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ADMINISTRATIVE LAW SURVEY

INTRODUCTION

Federal administrative agencies play a large role in articulating and implementing public policy in the United States.[1] Thus, they wield a power that affects the lives of all Americans. Congress and the courts continue to develop legal principles that attempt to define the limits of that power. In doing so, however, they consistently take a deferential approach to agency action. This broad deference to agency action raises questions as to whether any meaningful limits on agency action exist.

In its most recent term, the United States Court of Appeals for the Tenth Circuit continued its policy of extending substantial deference to agency decision-making. The court did so by reaffirming its adherence to three widely accepted principles of administrative law: (1) deference to reasonable agency interpretation of its governing statute; (2) limiting review of agency action to "review on the record"; and (3) deference to agency action that is not "arbitrary or capricious." These highly deferential standards do not, however, provide a substantial check on agency power.

In *NLRB v. Viola Industries-Elevator Division, Inc.*,[2] the Tenth Circuit extended deference to the National Labor Relations Board's decision to reinterpret a portion of its governing statute.[3] The new interpretation displaced a long-standing rule that the Supreme Court had arguably articulated as the law.[4] The agency's adoption of a new, albeit, reasonable interpretation of the statute raised serious questions under the separation of powers doctrine.[5]

In *Bar MK Ranches v. Yuetter*,[6] the Tenth Circuit limited its review of a United States Forest Service decision to the "record." The court narrowly interpreted this "review on the record" limitation to include only those documents examined by the agency when it made its original determination.[7] In some cases, this narrow interpretation of the "record" will preclude the court from undertaking a more substantive evaluation of the legality of the agency's action.

Within the narrow boundaries of "review on the record," the court in *Yuetter* only sought to determine if the agency decision was arbitrary or capricious.[8] This is arguably the most deferential standard of review. This

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1. William L. Andreen, *An Introduction to Federal Administrative Law Part I: The Exercise of Administrative Power and Judicial Review*, 50 ALA. LAW. 322 (1989).
2. 979 F.2d 1384 (10th Cir. 1992).
3. *Id.* at 1394.
4. *Id.* at 1398.
5. *Id.* at 1397.
6. 994 F.2d 735 (10th Cir. 1993).
7. *Id.* at 739.
8. *Id.*

standard was also strictly applied in *Lewis v. Babbitt*,[9] where the Tenth Circuit reviewed various decisions by the National Park Service to determine if they were arbitrary or capricious.[10]

These cases illustrate the Tenth Circuit's adherence to broadly accepted principles of administrative law that extend substantial deference to agency action. This broadly deferential approach, however, raises questions as to whether there are meaningful limits on agency power.

I. When An Agency Changes Its Mind: Deference, Retroactivity and Constitutional Considerations in *NLRB v. Viola Industries-Elevator Division, Inc.*[11]

A. *Background*

1. Deference to Agency Interpretations

The Administrative Procedure Act[12] ("APA") provides a uniform set of legal principles to be applied to federal agencies.[13] The APA, and the Supreme Court's interpretation of its various provisions, establish the basis for judicial review of administrative decisions.[14]

From this foundation, Congress and the federal courts have continued to struggle with exactly how to control the authority of administrative agencies. Judicial review of agency action is generally considered a necessary check against abuses of agency authority.[15] Yet, judicial intervention can frustrate an agency's effectiveness.[16]

The APA does not explicitly indicate how much deference should be accorded to agency interpretations.[17] Thus, the question of when courts should defer to an agency's interpretation of its governing statute has been the basis of considerable debate. The judiciary's approach has ranged between two extremes: courts ignoring the administrative view and employing traditional tools of statutory interpretation to arrive at what they regard as the best interpretation of the statute; and courts framing the inquiry in terms of whether the administrative interpretation is one that a reasonable interpreter might make.[18] Under the latter deferential approach, a court acknowledges that the statute is susceptible to multiple interpretations.[19] The court does not attempt to discover the best inter-

9. 998 F.2d 880 (10th Cir. 1993).
10. *Id.* at 881.
11. 979 F.2d 1384 (10th Cir. 1992).
12. 5 U.S.C. §§ 551-559, 701-706 (1988 & Supp. IV 1992).
13. *Id.*
14. John C. Haas, Survey, *Administrative Law*, 70 Denv. U. L. Rev. 625, 625 (1993); *see also* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. on Reg. 283, 307-08 (1986) (stating that courts are mandated by the APA to "check" administrative agencies).
15. Eric M. Braun, Note, *Coring the Seedless Grape: A Reinterpretation of* Chevron U.S.A. Inc. v. NRDC, 87 Colum. L. Rev. 986, 987 (1987).
16. *Id.*
17. *See* 5 U.S.C. §§ 551-559, 701-706 (1988 & Supp. IV 1993).
18. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L. J. 969, 971 (1992).
19. *Id.*

pretation, but rather seeks to assure that the agency view does not contradict the statute.[20]

Prior to the 1984 Supreme Court decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[21] courts were inconsistent in their approach toward the issue of deference.[22] *Chevron* provided a procedural formula for courts to follow in determining whether to defer to agency interpretations. The issue in *Chevron* was the meaning of the term "stationary source" in the 1970 and 1977 Amendments to the Clean Air Act.[23] The Environmental Protection Agency (EPA) interpreted the term to mean that an entire factory could be a single "stationary source" under certain circumstances.[24] This became known as the "bubble concept" since an entire factory would be treated as a single stationary source enclosed in a bubble.[25]

The court of appeals held that the EPA's interpretation conflicted with the statute.[26] The court recognized that neither the statutory language nor the legislative history compelled any particular interpretation of the term "stationary source."[27] The court reasoned, however, that the correct meaning of the term could nevertheless be drawn from the overall statutory purpose.[28] This approach allowed the court to conclude that the bubble concept was statutorily prohibited because the general purpose of the Clean Air Act Amendments was to improve, rather than merely maintain, air quality.[29]

The Supreme Court reversed,[30] declaring that the appellate court "misconceived the nature of its role in reviewing the regulations."[31] The Court then set out a two-step test for judicial review of agency statutory interpretations:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is

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20. *Id.*

21. 467 U.S. 837 (1984).

