

NOTE

TAKING “DUE ACCOUNT” OF THE APA’S PREJUDICIAL-ERROR RULE

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INTRODUCTION

“NO administrative agency is perfect, and none are expected to be perfect by the reviewing judges.”¹ Instead, under a doctrine called both the “harmless-error” rule and the “prejudicial-error” rule,² agencies must correct their mistakes only if they have injured someone. Long a part of civil and criminal appeals, the rule also applies to review of most federal administrative activity because Congress incorporated it into the Administrative Procedure Act, also known as the APA.³ Despite how often courts review agency action under the APA, the Act’s harmless-error rule remains ill-defined. In fact, a recent Supreme Court opinion indicates that after sixty years of review under the APA, courts have yet to decide just when a complaining party has been injured—and therefore prejudiced—by an agency’s error.⁴

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¹ James T. O’Reilly, *Administrative Rulemaking: Structuring, Opposing, and Defending Federal Agency Regulations* 316 (1983).

² The terms are opposite sides of the same judicial-review coin. Except where circumstances dictate, this Note will freely use one term or the other regardless of which is used in the relevant statutory provision, judicial opinion, or scholarly article.

³ 5 U.S.C. § 706 (2006). The APA was recodified in its current location in the U.S. Code as part of a sweeping reorganization of the laws governing the federal government. Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 381 (codified as amended at 5 U.S.C. §§ 551-808 (2006)).

⁴ Only once before had the Court explicitly applied the harmless-error provision of § 706. See *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (noting that an erroneous, “stray statement” by the EPA was not sufficient to merit vacating and remanding adjudication of permit application). The provision has

In *Shinseki v. Sanders*, the Court interpreted the harmless-error provision of a federal veterans'-benefits statute.⁵ That statute's command used the language of the APA's harmless-error rule, which meant the Court could explain how the harmless-error doctrine applies in both the veterans'-benefits and APA appeals.⁶ Yet rather than offer a complete description of the doctrine—something the Court had never done before—Justice Breyer's majority opinion declared something already widely understood: the burden of demonstrating harm is borne by the parties challenging agencies' decisions.⁷ This holding is uncontroversial, and just restates what almost all lower courts had held for the past six decades.⁸

Sanders left unexplored the interesting and important question of how parties can persuade a court that an error was prejudicial. That question, which helps decide numerous cases every year,⁹ should have an accepted answer by now.¹⁰ It does not. Scholarship on administrative harmless error is just beginning to emerge, and so far neither courts nor commentators have developed a general account of how the burden of showing harm can be met in administrative cases.¹¹ This is most likely attributable to how courts applied

otherwise appeared in the U.S. Reports only when the Court cited the entire text of Section 706 for some other purpose. See, e.g., *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 375 n.21 (1989).

⁵ 129 S. Ct. 1696, 1700 (2009).

⁶ See *id.* at 1706 (discussing the link between 38 U.S.C. § 7261(b)(2) and 5 U.S.C. § 706). Compare 38 U.S.C. (2006) (“[T]he court . . . shall take due account of the rule of prejudicial error.”), with 5 U.S.C. § 706 (“[D]ue account shall be taken of the rule of prejudicial error.”).

⁷ *Sanders*, 129 S. Ct. at 1706.

⁸ *Id.* at 1706 (noting general agreement among circuits); see *infra* Section I.B. for more discussion.

⁹ See generally, *Nevada v. Dept. of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006) (identifying a line of cases applying the APA's harmless-error rule to activities carried out under the National Environmental Policy Act (“NEPA”). Those acts excluded from review by § 701 are of course not subject to prejudicial-error analysis under § 706. See *infra* note 15 and accompanying text.

¹⁰ The first harmless-error statute was enacted even earlier. See *infra* Section I.A.

¹¹ See C. Robert Luthman, *Conway v. Principi, Mayfield v. Nicholson, and (Re?) Defining the Harmless Error Doctrine in Light of the Veterans Claims Assistance Act of 2000*, 16 Fed. Cir. B.J. 509, 510–17 (2007) (providing a capsule summary of the history of harmless error as applied in civil, criminal, and administrative appeals); James G. Reinhart, *The Rule of Prejudicial Error and 38 U.S.C. § 5103(a)*:

the prejudicial-error rule before and after the APA's passage. Judges had for many years presumed that all errors were harmful. Then prejudice became a case-by-case inquiry—one made with little concern for consistency. Now, six decades after the APA's passage, patterns have developed to the point that a general account is worthwhile.

This Note undertakes that effort. It describes how courts have applied the doctrine and recommends improvements. Part I traces the rule's background and identifies what consensus exists. Part II explores what *Sanders* did not by explaining how courts have decided whether an error was harmful. In many opinions, courts find errors harmful if they either altered an agency's ultimate decision or prevented a party from adding information to the agency's record. Of those two types of harm, the former matters for substantive or procedural errors and the latter is relevant only for procedural mistakes. Still, as simple as this sounds, many decisions do not fit this mold because courts sometimes misunderstand prior cases, invent new tests for harm, or focus too closely on the facts of a particular appeal.

Part III suggests how courts can apply the doctrine with greater consistency and can better protect the public's participation in an agency's decision. First, courts should divide substantive and procedural errors, and always apply distinct prejudice tests to them. Applying the same tests to the same types of errors—something still not always done—prevents judges from erecting a façade of rules around exercises of discretion. Second, courts should alter the test applied to procedural errors. Rather than focusing on the agency's record, the updated test will ask whether a procedural error kept a challenger from sharing information with an agency. The test will now focus on what the challenger had to offer the agency. Until now, judges have evaluated whether errors altered agencies' formal records or their decisions, while giving less consideration to the people and organizations that rely on administrative procedures for access to those agencies. Modifying the prejudice test applied to procedural errors will better emphasize their participa-

tion,¹² which is, after all, the purpose of having so many procedural rules.

I. TEXT, HISTORY, AND SOME AGREEMENT

The APA applies to most decisions made by most agencies, making the opinions that apply the Act's harmless-error rule representative of all administrative cases in which judges consider prejudice. Enacted in 1947, the APA was the culmination of a decade-long effort to standardize rights and procedures across all federal agencies.¹³ Since then, the APA has governed judicial review of any final administrative action except for those exempted by another statute or committed to an agency's discretion.¹⁴ The APA has an expansive standing provision, too. Congress permitted not only those suffering legal wrongs from agency decisions to challenge those decisions, but also those "adversely affected or aggrieved" by them.¹⁵ Most challenged administrative decisions, therefore, can be reviewed under the APA.

When suits that rely on the APA are filed, courts apply the standards of error set forth in Section 706. That provision instructs courts to "hold unlawful and set aside agency action, findings, and conclusions" that are found to satisfy one of the six standards of error that are then listed.¹⁶ Several of those standards use well known verbal formulations: "arbitrary, capricious, [or] an abuse of discre-

¹² Courts are more concerned about this at other stages of judicial review, such as when considering standing to challenge a procedural error. For interesting discussion on that topic—plus its relationship to harmless error—see Richard J. Pierce, *Making Sense of Procedural Injury*, 62 *Admin. L. Rev.* 1, 3–8 (2010).

¹³ Jerry L. Mashaw et al., *Administrative Law: The American Public Law System* 9 (5th ed. 2003).

¹⁴ 5 U.S.C. § 701 (2006); accord *Consol. Gas Supply Corp. v. Fed. Energy Regulatory Comm'n*, 606 F.2d 323, 328–29 (D.C. Cir. 1979) (describing the breadth of the APA's applicability).

¹⁵ 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); see also *id.* § 704 (describing the form of review under the APA).

¹⁶ *Id.* § 706(2).

tion,”¹⁷ “without observance of procedure required by law,”¹⁸ and “unsupported by substantial evidence.”¹⁹

When courts identify mistakes, Section 706 requires them to assess the errors’ effects. Reviewing courts are told that “[i]n making the foregoing determinations . . . due account shall be taken of the rule of prejudicial error.”²⁰ This is the APA’s harmless-error rule, one that leaves several questions open: what is the “rule of prejudicial error”? How does one take “due account” of the rule? And what does this command mean for courts, agencies, and the parties who initiate challenges?²¹

This Part reviews the language of Section 706’s prejudicial-error rule and examines its antecedents in search of text-based answers to those open questions. The effort proves partially successful. The text indicates which side bears the prejudice burden in different situations—usually the same parties that bear the prejudice burden in civil and criminal appeals. But the text offers little help in determining what those parties must demonstrate to satisfy their burdens. This Part concludes by exploring why that question has not yet been answered by courts or legal scholars.

A. Section 706 and the General Harmless-Error Doctrine

The APA’s drafters gave no explicit instructions on how to engage in prejudicial-error analysis. Instead, they provided only an oblique reference to the then-existing harmless-error doctrine used in civil and criminal appeals.²² This Section examines Section 706’s

¹⁷ Id. § 706(2)(A).

¹⁸ Id. § 706(2)(D).

¹⁹ Id. § 706(2)(E).

²⁰ Id. § 706. The provision reads in full: “In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.”

²¹ See Noncompliance with the APA as Reversible Error: The Function of “Prejudicial Error” and “Seasonable Objection,” 6 *Stan. L. Rev.* 693, 694–95 (1954) (raising these same issues).

²² The rule of prejudicial error could have applied to many fewer reviews under the APA. Early drafts of the Act merged the rule into one of the Act’s six standards of review—the one now listed as § 706(2)(D). In those drafts, courts were to set aside agency action conducted “without observance of procedure required by law resulting in prejudicial error.” During the legislative process, the reference to prejudicial error was moved to its current home at the tail end of what is now § 706. For discussion of

text and the older harmless-error doctrine to which it referred. That history is important: it predicts which areas of the administrative harmless-error doctrine are well understood and which remain murky today.

