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Images of Representation

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Images of Representation

Elizabeth Magill*

*University of Virginia Law School, mem2a@virginia.edu

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Images of Representation

Elizabeth Magill

Abstract

This paper is one of a series of papers commemorating Richard Stewart's important article, *The Reformation of American Administrative Law*. Among other things, Stewart's 1975 article identified "interest representation" as the central idea that animated a series of important and disparate developments in administrative law doctrine.

This paper unpacks the idea of interest representation and identifies tension in that idea. It does so by asking a simple question: What is the function of representing interests in administrative process? The paper argues that, in Stewart's work and in the law more generally, there are two distinct answers to that question. One answer is straightforwardly instrumental. The other answer is not; it is about promoting the legitimacy of administrative governance. The two functions have different implications for the design of administrative process and judicial review of agency action. After identifying these two functions, the paper turns to the everyday world of administrative law in an effort to discern which of these two views the law embraces. Examining two areas of law—standing and prejudicial error—yields two different answers. In one area (standing), the law embraces a fairly instrumental view of the function of participation; in the other area (prejudicial error), the law veers more toward a non-instrumental view.

Images of Representation

M. Elizabeth Magill¹

Richard Stewart's *Reformation of American Administrative Law*² both captured and coined the term "interest representation" for emerging developments that occurred at a crucial moment in administrative law. *Reformation's* interest representation model rested on three developments: changes in the law of standing that enlarged the class of persons who had the right to seek judicial review of agency action; the expansion of participation rights before agencies; and the judicially imposed requirement that the agency "adequately consider" the claims put forward by those participants. These developments opened up agency policymaking to all those—and, in particular, consumers, environmentalists, and listeners—interested in its formulation, backed by the promise that those who were ignored by the agency could complain in court that their views were given short shrift. By everyone's measure, these were dramatic changes in the law and *Reformation* captured, explained, and critically evaluated those changes like no other work.

The effort to assure meaningful participation in agency decision making by all interests was not some technical fix to an otherwise well-functioning machine. As Stewart describes it, the model represented nothing less than a new justification for the legitimacy of administrative governance. Courts had lost faith in the older models that had legitimated agency decision making and interest representation emerged to replace them. Under the new model, courts would assure that all interested parties could express their views and have them adequately considered. Stewart relied on a provocative image to capture this idea: courts had reshaped the agency in the image of the legislature. Regulatory

¹ Professor of Law and John V. Ray Research Professor, University of Virginia School of Law; Visiting Fellow, Program in Law and Public Affairs, Princeton University (2005-2006). Correspondence and comments welcome at mem2a@virginia.edu. Thanks to John Harrison, Ron Levin, Dan Ortiz, and Richard Pierce for helpful comments and conversations and to Emil Barth, Kathleen Huang, and Dan Stern for first-rate research assistance.

² 88 Harv. L. Rev. 1669 (1975).

decisions formulated according to a legislative-style pluralist process would be legitimate, just as legislative decisions are legitimate.

Assuring that a broad range of interests have a meaningful voice in the formulation of governmental policy is central to the model Stewart described in *Reformation*, just as it is at the center of theorizing about any number of issues. The need for the people to have a voice in government decision making is taken, on most political theories, to be a necessary requirement of a legitimate government. The desire to adequately represent the people's voice is also evident in many parts of law and legal thinking. Election law is one obvious place where the Constitution and statutes incorporate judgments about the nature of political representation and the design of electoral systems that facilitate representation. The difficulty of squaring judicial review with democracy is driven by the concern that judges should not lightly—and, if they must, only under a limited set of circumstances—overturn the decisions of those who were elected by the people. In other words, Stewart wrote against a rich background when he identified meaningful representation of interests as the centerpiece of the new model of administrative law.

To say that representation of those affected by governance is a theme running through many schools of thought is not to say that we have a neatly worked out theory of interest representation. Far from it. In this essay, I will focus on one tension in our ideas about representation, a tension both evident in and recognized by *Reformation*. That tension comes to the surface when one asks a simple question: What is the *function* of representing interests in administrative governance? *Reformation* identified two impulses that drove the development of the interest representation model and they, in turn, map on to two different justifications. As the first part of this essay will draw out, these two images of representation are distinct and their implications can conflict. One justification prizes participation for its instrumental effects; the other prizes participation for the legitimacy it provides to administrative action. The second part of the essay asks a descriptive question: Which image of representation does the law embrace? To answer this question, I focus on two areas of the law—standing and prejudicial error—where courts take a stance on the function of interest representation. The analysis reveals that the law does not speak with one voice on the function of representation.