22. *See, e.g.*, Merrill, *supra* note 18, at 971; Claude T. Coffman, *Judicial Review of Administrative Interpretations of Statutes*, 6 W. NEW ENG. L. REV. 1, 3 (1983); *see also* Haas, *supra* note 14, at 625 (discussing the Supreme Court's inability to develop a consistent position on deference prior to 1984).

23. 467 U.S. at 840; *see* Clean Air Amendments of 1970, Pub. L. No. 91-604, § 111(a)(3), 84 Stat. 1676, 1683 (codified as amended at 42 U.S.C. § 7411(a)(3) (1988)); Clean Air Amendments of 1977, Pub. L. No. 95-95, § 172(b)(6), 91 Stat. 685, 747 (codified as amended at 42 U.S.C. § 7502(b)(6) (1988)). The term was important because to construct or modify a "stationary source" that emitted more than 100 tons of pollution per year and was located in an area that did not meet federal air quality standards, an applicant had to comply with rigorous statutory standards. *Chevron*, 467 U.S. at 864 n.38.

24. *Chevron*, 467 U.S. at 840; *see also* 46 Fed. Reg. 50,766 (1981) (notice of a final rule adopting the "plantwide" definition). The EPA's definition would limit the number of sources to be reviewed for permits. *See id.*

25. *See Chevron*, 467 U.S. at 840.

26. NRDC v. Gorsuch, 685 F.2d 718, 726 (D.C. Cir. 1982), *rev'd sub nom.* Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).

27. *Id.* at 726 n.39.

28. *Id.* at 726.

29. *Id.* at 726-27.

30. *Chevron*, 467 U.S. at 866.

31. *Id.* at 845.

> clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[32]

The Court equated "permissible" with "reasonable."[33] In order for an agency construction to be upheld as reasonable, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding."[34] Under *Chevron*, if the meaning of a statute is unclear, the agencies are the preferred gap fillers.[35] This is an deferential standard that may, in some cases, conflict with the separation of powers doctrine.

2. Deference and the Separation of Powers

The United States Constitution grants legislative powers to Congress,[36] executive power to the president,[37] and judicial power to the Supreme Court and its inferior courts.[38] Despite this scheme, there is overlap in the functions of each branch of government.[39] This overlap is especially evident in the power delegated to administrative agencies, which typically serve quasi-legislative, quasi-executive, and quasi-judicial functions.[40]

The power of administrative agencies to make determinations of law is an especially troubling area of overlap. The *Chevron* doctrine, which holds that courts must defer to reasonable interpretations of law made by administrative agencies, has been attacked on the grounds that it violates the separation of powers principle of the Constitution.[41] Moreover, the *Chevron* doctrine arguably usurps judicial authority and grants excessive power to administrative agencies.[42]

3. Retroactive Application of Administrative Rules

Courts generally favor prospective application of rules when an agency responds to actions of parties who have relied in good faith on

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32. *Id.* at 842-43.
33. *See id.* at 844.
34. *Id.* at 843 n.11.
35. *Id.* at 843-44. *See generally* Robert J. Gregory, *When a Delegation is Not a Delegation: Using Legislative Meaning To Define Statutory Gaps*, 39 CATH. U. L. REV. 725 (1990) (discussing congressional delegation of rulemaking authority to administrative agencies).
36. U.S. CONST. art. I, § 1.
37. *Id.* art. II, § 1, cl. 1.
38. *Id.* art. III, § 1, cl. 1.
39. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 430 (1987) (arguing that the notion of separation of powers is in some respects a mischaracterization of our constitutional system).
40. *See* Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B. C. L. REV. 757, 758-59 (1991).
41. *See id.* at 759.
42. *Id.*

prior agency pronouncements.[43] However, retroactive application of rules may be necessary in some cases in order for the agency to carry out Congress' delegation efficiently.[44]

There are two different types of retroactive rulemaking.[45] First, an agency may make a curative rule by retroactively remedying a procedural defect in an existing rule without substantively changing the content of the rule.[46] Second, an agency may substantively modify an existing rule regardless of the presence of a prior defect.[47] This latter type of retroactive rule is more problematic. Its validity generally depends upon a balancing of congressional intent and the needs of the administrative agency against potential hardship to persons who have relied on the prior rule.[48]

A court may extend deference to any reasonable agency interpretation.[49] This is true even when the agency radically changes its mind.[50] When an agency does so, however, and attempts to apply the new interpretation retroactively, the court should try to avoid hardship to persons who relied on the prior agency rule.[51]

B. *Agency Action*

In *NLRB v. Viola Industries-Elevator Division, Inc.*,[52] the National Labor Relations Board ("NLRB" or "Board") found that Viola Industries-Elevator Division, Inc., and Viola Industries, Inc. (collectively, Viola Industries), violated the National Labor Relations Act[53] (the "Act") by not honoring a prehire agreement[54] it entered into with the International Union of Elevator Constructors (the "Union").[55]

Under the original provisions of the Act, employers were not permitted to bargain with a union that had not been selected by the majority of the employees.[56] Originally, the union could establish majority status only through voluntary recognition by the employees or formal certification.[57] Congress, however, determined that applying these rules to the construction industry posed some unique problems due to the usual short duration

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43. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95 (1974).

44. For instance, agencies occasionally must adjust public programs retroactively in order to allocate limited funds fairly.

