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## A TALE OF TWO STANDARDS: WHY WYOMING COURTS SHOULD APPLY THE ACTUAL SUBSTANTIAL EVIDENCE STANDARD WHEN REVIEWING WORKERS' COMPENSATION CASES

*Michael C. Duff\**

### I. INTRODUCTION

In Wyoming, as in almost every other state in the United States, facts in contested workers' compensation cases are developed within an administrative agency.<sup>1</sup> Thus, common workers' compensation issues such as whether an injury is causally related to work,<sup>2</sup> the degree of a workers' disability,<sup>3</sup> an employee's

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<sup>1</sup> WYO. STAT. ANN. § 27-14-102(a)(vi) (2017). For a succinct summary reflecting the universal use of administrative agencies in workers' compensation adjudication see David B. Torrey, *The Workers' Compensation Judge and Finality of Fact-Finding Among States: Introduction and Tables*, NATIONAL ASSOCIATION OF WORKERS' COMPENSATION JUDICIARY COMPARATIVE ADJUDICATION SYSTEMS PROJECT, at tbl. 1, 2 (2012), <http://www.davetorrey.info>. Since Judge Torrey's summary, Tennessee, possessing one of the last two court-based systems, has transitioned to an administrative agency-based system. *Id.* Only Alabama remains as a court-based system. *Id.*; see also David B. Torrey, *Master or Chancellor? The Workers' Compensation Judge and Adjudicatory Power*, 32 J. NAT. ASSOC. OF ADMIN. LAW JUDICIARY 23, 35 (2012).

<sup>2</sup> In Wyoming, "injury" means "any harmful change in the human organism other than normal aging and includes damage to or loss of any artificial replacement and death, arising out of and in the course of employment while at work in or about the premises occupied, used or controlled by the employer and incurred while at work in places where the employer's business requires an employee's presence and which subjects the employee to extrahazardous duties incident to the business." WYO. STAT. ANN. § 27-14-102(a)(xi).

<sup>3</sup> *Id.* §§ 27-14-404–405.

average wage at the time of injury,<sup>4</sup> whether an employee provided timely notice of injury,<sup>5</sup> whether a worker is an employee within the meaning of the Act,<sup>6</sup> and whether an injury occurred on an employer's premises,<sup>7</sup> are initially decided by an administrative agency.<sup>8</sup> Wyoming's system is somewhat unique in that these kinds of factual questions, when preliminarily contested, may be decided by one of two<sup>9</sup> administrative factfinders: a hearing officer designated by the Office of Administrative Hearings (OAH) or,<sup>10</sup> in "medically contested cases," by a panel of the "Medical Commission."<sup>11</sup>

For a legal observer, the question almost immediately arises as to what level of "deference" courts should afford administrative officials engaging in workers' compensation fact finding when it is challenged in a proceeding for judicial review.<sup>12</sup> Wyoming, like nineteen other states, and tribunals under the federal Longshore Harbor Workers' Act, applies the "substantial evidence" standard of review.<sup>13</sup> That standard is expressed in various ways but a common formulation is that the decision of an administrative agency will be upheld if it is based on evidence that a "reasonable mind could accept as supporting the agency's determination."<sup>14</sup> In Wyoming, however, the state supreme court *also* upholds

<sup>4</sup> *Id.* § 27-14-403.

<sup>5</sup> *Id.* § 27-14-502.

<sup>6</sup> *Id.* § 27-14-102(a)(vii).

<sup>7</sup> *See, e.g.,* Shelest v. State *ex rel.* Wyoming Workers' Safety & Comp. Div., 2010 WY 3, ¶ 14, 222 P.3d 167, 171 (Wyo. 2010) (denying claim on the basis that employee's injuries did not occur while he was acting within the course of his employment).

<sup>8</sup> WYO. STAT. ANN. §§ 27-14-601–616. Internal administrative agency determinations may, of course, at times involve mixed questions of fact and law. Bernard Schwartz, *Mixed Questions of Law and Fact and the Administrative Procedure Act*, 19 FORDHAM L. REV. 73, 73 (1950) ("A theory of review based upon the 'law-fact' distinction assumes that there is a more or less clear-cut division between 'law' and 'fact,' with the former for the judge and the latter for the administrator.")

<sup>9</sup> Initial, pre-dispute claims processing is conducted directly by the Wyoming Safety and Compensation Division (WSCD). *See generally* WYO. STAT. ANN. § 27-14-102(a)(vi).

<sup>10</sup> *See id.* § 27-14-602(a); *infra* notes 181–211 and accompanying text.

<sup>11</sup> *See* WYO. STAT. ANN. § 27-14-616(b)(iv); Judd v. State *ex rel.* Wyo. Workers' Safety & Comp. Div., 2010 WY 85, ¶ 30, 233 P.3d 956, 968 (Wyo. 2010) (holding that claimant may not contest decisions by the WSCD to refer a case to the Medical Commission); *infra* notes 189–211 and accompanying text (discussing Medical Commission).

<sup>12</sup> In this context, deference may be defined as "[a] polite and respectful attitude or approach, esp. toward an important person or venerable institution whose action, proposal, opinion, or judgment should be presumptively accepted." *Deference*, BLACK'S LAW DICTIONARY (10th ed. 2014). The "deference" in question is to evidentiary or fact-finding review, and not to statutory interpretation, as in "Chevron" deference.

<sup>13</sup> 12 Lex K. Larson, LARSON'S WORKERS' COMPENSATION LAW § 130.01 (Matthew Bender, Rev. Ed.); WYO STAT. ANN. § 16-3-114(c)(ii)(E).

<sup>14</sup> *See, e.g.,* Price v. State *ex rel.* Wyo. Dep't of Workforce Services, Workers' Comp. Div., 2017 WY 16, ¶ 7, 388 P.3d 786, 789–90 (2017) ("Substantial evidence means 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'"). This formulation of the

decisions by workers' compensation administrative agency officials deemed "not contrary to the overwhelming weight of the evidence."<sup>15</sup> It is unclear whether this "overwhelming weight" formulation is an odd version of the traditional substantial evidence rule—sometimes the "overwhelming weight" and "substantial evidence" rules are used in the same paragraph—or is another standard altogether.<sup>16</sup> This unclear situation is the focus of this article. Because of the nature of the focus, the article must frequently transition between administrative procedural law and substantive workers' compensation law issues.

An overwhelming weight standard certainly does not on its face resemble a "substantial evidence" standard. Although standards of review are seldom flawlessly precise, attentive students of administrative law are aware that the trend in administrative law, over the last several decades, has been *against* hyper-insulation of administrative agency fact-finding.<sup>17</sup> The U.S. Supreme Court's landmark opinion in *Universal Camera* stood, in essence, for the proposition that the decision of an administrative tribunal should be supported by more than just *any* evidence.<sup>18</sup> Most agree that courts lack the authority to substitute their judgment for the decision of an administrative agency<sup>19</sup>—that is to say, it is not enough that a court might have found differently from an administrative agency

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rule is commonly ascribed to the Supreme Court's opinion in *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

<sup>15</sup> See, e.g., *Dale v. S & S Builders*, 2008 WY 84, ¶ 22, 188 P.3d 554, 561 (Wyo. 2008) ("If the hearing examiner determines that the burdened party failed to meet his burden of proof, we will decide whether there is substantial evidence to support the agency's decision to reject the evidence offered by the burdened party by considering whether that conclusion was contrary to the overwhelming weight of the evidence in the record as a whole."). For thorough analysis of *Dale*, see *infra* notes 268–302 and accompanying text. The standard is alternatively articulated as "whether the conclusion was clearly contrary to the overwhelming weight of the evidence." *Watkins v. State ex rel. Wyoming Med. Comm'n*, 2011 WY 49, ¶ 16, 250 P.3d 1082, 1086 (Wyo. 2011). In addition, the standard considers "whether the conclusion was clearly contrary to the overwhelming weight of the evidence considered on the record as a whole." *In re Bilyeu v. State ex rel. Wyoming Workers' Safety & Comp. Div.*, 2012 WY 141, ¶ 7, 287 P.3d 773, 775 (Wyo. 2012). The essence of the principle for purposes of this article is that the weight of the evidence against the agency's position must be overwhelming to justify a court's reversal on evidentiary grounds.

<sup>16</sup> See *supra* note 15 and accompanying text.

<sup>17</sup> See *infra* notes 62–89 and accompanying text. As will be developed, substantial evidence is essentially reasonableness review of factual determinations. See generally *T-Mobile S., LLC v. City of Roswell, Georgia*, 135 S.Ct. 808 (2015). "Reasonableness review conveys to the court that it need not delve so deeply into the agency's judgment so as to assure that the conclusion is correct. Yet it tells the court to assure that there is a relatively high probability that the agency is correct." CHARLES H. KOCH, JR. & RICHARD MURPHY, 3 ADMIN L. & PRAC. § 9.24 (3d ed. 2017).

<sup>18</sup> *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490 (1951); see *infra* notes 129–49 and accompanying text for the federal discussion. See *infra* notes 303–15 and accompanying text (further developing this point in the context of Wyoming Administrative Law).

<sup>19</sup> *State ex rel. Wyo. Workers' Comp. Div. v. Roggenbuck*, 938 P.2d 851, 853 (Wyo. 1997).

if finding facts in the first instance in any given case.<sup>20</sup> Neither, however, should a court be required to acquiesce when it cannot *in good conscience* uphold the decision of an agency.<sup>21</sup> The “overwhelming weight” standard seems contrarily to say that a Wyoming court may *not* set aside the decision of an administrative agency unless the weight of the evidence is overwhelmingly against the agency.<sup>22</sup> The overwhelming weight standard simply “feels” wrong. The evidence in a given case may not be *overwhelmingly* against an agency’s position, yet still not *reasonably* support it. Surely, a court ought to be free to reverse an administrative agency, if it cannot in good conscience underwrite an outcome.

This article demonstrates that, whatever the relationship between the overwhelming weight and substantial evidence standards, Wyoming courts mistakenly adopted the overwhelming weight standard in the 1970s based on an outdated administrative law encyclopedia entry from 1962.<sup>23</sup> The standard should either be abandoned or much more clearly explained, especially in light of, and to address, the standard’s questionable origins. In the first place, the overwhelming weight standard is inconsistent with a contemporary legal understanding of substantial evidence.<sup>24</sup> Secondly, the potentially-aggressive, benefit-reducing standard<sup>25</sup> that the overwhelming weight threatens to routinely become is especially inappropriate in a state like Wyoming. Wyoming

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<sup>20</sup> *Universal Camera*, 340 U.S. at 488 (assessing entirety of record does not entitle courts to “negative” conclusions of expert agencies or displace the agencies’ choices between two “fairly conflicting views” even though courts would justifiably have made a different choice had the matter been before them *de novo*).

<sup>21</sup> *Id.*

<sup>22</sup> See *infra* notes 109–13 and accompanying text.

<sup>23</sup> See *infra* notes 109–13 and accompanying text.

<sup>24</sup> See *infra* notes 114–49 and accompanying text. In fact, at least one Wyoming court has precisely captured this evolution, but for subtle reasons, other courts seem not to have followed. See *infra* notes 303–15 and accompanying text; *Bd. of Trs. v. Colwell*, 611 P.2d 427, 429 (Wyo. 1980).

<sup>25</sup> Although beyond the scope of this article, Wyoming’s status as a “monopolistic” state—a state in which the state government rather than private insurance companies insures workers’ compensation benefits—is an important background consideration when evaluating its workers’ compensation legal issues. Maureen Gallagher, *States of Confusion: Workers’ Compensation Extraterritorial Issues*, INS. PARTNERS ACAD. 6–7 (2016), <http://www.insurancepartnersacademy.com/wp-content/uploads/2011/09/2016-WC-Extraterritorial-Issues-1-16-Edition-1.pdf>. Since the state is the payer of claims, it is not merely an arbiter of essentially private disputes. Robert P. Hartwig, *Competitive Workers’ Compensation Task Force Meeting, Ohio Bureau of Workers’ Compensation*, INS. INFO. INST. 5–6 (2010), [https://www.iii.org/sites/default/files/docs/pdf/Ohio\\_WCTestimony-0819101.pdf](https://www.iii.org/sites/default/files/docs/pdf/Ohio_WCTestimony-0819101.pdf). The state obviously has a budgetary interest in the outcome of disputes that cannot rationally be ignored, since unlike private insurance companies, it both defines its liability and decides whether it will pay claims. *Id.* At the time of the establishment of such state funds, in the early 20th century, there was great concern about the political interplay between the state monopolistic funds and other departments of state government. PRICE V. FISHBACK & SHAWN E. KANTOR, *PRELUDE TO THE WELFARE STATE, THE ORIGINS OF WORKERS’ COMPENSATION* 153–54 (University of Chicago Press 2007).

constitutionally ensures that labor has “just protection” under law,<sup>26</sup> provides citizens a fundamental right to access courts for the purpose of asserting claims for personal injury,<sup>27</sup> and forbids laws limiting damages for injury and death.<sup>28</sup> The Wyoming constitution also voids any employer-employee contract or agreement by an employer that waives a right to recover damages for causing the death or injury of an employee.<sup>29</sup> The risk of rights’ deprivation by effectively insulated agency action in such a rich constitutional environment is simply too high. To be clear, the degree of decisional deference afforded by courts to administrative agencies is a complicated and ongoing topic of debate in many substantive legal domains in which administrative bodies make decisions.<sup>30</sup> But one should remember that *highly* deferential judicial standards of review of administrative agency action shift power in tangible ways to the executive branch.<sup>31</sup> Whether that is a desirable policy choice for Wyoming is a question that should be taken on cautiously and explicitly, not accidentally.

The plan of this article is as follows. Part II of the article traces the origins of the “overwhelming weight” standard in Wyoming.<sup>32</sup> Shifting to administrative law, Part III explains the emergence of the traditional substantial evidence rule under federal law as a reaction to Wagner (National Labor Relations) Act decisions of the federal circuit courts in the early and mid-1930s.<sup>33</sup> The reaction, as discussed in the Supreme Court opinion, *Universal Camera*,<sup>34</sup> produced a deliberate “movement” in administrative law away from a *de facto* “any evidence” standard.<sup>35</sup> Though there was not universal agreement on the claim, many argued

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<sup>26</sup> WYO. CONST. art. 1, § 22 (“The rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service and to promote the industrial welfare of the state.”).

<sup>27</sup> See *infra* notes 241–46 and accompanying text.

<sup>28</sup> See *infra* notes 241–50 and accompanying text.

<sup>29</sup> See *infra* notes 241–51 and accompanying text.

<sup>30</sup> See generally CHARLES H. KOCH, JR. & RICHARD MURPHY, 3 ADMIN L. & PRAC. § 11:22 (3d ed. 2017).

<sup>31</sup> See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1751 (2007) (discussing one role of courts reviewing administrative action as mediation between legislative and executive branches).

<sup>32</sup> See *infra* notes 44–113 and accompanying text.

<sup>33</sup> See *infra* notes 114–49 and accompanying text.

<sup>34</sup> See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 478–80 (1951).

<sup>35</sup> *Id.* at 487–88.

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which, in and of itself, justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both

that courts were applying an “any evidence” standard of review to early New Deal administrative agency decisions, resulting, the argument went, in the rubber-stamping of virtually all agency action.<sup>36</sup> Part IV discusses administrative agency evidentiary review in the context of agency expertise.<sup>37</sup> Many states, including Wyoming, advance agency expertise as a justification for affording agencies deference.<sup>38</sup> Other states appear to have deliberately adhered to standards of review in which courts will uphold administrative agency decisions supported by *any* evidence.<sup>39</sup> Much of Wyoming workers’ compensation system is relatively “non-expert,” which appears to weaken the case for hyper-deferential judicial review of administrative workers’ compensation decisions.<sup>40</sup> Part V focuses closely on Wyoming administrative law decisions and reveals that, in fact, important Wyoming precedent and statutory law have acknowledged the *Universal Camera* substantial evidence “movement,”<sup>41</sup> but subsequent Wyoming cases have applied, without adequate explanation, a substantial evidence rule in derogation of modern administrative law.<sup>42</sup> Finally, Part VI concludes by arguing that the Wyoming Supreme Court should either abandon the overwhelming weight standard or explain more clearly what relationship it has to the contemporary understanding of substantial evidence.<sup>43</sup> This article argues that Wyoming courts should apply the actual substantial evidence standard, but takes the position that, in any event, the substantial evidence and overwhelming weight standards fundamentally differ and cannot rationally coexist without the courts providing additional doctrinal guidance.

## II. ORIGINS OF THE “OVERWHELMING WEIGHT” FORMULATION

This Part analyzes the development of Wyoming’s overwhelming weight standard of judicial review of agency action. It explores the standard as one appearing to hold that the courts may not set aside agency action unless the agency is overwhelmingly wrong. First, the Part explores a judicial opinion appearing to exemplify what can go wrong when courts feel constrained to apply minimal

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statutes [the Administrative Procedure and Taft-Hartley Acts] that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General’s Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment.