The text of Section 706 points interpreters to a harmless-error rule that predates the APA, though it does so without an obvious textual hook. Neither “due account” nor “rule of prejudicial error” is self-defining.²³ No other provision of the APA defines or refers to Section 706’s instruction to consider harmless error, either. And Congress paired these terms for the first time in the APA, meaning that no statutory provision using those phrases had had judicial gloss applied by the time Congress drafted Section 706.²⁴ But that has not left courts free to decide questions of prejudice however they want in APA cases. Instead, the provision’s use of the definitive article indicates that the legislature had a particular standard in mind: the text instructs courts to apply “*the* rule of prejudicial error” as it existed when Congress passed the Act.²⁵

That preexisting harmless-error doctrine was imported from English law by American judges, who applied it until Congress codified a different rule.²⁶ Before World War I, courts applying the English-based rule presumed that errors in civil and criminal trials were prejudicial.²⁷ Those nineteenth- and early twentieth-century

this and other revisions, see Raoul Berger, *Do Regulations Really Bind Regulators?*, 62 Nw. U. L. Rev. 137, 160–62 (1967).

²³ But see *id.* at 160 (giving meaning to “due” in “due account”).

²⁴ There are, however, later-enacted statutes that use the “due account” language and presumably take gloss from § 706. See, e.g., Program Fraud Civil Remedies Act of 1986 § 6103(a), 31 U.S.C. § 3805 (2006); Congressional Accountability Act of 1995 § 406, 2 U.S.C. § 1406(d) (2006).

²⁵ See, e.g., *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (explaining that the federal habeas statute’s “consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner’s habeas petition”). Looking to an existing harmless-error rule comports with the Supreme Court’s practice of giving terms not defined within the APA their generally understood meaning at the time of its enactment. See *Dir., Office of Workers’ Comp. Programs, Dep’t of Labor v. Greenwich Collieries*, 512 U.S. 267, 275 (1994) (interpreting undefined term of the APA as following the definition generally accepted at the time of the enactment of the APA).

²⁶ Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 Marq. L. Rev. 433, 435–36 (2009).

²⁷ See *Deery v. Cray*, 72 U.S. (5 Wall.) 795, 807–08 (1866) (announcing harmless-error rule that “it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party’s rights”); see also *Chapman v. California*,

courts applied the rule almost without exception, which, observers complained, turned appellate review into trial-transcript flyspecking competitions.²⁸ Congress later added the rule to the Judicial Code in 1919.²⁹ The provision directed appellate courts “in any case, civil or criminal, [to] give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”³⁰

To courts, the codified harmless-error rule transformed the English-based common-law rule. No longer would erring parties need to overcome a presumption of harm to defend against an appeal.³¹ Now Congress required the appealing parties—after identifying technical and other equally insubstantial errors in lower court proceedings—to explain what harm resulted from those mistakes. Parties opposing an appeal, in comparison, continued to bear the prejudice burden only if the errors at issue proved to be substantial.³²

While courts understood the new Judicial Code provision to change the harmless-error rule, their opinions reveal ambivalence both about classifying errors as either substantial or minor and about what burden-bearing parties would have to prove to win in either scenario. Discussions of the new harmless-error provision were cast in general language, such as in *United States v. River Rouge Improvement Co.*:

386 U.S. 18, 24 (1967) (recognizing common-law burden as properly placed on appellee).

²⁸ See Sam Kamin, Harmless Error and the Rights/Remedies Split, 88 Va. L. Rev. 1, 9–11 (2002).

²⁹ 28 U.S.C. § 391 (1925) (repealed by Judicial Act of 1948). The language of the amended version is much more susceptible of application to administrative appeals: “On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.” Id. § 2111 (2006).

³⁰ Id. § 391 (1925).

³¹ Cf. *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 553 (1984) (“The harmless-error rules adopted by this Court and Congress embody the principle that courts should exercise judgment in preference to the automatic reversal for ‘error’ and ignore errors that do not affect the essential fairness of the trial.”).

³² See *McCandless v. United States*, 298 U.S. 342, 347–48 (1936) (concluding that the common-law rule remains in place for errors that affect the substantial rights of appellants).

It suffices to say that since the passage of this Act, as well as before, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties . . . is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party.³³

In other words, errors that were not insignificant were harmful, unless they were harmless. The Court said nothing new during this era.

The Court may have been so circumspect because it wanted to keep the analysis fact-specific. Just a year before the APA was enacted, *Kotteakos v. United States* reminded courts to keep harmless-error analysis focused on the context of each case.³⁴ Justice Rutledge devoted several pages of the opinion—an appeal of a criminal conviction—to the 1919 harmless-error codification, and concluded that looking for prejudice “requires . . . judgment transcending confinement by formula or precise rule.”³⁵ Later, he added, “What may be technical for one is substantial for another; what [is] minor and unimportant in one setting crucial in another.”³⁶ Even so, Justice Rutledge did not foreclose applying principles across different cases: he noted that “the precise border” between technical and substantial errors “may be indistinct, but case-by-case determination of particular points adds up in time to discernible direction,”³⁷ a point that Justice Breyer re-emphasized in *Sanders*.³⁸

Though hardly the paragon of draftsmanship, the text of Section 706 allows a reader to conclude that courts should take due account of the rule of prejudicial error in a manner consistent with

³³ 269 U.S. 411, 421 (1926).

³⁴ 328 U.S. 750, 761–62 (1946).

³⁵ *Id.* at 761. See generally *id.* at 757–66 (complete discussion of the harmless-error rule).

³⁶ *Id.* at 761.

³⁷ *Id.* at 761–62.

³⁸ 129 S. Ct. 1696, 1704–05 (2009) (“We have previously warned against courts’ determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record.”); *id.* at 1707 (“We have previously made clear that courts may sometimes make empirically based generalizations about what kind of errors are likely, as a factual matter, to prove harmful.”).

the general harmless-error doctrine that existed when the APA was enacted. To follow that rule, courts reviewing appeals from both trial courts and agencies should split technical from major errors and apply the prejudice burden to different parties depending on the severity of the error at issue.³⁹ Beyond that, the general harmless-error doctrine from 1946 left wide gaps to be filled. This delegation allowed courts to develop tests for prejudice in APA cases, a task that they have started but not yet completed.

B. Basics of Prejudicial Error Under Section 706

Courts applying the APA's prejudice rule have followed the path laid out in decisions like *River Rouge Improvement* and *Kotteakos*.⁴⁰ When deciding appeals under Section 706, courts have required challengers to demonstrate how they were harmed by agencies' errors, while on occasion shifting the burden to an agency to show that no harm resulted. These burden shifts have been rare, occurring only when an agency has run roughshod over important statutory rules. This much of the doctrine has been described by courts, and it sets the stage for exploring how challengers and agencies can win on the question of prejudice.

The Supreme Court held in *Sanders* that "the burden of showing that an error is harmful normally falls on the party attacking the agency's determination."⁴¹ APA cases decided by lower courts before *Sanders* pointed to that same conclusion with near-

³⁹ The Supreme Court has not decided whether the administrative doctrine should track the general doctrine even more closely. Compare *id.* at 1704 ("We have no indication of any relevant distinction between the manner in which reviewing courts treat civil and administrative cases."), with *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 144 (1940) ("[T]o assimilate the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process.").

⁴⁰ Courts interpreting the prejudicial-error command of § 706 would probably agree with this assessment, having consistently stated that general harmless-error principles inform the APA requirement. E.g., *Braniff Airways v. Civil Aviation Bd.*, 379 F.2d 453, 465 (1967) ("Although the standards governing its application may differ, the 'harmless error' principle announced for our general jurisprudence by decision and statute . . . is applicable to the review of the decisions of administrative agencies.") (citation omitted).

⁴¹ 129 S. Ct. at 1706.

uniformity.⁴² For instance, the D.C. Circuit described this default burden in *Air Canada v. Department of Transportation*, stating in an oft-cited passage that, “As incorporated into the APA, the harmless-error rule requires the party asserting error to demonstrate prejudice from the error.”⁴³ Other circuits agreed: challengers had to show that errors harmed them or their challenges would fail.⁴⁴ The courts also made this the default assignment in reviews of both rulemaking and adjudication, and for both substantive and procedural errors.

Agencies have borne the prejudice burden in unusual cases, though. They have done so primarily after failing to give any public notice of proposed regulations or opportunities for the public to comment on them.⁴⁵ The rules mandating notice-and-comment periods, set forth in Section 553 of the APA,⁴⁶ are among the most important provisions of that act, and courts strive to protect them.⁴⁷ The D.C. Circuit has explained that the usual practice of placing the harmless-error burden on challengers “is normally inappropriate where the agency has completely failed to comply with § 553.”⁴⁸

⁴² For the few cases that reach the other conclusion, see the Ninth Circuit cases discussed *infra* Part II.A.2. As that Part suggests, those cases have failed to gain traction even in the Ninth Circuit and are probably based on an erroneous understanding of precedent.

⁴³ 148 F.3d 1142, 1156 (D.C. Cir. 1998). For examples of language from other opinions citing or approving of *Air Canada*, see *Chamber of Commerce of the U.S. v. SEC*, 443 F.3d 890, 904 (D.C. Cir. 2006) and *Friends of Iwo Jima v. National Capital Planning Commission*, 176 F.3d 768, 774 (4th Cir. 1999). *Air Canada*, like many opinions cited in this Note, does not actually make this a holding because the court found that no error occurred. Even so, these statements are cited by courts as authoritative, and this Note will treat them as such.

⁴⁴ E.g., *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004); *Am. Airlines, Inc. v. Dep’t of Transp.*, 202 F.3d 788, 797 (5th Cir. 2000).

⁴⁵ Blatant violation of other APA provisions can trigger a burden shift too. See *Portland Audubon Soc’y v. Endangered Species Comm’n*, 984 F.2d 1534, 1548 (9th Cir. 1993) (shifting the burden following a violation of § 554 of the APA, which generally bars *ex parte* contacts during ongoing administrative activity).

⁴⁶ 5 U.S.C. § 553 (2006); see also *Ala. Power Co. v. FERC*, 160 F.3d 7, 10–11 (D.C. Cir. 1998) (shifting the burden implicitly after the agency promulgated a rule without the notice required by a program-specific statute).

⁴⁷ Cf. *W. Oil & Gas Ass’n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (“When substantive judgments are committed to the very broad discretion of an administrative agency, procedural safeguards that assure the public access to the decision-maker should be vigorously enforced.”).

