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Special Problems of Interpretation Arising Out of Procedure for Levying Special Assessments

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his cave; in *Williams* he has tamed the dragon and made him a useful animal.

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SPECIAL PROBLEMS OF INTERPRETATION ARISING OUT OF PROCEDURE FOR LEVYING SPECIAL ASSESSMENTS

Nine property owners petitioned to have their properties stricken from an ordinance[1] assessing each lot for street improvements in proportion to the frontage it bore to all of the abutting lots.[2] The plaintiffs contended that the ordinance resulted in excessive assessments against their properties which caused them to pay a disproportionately larger share of the cost of the improvements than other citizens of Baton Rouge to whose general benefit these improvements accrued. After the trial court denied relief, the First Circuit Court of Appeal reversed and ordered that the respective properties be deleted from the assessment ordinance.[3] On appeal, the Louisiana Supreme Court reversed and *held* that although the council received no evidence on the issue of proportional benefit, the statement in the council's resolution and assessment ordinance which recited that "each lot or parcel of real estate to be assessed will be benefited to an amount not less than the proposed local or special assessment" was a sufficient compliance with the statutory provisions concerning the requisite benefits determination. The court further concluded that one may not protest that a legislative body has not done what a resolution and/or ordinance proclaims that it has done, and that the council's determination of benefits was a legislative act that may not be upset absent a manifest abuse of power exceeding limits of legislative

1. Local or Special Assessment Ordinance No. 4047 was adopted by the East Baton Rouge Parish Council on June 27, 1973, assessing property adjacent to North Street in the City of Baton Rouge for construction of improvements along North Street. This assessment ordinance purported to assess the plaintiffs' property in accordance with LA. R.S. 33:3301-3319 (1950).

2. These properties are located adjacent to North Street in the City of Baton Rouge. Before the improvements North Street was a two-lane asphalt street, bordered by sidewalks, street lights, and underground drainage. With the improvements it became a four-lane concrete street bordered by wide sidwalks, underground conduits for street lighting, improved drainage, and tree wells for plantings. Landry v. Parish of East Baton Rouge, 343 So. 2d 207, 210 (La. App. 1st Cir.), *rev'd*, 352 So. 2d 656 (La. 1977).

3. Landry v. Parish of East Baton Rouge, 343 So. 2d 207 (La. App. 1st Cir.), *rev'd*, 352 So. 2d 656 (La. 1977).

discretion.[4] *Landry v. Parish of East Baton Rouge*, 352 So. 2d 656 (La. 1977).

Under title 33, section 3301 of the Louisiana Revised Statutes, municipalities are authorized to improve streets and may levy local or special assessments on the real property abutting the improvements to defray their total cost.[5] Upon completion of the contract, the municipality *must* require from the engineer of the municipality a duly certified statement, showing in detail the total cost of the improvements in the proportion that their frontage bears to all abutting lots.[6] Upon receipt of the engineer's certified statement, the governing authority of the municipality is required to review the statement, including the proposed assessment, and to determine whether each parcel of real estate will be benefited to an amount not less than the proposed assessment.[7]

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4. The court was also faced with the council's contention that plaintiffs' lawsuit had prescribed. The council argued that prescription began to run on May 8, 1973, the date Resolution No. 10,274 was published. The court concluded that the plaintiffs did not contest the authority of the council to order the improvements, but were contesting the validity of Resolution No. 10,413 of May 9, 1973, and Assessment Ordinance No. 4047 of June 27, 1973. The former was not published until July 12, 1973 and the latter until September 6, 1973. Accordingly, plaintiffs' lawsuit filed on July 17, 1973 was not later than thirty days from the date the Resolution (10,413) or the Ordinance (4047) was published, the time limit set by LA. R.S. 33:3319 (Supp. 1958).

5. The requisite procedures to prepare and enact an assessment ordinance include the adoption of a resolution giving notice of the municipality's intention to make the proposed assessments, and the holding of an open session to hear all objections to the proposed improvements, the manner of paying for them, and the manner in which the improvements shall be made (LA. R.S. 33:3302 (Supp. 1970)); an ordering of the construction of the improvements, publication of the notice of intention, preparation of plans and specifications, advertising for bids (LA. R.S. 33:3303 (1950)); and awarding of the contract (LA. R.S. 33:3304 (Supp. 1956)).