I. WHY REPRESENT INTERESTS?

Reformation itself concisely captured several rationales for the interest representation model:

Such participation, it is claimed, will not only improve the quality of agency decisions and make them more responsive to the needs of the various participating interests, but is valuable in itself because it gives citizens a sense of involvement in the process of

government, and increases confidence in the fairness of government decisions. Indeed, litigation on behalf of widely shared public interests is explicitly defended as a substitute political process that enables the citizens to cast a different kind of vote, [which] informs the court that . . . a particular point of view is being ignored or underestimated by the agency. Its ultimate aim is seen as a basic reordering of governmental institutions so that access and influence may be had by all.³

Here, Stewart identifies both instrumental and non-instrumental justifications for interest representation. I will draw these justifications out, relying both on *Reformation* itself and other developments in administrative law.

Improve Agency Decision Making

The most straightforward reason to require interest representation is the first one Stewart identifies: to improve agency decision making. An agency might make an inadequate decision for any number of reasons. It might be wayward or incompetent; it might lack the requisite information or expertise. Interest representation counteracts these pathologies.

Guarding against a specific kind of wayward agency behavior is a critical factor in Stewart's explanation for courts' development of the interest representation model. On Stewart's telling, courts transformed the law because they feared that agencies were captured by concentrated interests and, as a result, their decisions were skewed. Stewart explains that judges developed the new model of administrative governance "in reaction" to the critique that "agencies are biased in favor of regulated and client groups, and are generally unresponsive to unorganized interests."⁴ Interest representation, then, is about the lack of representation of a certain *kind* of interest—the public interest, or the regulatory beneficiaries—and the consequent unfairness of agency decisions.

One might also require or permit participation in administrative decision making for less pessimistic reasons. Such participation could give the agency access to information or expertise that it does not possess and does not have the resources to acquire. Countless agency decisions fit this mold. For example, imagine that the agency has to decide what a standard serving size is for thousands of food products, but it lacks the technical knowledge or the resources to gather such information. Non-governmental actors can bring such information to the table.

These functions of representation in administrative processes do not, as a logical matter, require comprehensive participation in administrative decision making *as well* as judicial evaluation of whether the agency adequately

³ Stewart, *supra* note 2, at 1761 (footnotes and citations omitted).

⁴ Stewart, *supra* note 2, at 1712 (footnotes omitted).

considered participants' views. Although these developments traveled together, one can imagine a regime where agencies are required to invite participation that does not assign courts the role of policing the quality and fairness of agency action. Just such an approach can be found in judicial evaluation of social and economic legislation under the Equal Protection and Due Process Clauses, which is governed by a rational basis standard. The application of that standard assumes that there has been formal access to the legislative process, but courts do not flyspeck the record to determine whether legislators adequately considered the views of those participants.

If the participation is required in order to overcome the agency's lack of information or expertise, then skeptical judicial review would not be necessary. But requiring a legislative-style pluralist process as well as judicial scrutiny of that process does make sense if one is convinced that the agency cannot be trusted to avoid the pathologies that the participation is designed to counteract. The judicial fear that helped trigger the developments that Stewart describes suggested that agencies could not be trusted, in which case requiring participation alone could not cure the problem. Evaluation by some non-agency actor was necessary.

It also bears emphasis that the interest representation model does not, as a logical matter, lead to improved agency decision making. Whether it does so is an empirical question, and a complicated one at that. One would first have to define what counts as improved decision making before one could evaluate the effects of these developments on agency work product. In 1975,⁵ Stewart expressed doubts about the utility of the whole project, and subsequent scholarship has only deepened skepticism about whether broad participation, expansive access to judicial examination of agency action, and the adequate consideration doctrine have actually improved decision making.⁶

Two implications follow from an instrumental rationale for interest representation. The right to participate should depend on the parties' ability to bring something to the table. It follows from this that if the agency's decision is acceptable—imagine that there is only one acceptable outcome under the statute and an agency has chosen that outcome—then there should be no need for participation.

Legitimate Agency Governance

While the instrumental reason for participation may be familiar, it is by no means the only reason offered for interest representation. On another view, participation serves, not to make the agency decision better as measured against some correct outcome, but to make that decision acceptable, or legitimate, by dint

⁵ Stewart, *supra* note 2, at 1770-76.