⁴⁸ *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988). For a more complete treatment of *McLouth*, see M. Elizabeth Magill, *Images in Rep-*

The court worried that allowing an agency to skip public notice-and-comment periods on harmless-error grounds could leave Section 553 “eviscerated.”⁴⁹

The D.C. Circuit knew how to protect those procedures. It shifted the prejudice burden, a move that fits with the general harmless-error doctrine imported into the APA. Public notice-and-comment periods form the backbone of agency rulemaking, which means that abandoning Section 553’s rules is the type of mistake that has the “natural effect” of harming the “substantial rights” of interested parties.⁵⁰

Burden-shifting also encourages compliance with important mandates from Congress like those in Section 553. Agencies lose when they must disprove prejudice. In contrast, when an agency merely deviates from those rules, rather than outright ignores them, it stands a much better chance of being affirmed on appeal because challengers bear the (default) prejudice burden. So agencies at least try to follow the rules in Section 553 to avoid the guaranteed loss that follows a burden shift. As a result, though burden-shifting cases set a floor for agency compliance with the APA and other important statutes, they are unusual. Courts have shifted the burden in fewer than ten cases; they have applied the default burden every other time.⁵¹

Although legal scholars agree with courts on when to shift the prejudice burden, they, like courts, have not defined the burdens that can be or should be satisfied. Professor Ronald M. Levin published what appear to be the only descriptive and normative arguments regarding the APA’s provision.⁵² His analysis and proposal—

resentation, *Issues in Legal Scholarship* 12–14, 15 n.41 (2005) (discussing Richard B. Stewart, *Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667 (1975)).

⁴⁹ *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002). But not every federal jurist thinks that this is a good way to vindicate procedural rights. See *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982) (Kilkenny, J., concurring in part and dissenting in part) (“To permit a party to prevail where no harm has been demonstrated is nothing short of allowing litigants to use the federal courts to complain about things that in no way affect them.”).

⁵⁰ See *Kotteakos v. United States*, 328 U.S. 750, 760–61 (1946) (using these terms while assigning the burden to appellee).

⁵¹ See *infra* Subsection II.B.2.

⁵² Ronald M. Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 *Admin. L. Rev.* 239, 261–62, 282–84 (1986).

to ask in every case whether an error changed an agency's decision—was cursory, only a few paragraphs in a long restatement of judicial review of administrative agencies. Even more, Levin acknowledged that the APA's prejudicial-error doctrine was opaque yet did not try to synthesize the cases he cited.⁵³ Furthermore, only the First Circuit has used a similar approach, which it has done without any hint that it knows of Levin's proposal.⁵⁴

The only other scholarship on administrative harmless error offers in-depth but narrowly focused analysis. The articles explore harmless error in particular scenarios, rather than in all types of administrative challenges. For example, multiple authors have written about the prejudice that agencies cause when they impose rules on themselves and then break them.⁵⁵ Another author has suggested a prejudice standard specific to the veterans' benefits provision analyzed in *Sanders*.⁵⁶ No one doubts the utility of these articles, which offer valuable insights on important issues that affect day-to-day administrative practice. But by focusing on such small sets of cases, these authors have had little reason to address the complexities presented by the full range of harmless-error cases. As it turns out, they may not have had reason to address them.

Justice Rutledge's comment, echoed by Justice Breyer in *Sanders*,⁵⁷ that individually decided cases may eventually give rise to "discernible direction," could explain why no one has yet articulated how to satisfy the APA's prejudicial-error rule. Cases appealed in the years immediately after the Act's passage tended to state little more than the Judicial Code's requirement that the challenging party's "substantial rights" must be affected for prejudice

⁵³ Id. at 284 ("Generally, however, courts have applied the principle without committing themselves to any particular verbal formula summarizing it.").

⁵⁴ See discussion *infra* Part II.B.

⁵⁵ See, e.g., Berger, *supra* note 22, at 138; Thomas W. Merrill, *The Accardi Principle*, 74 *Geo. Wash. L. Rev.* 569, 569–70 (2006); Note, *Violations By Agencies of their Own Regulations*, 87 *Harv. L. Rev.* 629, 629 (1974). These cases are governed by what is often called the *Accardi* doctrine.

⁵⁶ See Reinhart, *supra* note 11, at 1–2.

⁵⁷ 129 S. Ct. 1696, 1707 (2009) ("We have previously made clear that courts may sometimes make empirically based generalizations about what kind of errors are likely, as a factual matter, to prove harmful.").

to be found.⁵⁸ As the 1960s gave way to the 1970s and 1980s, early rule-like elements developed, but most analysis remained context-specific.⁵⁹ Only from the 1990s to the present have distinctions begun to crystallize.⁶⁰ Yet even in this modern era, some courts have seemingly embraced Justice Rutledge's notion that courts need not color within the lines drawn by earlier opinions. They either choose different tests than similar cases suggest are appropriate or conduct "one-off" analysis good for one case only.⁶¹ In sum, the idea of even devising a general rule of harmless error under the APA is relatively new; trying to provide a general account of what was long a highly fact-specific inquiry may not have been feasible until now.

II. HOW COURTS APPLY THE PREJUDICE BURDENS TO ADMINISTRATIVE ERRORS

Courts do not yet agree on how to apply the APA's rule of prejudicial error for every case. In general, they decide whether an error caused prejudice by using one of three tests, though only two are useful gauges of harm. They do not consistently choose the same tests for the same types of errors, however, and in many opinions they do not even identify which test they have used. Both problems undermine the "ruleness" of the APA's rule of prejudicial error. Even so, at least some order can be established.

Indeed, most errors are reviewed under the two insightful prejudice standards. The first has been applied primarily to substantive errors and requires a challenger to show that an error changed an agency's chosen course of action. This is an "outcome-based" standard. The second test has been applied only to procedural errors and asks whether the record compiled while the agency considered

⁵⁸ E.g., *Olin Indus., Inc. v. NLRB*, 192 F.2d 799, 799 (5th Cir. 1951) (filing charges by regular instead of certified mail was "mere technical defect" because "[i]t did not affect the substantial rights" of the parties).

⁵⁹ E.g., *Econ. Opp. Comm'n of Nassau County v. Weinberger*, 524 F.2d 393, 399–400 (2d Cir. 1975) (blending together the modes of analysis described *infra* Sections II.A. and II.B).

⁶⁰ E.g., *Air Canada v. Dep't of Transp.*, 148 F.3d 1142, 1156–57 (D.C. Cir. 1998) (considering both record-based and outcome-based arguments of prejudice following demonstration of a procedural error, but keeping them distinct).

⁶¹ See, e.g., *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764–66 (9th Cir. 1986) (holding error harmless because purposes of notice requirements in program act were fulfilled).

its options was affected by the mistake at issue. This is a “record-based” standard.⁶²

The third test competes with the first two tests but in a curious way. Courts quote the D.C. Circuit opinion *Braniff Airways v. Civil Aeronautics Board* to state that an error is only harmless when it “clearly had no bearing on the procedure used or the substance of decision reached.”⁶³ This is not good: these courts have misunderstood the *Braniff* passage’s context and have created a rule that treats nearly every error as prejudicial. Thus, reference to *Braniff* diverts judges who could otherwise use one of the two meaningful tests for prejudice. This Part will consider each test in turn.

A. Outcome-Based Standard

The outcome-based standard is straightforward in theory and practice. To determine whether an agency’s error has harmed the challenging party, courts ask if the mistake led the agency to make different choices than it otherwise would have made. This inquiry is easy to comprehend, because an agency either would or would not have reached the same result it did absent an error. That makes it an attractive tool for measuring prejudice. Further bolstering the test’s appeal, courts have applied it without creating the doctrinal oddities that plague the other two standards—that is, except for two Ninth Circuit cases that inexplicably depart from the default burden placement recently affirmed in *Sanders*.

1. When Challengers Bear the Burden

Courts have applied the outcome-based test to challengers in different forms. Some judges have declared that an error was either prejudicial or harmless based on fact-specific analysis—often left unstated—of whether an error led an agency in a different direction.⁶⁴ Others have devised verbal formulations to gauge whether

⁶² Outcome-based and record-based are descriptors created for this Note.

⁶³ 379 F.2d 453, 466 (D.C. Cir. 1967) (quoting *Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964)).

⁶⁴ E.g., *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (holding that the EPA’s allegedly erroneous statement that its actions were required by statute “was dictum, and it had no bearing on the final agency action that respondents challenge”). The Court has stated that prejudice analysis need not be explicit when the harm from errors is obvious. *Shinseki v. Sanders*, 129 S. Ct. 1696, 1706

an agency would reach the same result if it had not erred.⁶⁵ Using one popular phrase, a few courts have asked whether “substantial evidence” supported an agency’s decision after erroneous reasoning had been removed from consideration.⁶⁶

In *Kurzon v. United States Postal Service*, the First Circuit used a similar phrase, requiring the challenger to create “substantial doubt” that the agency would have reached the same outcome without its error.⁶⁷ Kurzon, the challenger, owned a company that was mailing advertisements for a non-prescription drug. The Postal Service examined the mailers and, after a hearing on the record, found that they made false representations—namely that the drug treated certain conditions when in fact it did not.⁶⁸ The agency entered a “mail stop order” against Kurzon as a result.⁶⁹ Kurzon then challenged the order, in part because it lacked support in the record.⁷⁰ After its review, the First Circuit concluded that most findings were supported with substantial evidence,⁷¹ but it agreed with Kurzon that one particular factual conclusion was incorrect.⁷²

The court next turned its focus to prejudice. Substantive mistakes, the panel said, would require remediation “only if ‘the court is in substantial doubt whether the administrative agency would have made the same ultimate finding with the erroneous finding removed from the picture’”⁷³ Unfortunately for Kurzon, the

(2009) (“Often the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said.”).

⁶⁵ As an example, the Tenth Circuit has stated that evidence erroneously admitted to an adjudication is prejudicial only if “if it can be reasonably concluded that with . . . such evidence, there would have been a contrary result.” *Gunderson v. U.S. Dep’t of Labor*, 601 F.3d 1013, 1021 (10th Cir. 2010) (quoting *Sanjuan, Inc. v. IBP, Inc.*, 160 F.3d 1291, 1296 (10th Cir. 1998)).

⁶⁶ E.g., *Allison v. Dep’t of Transp.*, 908 F.2d 1024, 1029–30 (D.C. Cir. 1990) (using “substantial evidence”); *Delta Air Lines, Inc. v. Civil Aeronautics Bd.*, 564 F.2d 592, 598 (D.C. Cir. 1977) (“The court should affirm if it appears all the important basic findings made by the Board are supported by substantial evidence.”).