<sup>36</sup> *Id.*

<sup>37</sup> See *infra* notes 150–236 and accompanying text.

<sup>38</sup> See *infra* notes 158–80 and accompanying text.

<sup>39</sup> See *infra* notes 212–25 and accompanying text.

<sup>40</sup> See *infra* notes 181–211 and accompanying text.

<sup>41</sup> See *infra* notes 303–15 and accompanying text.

<sup>42</sup> See *infra* notes 237–331 and accompanying text.

<sup>43</sup> See *infra* notes 332–38 and accompanying text.

scrutiny to agency fact finding.<sup>44</sup> The Part then locates the case-law origin of the overwhelming weight standard, revealing that the Wyoming Supreme Court borrowed the standard from an American Jurisprudence administrative law encyclopedia that inaccurately equated the substantial evidence and overwhelming weight standards.<sup>45</sup> Finally, the Part commences exploration of the impact the erroneous borrowing has had on Wyoming law by transitioning to the history of the traditional substantial evidence rule.<sup>46</sup>

### A. *Setting the Stage: The Moss Opinion*

The general oddity in the phraseology of the overwhelming weight standard would, standing alone, invite investigation of its origins.<sup>47</sup> The language of the standard has been used in only two states, Wyoming and Missouri.<sup>48</sup> As applied in Wyoming, the standard demands explication. The Wyoming Supreme Court's opinion, in *Moss v. Wyoming Workers' Safety and Compensation Division*, is a useful vehicle for demonstrating the practical impact that renders the standard more than just a curiosity.<sup>49</sup> In *Moss*, the Division denied Moss's claim<sup>50</sup> based on the Medical Commission's rejection of Moss's testimony of pain and disability as not credible.<sup>51</sup> Moss was partially, but seriously, disabled; and after he exhausted his temporary total disability benefits, he applied for permanent and total disability benefits under Wyoming's "odd lot doctrine":

To be entitled to an award of benefits under the odd lot doctrine, an employee must prove: 1) he is no longer capable of performing the job he had at the time of his injury and 2) the degree of his physical impairment coupled with other factors such as his mental capacity, education, training and age make him eligible for PTD benefits even though he is not totally incapacitated . . . To satisfy this burden, an employee must also demonstrate he made reasonable efforts to find work in his community after reaching maximum medical improvement or, alternatively, that he was so completely disabled by his work-related injury that any effort to find employment would have been futile . . . If the employee meets his burden, the employer

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<sup>44</sup> See *infra* notes 47–61; 62–89 and accompanying text.

<sup>45</sup> See *infra* notes 90–108 and accompanying text.

<sup>46</sup> See *infra* notes 109–13 and accompanying text.

<sup>47</sup> See *supra* note 15 and accompanying text.

<sup>48</sup> See *infra* notes 49–99, 226–36 and accompanying text.

<sup>49</sup> *Moss v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 2010 WY 66, 232 P.3d 1 (Wyo. 2010).

<sup>50</sup> *Id.* at ¶ 1, 232 P.3d at 3.

<sup>51</sup> *Id.* at ¶¶ 17–37, 232 P.3d at 6–11.

must then prove that “light work of a special nature which the employee could perform but which is not generally available in fact is available to the employee.”<sup>52</sup>

Writing for the majority, Justice Kite found that “[g]iven the evidence Mr. Moss presented, there is no question but that he met his burden of showing that the degree of his physical impairment coupled with other factors such as his mental capacity, education, training and age make him eligible for PTD benefits.”<sup>53</sup> The Medical Commission threw everything but the kitchen sink at Moss, and it drew an unusually sharp response from the Justice:

The record indicates that the Medical Commission disregarded relevant evidence, made incorrect assumptions about other evidence and, rather than considering the evidence fairly and objectively, generally viewed it in the light most likely to result in a denial of benefits. An employee has a right to be heard before an unbiased, fair and impartial tribunal . . . Some of the Medical Commission’s findings and conclusions cast doubt on whether the proceedings in this case satisfied that right.<sup>54</sup>

Despite the significant underlying irregularities in the Medical Commission fact-finding proceeding, Justice Kite upheld the Division’s decision finding that “it came forward with sufficient evidence to refute Mr. Moss’s evidence and to prove work within his limitations was available.”<sup>55</sup> Nevertheless, Justice Kite held, “We cannot conclude that the Medical Commission’s ruling was *against the overwhelming weight of the evidence*.”<sup>56</sup>

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<sup>52</sup> *Id.* at ¶ 14, 232 P.3d at 5 (internal citations omitted).

<sup>53</sup> *Id.* at ¶ 22, 232 P.3d at 7.

<sup>54</sup> *Id.* at ¶ 40, 232 P.3d at 11 (internal citations omitted). The Medical Commission discredited Moss and his doctors, found Moss’s favorable social security disability decision irrelevant when it was almost certainly relevant, and mischaracterized or overemphasized video evidence. *Id.*

<sup>55</sup> *Id.* at ¶ 43, 232 P.3d at 11–12. The outcome is questionable because its basis is not parallel to the burden-shifting requirement for odd-lot analysis under Wyoming law. *See id.* Once Justice Kite had found that Moss met his preliminary burden, the burden of production shifted to the Division to show that “light work of a special nature which the employee could perform but which is not generally available in fact is available to the employee.” *Id.* at ¶ 14, 232 P.3d at 5. According to Justice Kite, “the Division . . . presented evidence that light work was available in the geographic area in which Mr. Moss resides.” *Id.* at ¶ 43, 232 P.3d at 11–12. But the standard required the Division to have shown that light work of a special nature was in fact available to Moss. *Id.* This the Division, through Moss’s vocational expert, did not do. *Id.*

<sup>56</sup> *Id.* at ¶ 43, 232 P.3d at 12 (emphasis added). It is not clear whether the majority meant to say that the Division’s decision was not against the overwhelming weight of the evidence. *See id.* The Court reviews the decision of the “administrative agency” directly and, in this context, it is somewhat unclear as to whether the Division, the Medical Commission, or both is “the administrative agency.” *See id.*

In dissent, Justice Hill departed sharply from the majority's opinion. In an especially poignant passage, Justice Hill wrote:

The evidence offered by the Division was not the sort of evidence that “a reasonable mind would accept as adequate to support a conclusion.” The majority has already rejected most of the Medical Commission's findings that negatively impacted Moss's case. That circumstance leads me to view with distrust this final finding made by the Commission, which now must bear the entire weight of the final decision to deny Moss the benefits at issue here.<sup>57</sup>

Justice Hill did not refer to the “overwhelming weight” standard. Rather, he stated that “[t]he evidence offered by the Division was not the sort of evidence that ‘a reasonable mind would accept as adequate to support a conclusion.’”<sup>58</sup>

The foregoing reveals that the difference between the “overwhelming weight” and “substantial evidence” formulations were at center stage. As already discussed, under Wyoming law, both phrases purport to be formulations of something called

<sup>57</sup> *Id.* at ¶ 48, 232 P.3d at 14 (Hill, J., dissenting).

<sup>58</sup> *Id.* at ¶ 52, 232 P.3d at 14. Aside from the unwillingness of Justice Hill to credit the Commission at all on the ultimate conclusion of permanent and total disability in light of its “play[ing] loose and fast with the facts,” it was also clear that the majority and the dissent had differences of opinion on the correct “odd lot doctrine” standard to apply. *See id.* Justice Hill quoted at length *Schepanovich v. U.S. Steel Corp.*:

. . . If the evidence of degree of obvious physical impairment, coupled with other facts such as the claimant's mental capacity, education, training, or age, places claimant prima facie in the odd-lot category, the burden should be on the employer to show that some kind of suitable work is regularly and continuously available to the claimant. Certainly in such a case it should not be enough to show that claimant is physically capable of performing light work, and then round out the case for noncompensability by adding a presumption that light work is available . . .

The corollary of the general-purpose principle just stated would be this: If the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or relegated to the odd-lot category, it is not unreasonable to place the burden of proof on him to establish unavailability of work to a person in his circumstances, which normally would require a showing that he has made reasonable efforts to secure suitable employment . . .

Other jurisdictions in this context have held that an employee in circumstances similar to those of the appellant must show that reasonable efforts have been made to obtain suitable employment in order to meet their burden of proof and shift the burden of proof to the employer . . .”

*Id.* (quoting *Schepanovich v. U.S. Steel Corp.*, 669 P.2d 522, 525 (Wyo.1983)).

Justice Hill seemed correct in pointing out that the odd-lot standard he recited would have made it easier for an employee to make out a prima facie odd-lot claim. *See id.* The larger point, however, was that the outcome was not acceptable to a reasonable mind under the circumstances. *See id.*

“substantial evidence.”<sup>59</sup> It is difficult (although not impossible) to accept that the factual findings of a generally *untrustworthy* administrative agency decision could be reasonable. At a certain point, however, a reasonable mind, recognizing the corruption of a fact-finding proceeding, might find its conscience being challenged in upholding such a corrupted decision. A court in such a frame of mind might wish to simply remand an adjudication to an agency for renewed fact-finding. On the other hand, if an agency produces *any* credible evidence, and an adverse party produces merely *some* evidence in opposition to the agency’s position, it may be difficult for a court to set aside the agency’s decision under the overwhelming weight standard. This dilemma seemed to be at the heart of the disagreement between Justices Kite and Hill, and there is no persuasive evidence that the Wyoming legislature meant to disempower Wyoming courts in this manner.

In light of the difficulties inherent in applying the “overwhelming weight” standard, it is important to explore its origins.<sup>60</sup> The departure from traditional substantial evidence principles represented by the overwhelming weight standard warrants exploration of whether the Wyoming courts have a cogent rationale for modifying traditional substantial evidence analysis.<sup>61</sup>

### B. *The Impact of Spiegel*

The first instance of use of the “overwhelming weight” standard in a Wyoming case is *Laramie County School District No. 1 v. Spiegel*.<sup>62</sup> In *Spiegel*, Sydney Spiegel appealed to a Wyoming district court the decision of the Laramie School District No. 1 not to renew his teaching contract.<sup>63</sup> The dispute was first appealed to a state district court, and then to the Wyoming Supreme Court.<sup>64</sup> Much of the supreme court’s discussion of the case concerned the sufficiency of the procedural due process afforded Spiegel during the school district’s deliberations.<sup>65</sup> Among other issues considered by the court, however, was whether the school district’s factual findings, in connection with the non-renewal decision, were supported by substantial evidence, an issue relevant under the Wyoming Administrative Procedure Act, which governed judicial review of the school district’s decision.<sup>66</sup> In analyzing this question, the court surveyed a number of substantial evidence

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<sup>59</sup> See *supra* note 15 and accompanying text.

<sup>60</sup> See *infra* notes 62–108 and accompanying text.

<sup>61</sup> See *infra* notes 62–89 and accompanying text.

<sup>62</sup> *Bd. of Trs. v. Spiegel*, 549 P.2d 1161, 1178 (Wyo. 1976).

<sup>63</sup> *Id.* at 1163.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1164–73.

<sup>66</sup> *Id.* at 1177 (citing the then-existing statutory provision WYO. STAT. ANN. § 9-276.32 (1975 Cum. Supp.)).

formulations, including definitions from the Pennsylvania courts,<sup>67</sup> the United States Supreme Court,<sup>68</sup> and, importantly, §. 688 of the American Jurisprudence Administrative Law encyclopedia.<sup>69</sup> In the then-current version of the encyclopedia, among the tests of substantial evidence articulated was whether the decision is not clearly contrary to the overwhelming weight of the evidence.<sup>70</sup> The Wyoming Supreme Court upheld the district court's reversal of the school district's non-renewal determination.<sup>71</sup> The court stated:

Applying the foregoing definitions, standards and tests for use and application of the substantial evidence rule, we are compelled to hold, as we do, that the Board, given the facts in this record, could not reasonably, and, absent action characterized by arbitrariness, capriciousness and bias, have reached the conclusion it did. We, therefore, find that the evidence was insufficient to support a conclusion that there was cause to terminate.<sup>72</sup>

The difficulty with this determination is that it cannot be ascertained, specifically, which definitions the court meant to apply. With respect to “whether the decision is not clearly contrary to the overwhelming weight of the evidence,” the court’s definitional language was obscure:

The test as to whether or not there is substantial evidence *has been said to be* . . . whether the administrative decision finds reasonable support in substantial evidence, whether the evidence reasonably tends to support the findings, or, it has been indicated, whether the decision is not clearly contrary to the overwhelming weight of the evidence.<sup>73</sup>

The court was evidently summarizing the then-current version of the American Jurisprudence Administrative Law encyclopedia.<sup>74</sup> But the summarization was a hodgepodge of differing substantial evidence rules on the relevant encyclopedia page.<sup>75</sup> When, therefore, the court stated it was “applying

<sup>67</sup> *Id.* at 1178.

<sup>68</sup> *Id.* (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607 (1966) (citing cases of the National Labor Relations Board and the Federal Trade Commission)).

<sup>69</sup> *Id.* at 1178.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 1180.

<sup>72</sup> *Id.* at 1177–78.

<sup>73</sup> *Id.* at 1178.

<sup>74</sup> *Id.* (citing 2 AM. JUR. 2D *Administrative Law* § 688 (1962)).

<sup>75</sup> *Id.*

the foregoing definitions,” a present reader is hard-pressed to know *which* definitions the court intended to reference.<sup>76</sup>

Whatever *Spiegel* meant to say, it became clear, in due course, that Wyoming courts would press the “overwhelming weight” standard into frequent service. The first Wyoming workers’ compensation case utilizing the “overwhelming weight” standard was *Wyoming Workers’ Compensation Division v. Brown*, decided in 1991.<sup>77</sup> In *Brown*, a state district court reversed a reduction in attorneys’ fees and costs by the Wyoming Office of Administrative Hearings because “there was no factual basis to determine that the fees billed by [the attorney] were not reasonable and necessary.”<sup>78</sup> In considering the Division’s appeal of the district court’s decision, the Wyoming Supreme Court, for the first time in a Wyoming Workers’ Compensation decision, said, “[w]e have indicated we defer to the experience and expertise of the agency in its weighing of the evidence and will disturb its decisions only where it is clearly contrary to the overwhelming weight of the evidence on record.”<sup>79</sup> In applying the substantial evidence standard the *Brown* Court cited to *Southwest Wyoming Rehabilitation Center v. Employment Security Commission of Wyoming*<sup>80</sup> and *Cody Gas Co. v. Public Service Commission of Wyoming*.<sup>81</sup> *Southwest Wyoming Rehabilitation*, an unemployment compensation case, in turn cited to *Spiegel* in defining substantial evidence generally,<sup>82</sup> and to *Cody Gas* in connection with the “clearly contrary to the overwhelming weight of the evidence” standard.<sup>83</sup> *Cody Gas*, in turn, cited to *Wyoming Insurance Co. v. Avemco Ins. Co.*,<sup>84</sup> which in its turn cited *Big Piney Oil & Gas Co. v. Wyoming Oil and Gas Conservation Commission*,<sup>85</sup> which, again, cited back to *Spiegel*.<sup>86</sup>

Thus, *Spiegel* was the progenitor of the “overwhelming weight” standard. No Wyoming court employed the standard prior to the *Spiegel* decision in 1976.<sup>87</sup> By the late 1970s, courts routinely adopted the standard without explaining

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<sup>76</sup> See *supra* note 58 and accompanying text.

<sup>77</sup> State *ex rel.* Wyo. Workers’ Comp. Div. v. Brown, 805 P.2d 830, 833 (Wyo. 1991).

<sup>78</sup> *Id.* at 833.

<sup>79</sup> *Id.*

<sup>80</sup> Sw. Wyo. Rehab. Ctr. v. Emp’t Sec. Comm’n of Wyo., 781 P.2d 918, 921 (Wyo. 1989).

<sup>81</sup> Cody Gas Co. v. Pub. Serv. Comm’n of Wyo., 748 P.2d 1144, 1146 (Wyo. 1988).

<sup>82</sup> *Su. Wyo. Rehab. Ctr.*, 781 P.2d at 921. It is worth noting that Justice Urbigkit authored both *Brown* and *Su. Wyo. Rehab. Ctr.*

<sup>83</sup> *Id.*

<sup>84</sup> *Cody Gas Co.*, 748 P.2d at 1146 (citing Wyo. Ins. Dept. v. Avemco Ins. Co., 726 P.2d 507, 509 (Wyo. 1986)).

<sup>85</sup> *Avemco Ins. Co.*, 726 P.2d at 509 (citing Big Piney Oil & Gas Co. v. Wyo. Oil & Gas Conservation Comm’n, 715 P.2d 557 (Wyo. 1986)).

<sup>86</sup> *Big Piney Oil & Gas Co.*, 715 P.2d at 562.