⁶ See, e.g., Jerry L. Mashaw and David L. Harfst, *The Struggle for Auto Safety* (Harvard 1990); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 *Nw. U. L. Rev.* 173 (1997).

of the process by which it came to be. Stewart identifies some familiar versions of this rationale. Meaningful participation, he writes, “gives citizens a sense of involvement in the process of government, and increases confidence in the fairness of government decisions.”⁷

But *Reformation* goes beyond these familiar justifications for involving the citizenry in governmental decision making. It does so by explaining that the new model envisions the agency as a mini-legislature—a place where all voices have an opportunity to be heard. By mimicking the representation of all interests characteristic of the legislature, the resulting agency action is endowed with the same legitimacy that attaches to legislative action.⁸ The idea here is not the dignity of an individual threatened with injury by the government, but pluralist exchange, where “interests,” not individuals, get a chance to persuade government decision makers. Pluralism, that is, applied to administrative process.

The analogy to the legislature is both imaginative and powerful, but it can also mislead. Its power lies in the fact that the agency process envisioned in the interest representation model does borrow from the legislature. All those interested in regulatory policy have their chance to persuade the agency of the rightness of their views. But, as noted earlier, the administrative-legislature is different from the legislative-legislature in a crucial respect: The legislative lobbyist cannot challenge a statute based on the ground that her arguments were ignored, while the administrative lobbyist can. Courts, applying minimal constitutional scrutiny, would not hear such an argument about a statute, but courts applying the “adequate consideration” requirement to an agency rule would listen. Interested parties may have a right to participate in legislative decision making, but they do not have a judicially enforceable right to *meaningfully* participate.

Reformation’s identification of this legitimacy-based justification for interest representation should be contrasted with the instrumental rationale identified earlier.⁹ Under the instrumental view, interest representation is a way to improve decision making. At the moment in time Stewart was describing, the particular instrumental end was the prevention of agency capture. That view assumes that there are better, or fairer, decisions that agencies can be expected to reach if only they are forced to adequately consider all the relevant interests.

But the appeal of re-creating the agency in the image of a legislature is rooted in something quite different. It is animated by a thorough-going

⁷ Stewart, *supra* note 2, at 1761.

⁸ Stewart, *supra* note 2, at 1712.

⁹ In *Reformation* itself, Stewart recognizes the tension. See Stewart, *supra* note 2, at 1712 (“The viability in practice of such a pluralist theory of legitimacy is challenged at the outset by the predominant contemporary critique of the administrative process: that agencies are biased in favor of regulated and client groups.”) (footnotes omitted).

pessimism about the existence of right answers. Interest representation is attractive, as Stewart puts it, because “we have come not only to question the agencies’ ability to protect the ‘public interest,’ but to doubt the very existence of an ascertainable ‘national welfare’ as a meaningful guide to administrative decision.”¹⁰ The notion that all the courts can do is assure fair representation of interests is based on the “assumption that there is no ascertainable, transcendent ‘public interest,’ but only the distinct interests of various individuals and groups in society.”¹¹ This pluralist vision becomes a stand-in for the earlier models that legitimated agency action that were no longer sustainable.¹² Without those models or a clearly defined public interest, courts have two choices. They could permit the agency to select its own version of the right answer, or they could require the agency to facilitate meaningful participation by those who hold competing perspectives of the right answer. Courts chose the latter and interest representation emerged as a new explanation for the legitimacy of agency decision making. As Stewart describes:

This analysis suggests that if agencies were to function as a forum for all interests affected by agency decision making, bargaining leading to compromises generally acceptable to all might result, thus replicating the process of legislation. Agency decisions made after adequate consideration of all affected interests would have, in microcosm, legitimacy based on the same principle as legislation and therefore the fact that statutes cannot control agency discretion would become largely irrelevant.¹³

The logical implications of this view of interest representation are pretty obvious. A requirement that all interests affected by government decision making must have a meaningful opportunity to participate in administrative governance suggests that the right to participate is not dependent on a demonstration that a group’s participation will improve outcomes; nor should judicial confidence in the rightness of an agency’s decision obviate the need for such representation.

II. INTEREST REPRESENTATION AND ADMINISTRATIVE LAW

That there are two perspectives on the function of representation in administrative process may not be a surprise. But our lack of surprise does not mean we can embrace the two visions simultaneously. They have different

¹⁰ Stewart, *supra* note 2, at 1683.

¹¹ Stewart, *supra* note 2, at 1712.

¹² Stewart, *supra* note 2, at 1684 (“Once the function of agencies is conceptualized as adjusting competing private interest in light of their configuration in a given factual situation and the policies reflected in relevant statutes, it is not possible to legitimate agency action by either the ‘transmission belt’ theory of the traditional model, or the ‘expertise’ model of the New Deal period.”)