⁶⁷ 539 F.2d 788, 796 (1st Cir. 1976).

⁶⁸ *Id.* at 789.

⁶⁹ *Id.* at 789, 791.

⁷⁰ *Id.* at 792.

⁷¹ *Id.* at 794–95.

⁷² *Id.* at 796. The judicial officer mistakenly understood the medical condition to be the result of another ailment, like an infection. The condition was actually an “independent condition.” *Id.*

⁷³ *Id.* (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 139 (1st Cir. 1953)).

mistaken conclusion was “essentially irrelevant to the ultimate finding of false representation.”⁷⁴ The Postal Service would have imposed the mail stop order even without that lone erroneous conclusion. And thus, the court declined to invalidate the order.⁷⁵

Kurzon illustrates the outcome-based test’s primary virtue: its respect for agency resources. Vacating agency action for errors that did not change the outcome wastes time and money; it forces agencies to repeat adjudications and rulemakings where the results on remand are foregone conclusions. Especially in complex decisions where an agency has invested significant manpower and filled hundreds of pages of the Federal Register with its reasoning, tiny errors tucked into throwaway sentences are expected. Courts refuse to upset months or even years of work because an agency cited the wrong statute in a footnote or miscalculated a pollutant’s effects by tenths of a percentage point when neither error affected an agency’s choices.⁷⁶

This test has a notable drawback. The outcome-based standard does not force agencies to follow rules. Agencies can cite bad evidence, draw faulty inferences, and take procedural shortcuts so long as the ultimate outcome is not provably affected.⁷⁷ This perhaps explains why courts apply the outcome-based standard mainly to substantive errors. They may think it too hard to demonstrate that a procedural error changed a result, which could leave the rules established by Congress too vulnerable to deviations.⁷⁸ In that

⁷⁴ *Id.* at 797.

⁷⁵ *Id.* at 798.

⁷⁶ See *Rybachek v. EPA*, 904 F.2d 1276, 1295 (9th Cir. 1990) (“We acknowledge that the EPA’s data may not be consistent to every decimal point. [A]ny slight misstatements in some of the EPA’s calculations seem fairly understandable and . . . the misstatements are so minor that [the challengers] could [not] have been harmed by them.”).

⁷⁷ For a recent example, see *City of Portland v. EPA*, 507 F.3d 706, 716 (D.C. Cir. 2007) (holding agency’s reliance on outdated scientific data harmless where the reliance did not affect the final rule). Aware that agencies are excused from their errors in these situations, the First Circuit has reminded reviewers to be careful with outcome-based review. *Save Our Heritage, Inc. v. FAA*, 269 F.3d 49, 61 (1st Cir. 2001) (“Obviously, a court must be cautious in assuming that the result would be the same if an error, procedural or substantive, had not occurred . . .”).

⁷⁸ See *United States v. Utesch*, 596 F.3d 302, 312 (6th Cir. 2010) (“[A] reviewing court must focus not merely on the ultimate rule but on the process of an administrative rulemaking; otherwise, an agency could always violate the APA’s procedural re-

line of thinking, the record-based standard may better balance regulatory beneficiaries' interests in seeing procedural rules obeyed with agencies' interests in conserving resources.

2. When Agencies Bear the Burden

No court has shifted the harmless-error burden to an agency guilty of a substantive error, but when one does, the test should resemble the one that challengers normally face. Two odd Ninth Circuit opinions support this prediction. In them, the court identified important but hardly egregious reasoning errors. Then it did something strange. Rather than ask the challengers to identify the harm, the court assigned the prejudice burden to agencies as a default. Explaining this curious placement, the court wrote in *Gifford Pinchot Task Force v. United States Fish & Wildlife Service* that “[i]n applying harmless error analysis, our precedent dictates that the agency must demonstrate that its error on the controlling regulation was harmless.”⁷⁹ The same judge repeated this sentiment a year later in *Natural Resources Defense Council v. United States Forest Service*.⁸⁰ These opinions are wrong. They are inconsistent with the Supreme Court's holding in *Sanders* that challengers usually bear the prejudice burden,⁸¹ and also cite several Ninth Circuit decisions that, in truth, do not really support placing the prejudice burden on agencies in every case.⁸²

Erroneous as they may be, these two cases are nonetheless useful. They apply a prejudice test similar to the one that challengers must satisfy in normal cases. According to *Gifford Pinchot*, the agency “could show harmless error by proving that, even if it ig-

quirements based on the representation that it would have adopted the same rule had the proper process been followed.”).

⁷⁹ 378 F.3d 1059, 1071 (9th Cir. 2004), amended by 387 F.3d 968 (9th Cir. 2004).

⁸⁰ 421 F.3d 797, 807 (9th Cir. 2005).

⁸¹ See *supra* note 42 and accompanying text; see also *Shinseki v. Sanders*, 129 S. Ct. 1696, 1706–07 (2009) (declining to decide lawfulness of presumptions similar to burden-shifting described *supra* Section I.A.).

⁸² *Gifford Pinchot*, for example, cites three Ninth Circuit decisions, none of which discuss whether to place the burden on agencies in all cases. See 378 F.3d at 1071 ((citing *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993); *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992); *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982)). At least one of the three belongs in the utter failure category and is therefore not an appropriate case to cite for *Gifford Pinchot's* point. See *Buschmann*, 676 F.2d at 358.

nored [its impermissible] regulation, it did not affect the result of the critical habitat analysis.”⁸³ If an agency is ever (correctly) required to show that its egregious substantive error was harmless, it likely will have to prove that its mistake did not change its ultimate decision. And that may be hard to do.

A coherent picture emerges from these cases, even with the Ninth Circuit’s curveball. When an agency commits a substantive error, a challenger must make a court doubt that the agency would have made the same decisions without its mistake. Should an agency’s error prove to be so egregious that a court shifts the prejudice burden, the agency probably will have to prove the opposite: that its mistake could not have affected the result. The latter test will remain a prediction until a court applies the test to an utter failure of reasoning rather than places it on an agency from the outset as in *Gifford Pinchot*.

B. Record-Based Standard

The record-based harmless-error test is as simple in theory as its counterpart, the outcome-based inquiry. A challenger must show that a procedural error prevented specific facts or arguments from being presented to an agency and entered into the administrative record. Courts have applied the standard inconsistently, though. For example, they have shifted the prejudice burden in myriad erratic ways after identifying utter failures to follow procedural rules.⁸⁴ They also have subjected many procedural errors to the outcome-based standard instead of the record-based standard,⁸⁵ and no court has explained why some are reviewed under one test versus the other.⁸⁶ So, while easy to describe, the record-based standard remains a work in progress.

⁸³ 378 F.3d at 1072. The court was more circumspect in *Natural Resources Defense Council*: “[W]e hold that the Forest Service’s mistake had some bearing on the substance of the Forest Service’s decision to adopt [a particular regulation].” 421 F.3d at 807–08.

⁸⁴ See *infra* Subsection II.B.2.

⁸⁵ See, e.g., *Steel Mfrs. Ass’n v. EPA*, 27 F.3d 642, 649 (D.C. Cir. 1994); *Texas-Capital Contractors v. Abdnor*, 933 F.2d 261, 269–70 (5th Cir. 1990). In comparison, the record-based test has not been applied to substantive mistakes.

⁸⁶ Compare, e.g., *Friends of Iwo Jima v. Nat’l Capital Planning Comm’n*, 176 F.3d 768, 774 (4th Cir. 1999) (outcome-based standard applied to procedural error), with

1. When Challengers Bear the Burden

The D.C. Circuit opinion in *Gerber v. Norton* provides an informative example of the record-based test.⁸⁷ The U.S. Fish and Wildlife Service issued a permit allowing real estate developers to build on one of the few remaining habitats of the endangered Delmarva fox squirrel.⁸⁸ Under procedures dictated by the Endangered Species Act, the Service had to publish the permit application in the Federal Register, receive comments from the public, and conclude that the squirrel could survive the construction. The Service published the permit application, but did not attach a map of where the squirrels would be relocated to make way for construction.⁸⁹ A conservation group submitted comments with the caveat that its opinions could not be considered complete until its members could review the map. The Service belatedly released the map when it published the final plan for moving the squirrels, and refused the conservation group's request for time to comment on the map.⁹⁰

The Service issued the construction permit a month later, which the conservation group successfully challenged. The D.C. Circuit read the Endangered Species Act to require publishing the map for comments.⁹¹ Thus, the Service had erred. The court also found that the challengers had demonstrated prejudice from the Service's error "to an extent we have rarely seen in APA cases."⁹² The challengers had identified three specific critiques of the permit that they would have made had they seen where development would intrude on the squirrel's turf.⁹³ The permit was declared invalid.

Am. Radio Relay League, Inc. v. FCC, 524 F.3d 227, 237–38 (D.C. Cir. 2008) (record-based standard applied to procedural error).

⁸⁷ 294 F.3d 173 (D.C. Cir. 2002).

⁸⁸ Id. at 175–76.

⁸⁹ Id. at 177.

⁹⁰ Id. at 178.

⁹¹ Id. at 179.

⁹² Id. at 182.

⁹³ See id. For example, the challengers would have argued that the land designated to serve as a replacement for the disrupted habitat was already covered by an open-space easement and therefore offered no new protection for the squirrel. Compare id. (finding harm where challenger could identify arguments it would have made if it had been given the opportunity to comment), with U.S. Telecom Ass'n v. FCC, 400 F.3d 29, 41 (D.C. Cir. 2005) (holding slightly defective notice harmless because challenger could not identify any new arguments that had not been made during the comment period).

Gerber highlights the major difference between the outcome-based and record-based standards. Even if the conservation group had had access to the map and had offered its complete insight during the original comment period, the Service might nonetheless have granted the permit. Nothing required the Service to agree with the conservation group, meaning that the agency's failure to publish the map did not necessarily steer it in a different direction. Yet whether the permit would have been granted did not matter under the record-based test.⁹⁴ The D.C. Circuit deemed the group's extra comments to be sufficient evidence of prejudice.⁹⁵

Other courts have described circumstances in which a procedural error could be prejudicial, all of which in effect ask how an error affected an administrative record. For example, challengers have had to identify "hard data or new legal arguments" that were presented to an agency only during ex parte contacts prohibited by the APA.⁹⁶ Challengers also have been required to identify legal or factual conclusions that would have been overturned under the correct standard of administrative review,⁹⁷ "indicate with 'reasonable specificity'" what portions of documents not included in a rulemaking proposal but cited for support of a final rule were objectionable,⁹⁸ demonstrate an ability to "mount a credible challenge" to a rule on remand to an agency,⁹⁹ or show that a summary was not an "accurate, and sufficiently clear and direct" reflection of the com-

⁹⁴ See *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992) ("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.").