<sup>87</sup> See *Bd. of Trs. v. Spiegel*, 549 P.2d 1161, 1178 (Wyo. 1976).

it.<sup>88</sup> *Spiegel* led directly to *Brown* and to the “overwhelming weight” standard as applied in contemporary worker’s compensation cases like *Moss*.<sup>89</sup>

### C. *The Legal Encyclopedia Citation*

To this point, this Part primarily has concerned itself with identifying the precise origin of the “overwhelming weight” standard in Wyoming, locating it in *Spiegel*’s citation to an American Jurisprudence encyclopedia.<sup>90</sup> It is noteworthy that, by the time of the 1994 version of that encyclopedia, the “overwhelming weight” formulation of substantial evidence had completely dropped out of the encyclopedia,<sup>91</sup> a result suggesting extremely infrequent usage of the formulation outside of Wyoming.<sup>92</sup>

*Spiegel*’s selection of the “overwhelming weight” formulation in 1976, even if inadequately explained, would be understandable had it at that time been a common articulation of “substantial evidence,” but it was not. The 1962 American Jurisprudence encyclopedia cited to only two cases in two states where “it ha[d] been indicated” the standard was used: *Burke v. Coleman*,<sup>93</sup> a Missouri case, and *Central R. Co. of New Jersey v. Department of Public Utilities*, a New Jersey case.<sup>94</sup> Those two cases—a slender reed at all events—fail to reveal the existence of an actual “overwhelming weight” articulation of substantial evidence.

*Burke*, for example, involved revocation of an innkeeper’s license to sell “nonintoxicating beer.”<sup>95</sup> In upholding the supervisor of liquor control, the court stated, “[c]ertainly it cannot be said that the supervisor’s finding was clearly

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<sup>88</sup> In addition to the cases already discussed, see *Beddow v. Emp’t Sec. Comm’n of Wyo.*, 718 P.2d 12 (Wyo. 1986); *City of Cheyenne Policemen Pension Bd. v. Perreault*, 727 P.2d 702 (Wyo. 1986); *Mont.-Dakota Utils. Co. v. Wyo. Pub. Serv. Comm’n*, 746 P.2d 1272 (Wyo. 1987); *Teton Valley Ranch v. State Bd. of Equalization*, 735 P.2d 107 (Wyo. 1987); *Mountain Fuel Supply Co. v. Pub. Serv. Comm’n of Wyo.*, 662 P.2d 878 (Wyo. 1983); *Majority of Working Interest Owners in Buck Draw Field Area v. Wyo. Oil & Gas Conservation Comm’n*, 721 P.2d 1070 (Wyo. 1986); *Clements v. Bd. of Trs.*, 585 P.2d 197 (Wyo. 1978); *Laramie River Conservation Council v. Indus. Siting Council*, 588 P.2d 1241 (Wyo. 1978). Notably absent from this list are workers’ compensation cases, and notably present are energy related adjudications in which especially technical considerations were under consideration.

<sup>89</sup> See *Moss v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 2010 WY 66, ¶ 43, 232 P.3d 1, 12 (Wyo. 2010).

<sup>90</sup> See *supra* note 74 and accompanying text.

<sup>91</sup> See 2 AM. JUR. 2D *Administrative Law* § 539 (1994).

<sup>92</sup> See *infra* notes 226–36 and accompanying text (noting the standard is also used in Missouri, but has been significantly judicially limited).

<sup>93</sup> *Burke v. Coleman*, 202 S.W.2d 809, 811 (Mo. 1947).

<sup>94</sup> *Cent. R.R. Co. of N.J. v. Dep’t of Pub. Utils.*, 81 A.2d 162, 168 (N.J. 1951).

<sup>95</sup> *Burke*, 202 S.W.2d at 810.

contrary to the overwhelming weight of the evidence.”<sup>96</sup> *Burke* cited to a case interpreting a 1946 Missouri revision of the state administrative code meant to be consistent with the federal Administrative Procedure Act and to *broaden* the scope of judicial review of administrative factual findings.<sup>97</sup> The case to which *Burke* cited, *Wood v. Wagner Electric Corp.*, provided *no* legal source for the invocation of the “clearly contrary to the overwhelming weight of the evidence” phraseology during its discussion of the appropriate review of administrative findings.<sup>98</sup> Thus, the Missouri standard was originally on very infirm ground.<sup>99</sup>

*Central R. Co. of New Jersey*, the New Jersey case cited by the 1962 encyclopedia,<sup>100</sup> was a rate-setting case in which two railroads appealed a decision of the New Jersey Board of Public Utility Commissioners not to deny a requested rate increase in favor of a rate that was thought fair to the public but adequate to the railroads.<sup>101</sup> The 1962 encyclopedia’s citation of this case to support the “clearly contrary to the overwhelming weight of the evidence” formulation is truly bewildering because the case concerned the involved court’s jurisdiction and not a standard of review.<sup>102</sup> The dusty decision stated the court had inherent power to

<sup>96</sup> *Id.* at 811.

<sup>97</sup> *Wood v. Wagner Elec. Corp.*, 197 S.W.2d 647, 649 (Mo. 1946) (emphasis added). The case also has a state constitutional dimension that will be more fully discussed. *See infra* notes 226–36 and accompanying text.

<sup>98</sup> *Wood*, 197 S.W.2d at 649.

<sup>99</sup> For expanded discussion of developments in Missouri, *see infra* notes 226–36 and accompanying text.

<sup>100</sup> *See supra* note 74 and accompanying text.

<sup>101</sup> *Cent. R.R. Co. of N.J. v. Dep’t of Pub. Utils.*, 81 A.2d 162, 163–64 (N.J. 1951).

<sup>102</sup> *Id.* at 168. The passage upon which the encyclopedia apparently relied states:

Although the legislature has expressed that orders of the Board are not to be set aside unless there was no evidence before the Board to support the same reasonably . . . , it is established that if such legislative suggestion were a limitation upon a court constitutionally exercising the powers formerly exerted through the medium of prerogative writs, the statute would be repugnant to the Constitution. The statute now incorporated . . . , was enacted at a time when the former Supreme Court was in existence and exercised ancient inherent jurisdiction over prerogative writs. That court . . . said [in 1913]: ‘ . . . We are given jurisdiction to set aside the order of the commissioners when it clearly appears that there was no evidence before the board to support reasonably such order or that the same was without the jurisdiction of the board. On its face this section confers jurisdiction upon this court, but a jurisdiction of a limited character, only to be exercised when it clearly appears that there is no evidence before the board to support their order, or where the order is without their jurisdiction. If this language is taken literally, we should be powerless in any case within the jurisdiction of the board to set aside its order if there was any evidence to support it, no matter how overwhelming the evidence to the contrary might be. It is needless to say that such a literal construction of section 38 would bring it into conflict with our constitution. It needs no act of the legislature to confer on us the power to review the action of an inferior tribunal, and the legislature cannot limit us in the exercise of our ancient prerogative.’

review agency decisions supported by *no* evidence or concerning which there was overwhelming evidence contrary to the Board's position whatever the legislature had to say about the matter.<sup>103</sup> The original statement was necessary because the statute explicitly recited that courts were without authority to review a decision of the Board supported by *any* evidence.<sup>104</sup> The *Central R. Co. of New Jersey* court restated this proposition because the "no evidence" language remained in the statute despite the intervening decades.<sup>105</sup> This was, however, a jurisdictional question respecting the *reviewability* of the Board's activity, and the encyclopedia erroneously cited the case as an exemplar of the *quantum* of evidence necessary to sustain an agency's factual determinations.<sup>106</sup> Once the *Central R. Co. of New Jersey* court concluded that it possessed jurisdiction to review, it cited cases emphasizing the necessity that rate setting be reasonable, and invoked *Universal Camera Corp. v. N.L.R.B.* in the course of its discussion.<sup>107</sup> The tenor of the opinion is steeped in whole-record review and well-removed from the idea that an agency's decision must necessarily be upheld unless "clearly contrary to the overwhelming weight of the evidence."<sup>108</sup>

#### D. Consequence

Accordingly, the "overwhelming weight" formulation of substantial evidence was an unsupportable creation of the 1962 Administrative Law American Jurisprudence encyclopedia, which cited one case which seemed to pull the standard from thin air (*Burke*),<sup>109</sup> and another that borrowed the standard inattentively from an ancient New Jersey case (*Central R. Co. of New Jersey*).<sup>110</sup> The standard was *never* an expression of "substantial evidence." One may wish to contend either that the policy of the formulation is sound or that it should be maintained for reasons of *stare decisis*. Before addressing those arguments, the article will proceed to a more general discussion of substantial evidence and its

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 168–69. As will soon be developed, *Universal Camera* stands in "spiritual" opposition to excessively deferential review by courts of agency fact finding. See *infra* notes 129–49 and accompanying text.

<sup>108</sup> *Cent. R.R. Co. of N.J.*, 81 A.2d at 168–69 ("It is now firmly settled in our system of jurisprudence that there must be sufficient or substantial competent and relevant evidence to support the findings of fact and reasonableness of the rates established by the Board.") (citations omitted).

<sup>109</sup> See *supra* notes 95–99 and accompanying text.

<sup>110</sup> See *supra* notes 100–08 and accompanying text.

relationship to the United States Supreme Court's *Universal Camera* opinion, which discussed substantial evidence within the confines of the judicial review provisions of the Administrative Procedure and Taft-Hartley Acts.<sup>111</sup> It is through that prism that one can better consider the extent to which the "overwhelming weight" formulation departs from now traditional notions of substantial evidence. As the article will show in the course of the ensuing discussion, the "overwhelming weight" formulation bears strong resemblance to a version of judicial review specifically rejected during legislative deliberations over the Administrative Procedure Act in 1946.<sup>112</sup> In other words, not only is the "overwhelming weight" formulation *not* a substantial evidence standard, at the time of the enactment of the federal Administrative Procedure Act policy makers and courts saw it as a narrower *alternative* to substantial evidence.<sup>113</sup>

### III. THE RELATIONSHIP OF THE SUBSTANTIAL EVIDENCE STANDARD TO THE ADMINISTRATIVE PROCEDURE AND TAFT-HARTLEY ACTS

Having established the origins of the "overwhelming weight" standard in Part II, the next Part explains that the historical origins of substantial evidence are steeped in a political reaction to what was widely perceived in the late 1930s as an unacceptably relaxed standard of review.<sup>114</sup> As the first section of the Part reveals, *Spiegel* appeared to either misunderstand or underappreciate this history.<sup>115</sup> The Part moves from exposition of that historical underappreciation to a fuller explanation of the historical origins of the substantial evidence rule, which leads, by way of *Universal Camera*, directly to an understanding of substantial evidence paralleling "whole record review."<sup>116</sup>

#### A. *Spiegel's* Canvassing of Substantial Evidence Law

It is instructive to recall the authorities upon which *Spiegel* relied when attempting to clarify the Wyoming substantial evidence standard.<sup>117</sup> The earliest Wyoming case cited was from 1950, *Howard v. Lindmier*, which said of substantial evidence that "it does not include the idea of weight of evidence, although it is more than a mere scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>118</sup> For that proposition,

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<sup>111</sup> See *infra* notes 114–49 and accompanying text.

<sup>112</sup> See *infra* notes 114–49 and accompanying text.

<sup>113</sup> See *infra* notes 114–49 and accompanying text.

<sup>114</sup> See *infra* notes 115–49 and accompanying text.

<sup>115</sup> See *infra* notes 117–28 and accompanying text.

<sup>116</sup> See *infra* notes 129–49 and accompanying text.

<sup>117</sup> See *supra* notes 62–89 and accompanying text.

<sup>118</sup> *Howard v. Lindmier*, 214 P.2d 737, 740 (Wyo. 1950).

*Lindmier* cited a Wisconsin case,<sup>119</sup> which in turn cited a decision of the National Labor Relations Board.<sup>120</sup> The other two Wyoming cases *Spiegel* cited for authority on substantial evidence relied squarely upon *Lindmier*.<sup>121</sup> Thus, there is a direct line from Wyoming substantial evidence law, as of 1950, to the substantial evidence cases decided under the National Labor Relations Act.

*Spiegel* also went beyond Wyoming law on the substantial evidence question. Aside from the encyclopedia<sup>122</sup>, *Spiegel* cited Pennsylvania authority resting on a 1940s-era case, *Pennsylvania State Board of Medical Education and Licensure v. Schireson*.<sup>123</sup> *Schireson* involved the revocation of a medical license.<sup>124</sup> In reversing the State Board of Medical Education and Licensure's decision to revoke Schireson's license, the Pennsylvania Supreme Court defined substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>125</sup> The *Schireson* court relied on National Labor Relations Act case law for this formulation of substantial evidence, citing a case upon which *Spiegel* itself relied,<sup>126</sup> *Consolidated Edison Co. of New York v. National Labor Relations Board*.<sup>127</sup>

In sum, *Spiegel*'s discussion of substantial evidence was either based on a non-existent substantial evidence standard, or on substantial evidence as defined in Supreme Court cases analyzing the substantial evidence standard as applied to the National Labor Relations Board's decisions.<sup>128</sup> The history of the judicial review of factual findings under the National Labor Relations Act is complicated. To properly contextualize this NLRA authority, upon which *Spiegel* relied, the next section discusses that history.

### B. Reaction to Wagner Act Judicial Review

In *Universal Camera Corp. v. N.L.R.B.*,<sup>129</sup> "the [U.S. Supreme] Court decided that the judicial review provisions of the Administrative Procedure

<sup>119</sup> *Gateway City Transfer Co. v. Pub. Serv. Comm'n*, 34 N.W.2d 238, 242 (Wis. 1948).

<sup>120</sup> *Id.* at 242 (citing *Washington Va. & Md. Coach Co. v. N.L.R.B.*, 301 U.S. 142 (1937)).

<sup>121</sup> *Rayburne v. Queen*, 326 P.2d 1108, 1109 (Wyo. 1958); *J. Ray McDermott & Co. v. Hudson*, 348 P.2d 73, 76 (Wyo. 1960).

<sup>122</sup> See *supra* notes 62–113 and accompanying text.

<sup>123</sup> *Bd. of Trs. v. Spiegel*, 549 P.2d 1161, 1178 (Wyo. 1976) (citing *Pa. State Bd. of Med. Educ. & Licensure v. Schireson*, 61 A.2d 343 (Pa. 1948)).

<sup>124</sup> *Schireson*, 61 A.2d at 344–45.

<sup>125</sup> *Id.* at 346.

<sup>126</sup> *Spiegel*, 549 P.2d at 1178.

<sup>127</sup> *Consol. Edison Co. of N.Y. v. N.L.R.B.*, 305 U.S. 197 (1938).

<sup>128</sup> See *supra* notes 90–113 and accompanying text.

<sup>129</sup> *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487–91, 494 (1951).

and Taft-Hartley Acts were identical in meaning, the legislative history of both Acts indicated the same purpose behind these provisions, and these statutes had broadened the scope of judicial review.”<sup>130</sup> In this context, “broadening” meant affording courts greater latitude to review and, if necessary, reverse decisions of the National Labor Relations Board. Justice Frankfurter, the author of *Universal Camera*, wrote:

... [T]he requirement for canvassing ‘the whole record’ in order to ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence. Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.<sup>131</sup>

Prior to the enactment of the Taft-Hartley Act in 1946, which was a second, updated version of the National Labor Relations Act<sup>132</sup>, the 1935 Wagner Act stated in Section 10(e): “the findings of the Board as to the facts ‘if supported by evidence, shall be conclusive.”<sup>133</sup> While some federal circuit courts may have been providing something like what became “whole record review,”<sup>134</sup> others were apparently not doing so, and there was a “mood” to reform judicial review of

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<sup>130</sup> Louis L. Jaffe, *Judicial Review: “Substantial Evidence on the Whole Record,”* 64 HARV. L. REV. 1233, 1233–34 (1951) [hereinafter *Substantial Evidence*]. Professor Louis Jaffe, a Harvard Law School professor specializing in administrative law, was a keen and sophisticated contemporary observer of what became a reaction against the obviously extremely deferential “if supported by evidence” standard. *See id.*

<sup>131</sup> *Universal Camera Corp.*, 340 U.S. at 488.

<sup>132</sup> The first version of the National Labor Relations Act is commonly known as the “Wagner Act,” after its strong proponent in the U.S. Senate, Robert F. Wagner of New York. *See generally* PAUL M. SECUNDA, JEFFREY M. HIRSCH & MICHAEL C. DUFF, *LABOR LAW 19–21* (Carolina Academic Press 2017).

<sup>133</sup> *N.L.R.B. v. Link-Belt*, 311 U.S. 584, 586 (1941); *see also* *N.L.R.B. v. Waterman S.S. Corp.*, 309 U.S. 206 (1940).