¹³ Stewart, *supra* note 2, at 1712.

implications for the design of administrative process as well as judicial evaluation of administrative decision making. The remainder of this essay will underscore that point by asking a straightforward question: Which image of representation does the law embrace?

This turns out to be a hard question to answer. There are, to be sure, many questions about administrative process and judicial review of administrative action that might require the identification of the function of representation: When and how should negotiated rulemaking occur? What is the proper role of White House oversight of legislative rulemaking? When should agencies be permitted to dispense with notice-and-comment rulemaking? Answering each of these (and many other) questions might very well require the identification of the function of participation in administrative process. But one rarely sees an explicit identification of the function of representation. That may be because, when addressing these questions, commentators and decision makers are not usually forced to choose among the perspectives on interest representation.

Concrete legal disputes, however, have a way of forcing such choices. When an agency has denied meaningful participation to a party, courts are sometimes asked to set aside the agency action; such cases invite courts to consider the function of the representation. The rest of this essay focuses on two areas in administrative law where courts can be read to have taken a stance on the function of participation in agency decision making. The law in these areas is illuminating precisely because courts do not embrace both perspectives. In one area (standing), the Supreme Court clearly endorses the instrumental view of participation; in another (harmless error), the courts take something closer to the legitimacy perspective. While analysis of these two areas cannot fully answer the descriptive question this essay has posed, they are a start toward a full answer.

Standing

Transformations in the law of standing play a crucial role in Stewart's account. Indeed, changes that permitted a broader set of interests (such as regulatory beneficiaries and competitors) to challenge agency action were key pillars of the model of interest representation that Stewart identified and critiqued. Those changes might be considered consistent with either perspective on interest representation, but Stewart describes them as driven by concerns about agency capture.¹⁴ The new standing regime opened the door to parties who were not the objects of regulatory action and, in that way, could be seen to counteract any agency tendency to cater to regulated parties.

¹⁴ Stewart, *supra* note 2, at 1728 (“The extension of standing to an increased range of affected interests is a judicial reaction to the agencies’ perceived failure to represent such interests fairly, and the consequent perceived need for court review to correct the dereliction.”); *id.* at 1730 (describing the “governing spirit” of the standing decisions as “a general concern with the inability of agencies to provide adequate representation to interests other than those of regulated firms”).

Today's law of standing looks somewhat different from the law that Stewart described. In at least in one important way,¹⁵ however, current law accords with an instrumental view of interest representation. Establishing standing requires the challenger to demonstrate that the governmental action has harmed a cognizable interest and that the injury will be redressed by a favorable ruling from the court. Consistent with the innovations in standing law that Stewart described, the list of potentially cognizable injuries continues to be long. Harm to economic, aesthetic, recreational, conservation, and informational interests can all, in theory, constitute Article III injuries. And these interests can be conferred by statute.¹⁶

If one takes the legitimacy-based justification for interest representation seriously, the denial of a right to participate in agency proceedings, even the denial of a *meaningful* opportunity to participate in agency proceedings, should also be a cognizable injury-in-fact. But the Supreme Court has stopped short of treating a deprivation of a right to participate as an injury-in-fact. In fact, it is quite clear that such an injury does not count as a cognizable injury.

*Lujan v. Defenders of Wildlife*¹⁷ most clearly makes the point. At issue was a Department of Interior rule that limited the geographic reach of a key provision of the Endangered Species Act (ESA). The provision, Section 7, requires that federal agencies consult with the Secretary of the Interior in order to assure that federally funded actions are not likely to jeopardize the continued existence of endangered or threatened species or their critical habitat. Interior's rule interpreted Section 7 to apply only within the territorial United States or on the high seas, and not to federal actions taken in foreign nations. To establish standing, the challengers to the rule pointed to several injuries. They first argued that Interior's interpretation would increase the rate of extinction of endangered and threatened species and that they had a direct interest in the preservation of such species.¹⁸ The Supreme Court held that the plaintiffs had failed to establish

¹⁵ As Lisa Bressman demonstrates, standing and reviewability doctrines make it difficult for a party to challenge agency inaction. See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L.Rev. 1657 (2004). This makes it more difficult for regulatory beneficiaries to challenge agency under-enforcement and may reflect a diminished judicial concern about regulatory capture. See also Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 656 (1985) ("Review at the behest of statutory beneficiaries may perform a critical function in ensuring against unduly lax enforcement that would violate statutory requirements. Such requirements may be undone through inadequate implementation as well as through overzealous enforcement. In both contexts, judicial review serves to vindicate the will of Congress as against the executive branch and may guard against the undue influence of powerful private groups over the regulatory process.")