⁹⁵ *Gerber*, 294 F.3d at 184.

⁹⁶ *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189, 1218 (D.C. Cir. 1980); cf. *Safari Aviation, Inc. v. Garvey*, 300 F.3d 1144, 1151–52 (9th Cir. 2002) (holding failure to consider challenger's arguments harmless because agency considered another interested party's arguments of the same substance).

⁹⁷ See *MBH Commodity Advisors v. Commodity Futures Trading Comm'n*, 250 F.3d 1052, 1064 (7th Cir. 2001).

⁹⁸ *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 540–41 (D.C. Cir. 1983); see also *Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 202 (5th Cir. 1989) (quoting *Small Refiner*, 705 F.2d at 540–41).

⁹⁹ *Util. Solid Waste Activities Group v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001); see also *Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (holding erroneously truncated comment period nonprejudicial because challenger "failed to identify any substantive challenges it would have made had it been given additional time").

plete record that the agency should have provided.¹⁰⁰ Each test asks the question from *Gerber*: Did the record change because of the mistake?¹⁰¹

Courts have undermined the record-based test by instead applying the outcome-based standard to some procedural errors without explaining why either test is employed in particular cases. It is not due to history—both tests have been used in some form since the APA's enactment. Nor is it a product of circuit splits. Panels of the D.C., Ninth, and Eleventh Circuits have applied both tests to procedural errors within the past decade,¹⁰² with none explaining whether or why they made a choice between the two. Compounding this confusion, both tests are sometimes applied to procedural errors in the same opinion.¹⁰³ And the First Circuit has even declined to apply the record-based test to procedural errors in favor of using the outcome-based test.¹⁰⁴ Whatever the explanation for this inconsistency, courts must resolve it if they hope to do more than enforce their preferences under the guise of prejudice analysis.

2. When Agencies Bear the Burden

Courts have done no better when shifting the burden in response to egregious procedural errors. These burden shifts have an inauspicious origin. The Fifth Circuit shifted the burden to an agency first in *United States Steel Corp. v. United States Environmental Protection Agency*,¹⁰⁵ but has refused to

¹⁰⁰ *Ghaly v. INS*, 48 F.3d 1426, 1435 (7th Cir. 1995).

¹⁰¹ Also, the Ninth Circuit employs a special test for procedural errors during rule-making, asking whether the challengers had actual notice of the proposed rule and the comment period in spite of the technically deficient notice. See, e.g., *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995).

¹⁰² Compare, e.g., *Miami-Dade County v. EPA*, 529 F.3d 1049, 1061 (11th Cir. 2008) (record-based test), *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237–38 (D.C. Cir. 2008) (same), and *Safari Aviation, Inc. v. Garvey*, 300 F.3d 1144, 1151–52 (9th Cir. 2002) (same), with *Powers v. U.S. Dep't of Agric.*, 245 F. App'x 924, 929 (11th Cir. 2007) (outcome-based test), *Am. Coke & Coal Chems. Inst. v. EPA*, 452 F.3d 930, 941 (D.C. Cir. 2006) (same, in dicta), and *Inst. for Wildlife Prot. v. Norton*, 149 F. App'x 627, 629 (9th Cir. 2005) (same).

¹⁰³ *St. Anthony Hosp. v. U.S. Dept. of Health & Human Servs.*, 309 F.3d 680, 698–99 (10th Cir. 2002).

¹⁰⁴ *Conservation Law Found. v. Evans*, 360 F.3d 21, 29–30 (1st Cir. 2004).

¹⁰⁵ 595 F.2d 207, 215 (5th Cir. 1979).

do so since then.¹⁰⁶ Two other circuits have used varying verbal formulations to shift the burden, all of which raised the bar too high for agencies to clear. Beyond the outcomes, however, little consistency exists.

The D.C. Circuit has applied something other than the default burden in two ways. Early cases from the circuit imposed a test like the one from *Shell Oil Co. v. EPA*:

While petitioners must show that they would have submitted new arguments to invalidate rules in the case of certain procedural defaults, . . . petitioners need not do so here, where the agency has entirely failed to comply with notice-and-comment requirements, and the agency has offered no persuasive evidence that possible objections to its final rules have been given sufficient consideration.¹⁰⁷

Shell Oil and earlier cases like *McLouth Steel Products Corp. v. Thomas*¹⁰⁸—the first D.C. Circuit case to make this shift—required an agency to prove that it had already considered any arguments that the challengers could have made.¹⁰⁹ The agencies failed every time.¹¹⁰

The D.C. Circuit's rhetoric changed after *Shell Oil*, but the results have remained the same. The reasoning in *Sprint Corp. v. FCC* suggests that the court now applies a lighter prejudice burden to challengers rather than shifting the burden onto agencies.¹¹¹ The

¹⁰⁶ See *Texas v. Lyng*, 868 F.2d 795, 798–99 (5th Cir. 1989) (declining to shift the burden as in *U.S. Steel*). The D.C. Circuit later rejected *U.S. Steel*, calling it a per se rule against finding harmless error. *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988) (declining to “endorse the Fifth Circuit’s blanket rule” against conducting any prejudicial-error analysis after an utter failure). But see Magill, *supra* note 48, at 13 (questioning the D.C. Circuit’s distinction in *McLouth*).

¹⁰⁷ 950 F.2d 741, 752 (D.C. Cir. 1991).

¹⁰⁸ 838 F.2d at 1324 (“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.”).

¹⁰⁹ The other well-know burden shifting case, *Sugar Cane Growers Cooperative of Florida v. Veneman*, also fits this description. 289 F.3d 89, 96–97 (D.C. Cir. 2002).

¹¹⁰ Most burden-shifting cases are discussed or cited in this Section. The other burden shifts that I have identified are in *Alabama Power Co. v. FERC*, 160 F.3d 7, 10–11 (D.C. Cir. 1998) and *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1548 (9th Cir. 1993).

¹¹¹ 315 F.3d 369, 376–77 (D.C. Cir. 2003).

Sprint court determined that the FCC's utter failure to give notice of a pending rule had somewhat harmed Sprint, instead of asking the FCC to disprove prejudice and then halting the analysis when the agency could not.¹¹² Yet the D.C. Circuit did not state that agencies no longer bore the burden following utter failures; the court just changed its test. Since then, reducing rather than shifting the burden has gained currency in the D.C. Circuit,¹¹³ though no panel has yet said that *Sprint* is the view preferred to the *Shell Oil-McLouth* approach.

The Ninth Circuit has shifted the burden, too, and has done so just as obliquely. Its shift looks like a half-finished D.C. Circuit shift. In *Paulsen v. Daniels*, for example, the court confronted a temporary regulation issued without public notice or a comment period.¹¹⁴ The court stated that the challengers would win if they had received no notice of the agency's activity and would lose if they had participated in the rulemaking even without public notice.¹¹⁵ Although the temporary regulation was identical to the ensuing permanent regulation (which had been subjected to notice and comment), the court invalidated the temporary rule for the period in which it had been in effect.

What is not clear in *Paulsen* is why. Did the Ninth Circuit place the prejudice burden on the agency or did it identify how challengers could carry the regular prejudice burden? What ended the prejudice inquiry in *Paulsen*—showing that the interested party received no notice of any kind—is what *triggered* the burden shift (or reduction) in the D.C. Circuit cases. The Ninth Circuit has not explained which reading is correct. This inconsistency between the two circuits has not affected the results, though: agencies have al-

¹¹² Id. at 377 (noting possible prejudice to Sprint, including the difficulty of persuading an agency to revoke an existing rule as compared to defeating a proposed rule).

¹¹³ See *AFL-CIO v. Chao*, 496 F. Supp. 2d 76, 88–90 (D.D.C. 2007) (“[T]he D.C. Circuit has relaxed the showing required of challengers where the agency has completely failed to comply with notice-and-comment procedures.”); see also *Chamber of Commerce of the U.S. v. SEC*, 443 F.3d 890, 904 (D.C. Cir. 2006) (distinguishing its facts from those of *McLouth*, where the court required only a “limited showing of prejudice” from the challengers following an “outright dodge of APA procedures”).

¹¹⁴ 413 F.3d 999, 1006 (9th Cir. 2005); see also *Buschmann v. Schweiker*, 676 F.2d 352, 357–58 (9th Cir. 1982) (invalidating interim amendment to Social Security regulation for lack of notice-and-comment period).

¹¹⁵ *Paulsen*, 413 F.3d at 1006–07 (analyzing Ninth Circuit precedent).

ways lost these cases.¹¹⁶ But it again obscures how the courts take due account of prejudicial error. And that makes application of the rule seem more like an exercise in judicial discretion.

Still, the record-based standard is at least intuitive. Courts that identify procedural errors often ask what would have been contributed to the record without the agency's error standing in the way. Challengers succeed when they cite something specific that they wanted to present to the agency but could not, like the conservation group's additional critiques in *Gerber*. Agencies must prove the opposite when they bear the burden, showing that no challenger could have had additional arguments to present. Perhaps by design, that standard has proven difficult for agencies to meet.

C. An Interloper Named Braniff Airways v. Civil Aeronautics Board

Judicial dalliances with a well-known D.C. Circuit opinion, *Braniff Airways v. Civil Aeronautics Board*,¹¹⁷ have further slowed completion of a framework for analyzing the administrative harmless error. Multiple circuits have quoted a passage from that opinion as an independent test for prejudice. The language should not be used to assess prejudice, however, because of the context in which the D.C. Circuit wrote it and because the words do not separate meaningful from meaningless mistakes.¹¹⁸

In *Braniff*, the Civil Aeronautics Board had awarded Eastern Airlines a new route from Florida to Dallas. Braniff Airlines, based in Dallas, contested the award. Braniff argued that several facts supporting the Board's decision were incorrect.¹¹⁹ The D.C. Circuit agreed but was not sure how those errors affected the Board's de-

¹¹⁶ The closest an agency has come to surviving a burden shift is in *United States v. Dean*, where one judge on the panel concluded that an agency's utter failure was in fact harmless. 604 F.3d 1275, 1288–89 (11th Cir. 2010) (Wilson, J., concurring in the result). The other judges found that § 553's good-cause exception permitted the rule to stand, which obviated the need to decide the prejudice question. *Id.* at 1278–82.