6. LA. R.S. 33:3305 (Supp. 1956).

7. LA. R.S. 33:3306(A) (Supp. 1970) provides:

> Upon receipt of the certified statement or report of the engineer as provided for in the preceding section, the governing authority shall review said certified statement or report, including the proposed local or special assessments, and thereafter *shall* make a determination as to whether each lot or parcel of real estate to be assessed will be benefited to an amount not less than the proposed local or special assessment . . . . (Emphasis added.)

Following the review and benefits determination, notice concerning the proposed assessment and the method of payment required must be mailed to each property owner to be assessed. LA. R.S. 33:3306(B) (Supp. 1970). After proper notice is given, the governing authority is permitted to adopt an ordinance levying a local or special assessment on each lot of real estate abutting the improved street. LA. R.S. 33:3306(C) (Supp. 1970). The municipality may participate in the payment of the total costs in the manner and to the extent that the governing authority of the municipality may determine. LA. R.S. 33:3318 (Supp. 1958).

Before section 3306 of title 33 was amended in 1970, it permitted the governing authority of a municipality to adopt an ordinance levying a special assessment on property "in proportion that its frontage bears to all the abutting lots or parcels of real estate to be improved."[8] This statute was commonly called the "front foot" rule. Prior to the statute's amendment, it was well-settled that the total burden of local public improvements could be placed on the abutting property owners.[9] Apportionment of the entire cost of a street improvement could be made without inquiring about any special benefit to the individual owners[10] even though the amount of the assessment exceeded the value of the property.[11]

The 1970 amendment to the statute now requires that each individual lot which is to be assessed be benefited to an *amount not less than the proposed assessment*.[12] In adopting the amendment, the legislature intended that municipal governing authorities deviate from the policy of imposing assessments without consideration of a cost-benefit ratio to a fairer and more equitable policy which mandates that the assessing authority determine the benefit to each lot abutting an improvement.

In the instant case, plaintiffs sought relief under section 3306 to have their respective properties stricken from the assessment ordinance. Plaintiffs contended that the Parish Council had failed to comply with statutory requirements in enacting the assessment ordinance because it was without sufficient facts and information to make the requisite determination of benefits to each assessed lot and thus had acted arbitrarily and capriciously.[13] The court concluded that the Parish Council's deter-

8. *See, e.g.*, City of Shreveport v. Weiner, 134 La. 800, 64 So. 718 (1914).

9. City of Alexandria v. Chicago, Rock Island and Pac. R.R., 240 La. 1025, 126 So. 2d 351 (1961); Palmer v. Mayor of Ponchatoula, 195 La. 997, 197 So. 697 (1940); Donaldson's Heirs v. City of New Orleans, 166 La. 1059, 118 So. 134 (1928).

10. City of Shreveport v. Shreveport Transit Co., 134 La. 568, 64 So. 414 (1914); Kelly v. Chadwick, 104 La. 719, 29 So. 295 (1901), *aff'd sub. nom.* Chadwick v. Kelly, 187 U.S. 540 (1902).

11. The imposition of such an assessment pursuant to the front foot rule and without inquiry into benefits has been held not to constitute a taking of property without due process of law. *See* the cases cited in note 9, *supra*.

12. *See* LA. R.S. 33:3306(A) (Supp. 1970), *supra* note 7.

13. Plaintiffs relied upon *Brill v. The City of Grand Rapids*, 383 Mich. 216, 174 N.W. 832 (1970), wherein the Michigan Supreme Court held that a widening of a twenty-foot wide paved blacktop street in a residential district to a "through" street of forty-five foot paved width for accommodation of heavier traffic did not specially benefit the adjacent property so as to justify the assessment. In the instant case, plaintiffs contended that, as in *Brill*, the improvements did not benefit them so as to justify the assessment. However, the court distinguished *Brill* from the instant case by stating:

> While there was an upgrading and widening of an already paved North Street as

mination of whether the abutting properties would be benefited to an amount not less than the proposed assessment involved a legislative function[14] "with admitted quasi-judicial overtones," as distinguished from a judicial function. Thus, the special assessment was allowed to stand in spite of the fact that the property owners had not been given the opportunity to be heard prior to the final administrative action. The court also concluded that the failure of the council to receive any evidence correlating specific monetary enhancement of the property with the cost of the street improvements did not exceed the limits of its legislative discretion.