45. Richard J. Wolf, Note, *Judicial Review of Retroactive Rulemaking: Has Georgetown Neglected the Plastic Remedies?*, 68 WASH. U. L. Q. 157, 163 (1990).

46. *Id.*

47. *Id.* at 164.

48. *Id.*

49. NLRB v. Local Union No. 103, International Ass'n of Bridge, Structural & Ornamental Iron Workers (Higdon), 434 U.S. 335, 350 (1978).

50. *Id.* at 351.

51. *See* Consolidated Freightways v. NLRB, 892 F.2d 1052, 1058 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 817 (1990).

52. 979 F.2d 1384 (10th Cir. 1992).

53. 29 U.S.C. § 158(f) (1988).

54. "A prehire agreement is an arrangement unique to the construction industry in which an employer enters into an agreement with a union before the union has been designated or selected as the representative of the workforce." *Viola*, 979 F.2d at 1389.

55. *Id.* at 1389.

56. *Id.* at 1392.

57. *Id.*

of construction jobs.[58] Consequently, Congress amended the Act to provide that it was not an unfair labor practice for a construction employer to enter into a collective bargaining agreement with a union prior to the union attaining majority status.[59]

Thus, the newly adopted Section 8(f) permitted prehire agreements in the construction industry. In *R.J. Smith Construction Co.*,[60] the NLRB determined Section 8(f)'s relation to other provisions of the Act. The doctrine developed in *R.J. Smith Construction Co.* endured for seventeen years and has been interpreted to stand for the following rule:

> [A] § 8(f) prehire agreement was merely a preliminary step which contemplated further action [toward] the development of a full bargaining relationship. During this preliminary stage there was no presumption of majority status which would protect the signatory union from challenge during the contract's term. The agreement . . . could be repudiated by either party at any moment . . . .
>
> However, a prehire agreement could convert into a full Section 9(a) [majority status] relationship . . . upon a showing that the signatory union enjoyed majority support, during a relevant period, among an appropriate unit of the signatory employer's employees.[61]

From 1972 to 1982, Viola Industries, an installer and servicer of elevator equipment, entered into a series of prehire contracts with the Union.[62] After entering into the third prehire agreement, which was signed December 14, 1982, and was effective for five years, Viola Industries began several elevator-installation projects.[63] Viola Industries, however, repudiated this third prehire agreement on November 4, 1983.[64]

The Union immediately filed a claim with the NLRB alleging that Viola Industries violated the Act by repudiating the agreement.[65] An Administrative Law Judge ("ALJ") determined that the Union had attained majority support from Viola Industries' employees at some point between 1978 and 1980.[66] Pursuant to the rule from *R.J. Smith Construction Co.*, the union was retroactively converted into the full-fledged bargaining representative of Viola Industries' employees.[67] Because Viola Industries could not repudiate this agreement, the ALJ ordered Viola to pay back wages and benefits to its employees.[68]

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58. *Id.*
59. *Id.*
60. 191 N.L.R.B. 693 (1971), *vacated and remanded*, Local No. 150, International Union of Operating Engineers v. NLRB, 480 F.2d 1186 (D.C. Cir. 1973).
61. *Viola*, 979 F.2d at 1392 (citations omitted).
62. *Id.* at 1389.
63. *Id.* at 1389-90.
64. *Id.* at 1390.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

After the decision of the ALJ, the NLRB overruled its prior interpretation of Section 8(f) in *John Deklewa & Sons.*[69] This new interpretation was affirmed on appeal by the Third Circuit in *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB (Iron Workers).*[70] The court of appeals enforced the Board's new rule that Section 8(f) agreements were no longer unilaterally voidable, thereby making these agreements enforceable until expiration.[71] The Board also abandoned the "conversion doctrine," holding that Section 8(f) prehire agreements were only enforceable during the term of the agreement and could not convert into traditional collective bargaining agreements without a standard election and certification.[72]

The Board announced that it would apply the new Section 8(f) principles "to all pending cases in whatever stage."[73] Thus, it applied the principles from *Deklewa* to *Viola* and found that the prehire agreement was binding and could not be repudiated by either party.[74]

C. *The Tenth Circuit Opinion*

1. Majority

Viola Industries argued on appeal to the Tenth Circuit that *Deklewa* was not a proper interpretation of the Act.[75] It further contended that those who had relied on the old rule should not be subject to retroactive application of the new rule, even if that rule was proper.[76]

Citing two prior Supreme Court opinions, *NLRB v. Local Union No. 103, International Ass'n of Bridge, Structural & Ornamental Iron Workers (Higdon)*[77] and *Jim McNeff, Inc. v. Todd,*[78] Viola Industries argued that without majority status, the collective bargaining relationship and a union's authorization to represent the employees are not triggered.[79] Thus, it argued the Board exceeded its statutory authority by granting majority status under Section 9(a) based solely upon the signing of a prehire agreement.[80]

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69. 282 N.L.R.B. 1375 (1987), *enforced sub nom.* International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (3d Cir.), *cert. denied,* 488 U.S. 889 (1988).

70. 843 F.2d 770 (3d Cir.), *cert. denied,* 488 U.S. 889 (1988).

71. *Id.* at 775.

72. *Id.*

73. *Deklewa,* 282 N.L.R.B. at 1389.

74. *Viola,* 979 F.2d at 1390.

75. *Id.* at 1391.

76. *Id.* For cases supporting Viola Industries argument see Jim McNeff, Inc. v. Todd, 461 U.S. 260 (1983); Trustees of Wyo. Laborers Health and Welfare Plan v. Morgan & Oswood Constr. Co., Inc., 850 F.2d 613 (10th Cir. 1988); Trustees of Colo. Statewide Iron Workers (Erector) Joint Apprenticeship and Training Trust Fund v. A & P Steel, Inc., 812 F.2d 1518 (10th Cir. 1987); New Mexico Dist. Council of Carpenters v. Jordan & Nobles Constr. Co., 802 F.2d 1253 (10th Cir. 1986).