¹¹⁷ 379 F.2d 453 (D.C. Cir. 1967).

¹¹⁸ See Magill, *supra* note 48.

¹¹⁹ The challengers argued that the Board's conclusion was unsupported by substantial evidence and should have been invalidated under § 706(2)(E). *Braniff*, 379 F.2d at 462.

cision to award the route to Eastern.¹²⁰ The court stated that, under the harmless-error doctrine incorporated by the APA, it could affirm the award if the errors “clearly had no bearing on the procedure used or the substance of the decision reached.”¹²¹ The court concluded that the Board’s findings were important enough to the decision to merit vacating the award to Eastern.

Other circuits have employed the “clearly had no bearing” quotation to determine whether an agency’s error was harmless. *United States Steel Corp. v. EPA* is the first and most prominent example.¹²² The Fifth Circuit stated in that case that the harmless-error doctrine “is 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 decision reached.’”¹²³ The Sixth,¹²⁴ Ninth,¹²⁵ Tenth,¹²⁶ and Eleventh¹²⁷ Circuits have also quoted *Braniff* in the same way. These courts are mistaken in quoting *Braniff* this way, however.

The D.C. Circuit did not write the *Braniff* passage as a standard for taking due account of the rule of prejudicial error. The court instead was explaining that the Supreme Court disfavors vacating agency action over minor errors. Under *SEC v. Chenery Corp.*, agencies must explain the reasoning underlying their decisions if those decisions are to withstand judicial review.¹²⁸ Even with that principle in place, the *Braniff* court explained, a court need not invalidate a decision every time the reasoning is slightly deficient.

¹²⁰ Id. at 466–67.

¹²¹ Id. at 466 (quoting *Mass. Trs. of E. Gas & Fuel Assocs. v. United States*, 377 U.S. 235, 248 (1964) (non-APA case)).

¹²² 595 F.2d 207, 215 (5th Cir. 1979). The opinion is more known doctrinally for shifting the burden of proof for prejudicial error. See *supra* Subsection II.B.2.

¹²³ 595 F.2d at 215 (quoting *Braniff*, 379 F.2d at 466) (emphasis added); see also *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) (quoting *U.S. Steel*’s misquote of *Braniff*, 595 F.2d at 215).

¹²⁴ *Berryhill v. Shalala*, 4 F.3d 993, *7 (6th Cir. 1993) (unpublished table decision).

¹²⁵ *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir. 1982). The Ninth Circuit cases in the *Buschmann* line employ both the *Braniff* “clearly had no bearing” language and different, independent tests for prejudice. See, e.g., *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (applying actual notice standard).

¹²⁶ *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 786 n.6 (10th Cir. 2006) (dictum) (quoting *Buschmann*, 676 F.2d at 358).

¹²⁷ *United States v. Dean*, 604 F.3d 1275, 1288 (11th Cir. 2010) (Wilson, J., concurring).

¹²⁸ 332 U.S. 194, 196 (1947).

This is all the opinion stands for, which means that the critical phrase “is to be used only” added by *U.S. Steel* and other opinions transformed the *Braniff* quote from a justification for harmless-error analysis to a limitation on the scope of that inquiry.¹²⁹

Even if the D.C. Circuit wrote the *Braniff* passage as a stand-alone measure of prejudice, the words give little guidance on when an error causes enough harm to warrant vacating agency action. Professor Elizabeth Magill has noted that opinions like *U.S. Steel* suggest all errors are prejudicial, because every mistake necessarily has some effect on the procedure followed or the substance of the decision reached, however trivial.¹³⁰ The record- and outcome-based tests at least separate miniscule mistakes from outright bumbles. As quoted, the *Braniff* passage does not. It places a prejudice burden on challengers far lighter than the other two standards, if it exists at all. Courts should therefore avoid further quotation in favor of the outcome- and record-based standards.

D. Summarizing the Prejudicial-Error Tests

This review of the standards that courts have used to measure prejudice leaves courts with a choice between an outcome-based test for substantive errors and a record-based evaluation for procedural errors. The boundary between the two is not impermeable, as some procedural errors have been subjected to outcome-based

¹²⁹ This misuse of *Braniff* is somewhat ironic because the opinion’s ensuing paragraphs form an early example of the outcome-based standard described supra Section II.A. *Braniff* may have been the first opinion to reach the conclusion that “[w]here a subsidiary finding is unsupportable or otherwise erroneous but the court is clear that its presence was not material to the ultimate finding, reversal is not appropriate.” 379 F.2d at 466. For reasons that are unclear, those words have garnered minimal attention, as only two cases appear to have cited *Braniff* on this point. See *PDK Labs. v. DEA*, 438 F.3d 1184, 1196–97 (D.C. Cir. 2006); *Kurzon v. U.S. Postal Serv.*, 539 F.2d 788, 796 (1st Cir. 1976). Other circuits have quoted *Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States* in the same fashion as the *Braniff* misquotes. See *Ngarurih v. Ashcroft*, 371 F.3d 182, 190 n.8 (4th Cir. 2004); *In re Watts*, 354 F.3d 1362, 1370 (Fed. Cir. 2004).

¹³⁰ See Magill, supra note 48, at 13 (“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.”); accord *Texas v. Lyng*, 868 F.2d 795, 799 (5th Cir. 1989) (same point).

analysis.¹³¹ Thanks to those opinions, the ill-described burden-shifting cases, and the *Braniff* distraction, the language and standards that courts use to look for prejudice vary for no apparent reason. This suggests that courts have not finished, or do not care to finish, a framework that is applicable in every case. That is unfortunate, but it is not the end state. Part III explains how courts can improve their harmless-error analysis—and make it more consistent—while maintaining the case-by-case approach called for by earlier Supreme Court decisions.

III. IMPROVING THE APA'S RULE OF PREJUDICIAL ERROR

Over the past six decades the administrative harmless-error doctrine has moved—careened, perhaps—in a discernible direction from its early case-by-case focus. That said, it remains unpredictable and under-described, and has been cited as one of the “grey holes” of administrative law.¹³² Professor Adrian Vermeule described grey holes as doctrines where the rule of law appears to operate, but a closer look reveals cases decided by judicial preferences.¹³³ Here, courts cite the “rule” of prejudicial error but select their tests for prejudice inconsistently. This suggests that tests are on occasion chosen haphazardly or even picked with an eye to the different outcomes that they will produce. By choosing inconsistently, courts limit predictability and undermine the public's confidence that judges are applying law rather than choosing sides.

Professor Vermeule's concerns can be addressed with two adjustments to the current set of tests, one significant and one smaller. First, substantive and procedural errors should be divided. The former group should always be subjected to the outcome-based test and the latter to the record-based test. Challengers and agencies alike will benefit from this change. They will know ahead

¹³¹ While the First Circuit was hesitant to apply the rule of prejudicial error to procedural mistakes, it showed no compunction about applying the outcome-based standard in lieu of a record-based test once it had elected to consider the prejudicial effects of the error. *Save Our Heritage v. FAA*, 269 F.3d 49, 61–62 (1st Cir. 2001). For another example of a procedural error subjected to outcome-based prejudice analysis, see *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 n.27 (D.C. Cir. 1978).

¹³² Adrian Vermeule, *Our Schmittian Administrative Law*, 122 *Harv. L. Rev.* 1095, 1096 (2009).

¹³³ *Id.* at 1096–97.

of time which standard a reviewing court will apply to the facts of their challenge, allowing the parties to better predict their chances on appeal. Some parties, anticipating defeat because a particular test will be employed, may elect not to pursue or defend certain challenges that they otherwise might have under the current, less predictable framework.

Sure, the substance-procedure divide has its faults, but it is better than what courts have been doing for sixty years under the APA. Indeed, it will not eliminate all harmless-error discretion, particularly the wiggle room to label an error as either substantive or procedural—a problem which has “bedeviled lawyers and civil procedure scholars in other areas since *Erie Railroad Co. v. Tompkins*.”¹³⁴ Yet using this divide to choose the appropriate prejudice test is the best option because the choice of test in most cases will be obvious—something that cannot be said for the current judicial dart-throwing.¹³⁵ The freedom to choose tests in certain close cases, moreover, will at least track ongoing substance-versus-procedure cases, forcing judges to conform their exercises of test-choosing discretion to the larger, ongoing debate.

The second change follows from adopting the substance-procedure dividing line. Courts must stop citing *Braniff Airways v. Civil Aeronautics Board* as an independent measure of prejudice.¹³⁶ Their misquotes of the case lack analytical power and have served only to confuse readers. Courts should instead use the other two measures of prejudice.

Other values can be better served with a more substantial change too. When confronted with a procedural error, courts should determine whether the error prevented a challenger from contributing anything to the record and should not ask whether other participants offered the same advice. This “contribution-based” standard is a modified version of the record-based test that

¹³⁴ David Zaring, Reasonable Agencies, 96 Va. L. Rev. 135, 138 n.8 (2010) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

¹³⁵ But some errors are indeed difficult to label. For example, is an agency’s failure to conduct analysis required by regulation a substantive error (for incomplete reasoning) or a procedural mistake (for failing to follow the rules)? To see courts applying both tests and therefore implicitly choosing both answers to this question, see *Rabbers v. Commissioner, Social Security Administration*, 582 F.3d 647, 654–58 (6th Cir. 2009) and the cases cited in the opinion.

¹³⁶ See *supra* Section II.C.

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it would replace, one that puts greater focus on the public's interest in participating. For this new test, courts must impose a seasonable-objection requirement with renewed emphasis. Under it, challengers must show that they have already presented their concerns to an agency, which should prevent an explosion in challenges attributable to the new contribution-based test; it gives agencies a chance to respond to complaints before courts do. This Part proceeds to consider the new standard and the seasonable-objection requirement.¹³⁷

A. Proposed Contribution-Based Standard for Procedural Errors

Rather than examine a procedural error from the agency's perspective ("Would the record before the agency look any different absent the mistake?"), courts should determine whether the mistake limited the challenging party's participation. A challenging participant would need to show that an error prevented her from offering her complete insights to the agency. A successful challenger would identify what information she sought to present to the agency but could not because the agency committed a procedural gaffe. This asks what a challenger would have left to share with an agency if the agency's decision were reopened for further consideration.

