court's analysis of the issue supports the proposition that the relevant distinction between *Florida East Coast* and *Ohio Bell* is one of individualized determination rather than time: agency

101. *Id.* at 245.

102. *Id.* at 245-46. "[E]ven in a rulemaking proceeding when an agency is making a 'quasi-judicial' determination by which a small number of persons are 'exceptionally affected, in each case upon individual grounds,' in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process." *Vermont Yankee Nuclear Power v. Natural Resources Defense Council*, 435 U.S. 519, 542 (1978).

103. 227 U.S. 88 (1913).

104. See *Florida East Coast*, 410 U.S. at 245.

105. *Id.* at 244; *Louisville & Nashville*, 227 U.S. at 91.

106. *Florida East Coast*, 410 U.S. at 246.

107. *Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n*, 873 P.2d 1001 (Okla.), *cert. denied*, 115 S. Ct. 191 (1994).

108. *Vermont Yankee Nuclear Power v. Natural Resource Defense Council*, 435 U.S. 519, 542 (1978).

109. See *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908).

110. *Id.* at 226.

action is adjudicative when it determines "disputed facts in particular cases" and legislative when its "purpose" is to promulgate "policy-type rules or standards."¹¹¹

V. Conclusion

Tired and old judicial mantras often appear in court opinions without the analytic reflection needed to determine either relevance or value to the case then being decided. In *Southwestern Bell*, it was "rate hearings are legislative in nature."¹¹² For the court, the conclusion proved determinative — there was no need to examine the unique complexities of ratemaking, its rich treatment in the development of state administrative law, or the United States Supreme Court's teachings on the distinction between particularized and generalized ratemaking proceedings.

The four judge dissenting opinion will stand steadfast alongside the majority opinion, reminding the reader that the important constitutional question before the court was too complex to be answered by an artificial and not wholly accurate label.¹¹³ In time, the court may reconsider its decision, break from the host of state courts that continue to drowsily refer to ratemaking as legislative, overturn *Southwestern Bell*, and chart a new course that appreciates ratemaking's uniqueness in administrative proceedings.

In the meantime, *Southwestern Bell* underscores the need for the legislature to reexamine the exemptions from the Administrative Procedures Act given to some agencies, including the Corporation Commission.¹¹⁴ In addition to creating uniform minimum standards of agency conduct, binding these agencies to the APA would add clarity to the law in three respects relevant to this case: (1) particularized ratemaking would clearly fall outside of the rulemaking umbrella,¹¹⁵ (2) in appropriate cases the disqualification of agency heads would be statutorily mandated,¹¹⁶ and (3) the APA's replacement provisions would operate to alleviate resort to the Rule of Necessity.¹¹⁷ Professor Maurice Merrill thought that the Oklahoma legislature had "shown unequivocally its intent to repudiate the 'rule of necessity'"¹¹⁸ and its belief that particularized ratemaking "preeminently is adjudicative."¹¹⁹ Hindsight suggests that it was not clear enough.

111. *Florida East Coast*, 410 U.S. at 245.

112. *Southwestern Bell Tel. Co. v. Oklahoma Corp. Comm'n*, 873 P.2d 1001, 1005 (Okla.), *cert. denied*, 115 S. Ct. 191 (1994).

113. On the use of dissents, see, e.g., William J. Brennan, Jr., *In Defense of Dissent*, 37 HASTINGS L.J. 427 (1986); Edward C. Voss, *Dissent: A Sign of a Healthy Court*, 24 ARIZ. ST. L.J. 643 (1992).

114. In addition to the Corporation Commission, the Oklahoma Tax Commission, the Oklahoma Public Welfare Commission, the Oklahoma Ordinance Works Authority, the Pardon and Parole Board, the Midwestern Oklahoma Development Authority, and the Grand River Dam Authority, among others, are exempt from compliance with Article II of the OAPA, which covers "individual proceedings." See 75 OKLA. STAT. § 250.4(B) (1991).

115. See *id.* § 250.3(2)(b).

116. See *id.* § 316.

117. See *id.*

118. Merrill, *supra* note 1, at 35.

119. See *id.* at 9.