77. 434 U.S. 335 (1978).

78. 461 U.S. 260 (1983).

79. *See Viola,* 979 F.2d at 1393 (citing *Higdon,* 434 U.S. at 346).

80. *Id.*

The Tenth Circuit examined *Higdon* first. In that case, the Supreme Court affirmed the Board's reliance on its earlier *R.J. Smith Construction Co.* decision that established the pre-*Deklewa* interpretation of Section 8(f).[81] The Tenth Circuit noted, however, that the *Higdon* court upheld the Board's decision because " '[t]he Board's resolution of the conflicting claims . . . represent[ed] a defensible construction of the statute and [was] entitled to considerable deference.' "[82] Therefore, the *Higdon* court was not stating the law with regard to Section 8(f), but merely was extending deference to the Board for a permissible statutory interpretation.[83]

In examining *McNeff*, the Tenth Circuit stated that *McNeff* simply relied on *Higdon* and did not reexamine the court's review function in these types of cases.[84] Thus, *McNeff* should not be viewed as a new approach distinct from the rule of deference in reviewing Board interpretations of the Act.[85] Therefore, the Tenth Circuit concluded that *McNeff* did not prevent the court's use of the *Deklewa* rule.[86]

The court then held that the *R.J. Smith Construction Co.* rule was not the only reasonable interpretation of the statute, but that the Board's *Deklewa* rule was also a reasonable interpretation.[87] "[I]n administrative adjudicatory proceedings courts 'will uphold a Board rule [so] long as it is rational and consistent with the Act.' "[88] A mere departure from precedent does not invalidate the Board's *Deklewa* decision.[89] Moreover, " '[a]n administrative agency is not disqualified from changing its mind.' "[90]

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81. *See Higdon*, 434 U.S. at 350-52.

82. *Viola*, 979 F.2d at 1393 (quoting *Higdon*, 434 U.S. at 350).

83. *Id.*

84. *Viola*, 979 F.2d at 1393 (citing *McNeff*, 461 U.S. at 265-71). The court went on to state that since *McNeff*, the Supreme Court has continued to stress the *Higdon* principle of deference. *Id.* (citing Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 844 (1984) as an example).

85. *Viola*, 979 F.2d at 1394.

86. *Id.* The Tenth Circuit also held that its earlier decisions, *see* cases cited *supra* note 76, did not preclude it from adopting *Deklewa*. *Viola*, 979 F.2d at 1394. Although each case upheld the *R.J. Smith Construction Co.* repudiation principle, the court reasoned that because those cases also relied on *McNeff*, which does not bar application of the new *Deklewa* doctrine, neither do those cases. *Id.*

The court found the Third Circuit's opinion in *Iron Workers*, upholding *Deklewa*, to be persuasive. *Id.* at 1395. The Third Circuit stated that prior Supreme Court decisions involving the Board's *R.J. Smith Construction Co.* interpretation simply reviewed the Board's prior interpretation and did not adopt the *R.J. Smith Construction Co.* interpretation of the statute as binding. *Id.*

The court noted that four other circuits have followed the Third Circuit on this issue. *Id.* at 1394 n.3 (citing C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB, 921 F.2d 350, 357 (1st Cir. 1990); NLRB v. Bufco Corp., 899 F.2d 608, 609 (7th Cir. 1990); NLRB v. W.L. Miller Co., 871 F.2d 745, 748 (8th Cir. 1989); Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers, 861 F.2d 1124, 1126, 1134, 1137 (9th Cir. 1988)).

87. *Id.* at 1395.

88. *Id.* at 1394 (quoting NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 787 (1990)).

89. *Id.* at 1395.

90. *Id.* (quoting *Higdon*, 434 U.S. at 351).

Finally, the court addressed the question of whether the new interpretation could be applied retroactively.[91] The court followed the Third Circuit[92] and held that the Board's new rule regarding Section 8(f) could be applied retroactively unless manifest injustice would result. The court held that any frustrated expectations resulting from the Board's application of the new *Deklewa* rule would not, in general, amount to manifest injustice.[93] Eliminating the right to repudiate prehire contracts only binds the parties to terms which they themselves negotiated.[94]

2. Dissent

In his dissent, Judge Baldock neither took issue with whether the new *Deklewa* rule was a permissible interpretation of the statute,[95] nor with the argument that the *Delkewa* rule achieved the goals of the NLRB more effectively than the rule from *R.J. Smith Construction Co.*[96] Judge Baldock's dissent focused instead on his concern for the separation of power between the courts and the executive branch.[97] He felt that the majority "revise[d], ultra vires, the Supreme Court's opinion in [*McNeff*] in order to avoid this substantial constitutional question."[98] The *McNeff* court interpreted the statute to settle a private lawsuit.[99] Unlike *Higdon*, the *McNeff* court was not reviewing an agency decision and nowhere limited its interpretation of Section 8(f) to "being merely a defensible construction."[100]

Judge Baldock stated that "the judicial deference afforded to an agency's construction of a statute has no place outside of . . . reviewing an agency decision."[101] To resolve the issue before it, the court in *McNeff* construed Section 8(f) and clearly stated that the *R.J. Smith Construction Co.* rule was the law.[102] Therefore, until an act of Congress or a Court decision overrules this precedent, it binds the lower courts as well as the administrative agency.[103]

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91. *Id.* at 1396. "Several Circuits have addressed the question of whether a new rule announced by an . . . agency in adjudicatory proceedings is to be applied retroactively and have upheld retroactive application unless manifest injustice would result." *Id.* (citing NLRB v. Bufco, 899 F.2d 608, 611 (7th Cir. 1990); Consolidated Freightways v. NLRB, 892 F.2d 1052, 1058 (D.C. Cir. 1989); NLRB v. Semco Printing Cent., Inc., 721 F.2d 886, 892 (2d Cir. 1983); NLRB v. New Columbus Nursing Home, Inc., 720 F.2d 726, 729 (1st Cir. 1983)).