¹⁶ See *Federal Election Commission v. Akins*, 524 U.S. 11, 20-21 (1998).

¹⁷ 504 U.S. 555 (1992).

¹⁸ *Id.* at 562-63.

that any injury to these interests was actual or imminent¹⁹ and a plurality held that they had failed to establish that any such injury would be redressed by a favorable ruling.²⁰

But the challengers also presented a distinct claim of injury, one that did not relate to their interest in species conservation. They claimed that they had suffered a special kind of injury—a “procedural injury.” Congress had created a right to a certain procedure (consultation), they argued, and the broad citizen suit provision of the ESA permitted any person to sue to vindicate a violation of that procedural right. The Eighth Circuit held that this was an independent claim of cognizable injury.²¹

The Supreme Court firmly rejected the procedural injury argument. The challengers were asserting a “noninstrumental ‘right’ to have the Executive observe the procedures required by law.”²² Such “a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws”—was not a cognizable Article III injury.²³ Congress could not constitutionally transform this widely shared interest into an individual right that could be vindicated in Article III courts. The existence of the citizen-suit provision, in other words, was irrelevant.²⁴

The procedural right at issue in *Lujan* was an agency obligation to consult with the Secretary of Interior and thus the procedure did not preserve *Reformation*-style interest representation. But many procedural obligations that agencies are bound to follow are aimed at preserving such participation. For instance, agencies are required to follow a notice and comment process when they promulgate a legislative rule. A denial of adequate notice or a denial of a right to comment would be procedural errors and ones that are at the core of the interest representation model. The lesson of *Lujan* is that a challenger attempting to build a claim of injury solely around an interest in participating in agency decision making for its own sake—independent of a connection between the procedure and the protection of a separate concrete and individual interest—would be bringing a generalized grievance that is not cognizable under Article III.

If there were any doubt about this conclusion based on the nature of the procedural injury at issue in *Lujan*, Justice Scalia’s famous (if there can be such a thing in the law of standing) footnote seven makes this clear:

¹⁹ Id. at 564.

²⁰ Id. at 568-71.

²¹ *Defenders of Wildlife, Friends of Animals v. Lujan*, 911 F.2d 117, 121 (8th Cir. 1990) (“[D]efenders has also satisfied the standing requirement by demonstrating a procedural injury based upon the Secretary’s failure to follow the required consultation procedures.”).

²² 504 U.S. at 573.

²³ Id.

²⁴ Id.

There is this much truth to the assertion that procedural rights are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case-law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare the Environmental Impact Statement, even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. . . . What respondents' "procedural rights" argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.²⁵

Constitutional injury, in other words, requires harm to a concrete interest and deprivation of a procedural right does not, by itself, count as a concrete interest.²⁶ As the Seventh Circuit put it in denying standing to parties based on an allegedly unlawful dismissal of an appeal of an agency decision: "A claimed participation injury cannot alone serve as proxy for the constitutionally required showing of concrete and particularized harm."²⁷

Not only is the dismissal of stand-alone procedural injuries as cognizable bases for injury a rejection of a non-instrumental view of interest representation, the concrete, individual interest requirement accords with an instrumental view of interest representation. Parties can have standing to vindicate a right to participate in agency decision making but only if the denial of the ability to participate injured some other individual interest—such as their interest in the environment, their land, or their business. Participation, in other words, is linked to its instrumental effect.

Prejudicial Error

Section 706 of the Administrative Procedure Act (APA) ends with the statement that, when courts apply that provision, "due account shall be taken of the rule of prejudicial error."²⁸ The two views of representation identified here would suggest different perspectives on how to apply this harmless error rule

²⁵ 504 U.S. at 572, n. 7.

²⁶ See *Bensman v. United States Forest Service*, 408 F.3d 945, 955 (7th Cir. 2005) (denial of statutorily granted right to appeal does not confer standing); *Fund for Democracy LLC v. SEC*, 278 F.3d 21, 27 (D.C. Cir. 2002) ("[p]articipation in agency proceedings is alone insufficient to satisfy judicial standing requirements").

²⁷ *Bensman* 408 F.3d at 955.

²⁸ 5 U.S.C. §706.

when there has been a denial of such representation. Imagine that a party was denied the opportunity to meaningfully participate in agency decision making. For instance, the agency did not provide sufficient notice of its intended action or did not adequately consider the views presented by a party. Such failures would deprive parties of central features of *Reformation's* interest representation model.