An analysis of the traditionally recognized distinction in administrative law between legislation and adjudication serves as a basis for assessing the validity of the court's conclusion that the benefits determination involved a legislative function. Historically, determining whether procedural due process requirements apply to the administrative process has been based upon the distinction between legislative and judicial functions.[15] If legislation, or rule-making, is involved, "there is no constitu-

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an integral part of downtown improvements in Baton Rouge, the purpose was not, as in *Brill*, to accommodate heavier traffic of a 'through' nature, nor had the character of a little traversed residential neighborhood been changed to that of a major thoroughfare or highway.

352 So. 2d at 660.

It is not out of place to inquire whether the court in *Landry* properly understood the effect of the improvements of North Street. It is imperative to point out that North Street is one of only *two* exits from Interstate 110, north-bound, that leads directly into the central business district of Baton Rouge. For many years before the improvement of North Street, the flow of traffic into the central business district could be accommodated by the Convention Street exit as it was the most expeditious route to most of the major buildings. However, with the recent construction of several large buildings directly adjacent to North Street, its character was drastically changed. With new construction came heavier traffic flow and the need to improve access to the expanded downtown facilities. The improvements on North Street accommodate this need. The improvements are for the benefit of all those persons who must use North Street to reach employment-related, governmental, and commercial destinations situated adjacent to North Street.

14. By concluding that the council's benefits determination was a legislative act, the court created an anomalous situation. Plaintiffs argued that *Brill v. The City of Grand Rapids* supported their position that the widening of a previously predominantly residential street did not specially benefit them so as to justify the assessment. With respect to this contention, Justice Calogero, writing for the majority, concluded that *Brill* was not dispositive of the instant case. Such a conclusion was in itself *adjudication*.

15. This distinction between legislative and judicial functions is what the United States Supreme Court has called the "recognized distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." United States v. Florida East Coast Ry., 410 U.S. 224, 245 (1973).

tional right to any hearing whatsoever,"[16] because the courts see the administrative exercise of legislative power as similar to the direct exercise of power by the legislature. If, however, a judicial or adjudicative function is involved, an analogy to the judicial process is made and an adherence to the procedural safeguards of due process[17] is required.

The basic distinction between rule-making and adjudication is best illustrated by the United States Supreme Court's treatment of two related cases under the due process clause of the fourteenth amendment. In *Londoner v. Denver*,[18] the Supreme Court held that due process had not been accorded a property owner who objected to an assessment against his property. Although the property owner was allowed to file a written complaint and objection, he was not heard orally. The Court concluded that due process of law required that the property owner "have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal."[19] Furthermore, the Court concluded that the opportunity to be heard must be afforded before the tax becomes irrevocably fixed.

Seven years later, in the case of *Bi-Metallic Co. v. Colorado*,[20] the Court sustained an order of the State Board of Equalization increasing the valuation of all taxable property in Denver by a substantial percentage, although no opportunity was given to the affected taxpayers to be heard before the assessments became irrevocably fixed. The Court analogized the agency's action to the direct exercise of power by the legislature.[21] Justice Holmes for the majority distinguished *Londoner* by noting that in the earlier case "[a] relatively small number of persons was

16. Willapoint Oysters v. Ewing, 174 F.2d 676, 693 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949).

17. *See* F. COOPER, THE LAWYER AND ADMINISTRATIVE AGENCIES 80-84 (1957); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 7.03, 8.04 (1958).

18. 210 U.S. 373 (1908).

19. *Id.* at 386.

20. 239 U.S. 441 (1915).

21. Justice Holmes, speaking for the Court, stated:

> 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. If the result in this case had been reached as it might have been by the State's doubling the rate of taxation, no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it.