92. *See supra* note 86.

93. *Viola*, 979 F.2d at 1396.

94. *Id.*

95. *Id.* at 1397.

96. *Id.*

97. *Id.*

98. *Id.* at 1397-98.

99. *Id.* at 1398.

100. *Id.*

101. *Id.*

102. *Id.* at 1399. "A [Section] 8(f) prehire agreement is subject to repudiation until the union establishes majority status." *Id.* (citing *McNeff*, 461 U.S. at 271). In addition, Judge Baldock noted that "subsequent cases interpreting *McNeff* never portended that the meaning given to [Section] 8(f) was merely a defensible construction; rather the [Tenth Circuit] applied the *McNeff* interpretation of [Section] 8(f) as if it were the law." *Id.* at 1399; *see supra* note 76.

103. *Viola*, 979 F.2d at 1399.

D. *Analysis*

Proponents of the deferential approach in *Chevron* argue, among other things, that agencies are more competent to interpret the statutes they administer.[104] When administering their governing statutes, agencies must do more than simply determine congressional intent; administrative statutory interpretation also involves complicated policy judgements.[105] Agencies are more efficient fact-finders, have greater technical expertise, and should be afforded great deference.[106]

Chevron, however, arguably went too far. The broad deferential approach in *Chevron* raises the question as to whether it will bring about an erosion of judicial review conferred by the constitution and by the APA.[107] This is especially true when a court defers to an agency interpretation that is contrary to a prior judicial interpretation. To defer under these circumstances raises serious issues concerning the separation of powers. The rules of deference should not be applied as an absolute rule, particularly when deferring might violate fundamental constitutional principles.

The court in *Viola* deferred to an agency interpretation that was a reasonable construction of the statute.[108] However, the interpretation constituted a change from a prior interpretation that had been articulated in the courts as law. Deference under these circumstances should have triggered analysis under the separation of powers doctrine. The court avoided this substantial constitutional question by asserting that the court in *McNeff* was operating under some deferential standard of review.[109] This is arguably an incorrect reading of *McNeff*. As the dissent indicates, the court in *McNeff* recited an interpretation of Section 8(f) in order to settle a dispute between private parties and was not reviewing an agency decision.[110] Therefore, to defer to the NLRB's new interpretation, which was contrary to the holding in *McNeff*, would allow an agency to overrule judicial precedent.

While deference is appropriate in some cases, *Viola* exemplifies the need for clear limits on its application. The principles of deference should never be used as a pretext for avoiding substantial constitutional questions.

In addition, the court in *Viola* applied the new rule retroactively. Citing Third Circuit rationale, the court held that to apply the new rule retroactively would not result in "manifest injustice."[111] It reasoned that application of this rule, which eliminated the right to repudiate prehire

104. *See* Braun, *supra* note 15, at 989.
105. *Id.*
106. *Id.*
107. Timothy B. Dyk, *The Supreme Court's Role in Not Shaping Administrative Law*, 44 ADMIN. L. REV. 429, 431 (1992); *see also* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990) (stating that *Chevron* is widely regarded as a "counter-Marbury" for administrative law).
108. *Viola*, 979 F.2d at 1395.
109. *See id.* at 1394.
110. *Id.* at 1398.
111. *Id.* at 1396.

contracts, would only hold the parties to terms that they themselves negotiated.[112] Therefore, in the court's mind no manifest injustice occurred.

The court diminished the potential hardship to Viola Industries by suggesting that Viola Industries would have entered into the agreement regardless of the Board's new construction of Section 8(f) in *Deklewa*.[113] This is speculative at best. The prior rule from *R.J. Smith Construction Co.* had endured for seventeen years. It would have been reasonable for Viola Industries to have relied on this rule in making its contract decisions with the Union. The new rule from *Deklewa* removed the element of flexibility that the old rule provided employers that contract with unions. Application of the new rule in *Viola* saddled Viola Industries with financial obligations[114] it might have been able to avoid under the old rule. Therefore, retroactive application of the *Deklewa* rule created a hardship on Viola Industries and, arguably, constituted manifest injustice.

II. JUDICIAL REVIEW OF ADMINISTRATIVE AGENCY DECISIONS AND THE ADMINISTRATIVE RECORD: *BAR MK RANCHES V. YUETTER*[115]

A. *Background*

Administrative agencies impact our society tremendously, and thus judicial review must provide meaningful checks to agency action. The APA authorizes judicial review of agency actions.[116] Courts, however, review whether the agency's action was arbitrary or capricious and not whether the agency should have decided the matter differently.[117] This is a very deferential standard.

While judicial review provides some protection against the unbridled power of an administrative agency, the Supreme Court has limited the role of courts in reviewing agency decisions.[118] Courts may not substitute their judgments for those of the agency.[119] In reviewing informal agency actions,[120] the APA limits courts to "review on the record."[121] This generally

112. *Id.* The majority also stated that the ALJ's determination that the Union did have majority status and, consequently, that the 8(f) agreement became enforceable undermined Viola Industries' claim of manifest injustice. *Id.* at 1397. However, it is unclear to what degree the court relied on this rationale in upholding retroactive application in *Viola*.

113. *See id.* at 1396.

114. Viola Industries' agreement with the Union obligated them to pay wages and benefits. *See id.* at 1390.

115. 994 F.2d 735 (10th Cir. 1993).

116. 5 U.S.C. §§ 701-706 (1988).

117. *See id.* § 706.

118. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Camp v. Pitts, 411 U.S. 138 (1973).

119. *Overton Park*, 401 U.S. at 416.

120. Under the APA, agency action can take the form of formal rulemaking or adjudication, with specified proceedings including trial hearings, witnesses and administrative law judges. 5 U.S.C. §§ 554-557 (1988 & Supp. IV 1992). This formal action results in a defined record similar to that in a court.

Agency rulemakings or adjudications can also be informal. There are sometimes general requirements for "informal" agency decisions, including proposed rules in the *Federal Register*, acceptance of comments from outside parties, and publication of a statement of purpose with final rules. *Id.* §§ 553(b)-(c). While formal types of administrative action define the record more clearly, informal agency actions often do not; the APA provides little guidance

means that courts should never examine an agency decision *de novo*; but rather, courts should limit the review to those documents examined by the agency when it made its original determination.[122]

For administrative agency decisions, the APA provides "thorough review" based on the "whole record" of a case.[123] The APA, however, does not explicitly define what that "record" should include. The statute and its legislative history provide little guidance as to the meaning and scope of this term.[124] In informal adjudication, the APA only requires a "brief statement of the grounds" for an agency's action.[125] This requirement, however, is so ambiguous as to provide little practical guidance in determining the scope of the "record" on review.

The Supreme Court has struggled with this ambiguous language and has chosen to define the scope of the record very narrowly. In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[126] the Supreme Court instructed the lower court to look only at what the agency relied upon in the record as the basis for its rationale.[127] In *Camp v. Pitts*,[128] the Court applied the rule of *Overton Park* and held that an agency's failure to explain adequately its final decision does not warrant a completely new hearing consisting of additional oral testimony before the court.[129] Rather, the reviewing court should require the agency to explain its action by submitting only necessary additional evidence in the form of affidavits or written testimony.[130]

Overton Park and *Camp* provide the general scope of the doctrine of "review on the record." Despite the Supreme Court's narrow approach, the doctrine has developed over time to include various far-reaching exceptions that permit the admission of additional evidence that the agency claimed was not part of the record.[131] It has been argued that these broad

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beyond requiring a "brief statement of the grounds" for the agency action. *Id.* § 555(e). Courts have responded to this ambiguous language by requiring the agency whose conduct is being challenged to assemble the record for the court.

121. *Id.* § 706 (requiring the court to "review the whole record").

122. *See, e.g., Overton Park*, 401 U.S. at 420; *Camp*, 411 U.S. at 142. The record is more difficult to determine when the court reviews informal rather than formal agency actions. *See supra* note 120.

123. 5 U.S.C. § 706 (1988).

124. *See* William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 40-41 (1975); *see also supra* note 120 (comparing the unclear APA provisions for informal agency actions with the statute's more defined provisions for formal agency actions).

125. 5 U.S.C. § 555(e) (Supp. IV 1992).

126. 401 U.S. 402 (1971).

127. *Id.* at 420.

128. 411 U.S. 138 (1973).

129. *Id.* at 142-43.

130. *Id.* at 143.

131. *See* Steven Stark & Sarah Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L.J. 333, 343-54 (1984). Stark and Wald note:

> [T]he exceptions which have developed to allow extra-record evidence are the following: (1) when agency action is not adequately explained in the record before the court; (2) when the agency failed to consider factors which are relevant to its final decision; (3) when an agency considered evidence which it failed to include in the record; (4) when a case is so complex that a court needs more evidence to enable it to understand the issues clearly; (5) in cases where evidence arising after the agency action shows whether the decision was correct or not; (6) in cases where agencies are sued for a failure to take action; (7) in cases arising under the National

exceptions essentially erode the *Overton Park-Camp* rule.[132] The Tenth Circuit, however, reaffirmed the viability of that rule in its most recent term.

B. *Agency Action*

In *Bar MK Ranches v. Yuetter*,[133] a group of landowners who held national forest grazing permits challenged the decision of the Forest Service to move 150 elk to the Manti-LaSal National Forest near Monticello, Utah.[134] Following regulatory procedure,[135] the landowners appealed the decision to the Regional Forester.[136] After the Regional Forester affirmed the original decision, the landowners appealed to the next administrative level.[137] The Chief of the Forest Service also affirmed, and the decision became final after the Secretary of Agriculture refused discretionary review.[138]

The landowners then filed for judicial review of the Forest Service's decision in federal district court.[139] The Forest Service accordingly filed its Administrative Record[140] along with a motion for summary judgment.[141] The landowners responded, arguing that the Forest Service did not comply with its regulations concerning the development of the agency appeal record[142] and that the Administrative Record was not adequately developed.[143]

The district court granted summary judgment in favor of the Forest Service, concluding that the Forest Service had complied with its own regulations and that the Administrative Record was adequate to evaluate the agency's decision.[144] The agency appeal record and the Administrative Record issues were then presented on appeal to the Tenth Circuit.[145]

C. *The Tenth Circuit Opinion*

The landowners first contended that the Forest Service improperly interpreted the regulatory provision, which states that "an appeal decision

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Environmental Policy Act; and (8) in cases where relief is at issue, especially at the preliminary injunction stage.

Id. at 344.

132. *See id.* at 358. *But see*, Dave Sive, *The Problem of the "Record" in Judicial Review of Environmental Administrative Action*, C637 ALI-ABA 29, 39 (1991) (stating that in his opinion the doctrine is still viable).

133. 994 F.2d 735 (10th Cir. 1993).

134. *Id.* at 737.

135. *See* 36 C.F.R. § 211.18(f) (1987).

136. *Yuetter*, 994 F.2d at 737.

137. *Id.*

138. *Id.* at 738.