Courts already have made similar inquiries under the record-based prejudice test. Among other roadblocks to a finding of prejudice by the D.C. Circuit in *United States Telecom Association v. FCC*, the challengers could not identify any arguments that they failed to present because the agency had given deficient notice of a

¹³⁷ Law reviews are not devoid of any inquiry into whether courts could better apply the rule of prejudicial error. See Levin, *supra* note 52, at 282–84 (reframing the APA's command to consider harmless error as part of an exhaustive restatement of § 706). But the bulk of scholarship accepts how courts consider harmless error as a given while exploring other arguments. See, e.g., Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance With Administrative Procedure Act Rulemaking Requirements*, 82 *Notre Dame L. Rev.* 1727, 1791–95 (2007) (exploring how the Department of Treasury has invoked the harmless-error doctrine to defeat certain challenges to rulemakings that violate the requirements of § 553 of the APA); Merrill, *supra* note 55, at 606–07 (noting the open question of what sorts of agency rule violations should be excused by the rule of prejudicial error without exploration of how courts had been answering the question).

proposed rule.¹³⁸ Likewise, in *Blackman v. Busey*, the FAA had held a hearing that, by statute, followed shortly after a pilot's license was revoked without notice;¹³⁹ the agency affirmed its revocation. The pilot challenged the affirmation, arguing in part that the unusually short time between the emergency revocation and the ensuing hearing had prevented sufficient discovery, but this argument failed because the pilot had not "mentioned what particulars of discovery he would have sought had he been afforded more time" to request documents.¹⁴⁰ The contribution-based test would make the question in these two cases the focus of harmless-error analysis.

Gerber v. Norton, the case of the late-published map, helps compare and contrast the proposed contribution-based test with the record-based standard.¹⁴¹ The D.C. Circuit had found the Fish and Wildlife Service's unwillingness to accept comments on the complete application to be prejudicial because the error had left the administrative record incomplete. Analysis under the contribution-based test would be similar. The conservation group had wanted to make certain comments but could not do so because the map was unavailable and then the Service refused to extend the comment period.¹⁴² The permit would thus have been vacated for almost the same reasons as under the record-based test.

Yet the two standards require courts to take different paths to reach those results, which can lead to differing outcomes in other cases. Under the record-based test in *Gerber*, the D.C. Circuit focused on the materials that were before the agency.¹⁴³ Had another interested party presented the map-specific criticisms at issue, then the Service's failure to make the map available to this particular challenger in time for comments would have been declared harmless.¹⁴⁴ The contribution-based standard, in contrast, would lead a

¹³⁸ 400 F.3d 29, 41 (D.C. Cir. 2005).

¹³⁹ 938 F.2d 659, 664 (6th Cir. 1991).

¹⁴⁰ *Id.*

¹⁴¹ 294 F.3d 173 (D.C. Cir. 2002). See discussion of *Gerber* supra Subsection II.B.1.

¹⁴² See supra Subsection II.B.1.

¹⁴³ 294 F.3d at 182.

¹⁴⁴ Cf. *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1152 (9th Cir. 2002) (holding agency's failure to consider comments from interested party harmless because another party had made substantially similar comments that were explicitly considered by agency).

court to find the agency's refusal to extend the comment period prejudicial regardless of what comments had been made by other parties. It would only matter that this conservation group could not offer its thoughts in full. The challengers would not lose their chance to participate in the permitting process thanks to another party's adventitious contribution of similar comments.

The contribution-based standard thus puts more emphasis on regulated parties' participation, which is positive for multiple reasons. First, the new test provides more assurance that all interested parties have the same opportunity to influence administrative decision-making.¹⁴⁵ Those opportunities to provide input no doubt help agencies develop and implement effective policies; but they also are valuable in their own right because regulated parties want to participate in the administrative process.¹⁴⁶ An error leads to an agency not receiving evidence or analysis from a particular participant and diminishes that participant's ability to influence the agency relative to other parties. The contribution-based test limits that harm. Successful challengers get a chance on remand to communicate information that should have been received during an agency's initial proceeding.¹⁴⁷ The prejudiced participants' opportunity to persuade the agency is thus kept on equal footing with other interested parties whose insights were received in full the first time.¹⁴⁸

Second, an evenhanded treatment of interested parties' opportunities to participate can in turn improve public perceptions of the

¹⁴⁵ See *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) ("When substantive judgments are committed to the very broad discretion of an administrative agency, procedural safeguards that assure the public access to the decisionmaker should be vigorously enforced.").

¹⁴⁶ See *Am. Coke & Coal Chem. Inst. v. EPA*, 452 F.3d 930, 938 (D.C. Cir. 2006) ("Under the APA, notice requirements are designed . . . to ensure fairness to affected parties, and to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.") (internal quotations and numbering omitted).

¹⁴⁷ See, e.g., *Hickman*, supra note 136, at 1792–93 ("The point of the APA's notice-and-comment rulemaking requirements is . . . to allow parties . . . to have an opportunity to present their case first before the agency.") (quotations omitted).

¹⁴⁸ Note, *Violations by Agencies of Their Own Regulations*, 87 *Harv. L. Rev.* 629, 631–42 (1973) (discussing regulated parties' interest in consistent treatment in the context of requiring agencies to follow gratuitous regulations).

federal bureaucracy.¹⁴⁹ Agencies often act with quasi-legislative and quasi-judicial powers.¹⁵⁰ They issue regulations binding on the general public in some settings and adjudicate the rights of individuals in others. Procedural errors by agencies effectively limit access to entities that exercise those powers.¹⁵¹ This can harm the government's legitimacy just like concerns that Congress is in the hands of special interests or that judges are biased against certain classes of litigants. Maintaining the public's faith in the bureaucracy requires treating all interested parties equally, just as in other branches of the federal government.¹⁵²

In contrast to these benefits, for which the choice of prejudice standard matters, potential objections restate general concerns about judicial review of administrative action. For example, the proposed standard increases the risk that a challenger will win when the error in question had zero impact on the decisions ultimately made by agencies or on the evidence compiled during the proceedings. Vacating these decisions would divert time and money to seemingly pointless remands in which nothing would change.¹⁵³ And these resources would be consumed without an accompanying guarantee that the overall quality of agency decision-making would improve as a result.¹⁵⁴

¹⁴⁹ See *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009) (identifying "the error's likely effects on the perceived fairness, integrity, or public reputation of [the] proceedings" as permissible considerations for harmless error).

¹⁵⁰ Cf. *Hickman*, supra note 137, at 1806 ("[H]eavy judicial scrutiny of agency adherence to APA procedural requirements ensures that procedures designed to at least approximate the legislative process function as intended.").

¹⁵¹ Cf. Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1670 (1975) ("Increasingly, the function of administrative law is not the protection of private autonomy but the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.").

¹⁵² Note, supra note 148, at 630 ("[U]nexplained deviations in treatment of persons in apparently similar situations may undermine public confidence in the agency's integrity and impartiality.").

¹⁵³ See *DSE, Inc. v. United States*, 169 F.3d 21, 31 n.5 (D.C. Cir. 1999) ("The SBA clearly erred. It is equally clear, however, that its error was harmless. It would be an empty formality for us to remand the matter back to the SBA, a waste of time and resources that we decline to order.").

¹⁵⁴ See Stewart, supra note 151, at 1763 ("Broad participation rights do not, by any means, ensure that all relevant interests will be represented before the agencies.").

Those criticisms are fair, but if avoiding pre-ordained outcomes and guarding agency resources were of paramount concern, then neither the burden shift nor the record-based test would ever have become part of the APA's prejudicial-error doctrine either.¹⁵⁵ Yet these standards are part of the doctrine, suggesting that administrative resources are not all that matters in judicial oversight of agencies.¹⁵⁶ Those earlier doctrinal developments occurred despite the risk of additional "empty" remands because they encouraged agencies to comply with procedural rules and support their decisions with solid reasoning. The contribution-based standard does the same thing. It accepts the possibility of more empty remands to ensure that regulated parties do not lose their opportunities to influence agency decision-making because agencies erred.

Two concerns about the contribution-based standard are not dismissed so easily, however. One could claim that challengers can invent contribution-based harms after the fact. They might argue that errors prevented them from contributing statements that in truth never occurred to them during the agency's decisionmaking process. This argument has some force because challengers know what their true intentions were, while agencies and reviewing courts do not. One could also worry, curiously, that challengers will never be able to satisfy the contribution-based test. After all, how could anyone prove that he truly was going to do or say something different? Courts might cast skeptical eyes over whatever evidence is offered on this question, perhaps because they fear that too many challengers will invent their "lost" insights only after agencies have reached unfavorable decisions. Considered together, these concerns pull in opposite directions. One worries that agencies will always have the upper hand while the other fears it will be too easy for challengers to succeed. Both can be assuaged with the same two responses.

¹⁵⁵ See discussion *supra* Part II.

¹⁵⁶ Examining errors for prejudice can include "among other case-specific factors, an estimation of the likelihood that the result would have been different, an awareness of what body (jury, lower court, administrative agency) has the authority to reach that result, a consideration of the error's likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings, and a hesitancy to generalize too broadly about particular kinds of errors when the specific factual circumstances in which the error arises may well make all the difference." *Shinseki v. Sanders*, 129 S. Ct. 1696, 1707 (2009).

The short answer, as with the concern for wasting administrative resources, is that similar risks are already present in the current prejudicial-error doctrine. Courts have long worried that agencies always conclude that their substantive errors had no impact on outcomes,¹⁵⁷ and that challengers devise new contributions to the administrative record only after judicial review has commenced.¹⁵⁸ The second answer is more complex. It requires re-emphasizing the seasonable-objection requirement.