Whether these failures are deemed prejudicial, however, would vary depending on which perspective one took as to the function of interest representation. On the instrumental view, the party would need to show that the agency's decision would have been different if the party had been allowed to meaningfully participate. The point of the participation is to improve the agency decision; if the lack of participation had no effect on the agency decision, then an old adage should apply: "no harm, no foul." On the legitimacy-based view, however, the showing of a denial of meaningful participation should, by itself, demonstrate prejudice.

Detecting which view the law embraces turns out to be difficult. That is in part because the harmless error principle has received remarkably little attention in the literature. Professor Ron Levin's 1986 characteristically insightful and incisive restatement of scope-of-review doctrine contains a brief analysis of harmless error rules for both procedural and substantive errors.²⁹ As to procedural errors, he notes that "[a]n action shall not be set aside because of a procedural error that plainly did not influence the outcome of the agency proceeding."³⁰ If the error is a failure in the agency's reasoning, Professor Levin observes that the error has to be *material* to warrant a remand to the agency. Thus, "if an agency's decision explicitly rests on two alternative and independent rationales, only one of which is flawed, the court can uphold the decision based on the other rationale."³¹ Or, "if an agency's rationale is erroneous but the agency would unquestionably have decided the case the same way if its premises had not been flawed, remand is unnecessary."³²

Professor Levin's restatement of harmless error doctrines accords with the instrumental view of the function of participation. Assume that an agency has made a procedural error. If it is clear that this failure, as Professor Levin puts it, "did not influence the outcome of the agency proceedings," then the error will be considered harmless. This approach is consistent with the instrumental view of

²⁹ Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 Admin. L. Rev. 239, 261-63, 282-84 (1986). Richard Pierce's treatise also discusses harmless error cases in a variety of parts of the treatise. See Richard J. Pierce, Jr., *Administrative Law Treatise* §7.3 ("Adequate Notice") (2002).

³⁰ Id. at 282.

³¹ Id. at 261.

³² Id.

participation in that it treats participation as a mechanism for influencing the outcome of agency decisions.

But in cases where the agency error looks like the denial of a right to meaningfully participate, the law applied is less hard-edged than this, and as a result, it tilts toward the legitimacy-based view of participation. To use Professor Levin's words, in such cases courts place great emphasis on words like "*plainly*"—as in the error is harmless only if the error plainly did not influence the outcome. In fact, in such cases, courts apply the harmless error rules in ways that make it very hard for the government to win. Where the agency error is one that limits participation, the courts presume the existence of prejudice and that presumption is difficult to overcome.

Several cases illustrate the point. The D.C. Circuit's *McLouth Steel Products Corp. v. Thomas*³³ is a good starting place because it has proved influential. There, a steel manufacturer challenged the Environmental Protection Agency's (EPA) rejection of the manufacturer's delisting petition for a type of waste; the refusal meant that the waste continued to be subject to regulation. EPA's decision relied on a model to compute the probable contamination levels of various substances and that model had not been vetted through a notice-and-comment process. The D.C. Circuit held that this was an error, and then turned to a discussion of the appropriate remedy. EPA argued that the challenger had not demonstrated "specific prejudice" from the error.³⁴ Discussing cases that had placed the burden on the challenger to show prejudice from an agency error, the court observed that "we think imposition of such a burden on the challenger is normally inappropriate where the agency has completely failed to comply with §553."³⁵ In fact, the D.C. Circuit suggested the presumption ran in the opposite direction in such a case: "Even if the challenger presents no bases for invalidating the rule on substantive grounds, we cannot say *with certainty* whether petitioner's comments would have had some effect if they had been considered when the issue was open."³⁶ *McLouth* presumes prejudice by assuming its existence unless it is shown—with *certainty*—that there was no prejudice.

In *McLouth*, the D.C. Circuit relied upon, but described itself as not going as far as, the Fifth Circuit's *U.S. Steel Co v. EPA*.³⁷ There, two companies challenged EPA's designation of areas in Alabama as nonattainment areas for certain pollutants. EPA had not provided notice and permitted comment on this designation and the Fifth Circuit held that this failure could not be justified.³⁸ It

³³ 838 F.2d 1317 (D.C. Cir. 1988)

³⁴ 838 F.2d at 1323.

³⁵ 838 F.2d at 1324.

³⁶ *Id.* (emphasis added).

³⁷ 595 F.2d 207 (5th Cir. 1979).