<sup>134</sup> *Universal Camera Corp.*, 340 U.S. at 490.

administrative agencies.<sup>135</sup> Well, perhaps somewhat more than a mood, for in 1939 the Walter-Logan Bill was passed,<sup>136</sup> though vetoed by Franklin Roosevelt.<sup>137</sup>

Walter-Logan was essentially a protest against the operations of newly-minted New Deal administrative agencies, and, despite the Walter-Logan veto, Roosevelt, at the suggestion of the Attorney General and others, appointed an expert committee to study administrative practices and procedures.<sup>138</sup> The Report of the Committee generated a “minority report,”<sup>139</sup> which reflected the views of committee participants wishing to make alternative proposals to Congress regarding proposed changes to administrative law.<sup>140</sup> The minority position on the standard of review held that “courts should set aside decisions *clearly* contrary to the *manifest* weight of evidence. Otherwise, important litigated issues of fact are in effect conclusively determined in administrative decisions based upon palpable error.”<sup>141</sup> This formulation of judicial review is obviously very similar to the Wyoming “overwhelming weight of the evidence” articulation. But the minority report originally proposed the “manifest weight” standard as an *alternative* to substantial evidence, not an explication of it.<sup>142</sup>

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<sup>135</sup> *Id.* at 487.

It is fair to say that in all this Congress expressed a mood. And it expressed its mood not merely by oratory but by legislation. As legislation that mood must be respected, even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of applications. Enforcement of such broad standards implies subtlety of mind and solidity of judgment. But it is not for us to question that Congress may assume such qualities in the federal judiciary.

*Id.*

<sup>136</sup> Note, *Final Report: Attorney General's Committee on Administrative Procedures*, 16 IND. L.J. 541 (1941).

<sup>137</sup> Jaffe, *Substantial Evidence*, *supra* note 130 at 1236; *Universal Camera Corp.* at 479–80.

<sup>138</sup> Louis J. Jaffe, *The Report of the Attorney General's Committee on Administrative Procedure*, 8 U. CHI. L. REV. 401, 402 (1941).

<sup>139</sup> *Id.* n.4.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 435 (citing Minority Report at 211).

<sup>142</sup> In similar vein, the House version of Taft-Hartley:

provided that the ‘findings of the Board as to the facts shall be conclusive unless it is made to appear to the satisfaction of the court either (1) that the findings of fact are against the manifest weight of the evidence, or (2) that the findings of fact are not supported by substantial evidence.’ The bill left the House with this provision. Early committee prints in the Senate provided for review by ‘weight of the evidence’ or ‘clearly erroneous’ standards. But, as the Senate Committee Report relates, ‘it was finally decided to conform the statute to the corresponding section of the Administrative Procedure Act where the substantial evidence test prevails.

*Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 484 (1951) (internal citations omitted).

These observations demonstrate substantial evidence, as a standard of judicial review, was developed as a compromise by those who wished to defend agency action against allegations that courts were simply rubber-stamping agency action, especially adjudications under the Wagner Act. *Universal Camera* explained:

The adoption in [the Taft-Hartley and Administrative Procedure Acts] of the judicially-constructed ‘substantial evidence’ test was a response to pressures for stricter and more uniform practice, not a reflection of approval of all existing practices. To find the change so elusive that it cannot be precisely defined does not mean it may be ignored. We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.<sup>143</sup>

Fearing that the substantial evidence standard still prevented effective judicial review, dissenters from the compromise initially offered standards like “clearly contrary to the manifest weight of the evidence” to *broaden* judicial review of agency fact-finding.<sup>144</sup> Admittedly, there is some confusion in the verbal formulae: the Walter-Logan Protesters used phrases like “clearly contrary to the manifest weight” because they believed the substantial evidence standard was *de facto* an “any evidence” standard.<sup>145</sup> This article, of course, argues that the “overwhelming weight” standard has been utilized by Wyoming courts to prevent, not facilitate, more intrusive judicial review of agency fact-finding.

Ultimately, the Wyoming courts have unwittingly borrowed an *antithesis* to traditional “substantial evidence” review because a 1962 American Jurisprudence encyclopedia inattentively failed to analyze the standards of review it cited.<sup>146</sup> A decade after the Attorney General’s report discussed above,<sup>147</sup> the Supreme Court, in *Universal Camera*, provided a durable theoretical foundation for broadened judicial review.<sup>148</sup> Nevertheless, the notion that the decision of an administrative

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<sup>143</sup> *Universal Camera Corp.*, 340 U.S. at 490.

<sup>144</sup> See *supra* note 141 and accompanying text.

<sup>145</sup> See *supra* note 141 and accompanying text.

<sup>146</sup> See *supra* notes 93–94 and accompanying text.

<sup>147</sup> See *supra* notes 107–41 and accompanying text.

<sup>148</sup> *Universal Camera Corp.*, 340 U.S. at 477:

Even though the whole record may have been canvassed in order to determine whether the evidentiary foundation of a determination by the Board was ‘substantial,’ the phrasing of this Court’s process of review readily lent itself to the notion that it was enough that the evidence supporting the Board’s result

agency should be upheld if “supported by evidence” proved surprisingly durable, a point that will be explored in the next Part.<sup>149</sup>

#### IV. EXPERTISE AS RATIONALE: WHITHER DEFERENCE?

Part III historically contextualized “substantial evidence” as a reaction to the perceived rubber-stamping of early New Deal administrative agency fact-finding.<sup>150</sup> The next Part considers the question of deference in fact-finding more generally.<sup>151</sup> First, the Part suggests that minimal scrutiny of fact-finding may be attributed to legislative confidence in the reliability of expert administrative bodies operating in specialized factual areas.<sup>152</sup> The Part moves on to observe that Wyoming workers’ compensation administrative fact-finders are relatively unspecialized, creating tension with the expertise justification for deference.<sup>153</sup> The Part next acknowledges, however, that some jurisdictions have elected to subject administrative fact-finding to minimal scrutiny by maintaining “any evidence” standards of review.<sup>154</sup> The Part concludes by discussing Missouri as an analogy to Wyoming.<sup>155</sup> While possessing an “overwhelming weight” standard similar to Wyoming’s, the Missouri experience suggests, in context, that the standard was meant to enlarge, rather than to restrict, the scope of judicial review of administrative agencies.<sup>156</sup> Missouri courts have now made it reasonably clear that, notwithstanding the highly deferential review implied by the language of the “overwhelming weight” standard, Missouri in practice applies whole-record, substantial evidence review.<sup>157</sup>

##### A. “Supported by Evidence”: Trust in Expertise?

It might be wondered why a legislature could be content with a standard of review requiring courts to uphold agency actions merely “supported by evidence.” Courts generally understand that administrative agencies have special competence and expertise to make factual determinations in specialized, technical areas of

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was ‘substantial’ when considered by itself. If is fair to say that by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board’s findings.

<sup>149</sup> See *infra* notes 212–25 and accompanying text.

<sup>150</sup> See *supra* notes 114–49 and accompanying text.

<sup>151</sup> See *infra* notes 152–236 and accompanying text.

<sup>152</sup> See *infra* notes 158–80 and accompanying text.

<sup>153</sup> See *infra* notes 181–211 and accompanying text.

<sup>154</sup> See *infra* notes 212–25 and accompanying text.

<sup>155</sup> See *infra* notes 226–36 and accompanying text.

<sup>156</sup> See *infra* notes 234–36 and accompanying text.

<sup>157</sup> See *infra* notes 234–36 and accompanying text.

law under the agencies' organic statutes.<sup>158</sup> In *Brown*, for example, the Wyoming Supreme Court stated, “[w]e have indicated we defer to the *experience* and *expertise* of the agency in its weighing of the evidence and will disturb its decisions only where it is clearly contrary to the overwhelming weight of the evidence on record.”<sup>159</sup> One of the most consistently advanced reasons for courts deferring to administrative agencies' fact-finding centers on agency expertise.<sup>160</sup> The judicial rationale for qualifying an agency as “expert” is not, however, always clear. As a commentator from the 1940s once observed:<sup>161</sup>

. . . [B]efore we can treat an expert as an expert we must be sure of two things: First, the subject matter as to which he expresses his opinion must be one with respect to which there is conceded to be a specialized body of knowledge which can be acquired only by study and training, and which is not possessed by the ordinary run of men; Second, the knowledge must be knowledge in a substantial sense. That is to say, there must be some reasonably objective standard of certainty. Absent this, there is, of course, no way in the world of knowing whether the expert has any idea what he is talking about. A physician is taken on faith because it is known from experience that his judgments are susceptible of being tested and it is assumed in the given case that they have been tested and their validity indicated. An engineer is taken on faith because he deals with matters of physics, which is among the exact sciences. But no one takes on faith, except upon a frankly gambling basis, an asserted “market expert” who professes to be able to predict security prices. The contrast between the market expert and the engineer is plain. The market expert has no reasonably objective standard of certainty.<sup>162</sup>

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<sup>158</sup> Emily Hammond Mezell, *Super Deference, the Science Obsession, and Judicial Review as Translation of Agency Science*, 109 MICH. L. REV. 733, 756 (2011) (“Coming on the heels of the *Lochner* era, the post-New Deal period reflected an expertise model of administrative law. There was, at this time, great faith in the ‘ability of experts to develop effective solutions to the economic disruptions created by a market system.’ Indeed, economic regulations were the most common, such as those governing ratemaking by railroads and utilities. Judicial review was characterized by great deference on account of the agencies’ expertise.”) (internal citations omitted).

<sup>159</sup> *State ex rel. Wyo. Workers’ Comp. Div. v. Brown*, 805 P.2d 830, 833 (Wyo. 1991) (citing *Sw. Wyo. Rehab. Ctr. v. Emp’t Sec. Comm’n of Wyo.*, 781 P.2d 918, 921 (Wyo. 1989); *Cody Gas Co. v. Pub. Serv. Comm’n of Wyo.*, 748 P.2d 1144, 1146 (Wyo.1988)).

<sup>160</sup> See Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 740 (2002) (discussing the Court’s veneration of agency expertise as a basis for judicial deference to agency “work product” in *SEC v. Chenery Corp.*, 332 U.S. 194, 209 (1947)).

<sup>161</sup> William J. Butler, *The Rising Tide of Expertise*, 15 FORDHAM L. REV. 19, 23 (1946).

<sup>162</sup> *Id.* at 34.

Within the realm of workers' compensation, one could reasonably expect an agency to have expertise with respect to certain aspects of working conditions and workplace hazards, or to common patterns of causation, or to the extent of a worker's incapacity. It is not, however, as easy to see why an agency should be afforded deference with respect to, for example, non-demeanor credibility determinations. A demeanor-based credibility determination, of course, involves no more than an assessment of whether a witness is "telling the truth" in connection with a particular, relevant fact. It is similar to the kind of finding that trial courts routinely make, and a court is reluctant to disturb such a credibility determination.<sup>163</sup> A non-demeanor credibility determination, on the other hand, involves not merely a determination as to whether, in context and based on demeanor, a witness is telling the truth, but also whether the testimony is logical and internally consistent.<sup>164</sup> It is at least arguable that conclusions as to the logic and consistency of testimony can be made as well, and perhaps better, from outside the realm of expertise.<sup>165</sup> The expert is no doubt the master of her field.<sup>166</sup> But her conclusions are, in a sense, limited by the perspective of her field.<sup>167</sup>

Another qualification which the judgment of the expert must have is that it be addressed to a problem which is solvable within his own field. Thus, the physician is no expert when he advocates euthanasia. Nor is the engineer an expert on the question whether a tunnel between Staten Island and Long Island is desirable.

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<sup>163</sup> James P. Timony, *Demeanor Credibility*, 49 CATH. U. L. REV. 903, 917 (2000) ("The Anglo-American legal system, evolving out of the common law, generally requires live testimony by the witness to allow the fact-finder to observe the demeanor and to assess the witness's credibility.").

<sup>164</sup> Judge Frank once explained the distinction in a civil case reviewed in the Second Circuit:

We accept, as we must, those of the trial judge's inferences of fact which he drew directly from his estimates of the credibility of witnesses whom he observed as they testified in his presence- i.e., his inferences (sometimes called 'testimonial inferences') that certain facts existed because he believed some witness or witnesses who testified before him that those facts did exist. We are not required, however, to accept a trial judge's findings, based not on facts to which a witness testified orally, but only on secondary or derivative inferences from the facts which the trial judge directly inferred from such testimony. We may disregard such a finding of facts thus derivatively inferred, if other rational derivative inferences are open. And we must disregard such a finding when the derivative inference either is not rational or has but a flimsy foundation in the testimony.

*Am. Tobacco Co. v. The Katingo Hadjipatera*, 194 F.2d 449, 451 (2nd. Cir. 1951). In the context of administrative agency review, it seems equally unjustified for courts to unflinchingly defer to derivative inferences.

<sup>165</sup> See Lynn McClain, *Fact, Fiction and Proof in the 21st Century: Evidence and Credibility for Fact Finding By Administrative Law Judges*, NAALJ ANNUAL CONFERENCE, Oct. 7, 2007, at 10-12, [http://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1881&context=all\\_fac](http://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1881&context=all_fac) (discussing the willingness of appellate bodies to review factual findings based on the coherence of witness testimony).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

No one doubts that the question involves some problems of engineering, but it cannot be answered without solving a host of problems about which the engineer knows no more than the ordinary citizen.<sup>168</sup>

Surprisingly, very little empirical work has been done to investigate whether the “expertise hypothesis” is true.<sup>169</sup> The reality is that, since the 1970s, there has been increased public skepticism about the actual existence of agency expertise.<sup>170</sup> One commentator described this skepticism as being a function of three factors: the natural distrust of the American public of the whole idea of elite experts running the government,<sup>171</sup> “a public perception that administrative agencies are in fact something less than expert,”<sup>172</sup> and the possibility “that many Americans have come to believe that a technical expertise is neither adequate nor appropriate for the resolution of significant questions of public policy of the kind that [legislatures] ha[ve] delegated regularly to administrative agencies.”<sup>173</sup> Although there is a historical understanding that non-expert generalists, and not specialists, staff the upper echelons of agencies:<sup>174</sup>

[T]he continuing expertness of an administrative agency as to matters of technical substance can be more properly understood as deriving primarily from its staff, and not from the shifting membership of those who temporarily serve as commissioners. It is, indeed, the experience and specialization of a large and dedicated staff that has permitted agencies to channel the diverse expertise of many individuals into the process of institutional decision-making—one of the unique contributions of the modern administrative process.<sup>175</sup>

Thus, lower-level staff specialists are the actual accumulators of experience and:

“[C]umulative experience” begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error,

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<sup>168</sup> *Id.* at 35. Similarly, why should Wyoming’s Medical Commission be deemed an “expert” in connection with assessing whether a claimant is “really” looking for work? See *infra* notes 181–211 and accompanying text.

<sup>169</sup> Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges: Some Preliminary Evidence from the Federal Trade Commission*, 1 JOURNAL OF ANTITRUST ENFORCEMENT 82, 88 (2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1990034](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990034).

<sup>170</sup> James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN L. REV. 363, 367–69 (1976).

<sup>171</sup> *Id.* at 369–70.

<sup>172</sup> *Id.* at 370–72.

<sup>173</sup> *Id.* at 372–74.

<sup>174</sup> *Id.* at 376.

<sup>175</sup> *Id.*

on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process.<sup>176</sup>

Of course, upper-level generalists have their part to play. “Thus, those who point to the absence of a technical expertise in agency members may actually be directing attention to an expertise of a different kind—an expertise in the art of skepticism about expertise, a competence in the worldly art of the politically acceptable and socially wise.”<sup>177</sup> But to say experts should be balanced with generalists does not mean that experts should be dispensed with altogether, for nothing then remains of the original justification for court deferral to the factual determinations of administrative agencies. In the end, legislatures likely assent to minimal judicial scrutiny of agencies because they think agencies will get “it” right, or are at least more likely to get “it” right than judges.<sup>178</sup> This observation introduces the difficulty inherent in *de facto* non-expert decision making. Suppose neither the upper echelons of an administrative structure nor the staff level of the agency are experts because there is not the kind of “continuing expertness”<sup>179</sup> or “specialization of a large and dedicated staff” that has come to characterize the kind of administrative decision making to which, at least in theory, judicial deference is owed.<sup>180</sup>

### B. *Non-Expert Decision Making*

In addition to the previous section’s analysis regarding limitations in the assumptions *about* expertise, it is also not always clear to *what portions or components of an agency* a court is *affording* deference. In the workers’ compensation context, for example, courts may potentially defer to fact experts—say, claims processors, state average wage calculators, or benefit rate-setters; or to policy generalists—say, agency heads (whether setting policy through rule making or adjudication). Moreover, it is often not clear whether courts are deferring to actual fact-finding, or to what in reality are mixed questions of fact and law.<sup>181</sup>

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<sup>176</sup> N.L.R.B. v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344, 349 (1952).

<sup>177</sup> Freedman, *supra* note 170, at 377.

<sup>178</sup> The best example of this intuition is when agencies are making findings “on the frontiers of scientific knowledge.” See *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (deferring to Nuclear Regulatory Commission on licensure of nuclear power plants); *Indus. Union Dep’t., AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 656 (1980) (deferring to OSHA on question of industrial carcinogens).

<sup>179</sup> See *supra* notes 158–78 and accompanying text.

<sup>180</sup> See *supra* notes 158–78 and accompanying text.