B. Seasonable-Objection Requirement

A challenger must be made to show that it seasonably objected to the agency's error.¹⁵⁹ This is a familiar requirement of appellate review, though it may sometimes go by different names like the "contemporaneous objection" requirement.¹⁶⁰ It has appeared with some frequency in administrative cases. An important early example is *United States v. L.A. Tucker Truck Lines, Inc.*¹⁶¹ In *Tucker Truck Lines*, a lower federal court had set aside the order of an Interstate Commerce Commission hearing examiner who had not been appointed in compliance with the APA.¹⁶² The Supreme Court reversed the lower court because the challenger "did not offer nor did the court require any excuse for its failure to raise the objection upon at least one of its many opportunities during the administrative proceeding."¹⁶³ That failure to object indicated to the Court that no harm had come from the improper appointment.

¹⁵⁷ See *supra* Subsection II.A.2.

¹⁵⁸ E.g., *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979) ("We must be satisfied . . . that given a new opportunity to comment, commenters would not have their first occasion to offer new and different criticisms which the Agency might find convincing.").

¹⁵⁹ See generally *Noncompliance with the APA as Reversible Error*, *supra* note 21, at 693–94.

¹⁶⁰ See, e.g., Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 *Colum. L. Rev.* 1103, 1113 n.52 (1999); Note, *Contemporaneous Objection Rule*, 79 *Harv. L. Rev.* 117, 117–20 (1965).

¹⁶¹ 344 U.S. 33 (1952).

¹⁶² *Id.* at 34–35.

¹⁶³ *Id.* at 35.

Lower federal courts have since imposed the requirement on similar grounds.¹⁶⁴

The rule should be more flexible in administrative reviews than in other settings. For the contribution-based test, participants should need to object only upon realizing that an agency erred, rather than when they should have known an error occurred. With this flexibility, courts can tailor application of the rule to the challenging party's sophistication. The veterans who challenged the denial of benefits in *Sanders* would be given more time to learn of a mistake and object to it than would the sophisticated multinational corporations challenging a regulation in *Sprint Corp. v. FCC*. Applied this way, the seasonable-objection requirement responds to lingering criticisms of the contribution-based standard and also helps in other ways.

Imposing a seasonable-objection requirement will induce potential future challengers to voice their concerns during or right after administrative proceedings, rather than marching directly to court. Interested parties will understand that they effectively forfeit the value of judicial review by not bringing errors to an agency's attention, as their silence will automatically render those mistakes non-prejudicial. A norm of objecting to errors as soon after their discovery as practicable will develop.¹⁶⁵ This provides at least three benefits.

First, these objections give agencies more opportunities to correct their mistakes and allow all parties to conserve resources.

¹⁶⁴ E.g., *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1136 (D.C. Cir. 1994) (noting that because challengers never sought to reopen the record, "[t]heir failure to do so suggests either that they were satisfied that the evidence already presented would meet the test or that they had no further evidence to offer"); *Riverbend Farms v. Madigan*, 958 F.2d 1479, 1488 (9th Cir. 1992) ("This [impermissible] system of regulation existed for decades without challenge; it was only after some handlers ran into trouble with the Department of Agriculture that, in looking for an escape, they came up with this challenge."); *Brown Telecasters v. FCC*, 289 F.2d 868, 870 (D.C. Cir. 1961) ("Brown's continued acquiescence in the understanding that the initial studio would be treated as available is palpably inconsistent with any notion of prejudice . . .").

¹⁶⁵ The norm has already developed elsewhere in civil and criminal litigation. E.g., E. Stewart Moritz, *The Lawyer Doth Protest Too Much, Methinks: Reconsidering the Contemporaneous Objection Requirement in Depositions*, 72 U. Cin. L. Rev. 1353, 1354 (2004) (describing the practice that lawyers learn about objections as "Use it, or lose it").

Simply put, having agencies correct their errors is more efficient than asking courts to do it.¹⁶⁶ All that might be needed is a correction published in the *Federal Register* or a written explanation to the challenger that elaborates on the agency's reasoning behind a decision. These types of explanations will satisfy some potential challengers' objections before suits are filed.¹⁶⁷ Other times, an agency's response might warn potential challengers that strong harmless-error arguments await them on judicial review. The potential challengers would recognize that their arguments about the agency's errors were doomed to fail once the court addressed prejudice and would elect not to file a challenge at all.¹⁶⁸ In other situations, an objection could sometimes motivate an agency to revisit its decisions rather than risk the expense of judicial review.¹⁶⁹ Regardless of why it ends, though, a dispute that is resolved before judicial review consumes fewer resources.

Second, as the practice of objecting becomes ingrained, it can flag weak claims of prejudice and allow courts to focus on stronger allegations of harm. Courts will be able to rely on the assumption that, thanks to the reinvigorated norm, interested parties will always complain to an agency as soon as they discover an error that affected the proceeding. Courts could therefore view challengers who did not voice their concerns directly to agencies with suspicion. Those regulated parties will not have done something that a party whose participation was truly affected by an error would have done: complain. The norm can help other challengers too. By

¹⁶⁶ See *Pepperell Assocs. v. EPA*, 246 F.3d 15, 27 (1st Cir. 2001) (explaining that seasonable objection rule "preserves judicial economy, agency autonomy, and accuracy of result by requiring full development of issues in the administrative setting to obtain judicial review") (internal quotation omitted).

¹⁶⁷ This rule thus serves the same purpose as the exhaustion requirement, because it allows agencies to "apply its expertise . . . and correct its own errors." *Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984).

¹⁶⁸ For example, after the federal government awards contracts, losing offerors are often entitled by rule to meet with the agency that awarded the contract. See 48 C.F.R. §15.506(a)(1) (2009). During the debriefing, the agency must explain its rationale for choosing the winner over the losing offeror. § 15.506(d). In doing so, the agency tries to persuade the offeror that its reasoning was valid and that all competition rules were followed—in other words, that no prejudicial errors were committed.

¹⁶⁹ Government-contract protests provide another example. See, e.g., *Logistical Support, Inc.*, B-244155, 91-2 ¶ 247 (Comp. Gen. Sept. 16, 2001) (noting that bid-protest regulations bar award of protest costs against agencies that take prompt corrective action).

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objecting to the agency and explaining their reasons, those participants will have signaled to courts that their objections should be taken seriously. In essence, these errors were significant enough to warrant complaints during administrative proceedings and did not transform into allegedly harmful mistakes on the courthouse steps.

Third, the contemporaneous objection and the agency's response will also provide insight for a court if the challengers pursue judicial review. As mentioned, the challenger's objection has signaling value. The First Circuit described how the agency's responses might also be useful in *Kurzon v. United States Postal Service*:

We might view the matter differently if Dr. Kurzon had called the mistake to the judicial officer's attention The confusion in the presiding officer's opinion is of the sort that is far more easily corrected by an agency than by a court, and an agency's failure to eliminate confusion such as this when asked to do so would be a sure indication that the misunderstanding ran deep.¹⁷⁰

Agencies that respond to objections thoughtfully will be in a better position than those who summarily rebuff or ignore challengers. Courts would worry that agencies in the latter group either did not understand that they made mistakes or failed to appreciate the harm that their errors caused.¹⁷¹ More thoughtful responses, in contrast, provide judges with a sense of what agencies thought of their mistakes close to the time that the errors were made. These explanations offered directly to challengers can add to the persuasive power of agencies' arguments during judicial review that challengers have indeed been given an opportunity to present their full insights to the agency.¹⁷²

¹⁷⁰ 539 F.2d 788, 797 (1st Cir. 1976) (dictum).

¹⁷¹ For an analogy from civil litigation, see *Welch & Corr Construction Corp. v. Wheeler*, 470 F.2d 140, 141 (1st Cir. 1972) (“[U]ntil objection is made, the court may not realize that the losing party believes it has a valid complaint. Calling the matter to the attention of the district court might entirely obviate the need of an appeal.”).

¹⁷² Courts must of course take the responses for what they are worth. Post hoc reasoning by agencies is generally disfavored. See, e.g., *Kan. Gas & Elec. Co. v. FERC*, 758 F.2d 713, 717 (D.C. Cir. 1985) (“Although this court strongly disapproves of crediting an agency's *post hoc* explanations that seem to differ from the plain language of the agency opinion”). These statements are no exception. Just as a challenger cannot win on the question of prejudice only on the strength of its original complaint

In conclusion, asking whether challengers objected within a reasonable amount of time serves multiple functions—namely, creating a contemporaneous record of the debate between an agency and a challenger—which lowers the costs of contribution-based review. This proposed replacement for the record-based standard thus can better protect participation without permitting a flood of new challenges. That improvement, coupled with the increased predictability that will follow from dividing substantive and procedural errors, will finally complete the framework for analyzing prejudicial error under the APA and pull the doctrine out of its grey hole.

CONCLUSION

Congress left room in the Administrative Procedure Act for different approaches to taking due account of the rule of prejudicial error. The legislature looks to have had the common-law rule of harmless error in mind when it passed the APA, which itself provided only so much of a guide. Without further specificity built into the Act, courts have been free to articulate their own standards and have created tests that are not immediately discernible but can be understood with some study. Unfortunately, what that study reveals is a series of cases that lie in a twilight zone between rules of general application and fully case-specific or even haphazard analysis. Harmless error appears to be an afterthought in many opinions, which no doubt explains why the imperfections that this Note identified have persisted.

This Note's proposals aim to pull administrative prejudice analysis out of its grey hole. Widespread embrace of a solidified substance-procedure divide will reduce the uncertainty that the current doctrine creates. For example, challengers who have identified procedural errors will not have to guess whether a court will apply the outcome-based test, record-based (or contribution-based) standard, or some new measure of prejudice. Adopting the contribution-based test for prejudice offers additional benefits, such as increasing the focus on regulated parties.

to the agency, an agency cannot defeat a prejudice argument with only a post-complaint statement. These insights will be helpful but not dispositive.

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The text of Section 706, its harmless-error antecedents, and the *Sanders* decision leave plenty of room for these proposals. The provision and associated cases do not, for example, require courts to impose a particular burden following identification of any given type of error.¹⁷³ Still, courts should always impose the same burden on the same parties following the same types of errors. Once the test is selected, courts should then focus on the case's facts. That will keep their inquiries outside of grey holes and inside the general harmless-error doctrine that originated in Congress and was reaffirmed in *Sanders*.

¹⁷³ The Supreme Court reserved judgment on the permissibility of shifting the burden in *Shinseki v. Sanders*, but did so with language that strongly favors allowing such shifts. 129 S. Ct. 1696, 1706–07 (2009).