239 U.S. at 445.

concerned, who were exceptionally affected, in each case upon individual grounds,"[22] whereas *Bi-Metallic* was a case "dealing only with the principle upon which all the assessments in the county had been laid."[23]

Thus, whether a party must be afforded an opportunity for a hearing to meet and to present evidence depends upon a distinction between adjudicative or legislative facts:

> Adjudicative facts are the facts about the parties and their activities, businesses and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy discretion.[24]

In *Bi-Metallic*, the principal issue concerned the general situation of property owned by any taxpayer. Thus, legislative facts were at issue. Conversely, in *Londoner*, the facts at issue were adjudicative because they concerned each parcel of real property abutting the improvements, and their relation to each other as such would affect the determination of the proper assessments.[25]

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22. *Cf.* Gart v. Cole, 263 F.2d 244 (2d Cir.), *cert. denied*, 359 U.S. 978 (1959). Property owners and residents in the area affected by a slum redevelopment project of the City of New York partially financed by federal funds under Title I of the Housing Act of 1949 were held not to be entitled to an oral hearing before the Federal Housing Administrator on the feasibility of the City's relocation plan.

> The impact of the determination was upon the *group*, not upon individuals, and as would normally be the case in Title I proceedings, the number of residents affected by the relocation proposals and therefore within the group is quite large.

263 F.2d at 251.

23. 239 U.S. at 446.

24. Facts pertaining to the parties and their businesses and activities, that is, adjudicative facts, are intrinsically the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial. The reason is that the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts. Yet people who are not necessarily parties, frequently the agencies and their staffs, may often be the masters of legislative facts. Because the parties may often have little or nothing to contribute to the development of legislative facts, the method of trial often is not required for the determination of disputed issues about legislative fact.

1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.02 at 413 (1958).

25. *See* B. SCHWARTZ, ADMINISTRATIVE LAW 202 (1976).

In *Landry*, the plaintiffs were nine abutting property owners whose assessments totaled about $20,000. Thus, as in *Londoner*, it seems evident that *Landry* concerned a relatively small number of persons who were each exceptionally affected upon individual grounds. In *Londoner*, the agency was not establishing a new rule, but was applying the rule promulgated by the legislature to the factual situation of the abutting property owners. Similarly, the Parish Council in *Landry* was merely applying the provisions of the applicable street improvements statutes as promulgated by the state legislature. The Parish Council was not concerned with a situation like that presented in *Bi-Metallic*, that is, a determination that would affect all property in the parish. Such action seems an exercise of judicial rather than legislative power and the relatively few property owners who were adversely affected on individual grounds should have been given an opportunity to be heard and present evidence.

The element of *applicability* should serve as a key in differentiating whether the Parish Council's benefits determination was the exercise of a legislative or judicial function. According to Chief Justice Burger, "[r]ulemaking is normally directed toward the formulation of requirements having a *general* application to all members of a broadly identifiable class."[26] Typically the legislative function of an administrative body is directed at "situations," rather than particular persons.[27] However, if the agency action is directed at particular persons, the same right to a hearing as in a proceeding which is clearly judicial in nature should be afforded.[28]

Because of the "individual impact" upon the property owners, the Parish Council's action involved an adjudicatory decision which should not have been allowed to stand under the guise of a legislative act. It is fundamental to our system of law that such adjudicatory action cannot be validly taken by any judicial or administrative tribunal unless an opportunity to be heard has been afforded.[29] The oldest established prin-

26. American Airlines, Inc. v. CAB, 359 F.2d 624, 636 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966) (Burger, C.J., dissenting) (emphasis added).

27. Willapoint Oysters v. Ewing, 174 F.2d 676, 693 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949).

28. [I]f the resulting administrative action, whether regarded as rule-making or otherwise, *is individual in impact* . . . , a hearing preceding any final administrative action is appropriate.

Appalachian Power Co. v. Environmental Protection Agency, 477 F.2d 495, 501 (4th Cir. 1973).