139. *Id.*

140. The administrative record constitutes the record filed in the district court by the Forest Service for judicial review of the Forest Service's decision. *Id.*

141. *Id.*

142. The agency appeal record constitutes the record developed through the internal agency review process. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 737.

will be based only on the record."[146] They argued that the Forest Service violated the regulation by basing its decision on information not contained in the agency appeal record.[147] Thus, the agency appeal record was improperly developed.[148] The Tenth Circuit disagreed, holding that the Forest Service's interpretation and application of its regulation were "reasonable and consistent with the regulation's plain meaning."[149]

The landowners also alleged that the Administrative Record filed with the district court included some documents not considered by the agency and failed to include other documents that were considered by the agency, thereby preventing the court from adequately reviewing the Forest Service's actions.[150] The Tenth Circuit addressed this issue by returning to the principles set forth in *Overton Park* and *Camp*.[151] The court stated that a district court reviews an agency action to determine if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[152] This review is based on the record that was before all administrative decision makers, including the Deciding Officer and the Reviewing Officers.[153] Therefore, the Administrative Record submitted to the district court was sufficient if it contained all documents considered at all stages of the Forest Service's decision process.[154]

The court held that the landowners failed to establish that the Administrative Record in this case was developed improperly.[155] While the landowners could verify that certain documents included in the Administrative Record and filed with the district court were not part of the agency appeal record, they failed to show that these documents were not part of the documents considered by the Deciding Officer.[156]

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146. 36 C.F.R. § 211.18(r) (1987); *Yuetter*, 994 F.2d at 738.
147. *Yuetter*, 994 F.2d at 738.
148. *See id.*
149. *Id.*
150. *Id.* at 739.
151. *See id.*
152. *Id.* (citing 5 U.S.C. § 706(2)(A)).
153. *Id.* (citing *Overton Park*, 401 U.S. 402, 420 (1971)). The Tenth Circuit further stated the law as follows:

> The district court must have before it the "whole record" on which the agency acted. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." The complete administrative record consists of all documents and materials directly or indirectly considered by the agency.
>
> . . . .
>
> An agency may not unilaterally determine what constitutes the Administrative Record, nor can the agency supplement the Administrative Record submitted to the district court with post hoc rationalizations for its decision. However, the designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity. The court assumes the agency properly designated the Administrative Record absent clear evidence to the contrary. When a showing is made that the record may not be complete, limited discovery is appropriate to resolve that question. The harmless error rule applies to judicial review of administrative proceedings, and errors in such administrative proceedings will not require reversal unless Plaintiffs can show they were prejudiced.

Id. at 739-40 (citations omitted) (quoting Camp v. Pitts, 411 U.S. 138, 142 (1973)).
154. *Id.* at 739.
155. *Id.* at 740.
156. *Id.*

Finally, the landowners alleged that certain documents submitted to the district court by the Forest Service were "post hoc rationalizations" for its decision.[157] The court held, though, that the landowners made no showing of prejudice from the alleged post hoc rationalizations.[158]

D. *Analysis*

Bar MK Ranches v. Yuetter clearly indicates that the *Overton Park-Camp* approach to judicial review on the record is still viable in the Tenth Circuit. The *Yuetter* court declared that the administrative record submitted to the district court is complete if it contains "nothing more and nothing less" than the full record considered and developed at all stages of an agency's decision process.[159] This language echoes the narrow standard of record review articulated in *Overton Park* and *Camp*.

The doctrine of review on the record stems from the concern that courts should not replace administrative agencies' decisions with their own.[160] Courts might begin acting more as independent decision makers if they are able to consider materials that were not before the agency when it made its decision.[161]

A broader notion of the record for informal agency decisions, however, does not necessarily suggest unacceptable court involvement.[162] With informal agency action, many of the procedural protections of the APA are unavailable.[163] Therefore, courts should "undertake a more searching review of the record and the merits in order to assure that agency action is lawful."[164] Without a broader notion of record review, agencies have almost unreviewable authority, which frustrates the objectives of judicial review.[165] Thus, like the *Chevron* doctrine, "review on the record" provides little opportunity for the court to limit agency action.

III. The Arbitrary and Capricious Standard of Review in *Lewis v. Babbitt*[166]

A. *Background*

The APA provides standards to be applied by courts reviewing agency action.[167] These standards are intended to ensure that "the courts do not improperly usurp the prerogatives of the legislature" to administer the activities of agencies or hinder the agency's ability to exercise authority

157. *Id.* at 740.
158. *Id.* "Although allegations of a post hoc addition to the Administrative Record sufficiently alleges procedural error, an allegation of a post hoc addition does not in itself sufficiently allege prejudice." *Id.*
159. *Id.* at 739.
160. *See* Stark & Wald, *supra* note 131, at 334.
161. *Id.*
162. *Id.* at 361.
163. *Id.* at 362.
164. *Id.*
165. *Id.*
166. 998 F.2d 880 (10th Cir. 1993).
167. 5 U.S.C. § 706 (1988).

properly entrusted to it.[168] The APA applies the "substantial evidence" standard of review to formal rulemaking and formal adjudication.[169] In situations where an agency acts through informal rulemaking or informal adjudication, the APA requires a reviewing court to decide whether the agency's action was "arbitrary, capricious, [or] an abuse of discretion."[170] The substantial evidence and arbitrary and capricious standards of review are both reasonableness standards simply requiring that the administrative record reflect sufficient facts to support the agency's decision.[171]

The "arbitrary and capricious" standard permits a court to set aside an agency decision only if it is "so clearly outside the range of action expected from responsible decision makers that [it] cannot successfully be defended as an exercise of reasoned judgment."[172] This standard of review is arguably the most deferential form of review. The Supreme Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*,[173] held that a court must determine whether the agency decision was based on a

> consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.[174]

In applying this standard, the "focal point for judicial review" is the administrative record.[175]