³⁸ 595 F.2d at 213-14.

then determined that the error could not be considered harmless. The court stated that the doctrine of harmless error was to be used “only ‘when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of the decision reached.’”³⁹ Other courts have repeated this statement of the harmless error rule,⁴⁰ but it is a perplexing formulation. Treating as prejudicial all errors that have *any* effect on the procedure used or the substance of the decision would make the vast majority of errors harmful, an approach that is in tension with the statutory command that “due account” be taken of the rule of prejudicial error.⁴¹ But the Fifth Circuit did not actually go so far. The court declined to deem the error before it harmless. The court did note that “the Agency’s error plainly affected the procedure used,” but then it noted that “we cannot assume that there was no prejudice to petitioners” and that the “[a]bsence of such prejudice must be clear for harmless error to be applicable.”⁴² In other words, contrary to its earlier statement, the court left open the possibility that an error that affected the procedure the agency used *could* be judged harmless. Although it did not go as far as some of its language suggested, the Fifth Circuit’s holding does make it difficult to demonstrate that an agency’s denial of the right to have notice and an opportunity for comment will be deemed harmless. Like the D.C. Circuit in *McLouth*, this formulation presumes the existence of prejudice unless its absence is “clear.”

Perhaps reacting to the strong language in the Fifth Circuit’s opinion, the D.C. Circuit in *McLouth* read the *U.S. Steel* court to have established a “blanket rule,” something the *McLouth* court declined to do.⁴³ It is not precisely clear what “blanket rule” the D.C. Circuit was referring to: the Fifth Circuit’s broad statement that harmless error could not excuse any error that affected substance or procedure (which the Fifth Circuit did not actually seem to apply), or that the absence of prejudice must be “clear” when the agency fails to provide notice and seek comment. Regardless of this ambiguity, the D.C. Circuit has since read *McLouth* to establish a presumption of prejudice when the agency error is a failure to allow meaningful participation. In *Cane Growers Cooperative of Florida v. Veneman*,⁴⁴ a growers’ association challenged the U.S. Department of Agriculture’s (USDA) failure to provide notice and permit comment as it

³⁹ 595 F.2d at 215 (quoting *Braniff Airways v. CAB*, 379 F.2d 453 (D.C. Cir. 1967)).

⁴⁰ This language is cited in several other U.S. Court of Appeals decisions as the governing standard. See, e.g., *In re Watts*, 354 F.3d 1362, 1370 (Fed. Cir. 2004); *Chemical Manufacturers Ass’n v. EPA*, 870 F.2d 177, 202 (5th Cir. 1989); *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982).

⁴¹ The D.C. Circuit in *McLouth* disagreed that its earlier decision in *Braniff* established this “broad” holding. See 838 F.2d at 1324 n.5.

⁴² 595 F.2d at 215.

⁴³ 838 F.2d at 1324.

⁴⁴ 289 F.3d 89 (D.C. Cir. 2002).

implemented a sugar support program for the 2001 sugar crop. USDA staff had consulted with interested parties, including the challengers, in as many as a dozen informal sessions as they prepared to implement the 2001 program. USDA employees had stated in those sessions that they would implement the program through a notice-and-comment process. But USDA ultimately did not provide notice and seek comment; it only issued a notice of program implementation.

The government argued that the challengers suffered no prejudice because they could not “identify any additional arguments they would have made in a notice-and-comment procedure that they did not make to the Department in the several informal sessions.”⁴⁵ Notice that even the government’s formulation of the rule falls far short of an outcome-determinative test for harmless error. Under its proposed approach, the challengers would just have to point to an argument they would have made—not that the argument would have had any traction—if the procedure had been different. Even so, the D.C. Circuit firmly rejected the government’s argument as too government-friendly. Relying on *McLouth*, the court stated that “an utter failure to comply with notice and comment cannot be considered harmless if there is *any uncertainty at all* as to the effect of that failure.”⁴⁶ According to the court, acceptance of the government’s argument “would have us virtually repeal section 553’s requirement” because, under the government’s test, the “government could skip those procedures, engage in informal consultation, and then be protected from judicial review unless a petitioner could show a new argument—not presented informally” and, hence, “section 553 obviously would be eviscerated.”⁴⁷

The Ninth Circuit’s *Riverbend Farms, Inc. v. Madigan*⁴⁸ discusses in perhaps the most colorful terms the reasons why courts are hesitant to judge agency denials of participation harmless. At issue was the longstanding USDA process for establishing agriculture marketing orders; the orders at issue limited the quantity of navel oranges shipped from one market to another. In developing these marketing orders, the USDA first established a marketing plan before the start of the season that estimated the weekly volume restrictions that would be necessary. Once the season started, week-by-week determinations were made that took account of the changing market conditions. In developing both the pre-season projections and the weekly orders, USDA relied heavily on the recommendations of a committee composed of industry representatives and one person from outside the industry. The weekly limits were established after this committee consulted with interested parties, held a public meeting, and made a

⁴⁵ Id. at 96.