<sup>181</sup> See, e.g., *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 182 (1971) (finding that when the National Labor Relations Board’s holding in a case “depends on the application of law to facts, and the legal standard to be applied is ultimately for the courts to decide and enforce.”). As Professor Mark Tushnet noted, the line between facts and law has been a hazy one since the inception of the administrative state:

In the traditional administrative structure involving implementation of workers' compensation law and policy, implementation is more or less continuous.<sup>182</sup> Minor officials make preliminary claims determinations and, subsequently, higher officials and administrative adjudicators oversee those decisions as part of a group effort.<sup>183</sup> A great deal of closely and explicitly coordinated workers' compensation-related effort goes exclusively into what is perceived as a unitary administrative determination of claims eligibility or ineligibility.<sup>184</sup> Small wonder that the judiciary may be reluctant to disturb decision making resulting from this kind of coordinated (and presumably self-correcting) effort, particularly where an agency has been doing much the same kind of work for a long period of time.<sup>185</sup>

The conceptual difficulty with affording the Wyoming workers' compensation administrative system judicial deference is that agency activity therein often does not closely resemble sustained, specialized agency action—especially prior

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. . . [A]s John Dickinson had urged in his 1927 treatise on administrative law, the distinction between facts and law was vague, and drawing it inevitably implicated the very policy questions that Progressive theorists believed the agencies themselves should decide. For Dickinson, it was impossible “to establish a clear line between so-called ‘questions of law’ and ‘questions of fact’ by any substantive test of definition.” Rather, “[A]ny factual state or relation which the courts . . . regard as sufficiently important to be made decisive for all subsequent cases of similar character becomes thereby a matter of law . . .” Administrative agencies applied general standards to “bridge[] th[e] gap” between “the special subsidiary facts . . . and the ultimate conclusion.”

MARK TUSHNET, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L. J. 1565, 1585 (2011) (quoting JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 312, 315 (1927)).

<sup>182</sup> See, e.g., 452 MASS. CODE REGS. 1.00 (2017) *et seq.* (Adjudicatory Rules of the Industrial Accident Board).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Something of this principle was captured in the U.S. Supreme Court's opinion in *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947). There, the Court upheld a disapproval by the Securities and Exchange Commission of a reorganization plan that would permit management to trade in certain securities during the reorganization. *Id.* In response to the argument, that neither the relevant statute nor an agency rule precluded such trading, the Court said:

Drawing upon its experience, the Commission indicated that [the] normal and special powers of the holding company management during the course of a . . . reorganization placed in the management's command 'a formidable battery of devices that would enable it, if it should choose to use them selfishly, to affect in material degree the ultimate allocation of new securities among the various existing classes, to influence the market for its own gain and to manipulate or obstruct the reorganization required by the mandate of the statute.'

*Id.* at 204. Among the reasons cited by the Court for permitting such an outcome was that “the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule.” *Id.* at 203. Thus, a rational decision based solely on agency expertise may be permissible and even necessary. *Id.*

to a dispute ripening to a “contested case,”<sup>186</sup> but even thereafter.<sup>187</sup> One might conceive of the system as “intermittently” administrative. The Division of Workers’ Compensation, for example, is a relatively recent creation under Wyoming law. It was not until the mid-1980s that the Wyoming legislature conferred on the Division partial centralized control of claims processing. The centralization of claims processing in the Division was not accomplished until 1996.<sup>188</sup>

Either hearing officers of the Office of Administrative Hearings (OAH)<sup>189</sup> or the Medical Commission hear contested cases.<sup>190</sup> OAH hearing officers issue decisions in workers’ compensation, drivers’ license, Department of Family Services’ child abuse/neglect central registry, and state employee personnel cases.<sup>191</sup> In addition, OAH Hearing Officers have heard cases referred by Professional Licensing Boards, the Departments of Agriculture, Education, Environmental Quality, Family Services, Game and Fish, Health, Revenue, Transportation, and Workforce Services.<sup>192</sup> In Fiscal Year 2016, OAH handled nearly twice as many drivers’ license hearings as workers’ compensation hearings.<sup>193</sup> In sum, it is very difficult to escape the conclusion that the OAH is something less than an “expert” administrative agency.<sup>194</sup> Strictly speaking, it is not even a workers’ compensation agency.<sup>195</sup>

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<sup>186</sup> Under Wyoming law, a contested case is defined as “a proceeding including but not restricted to ratemaking, price fixing and licensing, in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing . . . .” WYO. STAT. ANN. § 16-3-101(b)(ii) (2017).

<sup>187</sup> The Office of Administrative Hearings is by statute an independent agency and not statutorily limited to hearing workers’ compensation cases. *See* WYO. STAT. ANN. § 27-14-602(a) (2017) (the Wyoming workers’ compensation statute) (referencing WYO. STAT. ANN. § 9-2-2201(a) (2017) (“The office of administrative hearings is created as a separate operating agency . . . .”).

<sup>188</sup> George Santini, *The Breaking of a Compromise: An Analysis of Wyoming Workers’ Compensation Legislation, 1986-1997*, 33 LAND & WATER L. REV. 489, 517 (1998) (citing 1996 Wyo. Sess. Laws ch. 82, § 4); *see also* WYO. STAT. ANN. § 27-14-802 (Michie 1997).

<sup>189</sup> *See* WYO. STAT. ANN. § 9-2-2201. Prior to the establishment of the OAH, cases were tried to independent hearing officers, and before that, directly to district court judges. *See Santini, supra* note 188, at 497–504.

<sup>190</sup> WYO. STAT. ANN. §§ 27-14-601–602, 27-14-616 (2017).

<sup>191</sup> *See* 2016 Wyo. Off. Admin. Hearing Ann. Rep. at 2, <http://oah.wyo.gov>; *see also* Santini, *supra* note 188, at 505 n.31.

<sup>192</sup> *See* 2016 Wyo. Off. Admin. Hearing Ann. Rep. at 2, <http://oah.wyo.gov>.

<sup>193</sup> *Id.*

<sup>194</sup> The agency has extremely limited resources, employing only six full-time and four part-time hearing officers as of 2016. *See id.*

<sup>195</sup> If the expertise discussion extends to the level of the Division of Wyoming Workers’ Compensation, matters become even murkier. Historically, a number of the Division’s functions have even been privatized. Santini, *supra* note 188, at 506. It is obviously difficult to speak of a court’s deferring to private entities. Nevertheless, the first enactment of the Wyoming Administrative Procedure Act, in Ch. 108 Session Laws of Wyoming, § 12(c)–(d) (1965) authorized the use by agencies of “Auxiliary Personnel,” presiding officers lent either by the Attorney General or other agencies. There is no indication in the legislative history whether questions of expertise were considered during the enactment of these provisions. *See* WYO. STAT. ANN. § 16-3-101 (2017) *et seq.*

The lack of focus militates against the notion of expertise. As commentators have noted:

[E]xpertness . . . springs only from that continuity of interest, that ability and desire to devote fifty-two weeks a year, year after year, *to a particular problem*. . . [T]he art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.<sup>196</sup>

The lack of any intermediate administrative review exacerbates the limitations of the OAH structure. Specialist appellate administrative review might help to rectify deficiencies in fact-finding by quasi-generalist workers' compensation hearing officers. However, decisions of the hearing officers are appealed to the Wyoming district courts,<sup>197</sup> which review agency fact-finding under the substantial evidence standard, which of course returns to the problem of what substantial evidence means.<sup>198</sup>

Deference to the findings of the Medical Commission presents a different kind of problem. There is no question that the Medical Commission possesses medical expertise.<sup>199</sup> The question is whether the findings of the Medical Commission should be afforded deference outside the arena of medical expertise.<sup>200</sup> The *Moss* case provides an excellent example of how medical findings can intrude on other kinds of determinations. The Commission believed the claimant was exaggerating his claims of pain.<sup>201</sup> But the Commission's *expertise* appears limited

<sup>196</sup> See Tushnet, *supra* note 181 (quoting JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 23–24 (1938)).

<sup>197</sup> WYO. STAT. ANN. § 27-14-612 (2017). Review by the Wyoming Supreme Court of decisions of the district courts is *de novo*. *Dutcher v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 2010 WY 10, ¶ 9, 223 P.3d 559, 561 (Wyo. 2010); *Dale v. S & S Builders, LLC*, 2008 WY 84, ¶ 8, 188 P.3d 554, 557 (Wyo. 2008). The evidentiary review by the district court is under WYO. STAT. ANN. § 16-3-114(c)(2)(E) (2017) pursuant to Wyo. R. App. P. 12.09(a) (2017).

<sup>198</sup> WYO. STAT. ANN. § 16-3-114(c)(2)(E).

<sup>199</sup> Pursuant to WYO. STAT. ANN. § 27-14-616(a):

The medical commission is created to consist of eleven (11) health care providers appointed by the governor as follows:

- (i) Seven (7) licensed physicians appointed from a list of not less than fourteen (14) nominees submitted by the Wyoming Medical Society;
- (ii) Four (4) health care providers appointed from a list of not less than eight (8) nominees developed and submitted by appropriate health care provider groups selected by the director.

<sup>200</sup> See *supra* note 196 and accompanying text.

<sup>201</sup> See *Moss v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 2010 WY 66, ¶¶ 29–42, 232 P.3d 1, 9–11 (Wyo. 2010).

to an affirmation of the inability to establish a medical basis for a complaint of pain.<sup>202</sup> The additional inference that a claimant must, accordingly, be fabricating complaints of pain does not appear entitled to deference. Justice Kite's analysis revealed the limitations in affording a specialized body wide latitude in fact-finding beyond its domain of expertise. For this reason, referral to the original fact-finder is preferable to conferring overall final hearing authority on the Medical Commission.<sup>203</sup>

Thus, in Wyoming one has a lower level claims processing "Division" that is of relatively recent vintage; an Office of Administrative Hearings that is not exclusively devoted to workers' compensation matters; and a Medical Commission presumably intended to hear *medical* disputes, but which by statute is required to stray beyond that focused task to consider nonmedical issues in workers' compensation disputes.<sup>204</sup> The Wyoming courts may have no choice but to defer to decisions rendered by such a fractured administrative structure, but the "expertise theory" would be a difficult basis upon which to do so. The situation is reminiscent of the federal Occupational Safety and Health Act's split enforcement arrangement in which:

Congress separated enforcement and rulemaking powers from adjudicative powers, assigning these respective functions to two independent administrative authorities. The purpose of this 'split enforcement' structure was to achieve a greater separation of functions than exists within the traditional 'unitary' agency, which under the Administrative Procedure Act (APA) generally must divide enforcement and adjudication between separate personnel.<sup>205</sup>

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<sup>202</sup> Pursuant to WYO. STAT. ANN. § 27-14-616(b)(iv):

The division shall refer medically contested cases to the commission for hearing by a medical hearing panel. The decision to refer a contested case to the office of administrative hearings or a medical hearing panel established under this section shall not be subject to further administrative review. Following referral by the division, the hearing examiner or medical hearing panel shall have jurisdiction to hear and decide *all issues related to the written notice of objection* . . .

The Commission's mandate is not, accordingly, limited to ruling upon medical evidence. *See id.*

<sup>203</sup> The proposition has been well established in workers' compensation cases, in which medical evidence is supplied by parties, that an administrative agency may distinguish between medical facts and "the existence, causation or consequences of various injuries or diseases can rest upon something other than direct medical testimony," such as "the practical schooling that comes with years of handling similar cases." Larson, *supra* note 13, at § 128.01. The difficulty with a state medical administrative commission is that there is puzzling conflation between medical opinion and administrative fact-finding. *See id.* For this reason, all other states leave ultimate fact finding in the hands of the workers' compensation official, who is either permitted or required to accept only the purely medical findings of the independent medical fact finder. *Id.*; see also MICHAEL C. DUFF, WORKERS' COMPENSATION LAW 255–58 (Carolina Academic Press 2017).

<sup>204</sup> *See supra* note 202.

<sup>205</sup> Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 151 (1971).

Here, enforcement has been split three ways.<sup>206</sup> In *Martin Occupational Safety and Health Rev. Comm'n*,<sup>207</sup> the U.S. Supreme Court concluded that deference was due to the portion of the split agency, the non-adjudicative branch headed by the Secretary of Labor rather than the adjudicative branch called “the Commission,” because “Congress intended to delegate to the Commission the type of non-policy-making adjudicatory powers typically exercised by a court in the agency-review context.”<sup>208</sup> But in Wyoming, the Division’s Director possesses plenary workers’ compensation rulemaking authority;<sup>209</sup> the Medical Commission has a wide range of rulemaking powers;<sup>210</sup> and the Wyoming courts *de facto* afford the Office of Administrative Hearings and the Division of Workers’ Compensation—as this article argues—a form of hyper-deference. Unlike the situation under OSHA, in which the Secretary possessed historical familiarity and policymaking expertise, the workers’ compensation system has been in a state of considerable flux since its emergence from a court-based system in 1986.<sup>211</sup>

### C. “Any Evidence” Jurisdictions

Fact-finding not undertaken by experts may contain a variety of errors; but to the extent that a jurisdiction believes most such errors will be harmless, it may consciously eschew more modern developments and prefer to adopt a standard of review upholding agency decisions supported by *any* evidence. In the words of *Larson’s Treatise*, a widely-respected authority on workers’ compensation doctrine:

A finding of fact based on no evidence is an error of law. Accordingly, in compensation law, as in all administrative law, an award may be reversed if not supported by any evidence. Conversely, since the compensation Board has expressly been entrusted with the power to find the facts, its fact findings must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence points the other way. This statement is, without any close competition, the number one cliché of compensation law and occurs in some form in the first paragraph of compensation opinions almost as a matter of course.<sup>212</sup>

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<sup>206</sup> See *supra* notes 186–90 and accompanying text.

<sup>207</sup> *Martin*, 499 U.S. at 144.

<sup>208</sup> *Id.* at 154.

<sup>209</sup> WYO. STAT. ANN. § 27-14-802 (2017).

<sup>210</sup> See WYO. STAT. ANN. §§ 27-14-616(b)(i) (health care procedures and treatment), 616(b)(ii) (criteria for certification of temporary total disability), 616(b)(vi) (firefighter presumption procedures).

<sup>211</sup> *Martin*, 499 U.S. at 153.

<sup>212</sup> Larson, *supra* note 13, at § 130.01. The statement seems too sweeping. See *id.* To begin with, it would eclipse the substantial evidence rule in jurisdictions, applying it under traditional administrative law codes, which is the main point of this article. See *id.*

There are two problems worth mentioning regarding this formulation, one a logical problem and the second a historical problem. First, as a matter of logic, it does not follow that because a decision based on no evidence is unsupportable, a decision based on any evidence is supportable. Furthermore, the illogic of the proposition dovetails into the second historical problem. As previously discussed, the general, historical movement in administrative law has been in exactly the opposite direction: *any evidence* (similar to the “supported by evidence” standard in the prior Wagner Act) is not enough.<sup>213</sup> Courts have, as a matter of conscience, chosen not to uphold agency decisions that cannot be upheld on review of the whole record.<sup>214</sup>

A jurisdiction could, of course, *deliberately* choose to follow a different course. A state might purposefully render it “permissible for courts to determine the substantiality of evidence supporting [an administrative agency] decision merely on the basis of evidence which, in and of itself, justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn . . .”, whatever one might think of the idea on policy grounds.<sup>215</sup> *Larson’s Treatise* nevertheless seems mistaken when it equates the evidentiary phrases “any evidence,” “some evidence,” “any credible evidence,” “substantial evidence,” and “supported by evidence . . .”.<sup>216</sup> Certainly an “any evidence” standard, apparently embraced by Georgia and perhaps others, would suggest a legislative determination that the smallest conceivable positive quantum of evidence be permitted to support an administrative, workers’

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<sup>213</sup> See *supra* notes 114–49 and accompanying text.

<sup>214</sup> As Justice Frankfurter recounted in *Universal Camera*, the legislative history of, in particular, the Taft-Hartley Act, made clear that courts were expected to exercise their conscience even within the confines of deferential review standards:

The ‘substantial evidence’ rule set forth in section 10(e) is exceedingly important. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required.

*Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 484 n.17 (1951).

<sup>215</sup> *Id.* at 487.