29. Philadelphia Co. v. SEC, 175 F.2d 808, 817 (D.C. Cir. 1948), *vacated as moot*, 337 U.S. 901 (1949). The adversary hearing tradition can be traced back to the earliest origins

ciple in our administrative law is that "a party is not to suffer in person or in purse without an opportunity of being heard."[30] This right to a hearing includes not only the right to present evidence, but also a reasonable opportunity to learn and to challenge the allegations of the opposing party.[31] Accordingly, the Supreme Court has traditionally insisted that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property interests."[32] Thus, the failure of the Parish Council to afford an adversary hearing may have violated the property owners' rights to due process.[33]

The court further addressed itself to the plaintiffs' contention that the Parish Council was without sufficient facts and information to make the requisite determination of benefits. The court noted that the engineer's report was in "less than comprehensive form" and that the council did not receive any evidence that the lots to be assessed would be benefited to an amount not less than the proposed special assessment. Nevertheless, the court concluded that the council need not receive any evidence of any kind when making its benefits determination.[34] Writing for the majority, Justice Calogero further concluded that the determination may not be upset without evidence of a manifest abuse of power

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of Anglo-American law. In 1723, an English judge traced this tradition back to divine law itself: "Even God himself did not pass sentence upon Adam before he was called upon to make his defense. Adam (says God) where art thou? Has thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?" Rex v. University of Cambridge, 1 Str. 557, 567, 93 Eng. Rep. 698, 704 (K.B. 1723).

30. Painter v. Liverpool Gas Co., 3 Ad. & El. 433, 11 Eng. Rep. 478, 484 (K.B. 1836).

31. The right to submit argument implies the opportunity to challenge the allegations of the opposing party; otherwise the right may be but a barren one. Those who are brought into contest with the government in a quasi-judicial proceeding aimed at control of their activities are entitled to be advised fairly of what the government proposes and to be heard upon its proposals before it issues its final command. Morgan v. United States, 304 U.S. 1, 18-19 (1938). The opportunity to be heard must be provided at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

32. Boddie v. Connecticut, 401 U.S. 371, 378 (1971). (Emphasis in original.)

33. Although many controversies have arisen because of the vague and abstract words of the fourteenth amendment's due process clause, "there can be no doubt that at a minimum they require that deprivation of . . . property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 313 (1950).

34. Further addressing itself to this point, the majority stated:

> Although we find little merit in defendant's contention that the minutes of the council are not subject to collateral attack, etc., we are equally satisfied that one may not protest that a legislative body has not done that which through its exclusive means of communication (resolutions and/or ordinances) it has proclaimed that it has.

352 So. 2d at 660.

which exceeds the limits of legislative discretion.[35] Even assuming for purposes of discussion that the Parish Council's benefits determination was, indeed, a legislative function, the conclusions of the court concerning the applicable standard of judicial review should be examined to see if they are consistent with established jurisprudence.

Louisiana jurisprudence has established that courts will review decisions by an administrative body only to determine whether the hearing was conducted in accordance with the authority and formalities of the statute, whether the fact-findings of the body were supported by substantial evidence, and whether the hearing body's conclusions from those factual findings were arbitrary or constituted an abuse of the hearing body's discretion.[36] A court may not interfere with this legislative function unless it is clearly shown that the legislative body's action is so clearly arbitrary and capricious as to be unreasonable.[37] Equally well-settled, however, is the rule that statutes conferring upon municipalities the authority to impose local or special assessments are in derogation of common rights and must be strictly construed.[38] Municipal legislative acts are presumed to be valid and the burden rests with the party attacking the determination to prove that there was no substantial evidence for the legislative action.[39]

Resolution Number 10,413 and Ordinance Number 4047 specifically state that the Parish Council made the required benefits determination. This determination is presumed valid and would have been upheld upon judical review if there was "substantial evidence" to support the finding. However, the court in *Landry* did not examine whether there was "substantial evidence" to support the Parish Council's benefits determination, and instead concluded that courts may not upset such a determination absent "manifest and palpable abuse of power." Such language is, arguably, the *manifest error* rule in eloquent form, a

35. 352 So. 2d at 661.

36. *See, e.g.*, Allen v. LaSalle Parish School Bd., 341 So. 2d 73 (La. App. 3d Cir.), *writ refused*, 343 So. 2d 203 (La. 1977); Stewart v. East Baton Rouge Parish School Bd., 251 So. 2d 487 (La. App. 1st Cir. 1971); Moffitt v. Calcasieu Parish School Bd., 179 So. 2d 537 (La. App. 3d Cir. 1965).