⁴⁶ Id. at 96 (emphasis added) (citing *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988)).

⁴⁷ 289 F.3d at 96.

⁴⁸ 958 F.2d 1479 (9th Cir. 1992).

recommendation to USDA. After receiving the recommendation, the USDA published a rule in the Federal Register each Friday that set the volume restriction for the following week. The USDA rules, which clearly had not been adopted in compliance with the APA requirements for legislative rules, asserted that it would be “impracticable and contrary to the public interest” to do so.⁴⁹

Navel orange handlers challenged the process used to formulate the weekly marketing orders. The court held that the USDA failed to justify its unorthodox process and it thus could not be used in the future. The court then turned to the question whether the prior violations were harmless (an important question given a pending forfeiture proceeding against the challengers to the rule). Judge Kozinski had opened the opinion with the colorful statement that “[p]rocedure, not substance, is what most distinguishes our government from others.”⁵⁰ This foreshadowed his description of why judges must be exceedingly careful in applying harmless error rules to agency failures of this sort. As the opinion explained:

It’s true, as plaintiff’s argue, that we must exercise great caution in applying the harmless error rule in the administrative rulemaking context. The reason is apparent: Harmless error is more readily abused there than in the civil or criminal trial context. An agency is not required to adopt a rule that conforms in any way to the comments presented to it. So long as it explains its reasons, it may adopt a rule that all commentators think is stupid or unnecessary. Thus, if the harmless error rule were to look solely to result, an agency could always claim that it would have adopted the same rule even if it had complied with the APA procedures. To avoid gutting the APA’s procedural requirements, harmless error analysis in administrative rulemaking must therefore focus on the process as well as the result.⁵¹

After statements like this, however, the Ninth Circuit held the USDA’s departures from the requirements of the APA harmless. The main reason seems to be that all parties, including the challengers, were aware of and participated in the USDA process for decades. As the court put it, “While they are right that the Secretary must comply with some of the technical requirements, their belated challenge is evidence of the lack of prejudice resulting from the Secretary’s failure to do so in the past thirty-five years.”⁵² To describe USDA’s violations as technical is a real stretch. But the court was clearly of the view that challengers were not denied

⁴⁹ 958 F.2d at 1483.

⁵⁰ 958 F.2d at 1482.

⁵¹ *Id.*

⁵² 958 F.2d at 1488.

any real right to participate; they had been participating, and actively so, for decades.⁵³

It is not simple to extract general legal principles from these cases because courts resist them. Nonetheless, where the agency error is a denial of a right to participate in agency proceedings, the courts are extremely hesitant to treat the error as harmless. When faced with an error of this sort, courts presume the existence of prejudice. While they leave open the possibility that the error can be harmless, establishing that is difficult: the absence of prejudice must be “plain” or “clear.”

The approach in these cases cannot be squared with a hard-headed outcome determinative approach to harmless error. A denial of participation in agency proceedings does not have to be shown to affect the outcome of the proceeding in order for it to be judged prejudicial. Under *Veneman*, participants do not even need to point to additional or different arguments they would have made if the procedure had been different. This sort of reasoning does not tie participation to its instrumental effects on agency decision making. Instead, the courts are protecting a right to participate independent of those effects. One can thus read them as protecting participation for participation’s sake and, as such, embracing a legitimacy-based view of the function of participation in agency processes.

CONCLUSION

This brief essay has identified and separated out two different pictures of interest representation. The two justifications—or, as I have called them here, images—are familiar, as is the fact that they have different implications. But the tension between the two can be seen with particular clarity in administrative law. The instrumental view embraces one view about the function of participation, the legitimacy-based view suggests another. The latter part of this essay has grounded this familiar tension between instrumental and non-instrumental aims in a concrete context: the every-day world of administrative law. Examining two questions that arise regularly as judges consider challenges to administrative action, the essay identifies which view of representation the courts embrace and at the same time underscores the distinct implications of the two conceptions. While the answer produced by this analysis is only the beginning of a full answer to the descriptive question posed here, it is nonetheless instructive. It focuses our attention on the unavoidable conflict in our twin justifications for participation. Perhaps, too, it will have the added benefit of encouraging clear-headed thinking about the function of participation across a range of questions that arise in public law.

⁵³ *Paulsen v. Daniels*, 413 F.3d 999 (9th Cir. 2005), 2005 WL 1523204, p. *6 (describing *Riverbend Farms* as a case where the error was harmless because “interested parties received some notice that sufficiently enabled them to participate in the rulemaking process”).