B. *Agency Action*

In *Lewis v. Babbitt*,[176] Lewis contested the National Park Service's ("NPS") interpretation of the National Park System Concessions Policy Act[177] and the NPS's decision not to negotiate a new permit with him.[178] Lewis sold firewood as the concessioner in Yellowstone National Park from 1976 to 1989.[179] In 1989, the NPS received two proposals for the concession permit for the next four-year period, including Lewis's, and ultimately decided to award the permit to Firebox Inc. ("Firebox") after determining that Lewis could not demonstrate the ability to finance his amended proposal.[180] After review, the district court granted the NPS's motion for summary judgment.[181]

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168. ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULE MAKING § 9.2.12(f) (1986).
169. *See* 5 U.S.C. §§ 556, 557 (1988 & Supp. IV 1992).
170. *Id.* § 706(2)(A).
171. Melissa A. Dick, Survey, *Administrative Law*, 69 DENV. U. L. REV. 791, 791-92 (1992).
172. BONFIELD, *supra* note 168, § 9.2.12(b).
173. 401 U.S. 402 (1971).
174. *Id.* at 416.
175. Camp v. Pitts, 411 U.S. 138, 142 (1973); *see supra* part III.A.
176. 998 F.2d 880 (10th Cir. 1993).
177. 16 U.S.C. §§ 20-20g (1988).
178. *Babbitt*, 998 F.2d at 881.
179. *Id.*
180. *Id.*
181. *Id.*

C. *The Tenth Circuit Opinion*

The Tenth Circuit established at the outset that it was reviewing the agency decision to "determine whether it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' "[182] Applying this standard, the court held that the NPS did not act unreasonably in determining that Firebox's proposal was responsive to the Statement of Requirements ("SOR") for the permit or by requiring Lewis to match Firebox's proposal.[183] The Tenth Circuit held that the NPS's findings survived the arbitrary and capricious standard of review.[184]

The court also held that the NPS did not arbitrarily and capriciously determine that Lewis's amended proposal failed to satisfy the SOR's financial requirements.[185] Lewis was notified that Firebox had submitted a proposal to sell firewood from vending machines twenty-four hours a day.[186] Lewis then submitted an amended proposal which indicated that he also intended to sell firewood through vending machines and that he would match the terms of Firebox's proposal.[187] The amended proposal, however, did not provide information on how Lewis intended to finance the machines.[188]

On February 20, 1990, Lewis identified two possible sources of financing.[189] The next day, the NPS contacted both potential lenders and discovered that Lewis had not yet contacted either lender about his proposal.[190] On March 5, 1990, Lewis sent a letter to the NPS stating that he was also prepared to lease the vending machines in the event his loans were denied.[191] The NPS, however, did not receive the letter until the day after it had determined that Lewis was without adequate financing to implement his proposal.[192] Given these circumstances, the Tenth Circuit determined that the NPS's decision was not arbitrary or capricious.[193]

Finally, the court held that the NPS did not act arbitrarily by allowing Firebox, but not Lewis, to supplement its proposal with additional financial information.[194] The court found this argument unconvincing because the SOR stated, "[t]he National Park Service may verify information

182. *Id.* (citing 5 U.S.C. § 706(2)(A) (1988)).

183. *Babbitt*, 998 F.2d at 882. The SOR provided:

> To be responsive, proposals must be accompanied by a signed letter and *must contain sufficient information to convince the Secretary* acting through the Superintendent that the proponent meets the principal and secondary factors in the following paragraph. All responsive proposals will be further reviewed and evaluated to determine which is the best overall.

Id.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 882-83.

192. *Id.* at 883. The NPS then opted to negotiate a permit with FireBox. *Id.*

193. *Id.*

194. *Id.*

and clarify points as it feels necessary. It will not evaluate supplemental information or alterations of the proposal made that are submitted after the closing of the time period for receipt of proposals."[195] Based on its review of evidence in the administrative record, the court concluded that the NPS did not act "arbitrarily or capriciously" in rendering its decisions and thus affirmed the district court's decision to grant the NPS's motion for summary judgment.[196]

D. *Analysis*

Agencies are accorded substantial deference when they act through informal rulemaking or informal adjudication. It is thought that these actions typically require the agency to retain a high degree of discretion in order to exercise its congressionally delegated authority. *Lewis v. Babbitt* is a clear illustration of the Tenth Circuit's approval of this deferential approach.

Agencies should have some discretion in administering agency affairs because they are more knowledgeable in their delegated area of authority than the courts. This point is well illustrated in *Babbitt.* It is also true, however, that the power delegated to administrative agencies since the New Deal has increased dramatically.[197] Thus, agency decisions have a tremendous impact on contemporary life. In view of this trend, courts should reevaluate their role as reviewing bodies to ensure that agency power does not go unchecked.

Because the arbitrary and capricious standard of review is so deferential, agencies enjoy a great deal of latitude in informal decision making. This standard does not permit the court to disagree with an agency decision that is arguably wrong unless the decision rises to this heightened level of error. Thus the court is restricted in its ability to protect those aggrieved by an agency decision.

CONCLUSION

During the Tenth Circuit's most recent term, the court reviewed several agencies' decisions. The broad principle of deference to agency action remained a cornerstone of the Tenth Circuit's review. This deferential approach was reflected in the court's deference to an agency's reinterpretation of its governing statute, its upholding retroactive application of agency decisions, its adherence to the "review on the record" doctrine, and its application of the "arbitrary and capricious" standard of review.

Application of these deferential standards, however, while broadly accepted, does raise questions under the separation of powers doctrine in certain instances. In addition, given the broad impact that administrative agencies have on society, the deferential approach towards review of

195. *Id.*
196. *Id.*
197. *See* Andreen, *supra* note 1.

agency action should be reconsidered in light of the need for meaningful limits on agency power.

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