37. Butand v. Lake Charles, 338 So. 2d 358 (La. App. 3d Cir. 1976); Olsen v. City of Baton Rouge, 247 So. 2d 889 (La. App. 1st Cir.), *writ refused*, 259 La. 755, 252 So. 2d 454 (1971); Hunter v. City of Shreveport, 216 So. 2d 140 (La. App. 2d Cir. 1968).

38. Bell v. City of Shreveport, 234 La. 607, 100 So. 2d (1958); Barber Asphalt Paving Co. v. Watt, 51 La. Ann. 1345, 26 So. 70 (1899); Grambling v. City of Alexandria, 85 So. 2d 276 (La. App. 2d Cir. 1956).

39. *See* cases cited in note 36, *supra*.

scope of review which should be distinguished from the substantial evidence rule.

Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[40] The substantial evidence rule developed in the case law from the idea that a finding of fact not supported by substantial evidence is beyond the power of the administrative body.[41] Application of the rule has caused some difficulty. The reviewing court may not overturn a factual determination made by an administrative body if there is anything in the record upon which reasonable men could base such a finding. Thus, under the substantial evidence rule, the reviewing tribunal may, as a practical matter, only concern itself with the presence in the record of a rational basis for the conclusions of the administrative body and not with the correctness of the administrative body's findings of fact. Review under the substantial evidence rule is quite limited and the reviewing court is precluded from disturbing findings of fact more frequently than under the more flexible formulations of the manifest error rule.[42]

It is generally assumed that the *manifest error* rule permits stricter scrutiny on review than the substantial evidence test, because the rule evades definition, leaving its application dependent upon the individual circumstances of each case. Matters of policy may affect the reviewing court's judicial discretion, with the manifest error rule serving to limit or to extend the scope of review. The scope of appellate review under the manifest error doctrine may range from the narrowest review possible under the "substantial evidence" test to the broadest possible under the "clearly erroneous" test,[43] depending upon the factual circumstances of the decision under review.[44]

Regardless of whether review of administrative findings is purportedly broader or narrower than "substantial evidence," prior to *Landry* it

40. Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

41. The scope of review of a jury verdict is also usually stated in terms of the substantial evidence rule. In *NLRB v. Columbian Co.*, 306 U.S. 292, 300 (1939), the Supreme Court equated substantial evidence with the amount of evidence sufficient to justify a trial judge in sending the case to the jury rather than directing a verdict.

42. The substantial evidence rule is not applicable to the scope of review of findings of fact made by a trial judge sitting without a jury. There the test is ordinarily whether the finding is "clearly erroneous." This term has been defined as such error as to leave the reviewing court "with definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

43. *Id.*

44. *See* Comment, *Appellate Review of Facts in Louisiana Civil Cases*, 21 LA. L. REV. 402 (1961).

was settled that a finding of fact by an administrative body would be upheld upon a showing of supporting substantial evidence in the record. The court's use in the instant case of manifest error terminology, instead of a mere reference to the presence or absence of substantial evidence in the record, might be seen as an effort to broaden the scope of judicial review. Such an intention is, however, gravely doubted. It is suggested that the court's refusal to follow the trend toward the substantial evidence rule was because the Parish Council's record was without *any* evidence to support the conclusion that the requisite benefit had accrued to the adjacent property owners.[45] Had the court employed the substantial evidence test, it could not have reached its conclusion. Yet by using phrases apparently indicative of stricter scrutiny, the court was able to uphold a finding insupportable even under the traditionally more permissive standard.

Some judicial review of *fact* as well as *law* is essential if administrative bodies are to be kept within their designated authority. The law-fact distinction is of crucial importance for present purposes,[46] since there is no limitation on the power of the reviewing court to review conclusions of law. If a question of law is at issue, the court may substitute its independent judgment for that of the administrator. The question of sufficient evidence to justify the administrative body's findings of fact is really a question of law,[47] according to the leading case, *Florida East Coast Line v. United States*.[48] In treating the question of evidentiary basis of fact-findings as a question of law, Chief Justice White stated:

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45. The First Circuit Court of Appeal noted the parish's complete disregard of any evidence at hand when it stated:

> There is not one scintilla of evidence in this record that states that any given benefit adds "X" dollars to the value of the properties sought to be assessed so that the sum total of all of the benefits alleged to flow from all of the improvements equal[s] the amount of the assessment. All of the testimony offered by defendants is in general terms. The language found in the resolution and the ordinance that a determination was made is nothing more than a conclusion and does not satisfy the mandate of the statute.