<sup>216</sup> Larson, *supra* note 13, at § 130.01[3].

compensation decision.<sup>217</sup> That is not, however, Wyoming's law,<sup>218</sup> nor a fair rendering of the substantial evidence standard in many states regulated by modern administrative codes.<sup>219</sup>

Illinois provides an interesting parallel. Apparently, beginning in about the early 1980s, Illinois courts began to uphold decisions of that state's Industrial Commission when "not against the manifest weight of the evidence."<sup>220</sup> Furthermore, "a factual finding is contrary to the manifest weight of the evidence only if the opposite conclusion is clearly apparent."<sup>221</sup> In a process similar to the Wyoming experience, Illinois courts drew the "opposite conclusion" standard—as this article will term the Illinois standard—from an area of law unrelated to workers' compensation, in the case of Illinois, from zoning.<sup>222</sup> The "opposite conclusion" (Illinois) and the "overwhelming weight" (Wyoming) standards both appear excessively deferential. The distinction is that in Illinois, courts

<sup>217</sup> In reviewing the Larson treatise digest's footnote cases in § 130.01[3] n.14, it is difficult to agree that there is a broad swath of "any evidence" administrative law cases. *Id.* at § 130.01[3] n.14. Only cases from Georgia are cited. *Id.* The treatise digest's "supported by evidence" footnote cases, in § 130.01[3] n.17, include authority from Arkansas, Kentucky, Tennessee, and Texas. *Id.* at § 130.01[3] n.17 (citing *Pate v. Hook*, 557 S.W.2d 391 (Ark. 1977) (cannot "substitute judgment" citation to "substantial evidence" jury case); *Tackett v. Sizemore Mining Co.*, 560 S.W.2d 17 (Ky. 1977) ("ample" medical evidence); *Trane Co. v. Morrison*, 566 S.W.2d 849 (Tenn. 1978) ("material" evidence supported civil court trial judge's decree); *Abeyta v. Travelers Ins. Co.*, 566 S.W.2d 708 (Tex. Civ. App. 1978) (ample evidence); *Ramirez v. Nat'l. Standard Ins. Co.*, 563 S.W.2d 837 (Tex. Civ. App. 1978) (evidence sufficient to support jury finding); *Whaley v. Transp. Ins. Co.*, 559 S.W.2d 451 (Tex. Civ. App. 1977, writ ref'd n.r.e.) (jury finding not manifestly unjust)). A number of these cases are not administrative law cases, so they have limited applicability to workers' compensation cases decided in administrative law systems, which is now almost universally the case. *See id.* The same Larson's treatise section cites a United States Supreme Court case, *Del Vecchio v. Bowers*, 296 U.S. 280 (1935), for the proposition that "substantial evidence" is not a larger quantity than "any evidence." *Id.* This very old case (pre-*Universal Camera*) is inapposite because it arose under the Longshore and Harbor Workers' Act and applied to the quantum of evidence requisite to rebut a firm statutory presumption of coverage, which is a different evidentiary question in a quite dissimilar statutory regime. *See id.*

<sup>218</sup> Whatever else may be said about Wyoming's inconsistent substantial evidence jurisprudence, it remains abundantly clear that substantial evidence means at least "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Baker v. Wyo. Dept. of Workforce Services*, 2017 WY 60, ¶ 7, 395 P.3d 1095, 1098 (Wyo. 2017).

<sup>219</sup> *See, e.g., Lewis v. L.B. Dynasty, Inc.*, 799 S.E.2d 304, 305 (S.C. 2017) ("Substantial evidence is 'not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that [the commission] reached or must have reached' to support its orders.").

<sup>220</sup> *Kirkwood v. Indus. Comm'n*, 416 N.E.2d 1078, 1078 (Ill. 1981). One may note here the similarity between this standard and the position selected by the dissenters in the Attorney General's Report, but rejected by the Committee majority. *See id.*

<sup>221</sup> *Steel & Mach. Transp., Inc. v. Ill. Workers' Comp. Comm'n*, 33 N.E.3d 674, 683 (Ill. 2015).

<sup>222</sup> *Caterpillar, Inc. v. Indus. Comm'n*, 591 N.E.2d 894, 896 (Ill. 1992) (workers' compensation) (citing *Drogos v. Bensenville*, 426 N.E.2d 1276 (Ill. 1981) (zoning)).

utilizing the “opposite conclusion” standard very rarely *purport* to be applying the substantial evidence standard while *simultaneously* applying the “opposite conclusion” standard. On the contrary, it does not appear that in workers’ compensation cases the Illinois Supreme Court has applied *any* variant of the traditional substantial evidence standard in recent history.<sup>223</sup>

Consequently, as this section demonstrates, some states have created legal paradigms that are unusually deferential to workers’ compensation administrative decision making.<sup>224</sup> Others, to be sure, have held fast to the actual substantial evidence standard.<sup>225</sup> Presumably, rationales for insulating the decision making of administrative agencies may be grounded in expertise, in efficiency, or in both.

#### *D. Missouri Constitutional Development*

Missouri appears to apply a standard of review very similar—at least in its explicit phraseology—to the Wyoming “overwhelming weight” standard. In Missouri:

A court must examine the whole record to determine if it contains sufficient competent and substantial evidence to support the award, i.e., whether the award is contrary to the overwhelming weight of the evidence . . . Whether the award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. An award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence.<sup>226</sup>

Logically, the Missouri language could mean that the *only* time a workers’ compensation award does not contain sufficient competent and substantial evidence to support an award is when it is contrary to the overwhelming weight of the evidence. On the other hand, the language could mean that *one* clear case of an award not being supported by competent and substantial evidence is

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<sup>223</sup> For example, “such evidence as a reasonable mind could accept.” See *supra* note 14 and accompanying text. The author traced Illinois cases back to 2000, but could not find any articulation of the rule.

<sup>224</sup> See, e.g., *In re Wadsworth’s Case*, 963 N.E. 2d 1181, 1187 (Mass. 2012) (“We review a board’s decision regarding workers’ compensation benefits under the usual standard for appeal from a final decision of an administrative agency . . . except that we do not review whether the board’s decision was supported by substantial evidence . . . In the context of this case, we may reverse or modify the board’s decision where it is based on an error of law, or is arbitrary or capricious.”).

<sup>225</sup> *JP’s Landscaping v. Labor Comm’n*, 397 P.3d 728, 734 (Utah Ct. App. 2017) (“An administrative law decision meets the substantial evidence test when a reasonable mind might accept as adequate the evidence supporting the decision.”).

<sup>226</sup> *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222–23 (Mo. 2003) (en banc) (citations omitted).

when it is contrary to the overwhelming weight of the evidence. The two readings are not equivalent, for the first plainly limits the scope of judicial review while the second is not limiting to the same degree.

Unlike the situation in Wyoming, the substantial evidence standard in Missouri has an explicitly constitutional origin. “The Missouri Constitution, article V, section 18, provides for judicial review of the [workers’ compensation] commission’s award to determine whether the award is “supported by competent and substantial evidence upon the whole record.”<sup>227</sup> It may seem unusual to see judicial review standards specified in a state constitutional amendment. The development may perhaps be explained by the practice that had emerged in the Missouri courts during the 1930s and 1940s. Throughout that period, courts evidently reviewed agency adjudications like jury findings; a practice the public apparently found objectionable:

Passing therefore to the question of [appellate review], it must be borne in mind that the Commission’s finding stands on the same basis as the verdict of a jury in ordinary civil actions. . . . [T]he award is [therefore] conclusive on appeal to the circuit court, and also on appeal to this court, if there is *any* evidence before the Commission to support the award.<sup>228</sup>

The Missouri courts, in other words, appeared to equate review of *agency* factual findings with extremely deferential review of *jury* factual findings.<sup>229</sup> The constitutional amendment, referenced above, “worked a change in the scope of review and the effect to be attributed to findings of fact by the Industrial Commission.”<sup>230</sup> According to the Missouri Supreme Court:

[T]his stated minimum standard (‘supported by competent and substantial evidence upon the whole record’) is mandatory and requires no legislation to put it into effect. This does not mean that the reviewing court may substitute its own judgment on the evidence for that of the administrative tribunal. But it does authorize it to decide whether such tribunal could have reasonably made its findings, and reached its result, upon consideration of all of the evidence before it; and to set aside decisions clearly contrary to the overwhelming weight of the

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<sup>227</sup> *Id.* at 222.

<sup>228</sup> *Davis v. Research Med. Ctr.*, 903 S.W.2d 557, 563 (Mo. Ct. App. 1995), *rev’d*, 121 S.W.3d 220 (Mo. 2003) (quoting *Carter v. Priebe & Sons*, 77 S.W.2d 171, 174 (Mo. App. 1934)).

<sup>229</sup> *Davis*, 903 S.W.2d at 563. A very similar phenomenon transpired in Wyoming. *See infra* notes 237–331 and accompanying text.

<sup>230</sup> *Davis*, 903 S.W.2d at 563.

evidence. Of course, the reviewing court should adhere to the rule of deference to findings, involving credibility of witnesses, made by those before whom the witnesses gave oral testimony.<sup>231</sup>

Thus, the “overwhelming weight” standard in Missouri was likely meant to *enlarge*, not to diminish, the scope of judicial review, and, significantly, the Missouri Supreme Court simultaneously made direct reference to parallel contemporary developments in the enactments of both the Missouri and federal Administrative Procedure Acts.<sup>232</sup>

Still, the “overwhelming weight” standard had the same rhetorical tension in Missouri as this article contends it has, presently, in Wyoming. Thus, the Missouri courts began to construct a complicated, two-step analysis when engaging in judicial review of administrative action:

First, the reviewing court examines the record, together with all reasonable inferences to be drawn from the evidence therein, in the light most favorable to the findings and award of the Commission to determine whether they are supported by competent and substantial evidence. If so, the reviewing court must then determine whether the Commission’s findings and award, even if supported by some competent substantial evidence, were nevertheless clearly contrary to the overwhelming weight of the evidence contained in the whole record before the Commission.<sup>233</sup>

It is not surprising that a standard both requiring that an agency’s decision be reasonable *and* suggesting that agency awards might only be set aside when “clearly contrary to the overwhelming weight of the evidence” could create confusion (as it has in Wyoming). In *Hampton v. Big Boy Steel Erection*, the Missouri Supreme Court clarified, “[t]here is nothing in the constitution or section 287.495.1 that requires a reviewing court to view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the award.”<sup>234</sup> Ultimately, “[w]hether the

<sup>231</sup> *Wood v. Wagner Elec. Corp.*, 197 S.W.2d 647, 649 (Mo. 1946).

<sup>232</sup> *Id.* at 674.

<sup>233</sup> *Davis*, 903 S.W.2d at 565.

<sup>234</sup> *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo. 2003). The relevant judicial review of administrative action provision states:

The court, on appeal, shall review only questions of law and may modify, reverse, remand for rehearing, or set aside the award upon any of the following grounds and no other: (1) That the commission acted without or in excess of its powers; (2) That the award was procured by fraud; (3) That the facts found by the commission do not support the award; (4) That there was not sufficient competent evidence in the record to warrant the making of the award.

MO. REV. STAT. § 287.495 (2017).

award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record. An award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence.”<sup>235</sup> Certainly, an award against the overwhelming weight of the evidence is *not* supported by competent and substantial evidence—but the touchstone of the *Hampton* review is its endorsement of the “whole record,” conscientious spirit of *Universal Camera*.<sup>236</sup>

#### V. A PROPOSAL: CHOOSE OR EXPLAIN?

In Wyoming, the “overwhelming weight” and substantial evidence standards are in significant, rhetorical tension, just as similar standards were once in tension in Missouri, until the Missouri Supreme Court decided *Hampton*.<sup>237</sup> The “overwhelming weight” standard suggests *minimal*—perhaps the bare minimum—judicial scrutiny.<sup>238</sup> Substantial evidence, however, suggests a “conscientious” review of the entire adjudicative record.<sup>239</sup> The article will proceed to argue that the Wyoming Supreme Court should apply the *actual* substantial evidence rule, unmoored from the confusing and unnecessary overwhelming weight rhetoric. The Court should follow *Hampton*’s lead in making clear that there is nothing in Wyoming law that “requires a reviewing court to view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the award.”<sup>240</sup> At a minimum, however, the Wyoming Supreme Court should clearly explain any *intentional* analytical distinction between the standards, if any there be, so that the relationship between the formulations is understood by litigants.

##### A. State Historical and Constitutional Considerations

Concerns over purported judicial rubber stamping of National Labor Relations Board decisions generated the history surrounding the substantial evidence rule.<sup>241</sup> While the federal labor law context surrounding those decisions, and decisions involving other federal New Deal subjects in the era, were important, there is something different about state-based administrative adjudication of workers’ compensation claims.<sup>242</sup> Significantly, state workers’ compensation law pre-dates federal administrative law. Most state workers’ compensation statutes

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<sup>235</sup> *Hampton*, 121 S.W.3d at 223.

<sup>236</sup> *See supra* note 214 and accompanying text.

<sup>237</sup> *Hampton*, 121 S.W.3d at 223.

<sup>238</sup> *See supra* note 15 and accompanying text.

<sup>239</sup> *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951).

<sup>240</sup> *See Hampton*, 121 S.W.3d at 223.

<sup>241</sup> *See supra* notes 129–49 and accompanying text.

<sup>242</sup> *See supra* notes 129–49 and accompanying text.

were firmly in place by the 1920s.<sup>243</sup> Thus, judicial review of the findings of these nascent state administrative agencies preceded the coming of the federal administrative state in the early 1930s.<sup>244</sup> In short, there would have been limited federal administrative law to shape state administrative law, either through acceptance or rejection of the federal model.<sup>245</sup>

In Wyoming, it has been generally understood that citizens have a fundamental right to access courts to assert a claim for personal injury.<sup>246</sup> Furthermore, the courts will subject governmental impingements on that right to strict scrutiny.<sup>247</sup> It follows from this that administrative workers' compensation claims, as substitutes for common law tort suits, function as poor candidates for minimal scrutiny by the courts. It is one thing for the system to permit a substantive *quid pro quo* premised on an adequate exchange of rights; it is quite another to surrender meaningful judicial review of "tort-substitute" cases in the bargain. Neither does it seem likely that a system born in times preceding sophisticated justification for the administrative state would have contemplated surrender of fundamental rights premised on administrative policy justifications.

While the Wyoming Supreme Court has stated that "the worker's compensation system is not a tort-based system but is, instead, based upon contract," such a formulation is somewhat misleading.<sup>248</sup> The court's formulation underscores that

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<sup>243</sup> JOHN F. WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 10 (2004).

<sup>244</sup> It is true, of course, that federal agencies already existed in this period, and notable examples included the Federal Trade Commission, created in 1915, and the Interstate Commerce Commission, created in 1887. See *Timeline of Federal History*, SOCIETY FOR HISTORY IN THE FEDERAL GOVERNMENT, <http://shfg.org/shfg/programs/resources/timeline-of-federal-history/>. (last visited Nov. 14, 2017). However, there was no formally agreed-upon federal code to which the scattered agencies were bound or to which state agencies might have referred for even informal guidance. Martin Shapiro, *A Golden Anniversary?: The Administrative Procedures Act of 1946*, 19 REGULATION 40 (1996) ("Before the APA, Congress usually would spell out the procedures for rulemaking for particular acts and agencies. There seemed to be little need for special administrative law. But whenever Congress did not explicitly provide a rulemaking procedure for an agency, uncertainty arose over what type of approach would be appropriate.").

<sup>245</sup> Tushnet describes the situation just before the 1920s in the following terms:

Agency proceedings might move more quickly to an acceptable conclusion than judicial ones. Coming to terms with regulatory agencies meant accepting some departures from the procedures used in the ordinary courts, but not departures that were too substantial. Hewing closely to ordinary courts' procedures had the added advantage of giving the lawyers who represented businesses in court the opportunity to extend their representation to administrative agencies.

Tushnet, *supra* note 181 at 1592–93.

<sup>246</sup> See *Mills v. Reynolds*, 837 P.2d 48, 54 (Wyo. 1992).

<sup>247</sup> *Id.*

<sup>248</sup> *In re Perry*, 2006 WY 61, ¶ 22, 134 P.3d 1242, 1249 (Wyo. 2006) (citing *In re Injury to Spera*, 713 P.2d 1155, 1156 (Wyo. 1986)).

the original *quid pro quo* was in the nature of a *social* contract.<sup>249</sup> But the rights authorized to be exchanged derived from the Wyoming Constitution, which has always stated, “[n]o law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person.”<sup>250</sup> Furthermore, the Constitution continues to state, “[a]ny contract or agreement with any employee waiving any right to recover damages for causing the death or injury of any employee shall be void.”<sup>251</sup> Thus, workers’ compensation would in all likelihood have been unconstitutional without the Wyoming Constitutional amendment permitting it.<sup>252</sup> Furthermore, “[a]mount of damages to be recovered for causing the injury or death of any person” sounds in tort, not contract. As commentator George Santini has expressed the notion:

[T]he original worker’s compensation law concept is in the form of a trade-off in which the employees, in exchange for giving up their common law rights of recovery against their employers for work related injuries, receive certain limited benefits regardless of fault. Employers, in exchange for funding the worker’s compensation system, receive immunity from lawsuits brought on behalf of injured workers. Both sides recognized that the “blood of the workman” was the cost of production and that industry should bear the charge.<sup>253</sup>

Of course, if there were no underlying theory for liability in connection with “the blood of the workman,” there would be no occasion for an exchange, however characterized.

The tort-contract distinction is significant. A contractual dispute between commercial actors has long seemed tailor-made for binding private determination by a fact-finder, for example.<sup>254</sup> One simply ascertains the meaning of a (typically) written instrument, often with an eye to the Uniform Commercial Code.<sup>255</sup> To state the obvious, a statutory right is different. Contracting parties have a constitutional right to the non-impairment of their contracts by the State, of course, but they have no *constitutional* right to the *substance* of their agreement. The Wyoming courts vaguely suggest, by using the rhetoric of contract, that

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<sup>249</sup> See generally FISHBACK & KANTOR, *supra* note 25.