343 So. 2d at 214.

46. The law-fact distinction is one area in which the reviewing court subject to the substantial evidence rule may enjoy an equal amount of discretion as under the manifest error doctrine. K. DAVIS, ADMINISTRATIVE LAW TEXT 539 (2d ed. 1959).

47. *See* B. SCHWARTZ, *supra* note 25, at 591.

48. 234 U.S. 167 (1914). In *Florida East Coast*, the Interstate Commerce Commission was faced with the question of reducing the rates of three railroads which ran through Florida. The Commission reduced the rates of all three railroads although it had evidence only showing reduced costs on two of the lines. The court set aside the ICC's order insofar as it affected the third line because there was not sufficient evidence to justify that part of the order.

> [I]t is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence whatsoever to support it, the consideration of such a question involves not an issue of fact, but one of law which it is the duty of the courts to examine and decide.[49]

Under the *Florida East Coast* approach, it is fairly easy to see that the court in *Landry* could have substituted its judgment for that of the Parish Council by regarding the question of sufficient evidence as one of law. Just as the manifest error doctrine is capable of great flexibility, the substitution of judgment rule is, to a great extent, capable of judicial manipulation as the individual appellate court might desire.[50] In *Landry*, the substitution of judgment doctrine could have been employed as a standard of review allowing consideration of the case *de novo*.[51] Such a standard of review would have permitted the reviewing court completely to disregard the conclusions of the lower court. Thus, the due process hearing, which was never afforded the plaintiffs, could have been given at the stage of judicial review. Although a trial *de novo* in the reviewing court is rare, it can take the place of the administrative hearing.[52]

Another distinct problem with the *Landry* decision is the court's statement that "one may not protest that a legislative body has not done that which through its exclusive means of communication (resolutions and/or ordinances) it has proclaimed that it has."[53] Taken literally, this would shield council minutes from collateral attack, or *any* attack, because they are the council's "exclusive means of communication." This statement appears to mean that persons whose rights have been affected by administrative decisions may not be entitled to judicial review of that administrative determination. Moreover, the court's language is contrary to certain Louisiana statutes,[54] which establish a *rebuttable* pre-

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49. *Id.* at 185.

50. *See* Comment, *supra* note 44, at 411.

51. "Where the requisite due process hearing is not included in the . . . administrative process, it may be adequately supplied by a judicial proceeding in which new evidence may be supplied and full opportunity afforded for exploration of the basis of the disputed order." Jordan v. American Eagle Fire Ins. Co., 169 F.2d 281, 289 (D.C. Cir. 1948).

52. B. SCHWARTZ, *supra* note 25, at 209.

53. 352 So. 2d at 661.

54. LA. R.S. 13:3711 (1950) states:

> Copies of any books, records, papers or other documents of any of the executive and administrative departments, boards, and agencies of this state, and copies of any books, records, papers, or other documents of any of the political corporations, bodies politic, boards, departments and agencies of this state and the parishes and municipalities thereof, when certified as being true copies by the official, officer or employee in

sumption that the minutes containing such ordinances and resolutions are valid. Furthermore, any finding by the court that all resolutions and ordinances are to be taken at face value as valid and irrebuttable directly conflicts with the state constitution. Article 1, section 22, of the Louisiana Constitution of 1974 clearly provides that the courts must be open to every person for adequate remedy by due process of law and certainly preserves the presumption that all administrative determinations are reviewable by the court.[55]

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whose custody they may be, shall be admitted in evidence in all courts of this state, equally with the originals of such books, records, papers or other documents.

LA. R.S. 13:3712(A) (Supp. 1958) states:

Certified copies of books, records, papers or other documents provided in R.S. 13:3711 *shall be prima facie proof* of the existence and contents of the originals and of any act, transactions or occurrence or event as a memorandum of which said books, records, papers or documents were kept or made. (Emphasis added.)