<sup>250</sup> WYO. CONST. art. 10, § 4(a).

<sup>251</sup> *Id.* § 4(c).

<sup>252</sup> *Id.*

<sup>253</sup> Santini, *supra* note 188, at 493.

<sup>254</sup> See generally Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238 (1929) (canvassing the arbitration of commercial disputes in the 1920s).

<sup>255</sup> Daniel G. Collins, *Arbitration and the Uniform Commercial Code*, 41 N.Y.U. L. REV. 736, 750–51 (1966) (arguing that even where the Uniform Commercial Code is not expressly referenced in arbitration agreement, its provisions implicitly guide the resolution of commercial disputes).

a workers' compensation claim is akin to a routine, non-statutory commercial dispute.<sup>256</sup> It is hard to agree with the suggestion, for there is remedial substance in the employer-injured employee relationship. Under the Wyoming Constitution, an injured worker's damages may not be legislatively limited except by operation of the workers' compensation system.<sup>257</sup> In light of this very explicit limitation, the Act should not be read to have somehow impliedly repealed a right to judicial review appropriate to issues involving modification of fundamental rights.

### *B. The Wyoming Administrative Procedure Act*

The Wyoming legislature enacted the Wyoming Administrative Procedure Act in 1965,<sup>258</sup> and based it upon the Revised Model State Administrative Procedure Act.<sup>259</sup> "Both the Wyoming Act and the Model Act have much in common with the Federal Administrative Procedure Act."<sup>260</sup> In a 1962 symposium issue of the University of Wyoming Law Journal, commentators, at a time just preceding the enactment of the Wyoming APA, wrote on various aspects of the then-draft statute, including the appropriate scope of judicial review of administrative agency adjudication.<sup>261</sup> As one commentator at the symposium remarked, noting the Wyoming courts' inconsistency in using the substantial evidence rule to review administrative agency adjudications prior to 1961:

The court may have more faith in the judgment of one agency than in another. At any rate the court is not consistent in this area, and an attorney in Wyoming will have to be aware of this unless and until the issue is finally settled either by decision or by the enactment of a State Administrative Procedure Act or otherwise.<sup>262</sup>

As part of the 1962 symposium, Professor Bloomenthal of the University of Wyoming College of Law underscored many of the issues that have been under discussion in this article:

In terms of application of the substantial evidence rule, our Court, influenced somewhat by concepts pertaining to judicial

<sup>256</sup> See *supra* note 248 and accompanying text.

<sup>257</sup> See *supra* note 250 and accompanying text.

<sup>258</sup> David H. Carmichael & David R. Nicholas, *The Wyoming Administrative Procedure Act*, 1 LAND & WATER L. REV. 497, 497 (1966).

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> Harold S. Bloomenthal, *Administrative Law in Wyoming – An Introduction and Preliminary Report*, 16 WYO. L. J. 191, 213–14 (1962); Bobbie J. Baker, *Scope of Judicial Review*, 16 WYO. L. J. 191, 326–35 (1962).

<sup>262</sup> Baker, *supra* note 261, at 329.

review in appellate court actions, has talked about the necessity of viewing the case only as if the evidence most favorable to the decision should be considered in isolation. This approach on the federal level was the subject of considerable criticism that led to the adoption of the requirement that the administrative decision be based on substantial evidence as determined from the entire record and the reviewing court must take into consideration not only the favorable evidence but also any other evidence in the record that detracts therefrom. It is recommended that any proposed statute incorporate this requirement as does the Model Act which provides for review of decisions in the light of “the whole record.”<sup>263</sup>

The eventual text of the Wyoming Administrative Procedure Act is very similar to the federal Administrative Procedure Act in defining the scope of factual review in terms of substantial evidence. The Wyoming Administrative Procedure Act requires state courts to “[h]old unlawful and set aside agency action, findings and conclusions found to be . . . [u]nsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute.”<sup>264</sup> The federal Administrative Procedure Act requires federal courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [the adjudication sections of the APA] or otherwise reviewed on the record of an agency hearing provided by statute . . .”<sup>265</sup> As discussed previously, the federal APA substantial evidence rule is identical to the provision under the Taft-Hartley Act, and contemporary analysts understood it to be more expansive than “viewing the case only as if the evidence most favorable to the decision should be considered in isolation.”<sup>266</sup> To the extent the Wyoming legislature meant the Wyoming Administrative Procedure Act to incorporate a similar idea of substantial evidence, the “overwhelming weight” review differs significantly from then-contemporary understandings of judicial review under the Wyoming Administrative Procedure Act.<sup>267</sup>

### C. *Dale v. S & S Builders: Sound Judgment as a “Fairly Sturdy Standard”?*

It is notable that in a relatively recent discussion of the substantial evidence rule, in *Dale v. S & S Builders*, the Wyoming Supreme Court undertook an analysis of the relationship between the substantial evidence rule and the arbitrary

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<sup>263</sup> Bloomenthal, *supra* note 261, at 213–14.

<sup>264</sup> WYO. STAT. ANN. § 16-3-114(c)(ii)(E) (2017).

<sup>265</sup> 5 U.S.C. § 706(2)(E) (2012).

<sup>266</sup> *See supra* note 131 and accompanying text.

<sup>267</sup> *See supra* note 131 and accompanying text.

and capricious standard of review without considering the internal incongruity of Wyoming substantial evidence review itself.<sup>268</sup> The facts of the case were straightforward: a truck driver-heavy equipment operator with preexisting right knee injuries suffered a cut during a fall on a restricted-duty job.<sup>269</sup> There was conflicting evidence as to whether the cut was a “scrape” or a “wound,”<sup>270</sup> but in any event the driver-operator developed a staph infection.<sup>271</sup> The Wyoming Workers’ Compensation Division accepted the claim initially, but then rejected it.<sup>272</sup>

The hearing officer ruled the worker “had not met his burden of proving the infection was causally related to his work-related injury . . .”<sup>273</sup> On appeal, there was a good deal of disagreement about the standard of review that applied.<sup>274</sup> To understand the problem, imagine a case: X vs. Y. X has the burden of proof and presents evidence. Y presents no evidence. If the agency finds for Y, because it was not persuaded by X’s evidence, was the ultimate decision based on “substantial evidence”? The Wyoming courts, in particular the court in *Newman v. Wyoming Workers’ Safety & Compensation Division*,<sup>275</sup> had followed Pennsylvania law in concluding that the situation was sufficiently awkward that a different standard of evidentiary review, “arbitrary and capricious,” should apply.<sup>276</sup> The Wyoming Supreme Court deemed the arbitrary and capricious standard to apply “when there is no disputed evidence on an issue because the substantial evidence test is awkward when applied to a finding for the non-burdened party.”<sup>277</sup> The awkwardness of applying the substantial evidence standard in such circumstances does not, however, explain resorting to the arbitrary and capricious standard. As the *Newman* Court assessed the situation:

[E]ven if the factual findings are found to be supported by substantial evidence, the ultimate agency decision could still

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<sup>268</sup> Dale v. S & S Builders, LLC, 2008 WY 84, ¶¶ 10–27, 188 P.3d 554, 557–62 (Wyo. 2008).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* The intimation in the reported case is that the wound was in fact suffered after Dale’s fall. *Id.* A primary issue on appeal, however, was whether the factual findings by the Hearing Officer took proper account of the claimant’s testimonial incoherence produced by prescription medication during the first day of a two-day hearing. *Id.* The claimant alleged that the Hearing Officer’s failure to explicitly factor in the medication when considering testimonial inconsistencies was arbitrary, capricious and “fundamental error.” *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* The basis for the rejection was apparently the initial report of a “scrape” that was later treated as a “wound.” *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Newman v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 49 P.3d 163, 166–73 (Wyo. 2002).

<sup>276</sup> *Dale*, ¶ 13, 188 P.3d at 559.

<sup>277</sup> *Id.*

be found to be arbitrary or capricious for other reasons. The arbitrary or capricious standard works as a “safety net” to catch agency action which prejudices a party’s substantial rights or which may be contrary to the other WAPA review standards yet is not easily categorized or fit to any one particular standard.<sup>278</sup>

The arbitrary and capricious standard has routinely been viewed as a reasonableness catch-all provision in administrative law, a standard that applies when, for example, the substantial evidence standard does not or cannot apply.<sup>279</sup> For example, under the federal APA, substantial evidence review applies solely “in a case subject to [APA] sections 556 and 557 . . . or otherwise reviewed on the record of an agency hearing provided by statute.”<sup>280</sup> The question arose in the early 1970s as to the appropriate scope of judicial review of the record of an agency hearing that was *not* required by statute.<sup>281</sup> The answer provided by the U.S. Supreme Court in *Overton Park* was that the arbitrary and capricious standard of review applied in such circumstances.<sup>282</sup> Because the substantial evidence standard did not apply in that case, and because “the action of ‘each authority of the Government of the United States,’ . . . is subject to judicial review except where there is a statutory prohibition on review or where ‘agency action is committed to agency discretion by law,’ exceptions that did not apply to the case, the Court applied the arbitrary and capricious standard:

In all cases, agency action must be set aside if the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or if the action failed to meet statutory, procedural, or constitutional requirements. 5 U.S.C. §§ 706(2) (A), (B), (C), (D) . . . In certain narrow, specifically limited situations, the agency action is to be set aside if the action was not supported by “substantial evidence.”<sup>283</sup>

Thus, administrative law authority at times has articulated “substantial evidence” as a more specific subset of the general requirement that agency action not be arbitrary.<sup>284</sup> While the *Newman* court opined that the arbitrary

<sup>278</sup> *Newman*, 49 P.3d at 172 (internal citations omitted).

<sup>279</sup> *Id.*

<sup>280</sup> 5 U.S.C. § 706(2)(E) (2012).

<sup>281</sup> See Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park’s Requirement of Judicial Review “On the Record,”* 10 ADMIN L. J. Am. U. 179, 181–83 (1996) (describing judicial review of informal adjudication in period leading up to *Overton Park*).

<sup>282</sup> 5 U.S.C. § 706(2)(A).

<sup>283</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971).

<sup>284</sup> Of course, the arbitrary and capricious standard applies more broadly to all administrative agency decision making, and requires rational connections between facts found and policy choices agencies eventually decided upon. See Louis J. Virelli III, *Deconstructing Arbitrary and Capricious*

and capricious standard was *more* lenient and deferential to agencies than the substantial evidence standard,<sup>285</sup> an opinion not disputed by the *Dale* Court,<sup>286</sup> the federal authorities are not in universal agreement. As discussed recently by a Minnesota state court:

For questions of fact, the federal APA's arbitrary or capricious standard and substantial evidence standard are widely understood to be very similar, and perhaps identical. *See* Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys. (ADAPSO), 745 F.2d 677, 683–84 (D.C.Cir.1984) (Scalia, J.) (“[I]n their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same. The former is only a specific application of the latter . . . [T]he distinction between the substantial evidence test and the arbitrary or capricious test is ‘largely semantic[.]’”) (*quoting* Aircraft Owners and Pilots Ass’n v. FAA, 600 F.2d 965, 971 n. 28 (D.C.Cir.1979)).<sup>287</sup>

In light of the catch-all theory of arbitrary and capricious review, it is perhaps not surprising that some Wyoming courts began to hold that *whenever* a hearing officer found a claimant “failed to meet his burden of proof, the arbitrary and capricious standard applie[d].”<sup>288</sup> However, the *Dale* Court found that this erroneous proposition derived from a misreading of a prior case in which a hearing officer had made an incorrect ruling of *law*.<sup>289</sup> For the Court, the case had been read, wrongly, as if it had established a separate evidentiary review standard, for ultimately the substantial evidence standard continued to apply.<sup>290</sup> The Court, of course, acknowledged that in the case of federal “informal” adjudications, the

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*Review*, 92 N.C. L. REV. 721, 785 (2014) (arguing that courts and scholars have neglected extended discussion of the routine application of arbitrary and capricious review across all phases of administrative agency decision making).

<sup>285</sup> *Newman v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 49 P.3d 163, 170 (Wyo. 2002).

<sup>286</sup> *Dale v. S & S Builders, LLC*, 2008 WY 84, ¶ 13, 188 P.3d 554, 559 (Wyo. 2008).

<sup>287</sup> *In re Application of Minn. Power for Authority to Increase Rates for Elec. Serv. in Minn.*, 838 N.W.2d 747, 766 (Minn. 2013) (Anderson, J., concurring).

<sup>288</sup> *Dale*, ¶ 17, 188 P.3d at 560. The *Dale* court viewed this as a misreading of *Boyce v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 2005 WY 9, ¶ 6, 105 P.3d 451, 454 (Wyo. 2005). *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at ¶ 18, 188 P.3d at 560 (citing *State ex rel. Wyo. Workers’ Safety & Comp. Div. v. Slaymaker*, 2007 WY 65, 156 P.3d 977 (Wyo. 2007); *Spletzer v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 2005 WY 90, 116 P.3d 1103 (Wyo. 2005); *Taylor v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 2005 WY 148, 123 P.3d 143 (Wyo. 2005) (referring to both the substantial evidence and arbitrary and capricious standards of review); *David v. Wyo. Workers’ Safety & Comp. Div.*, 2007 WY 22, 151 P.3d 280 (Wyo. 2007) (applying arbitrary and capricious standard because the hearing examiner ruled the claimant had not met his burden of proof)).

substantial evidence standard did *not* apply, but that exception did not establish some new rule.<sup>291</sup>

Remarkably, even after reciting *Newman*'s inclusion of both the "overwhelming weight" and "substantial evidence" standards together in the same paragraph,<sup>292</sup> *Dale* failed to discuss in detail the meaning of substantial evidence.<sup>293</sup> The omission seems remarkable because the case represented a fundamental attempt to harmonize various judicial review provisions pertaining to administrative action. The case seemed to provide a golden opportunity for a broad discussion of substantial evidence; a hearing officer appeared to base a decision on testimony that had been influenced by ingestion of prescription drugs.<sup>294</sup> The hearing official, obviously concerned about the ingestion, recessed the first day of hearing.<sup>295</sup> The ultimate decision, while based on *some* evidence, was also based on questionable evidence.<sup>296</sup> The Wyoming Supreme Court addressed the same implicit question in *Dale* as in *Moss*: may a court decline to uphold a decision because it offends the court's conscience, or must courts in all instances uphold agency decisions that are not clearly contrary to the overwhelming weight of the evidence.<sup>297</sup> In light of the "overwhelming weight" standard it was not surprising that the claimant in *Dale* attempted to rely on the arbitrary and capricious standard.

Also remarkable was *Dale*'s relatively sparse treatment of the legislative history surrounding the Wyoming APA. The Court first stated:

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<sup>291</sup> *Id.* at ¶ 20, 188 P.3d at 560 (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)); see *supra* note 244 and accompanying text.

<sup>292</sup> *Dale*, ¶ 11, 188 P.3d at 558–59 (citing *Newman*, 49 P.3d at 168, 173).

<sup>293</sup> The *Dale* court's argument that WYO. STAT. ANN. § 16-3-114(c)(ii) provides only one evidentiary standard of review is confusing. See *id.* at ¶ 21, 188 P.3d at 561. Arbitrary and capricious review has obviously been pressed into service in connection with 5 U.S.C. §706(2)(A), which is virtually the mirror image of WYO. STAT. ANN. § 16-3-114(c)(ii)(A). See 5 U.S.C. §706(2)(A) (2012); WYO. STAT. ANN. § 16-3-114(c)(ii)(A) (2017).

<sup>294</sup> *Dale*, ¶ 29, 188 P.3d at 562:

At the conclusion of Mr. Dale's direct testimony, the hearing examiner expressed concern about his ability to continue with the hearing. The hearing examiner remarked that he "became concerned about halfway through Mr. Dale's testimony" that Mr. Dale's pain was making him unable "to adequately proceed and testify in this matter." He expressed concern that Mr. Dale would not be able to accurately answer questions. All of the parties agreed with the hearing examiner, and the hearing was continued until June 14, 2006.

<sup>295</sup> *Id.* at ¶ 2, 188 P.3d at 557.

<sup>296</sup> Testimonial discrepancies between a first hearing, when the claimant was incapacitated while testifying, and a second hearing, when he was not, formed part of the rationale for the judge's discrediting of the claimant. See *supra* note 289 and accompanying text. The mere recital of these facts underscores the problematic nature of the evidence.

<sup>297</sup> The court somewhat irreverently chided the claimant for failing to object to introduction of the first day's testimony. *Dale*, ¶ 33, 188 P.3d at 562–63. The issue was not the introduction of the testimony, but the manner in which it was used. *Id.*

Under the plain language of the statute, reversal of an agency finding or action is required if it is “not supported by substantial evidence.” Because contested case hearings under Wyoming’s Administrative Procedures Act, are formal, trial-type proceedings, use of the substantial evidence standard for review of evidentiary matters is more in keeping with the original intent of the drafters of the administrative procedures [sic] act.<sup>298</sup>

This passage, while initially suggesting a plain language treatment of the issue before the court, then appeals to “the original intent of the drafters” of the APA.<sup>299</sup> Yet, rather than discussing legislative history reflecting the original intent of the drafters, the *Dale* court cited to the federal treatise on administrative procedure, *Wright’s, Federal Practice and Procedure*.<sup>300</sup> While a respected authority, *Wright’s* does not reveal the intent of the drafters of the Wyoming APA.<sup>301</sup> The cited passage is nevertheless instructive for other purposes:

The reasonableness instruction tells the court that it is not to decide whether the agency found the one right answer—the answer the judge would have given—or even to determine how close the agency came to the one right answer; it requires only that the court decide whether the agency has found an answer which has a reasonable likelihood of being correct. After that, the court’s function ends and it is the agency’s judgment, not the court’s, which is controlling. Hence, the court must find that the decision demonstrates “sound judgment”—not necessarily correct judgment. Sound judgment, however, is a fairly sturdy standard and *the mere chance that the agency’s judgment is correct is not enough*. Reasonableness review demands that the *probabilities that the agency is correct be relatively high*. Reasonableness review requires the court to make the positive judgment that the decision could be correct . . .<sup>302</sup>

The question is thus brought full circle. That an agency’s decision is not “clearly contrary to the overwhelming weight of the evidence” should give a court little comfort that the agency has exercised “sound judgment” under a “fairly

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<sup>298</sup> *Id.* at ¶ 21, 188 P.3d at 561.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> The author has been able to uncover nothing on the intent of the drafters in this regard, though *see supra* note 258–267 and accompanying text (demonstrating contemporary discussants appeared to have the *Universal Camera* variant of substantial evidence in mind).

<sup>302</sup> CHARLES H. KOCH, JR. & CHARLES ALAN WRIGHT, 33 FED. PRAC. & PROC., JUDICIAL REVIEW § 8333 (2017).

sturdy standard.” The overwhelming weight standard sounds much closer to a standard upholding an agency on the “mere chance” that the agency is correct.

#### D. Closer Scrutiny of *Dale* & *Newman*

*Dale* provides additional insights into the development of the substantial evidence standard in Wyoming. As the *Dale* majority noted,<sup>303</sup> *Newman* had reiterated a statement made in earlier Wyoming cases:

[T]he deference that normally is accorded the findings of fact by a trial court is extended to the administrative agency, and we do not adjust the decision of the agency unless it is clearly contrary to the overwhelming weight of the evidence on record. This is so because, in such an instance, the administrative body is the trier of fact and has the duty to weigh the evidence and determine the credibility of witnesses.<sup>304</sup>

The reader will first recall that a similar “trial court” review standard had been applied in Missouri administrative law and had been interpreted as requiring a court to uphold an agency decision if any evidence supported it.<sup>305</sup> An amendment to the Missouri state constitution effectively required enhanced judicial review under the substantial provision.<sup>306</sup> The origin of the Wyoming trial court deference standard appears to be *Wyoming Steel & Fab., Inc. v. Robles*.<sup>307</sup> That case, in turn, cites for support of the relevant standard *Mekss v. Wyoming Girls School, State of Wyoming*,<sup>308</sup> and *Wyoming Workers’ Compensation Division v. Brown*,<sup>309</sup> but neither of those cases state that “the deference that normally is accorded the findings of fact by a trial court is extended to the administrative agency.”<sup>310</sup> This is important because some Wyoming cases had held in the era of *Robles*, “[t]he findings of the trial court are affirmed if there is any evidence to

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<sup>303</sup> *Dale*, ¶ 11, 188 P.3d at 558–59.

<sup>304</sup> *Id.* (citing *Newman v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 49 P.3d 163, 173 (Wyo. 2002)).

<sup>305</sup> See *supra* note 230 and accompanying text. A Missouri constitutional amendment subsequently enlarged and made less deferential the scope of judicial review with respect to substantial evidence. *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Wyo. Steel & Fab, Inc. v. Robles*, 882 P.2d 873 (Wyo. 1994).

<sup>308</sup> *Mekss v. Wyo. Girls Sch.*, 813 P.2d 185 (Wyo. 1991), *cert. sought and denied on other grounds*, 502 U.S. 1032 (1992).

<sup>309</sup> *State ex rel. Wyo. Workers’ Comp. Div. v. Brown*, 805 P.2d 830 (Wyo. 1991).

<sup>310</sup> Each case does, however, recite the “overwhelming weight” standard and creates some investigative suspicion that the courts reviewed the standards as closely related. See *Mekss*, 813 P.2d at 201; *Brown*, 805 P.2d at 833.

support them.”<sup>311</sup> In context, it is quite possible that some Wyoming courts were applying the “overwhelming weight” as an “any evidence” standard.

*Newman* also recounted that the Wyoming APA “initially did not address how the record should be considered in the conduct of judicial review.”<sup>312</sup> However, as *Newman* further explains:

This [judicial review] subsection was amended, effective May 25, 1979, to require agency action, findings and conclusions to be supported by substantial evidence, but also to provide for a review of the “whole record.” Under this standard, we do not examine the record only to determine if there is substantial evidence to support the Board’s decision, but we must also examine the conflicting evidence to determine if the Board could reasonably have made its findings and order upon all of the evidence before it. After reviewing the history and rationale in changing the “substantial evidence” rule in the Wagner Act to the “whole record” provision of the Federal Administrative Procedure Act (similar to present provisions of s 9-4-114(c)), the consideration is stated in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951), and quoted in *National Labor Relations Board v. Walton Manufacturing Company*, 369 U.S. 404, 405, 82 S.Ct. 853, 854, 7 L.Ed.2d 829 (1962) . . .<sup>313</sup>

The passage from *Newman* above, quoted verbatim from the court’s earlier opinion in *Board of Trustees of School District No. 4, Big Horn County v. Colwell*, establishes that the 1979 amendment to the Wyoming Administrative Procedure Act effectively superseded *Spiegel*’s “overwhelming weight” formulation, whether or not the *Spiegel* standard was erroneously adopted.<sup>314</sup> It is very difficult to read the language as other than an interpretation equating “whole record” review in Wyoming to the kind of “conscientious” review motivating *Universal Camera* and its progeny.<sup>315</sup>

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<sup>311</sup> *Capshaw v. Schieck*, 44 P.3d 47, 55 (Wyo. 2002); *Bowker v. Bowker*, 795 P.2d 1215, 1218 (Wyo. 1990); *Pine Creek Canal No. 1 v. Stadler*, 685 P.2d 13, 19 (Wyo. 1984).

<sup>312</sup> *Newman v. State ex rel. Wyo. Workers’ Safety & Comp. Div.*, 49 P.3d 163, 172 (Wyo. 2002) (citing 1965 Wyo. Sess. Laws 131–40; *Dubois Tel. Exch. v. Mountain States Tel. & Tel. Co.*, 429 P.2d 812, 816 n.1 (Wyo. 1967)).

<sup>313</sup> *Newman*, 49 P.3d at 173 (quoting *Bd. of Trs. v. Colwell*, 611 P.2d 427, 429 (Wyo. 1980)).

<sup>314</sup> The reader may recall that *Spiegel* was decided in 1976. See *Bd. of Trs. v. Spiegel*, 549 P.2d 1161 (Wyo. 1976).

<sup>315</sup> See *supra* notes 129–49 and accompanying text.

### *E. Revisiting Moss*

Conscientious, whole-record review would allow Wyoming courts the professional independence to decline to uphold workers' compensation administrative decisions where the record indicates that an agency "disregarded relevant evidence, made incorrect assumptions about other evidence and, rather than considering the evidence fairly and objectively, generally viewed it in the light most likely to result in a denial of benefits."<sup>316</sup> Any administrative system that would allow such an outcome must be adjusted. In *Moss*, the Wyoming Supreme Court determined that, despite clear evidence of biased fact-finding, it was obligated to find for the Division because the administrative decision was not clearly contrary to the "overwhelming weight of the evidence."<sup>317</sup> Moss, however, had "a laminectomy at L5–S1 and an L4–S1 fusion with a hip graft and hardware installation."<sup>318</sup> Furthermore:

Mr. Moss became ill after the surgery. Thinking the hardware might be the cause, Dr. Neal performed another surgery in October 2004 to remove the hardware. Mr. Moss continued to have pain and Dr. Neal referred him to a pain management clinic where he was seen by Dr. Kyle Matsumura. From 2005 through the hearing date, Dr. Matsumura treated Mr. Moss on a regular basis for pain by injection, neurotomy [cutting of nerves] and prescription narcotics . . .

In the course of treatment after the lumbar fusion, several doctors concluded that the fusion had failed. In 2007, Dr. Neal recommended that Mr. Moss undergo a revision fusion. Mr. Moss decided against the procedure because there was no guarantee it would result in a successful fusion, resolve his pain or increase his functional capacity.<sup>319</sup>

All of these required medical procedures were obviously work-related, so the only question was the extent of Moss's disability.<sup>320</sup> Although he had a theoretical work capacity, Moss's treating doctor said he was permanently disabled.<sup>321</sup> The Medical Commission attempted to discredit Moss's reports of pain and his

<sup>316</sup> See *supra* note 54 and accompanying text.

<sup>317</sup> *Moss v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 2010 WY 66, ¶ 43, 232 P.3d 1, 12 (Wyo. 2010).

<sup>318</sup> *Id.* at ¶ 4, 232 P.3d at 3.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at ¶¶ 12–21, 232 P.3d at 5–6.

<sup>321</sup> *Id.* at ¶ 4, 232 P.3d at 3.

treating doctor's opinion as to his total disability, utilizing methods the entire Court obviously concluded were deeply objectionable.<sup>322</sup>

Nevertheless, the Court concluded it was required to uphold the Division's finding that Moss was not entitled to benefits under the odd lot doctrine because the Court could not "conclude that the Medical Commission's ruling was against the overwhelming weight of the evidence."<sup>323</sup> It is unlikely that a reasonable mind could accept this outcome. Leaving to one side that the administrative actors committed an error of law, not fact, in misapplying the odd lot doctrine; and dispensing with the view that the Medical Commission need not be afforded deference in passing on the bona fides of an employee's work search,<sup>324</sup> the factual support for the agency's position consisted of three physicians refuting Moss's claim that he could not perform light duty work.<sup>325</sup> The issue was not whether, under ordinary circumstances, an administrative agency's reliance on this kind of testimony would be subject to scrutiny.<sup>326</sup> The issue was whether the Division's decision could be *conscientiously upheld* by any court given the circumstances of the case. In dissent, Justice Hill had the better view:

I would reject the Medical Commission's determination that there is work available that is within Moss's physical limitations (which, of course, includes the facts that he is walking around with what is essentially a broken back, the level of pain that he experiences almost constantly, and the anxiety and depression that is ancillary to that pain, and his inability to "work" and earn a living). The evidence offered by the Division was not the sort of evidence that "a reasonable mind would accept as adequate to support a conclusion." The majority has already rejected most of the Medical Commission's findings that negatively impacted Moss's case. That circumstance leads me to view with distrust this final finding made by the Commission, which now must bear the entire weight of the final decision to deny Moss the benefits at issue here.<sup>327</sup>

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<sup>322</sup> *Id.* at ¶¶ 28–37, 232 P.3d at 9–11.

<sup>323</sup> *Id.* at ¶ 43, 232 P.3d at 12.

<sup>324</sup> *See supra* notes 181–211 and accompanying text.

<sup>325</sup> *Moss*, ¶¶ 53–54, 232 P.3d at 16 (Hill, W., dissenting). There was much in the record to discredit these witnesses, though that is not legally determinative. *See id.*

<sup>326</sup> *See Hayes v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 2013 WY 96, ¶ 16, 307 P.3d 843, 849 (Wyo. 2013) ("When conflicting medical opinions are presented at the contested case hearing, the agency has the responsibility, as the trier of fact, to determine relevancy, assign probative value, and ascribe the relevant weight given to the evidence presented.").

<sup>327</sup> *Moss*, ¶ 48, 232 P.3d at 14.

Justice Hill, in short, applied the actual substantial evidence rule.<sup>328</sup> In context,<sup>329</sup> it is difficult to escape the impression that the shackles imposed by an unnecessarily potent overwhelming weight standard authorized a man with a “broken back”<sup>330</sup> being sent back out into his post-injury life with \$7,123.97.<sup>331</sup> Wyoming law does not require such a result and Wyoming policy should disclaim it.

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<sup>328</sup> See *supra* note 14 and accompanying text.

<sup>329</sup> As Justice Hill chronicled:

“The Division has brought to bear an unusually large cadre of experts in its attempt to dispute Moss’s claims, and the evidence provided by his treating physicians (claims of chronic, debilitating pain, anxiety and depression, and what amounts to a broken back). Both the Medical Commission, and the Division’s experts, relied on some surreptitious video-taping of Moss’s activities (although the snippets of film shed light on less than an hour’s worth of Moss’s life). The Medical Commission, and at least one of the experts hired by the Division, misused that evidence to a degree that can only be considered maliciously irresponsible. For instance, at the top of page 16 of its findings . . . , the Commission interpreted a piece of the film as showing Moss ‘sprinting up a flight of stairs at his home.’ Moss did not ‘sprint,’ although he moved at a brisk walk, but there were only two steps involved, from his yard to a small porch that led to the door of his mobile home. Moss is said to repeatedly bend, stoop and squat in the video, when in fact he bends slightly forward a few times, apparently to pick up small pieces of debris from the area he is watering with a hose. It was contended that Moss picked up a heavy piece of material (plywood?) and lifted it with ease onto an outbuilding. Moss brought that item to the hearing and it was a piece of tin that he slid onto the roof of the building, from a relatively low height, using the overhang of the roof as a weight bearing surface and then sliding the 8 pound piece of tin onto the roof. Even a superficial review of the video surveillance evidence mandates a conclusion that it did nothing to support the Medical Commission’s findings or the findings made in the IME reports. On the contrary, the credit given that evidence by the Medical Commission calls into question the fact-finding capacity of the Commission and its experts . . . . In addition to ignoring the SSA determination, and crediting the surveillance video as supporting findings that it simply cannot support, I add the following examples wherein the Medical Commission played loose and fast with the facts: (1) See pages 3–4, ¶ 4; wherein the Commission blames Moss’s injury on a congenital condition, as well as on his failure to observe his pre–2003 work effort restrictions (now that his condition has worsened considerably, the Commission contends he is more physically capable . . . than he was before the 2003 injuries and the failed surgery with hardware removal); (2) throughout its findings the Medical Commission refers to exhibits which cannot be located using its citations to the record; (3) In ¶ 15, pp. 6–7, fn. 1, the Medical Commission notes that Moss ‘has not submitted any evidence that his impairment rating of 23% was in error.’ When, in fact, that is what this case is all about (Moss’s condition steadily deteriorated after the date of that determination).”

*Moss*, ¶ 51, 232 P.3d at 15.

<sup>330</sup> *Id.* at ¶ 48, 232 P.3d at 14.

<sup>331</sup> *Id.* at ¶ 7, 232 P.3d at 3. It is not clear from the reported case whether this figure represented a permanent partial *impairment* or a permanent *partial disability* benefit. See WYO. STAT. ANN. §§ 27-14-405(g)–(h). The distinction, which is a unique creature of Wyoming law, is not important here.

## VI. CONCLUSION

The Wyoming Supreme Court should find its way back to the path laid out in *Colwell*.<sup>332</sup> The court should, in all cases, “examine the conflicting evidence to determine if [an agency] could reasonably have made its findings and order upon all of the evidence before it.” The court should reemphasize that the Wyoming legislature’s 1979 amendment of the Wyoming Administrative Procedure Act explicitly linked “substantial evidence” to whole-record review of the kind established by *Universal Camera*.<sup>333</sup> The best course would be for the court to simply overrule *Spiegel*,<sup>334</sup> and the “overwhelming weight” standard it mistakenly initiated.<sup>335</sup>

In the event the court declines to overrule *Spiegel*, it should make unambiguously clear that there is absolutely no difference between the overwhelming weight and substantial evidence standard. Alternatively, to the extent that the overwhelming weight standard means something different than “substantial evidence,” the court should explain both what the overwhelming weight standard means, and how it relates to the substantial evidence standard.

It is axiomatic that courts should not simply substitute their judgment for that of administrative agencies implementing statutes within the realm of the agencies’ expertise.<sup>336</sup> But *Universal Camera*, as agreed with by *Colwell*,<sup>337</sup> made clear that “a reviewing court is not barred from setting aside [an agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency’s] view.”<sup>338</sup> Because the overwhelming weight standard frustrates that bedrock principle of administrative law, it should be abandoned.

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<sup>332</sup> Bd. of Trs. v. Colwell, 611 P.2d 427, 429 (Wyo. 1980).

<sup>333</sup> *Id.*

<sup>334</sup> See *supra* note 62 and accompanying text.

<sup>335</sup> See *supra* notes 44–113 and accompanying text.

<sup>336</sup> *Colwell*, 611 P.2d at 428.

<sup>337</sup> *Id.*

<sup>338</sup> *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951).