55. It is still not clear whether municipal and parish boards are exempt from the procedural scheme established by the Louisiana Administrative Procedure Act, LA. R.S. 49:951-968 (Supp. 1966). The Act mandates compliance with procedural due process by all agencies within its ambit of coverage. *See* Dakin, *The Revised Model State Administrative Procedure Act—Critique and Commentary*, 25 LA. L. REV. 799, 800 (1965).

LA. R.S. 49:951(2) (Supp. 1974) limits the scope of coverage of the Act to agencies "authorized by law to make rules or to formulate and issue decisions and orders . . . ." Municipal governing bodies have been described as "agencies" of the state by the Louisiana Supreme Court. Bradford v. City of Shreveport, 387 So. 2d 487, 490 (La. 1975). *See* LA. CONST. art. VI, § 44(2). Once a determination is made that an entity falls within the intended defintion of "agency," the next inquiry concerns whether the agency is engaged in the rule-making or the adjudication process. LA. R.S. 49:951(1) & (6) (Supp. 1966 & 1975). If the agency conduct concerns rule-making, the conduct is regulated by the Act's rule-making provisions. LA. R.S. 49:953-954 (Supp. 1975 & 1976). If, on the other hand, the agency action is classified as adjudication, an additional step must be taken to see if the Act applies. If either a statutory provision mandates or a judicial determination demands notice and hearing in accordance with due process, the Louisiana Act will apply to the particular case. LA. R.S. 49:951(3) (Supp. 1966 & 1975); *see* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) (interpreting the Federal Administrative Procedure Act).

An argument for bringing municipal and parish boards under the force of the Act would find support in the recent supreme court decision of *Tafaro's Investment Co. v. Division of Housing Improvement*, 261 La. 183, 259 So. 2d 59 (1972). In *Tafaro*, a New Orleans city ordinance required notice and hearing to be afforded to property owners before official repair of the owners' premises could be ordered at the owners' expense. The court held that when an administrative agency adjudicates private property rights, the requirements of procedural due process must be observed, including a full evidentiary hearing prior to entry of the order. Because the city ordinance required that notice and opportunity for hearing be afforded, the argument for application of the Act seems compelling. Likewise in a property assessment situation, such as in the instant case, LA. R.S. 33:3302 (1950) requires notice and hearing to be afforded. Thus, the same argument could be applied.

Were the Act made applicable to municipal and parish boards, the scope of judicial

If *Landry* is allowed to stand, it would mean that municipal and parish governing bodies have a power possessed by no other officer or administrative body, and may disregard the express mandate of the 1970 amendment to section 3306. As interpreted by the court, the challenged statutory procedure permits a municipal or parish council to command the levying of a special assessment when, in its own opinion, there is the requisite benefit to the adjoining property owners. By sanctioning the order allowing the levying of the special assessment, the court, in effect, approved action taken without hearing, without evidence, without oral argument, and without opportunity to learn the basis thereof. Since such ex parte action was not deemed an abuse of the Parish Council's power, some question arises over what the court would deem an abuse of discretion or how this could be established in the absence of a hearing or the opportunity to present evidence. The infirmities of this holding become even more apparent upon realization that the administrative body's findings are not subject to general judicial review. The administrator's opinion is final upon this fundamental question of requisite benefits unless what the court denominates "manifest and palpable abuse of power" can be shown to exist. Absent such a showing, the administrative body may alone be cognizant of the reasoning behind its final opinion to levy a special or local assessment. Such authority, however beneficently exercised in one case, could amount to a finding by administrative fiat in another. Certainly, such authority is inconsistent with rational justice and invites the arbitrary exercise of power.

James Marshall Jones, Jr.

FOURTH AMENDMENT REMEDIES IN CIVIL PROCEEDINGS

On June 2, 1975, two detectives of the Jefferson Parish Sheriff's Office visited the defendant adult book store to obtain information to support a request for a search warrant. An affidavit signed by the officers described by name various sexual activities depicted in the books and movies displayed by the store. However, the search warrant which was subsequently issued lacked the specificity necessary to give sufficient gui-

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review of administrative determinations could be predicated upon expanded notions of manifest error rather than the substantial evidence or the "arbitrary and capricious" standards. Where an administrative agency is not within the Act, reliance may only be placed upon the limits of procedural due process. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).