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The Standard of Judicial Review of Administrative Agencies in the U.S. and EU: Accountability and Reasonable Agency Action

INTRODUCTION

The Constitution of the United States (“U.S.”) and the treaties of the European Union (“EU”) define the contours of government action.¹ Neither institution, however, specifies who or what is government.² Behind the elected actors immediately perceived as defining “government” lies another realm of state power, the realm of the administrative agency.³ Holding administrative agencies accountable for their actions is a pressing issue in democratic governments.⁴ Judicial review of administrative action is one method of regulating bureaucratic decision-making power.⁵ By reviewing the adequacy of the reasons given by administrators for their actions, the court protects individual rights from unreasonable state action.⁶

The requirement that administrative agencies, as actors of the state, give reasons for their actions is a cornerstone of democracy.⁷ The

¹ See generally U.S. CONST. art. I–III; Treaty on European Union (“Maastricht Treaty”), Art. G, 31 I.L.M. 247 (Feb. 7, 1992) (inserting a new Article 8 in the Treaty Establishing the European Economic Community).

² See generally U.S. CONST. art. I–III; Treaty on European Union (“Maastricht Treaty”), Art. G, 31 I.L.M. 247 (Feb. 7, 1992).

³ See JURGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 3–10 (1992); PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 51–100 (1989).

⁴ See STRAUSS, *supra* note 3, at 51–100; see also Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 575–76 (1984); J. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities*, 61 WASH. L. REV. 1103, 1103–09 (1986).

⁵ See STRAUSS, *supra* note 3, at 51–100; Strauss, *supra* note 4, at 576 n.11; Weiler, *supra* note 4, at 1103–09.

⁶ See STRAUSS, *supra* note 3, at 51–100; Weiler, *supra* note 4, at 1103–09; see also Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 181 (1992); Richard J. Pierce, Jr., *A Symposium on Administrative Law: “The Uneasy Constitutional Status of the Administrative Agencies,” April 4, 1986: Part I: Delegation of Powers to Administrative Agencies: Commentary: Political Accountability and Delegated Power: A Response to Professor Lowi*, 46 AM. U.L. REV. 391, 393 (1987).

⁷ See STRAUSS, *supra* note 3, at 23–37. See also LOUIS FAVOREAU, CONSTITUTIONAL REVIEW IN EUROPE, CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITU-

judiciary assumes the power to regulate government actors by defining the adequacy of reasons given by administrators when implementing legislative directives.⁸ The lens through which the court reviews administrative conduct, i.e., the standard of review applied to appeals from agency action, helps define the adequacy of the reasons stated.⁹ Although the nature and effect of judicial review depends on the nature of the action under review, in all instances one role of review is to protect private parties from unreasonable state action.¹⁰

In the U.S., the administrative process is codified in the Federal Administrative Procedure Act ("APA").¹¹ In addition to establishing the process for agency rulemaking and minimum procedural requirements for agency action, the APA states the scope and standard of judicial review of administrative action.¹² Unlike the U.S., the EU does not have a comprehensive system of administrative law.¹³ Although the EU treaties establish procedural requirements for rulemaking and administrative action, the treaties do not specify which standard of judicial review the court must apply when reviewing administrative action.¹⁴ The European Court of Justice ("ECJ"), and more recently,

TION ABROAD 38-62 (Louis Henkin & Albert Rosenthal eds., 1990) (judicial review of legislative action under constitutional guise fundamental to U.S. system with growing influence abroad); Theodore J. Lowi, *A Symposium on Administrative Law: "The Uneasy Constitutional Status of the Administrative Agencies," April 4, 1986: Part I: Delegation of Powers to Administrative Agencies: Principal Paper: Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U.L. REV. 295, 296-97 ("Every delegation of discretion away from electorally responsible levels of government to professional career administrative agencies is a calculated risk . . .").

⁸ See Shapiro, *supra* note 6, at 187; Koen Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians*, 1992 U. CHI. LEGAL F. 93 (1992).

⁹ See Shapiro, *supra* note 6, at 187; Lenaerts, *supra* note 8, at 94-96.

¹⁰ See Shapiro, *supra* note 6, at 188-90; STRAUSS, *supra* note 3, at 23-50. Judicial review of Congressional acts differs from that of administrative acts. See STRAUSS, *supra* note 3, at 103-32. The court applies a constitutional law analysis when reviewing whether the legislature was authorized to enact certain laws. See *id.* Separation of powers, constitutional authority, and federalism feature prominently in judicial review of legislative action. See *id.* In contrast, judicial review of administrative action analyzes whether the agency acted legally, i.e., within the bounds of its enabling legislation. See *id.* Although constitutional issues arise, especially relating to matters of due process and equal protection, courts focus primarily on rules of statutory construction to determine whether the agency action is authorized by Congress through the legislation the agency is required to implement. See *id.* Compare, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (authority of Congress to enact affirmative action legislation based on Article I of U.S. Constitution) with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984) (standard of review for statutory construction).

¹¹ See Administrative Procedure Act, 5 U.S.C. §§ 500-596, 701-706 (1994).

¹² See *id.* § 706.

¹³ See SCHWARZE, *supra* note 3, at 864.

¹⁴ See *id.* at 864-66.

the Court of First Instance (“CFI”), however, both serve a role similar to that of U.S. courts in regulating administrative decision making.¹⁵ The EU Courts both apply a substantive standard of review when analyzing the legality of agency action.¹⁶

This note demonstrates how the ECJ and the CFI rely on the innocuous “giving reasons” requirement of Article 190 of the Treaty of the European Economic Community (“Article 190”) as the legal basis for a fluid standard of judicial review actively evolving towards its U.S. codified counterpart.¹⁷ Part I of this note summarizes basic principles of transparency in government action. Part II illustrates the U.S. application and rationalization of judicial review of administrative action using the APA standards. Part III examines how the ECJ and CFI use Article 190 in case law as a basis for substantive review of agency action. Part IV compares similarities in the language and the purpose of the U.S. and EU courts when reviewing agency action. This note concludes that the ECJ and the CFI developed the “giving reasons” requirement of Article 190 into a full-fledged substantive review of administrative action comparable to the “arbitrary and capricious” standard codified in U.S. law.¹⁸

I. THE NEED FOR TRANSPARENCY IN GOVERNMENT ACTION: THE AMERICAN EXPERIENCE

The modern administrative state developed in response to the social changes brought about by post-Industrial Revolution economies.¹⁹ Expanded governmental powers and new structural arrangements reflect the globalization of national economies and the need for expertise in diverse, complex segments of the economy.²⁰ Changes in state structure influence modern legislative bodies, such as Congress, to spend the majority of their time on activities other than the enactment of legislation.²¹

The legislative and executive branches have created administrative agencies with substantial delegated powers to execute legislative direc-

¹⁵ See *id.* at 93–96; STRAUSS, *supra* note 3, at 5–18.

¹⁶ See SCHWARZE, *supra* note 3, at 93–96; STRAUSS, *supra* note 3, at 5–18.

¹⁷ See Shapiro, *supra* note 6, at 220.

¹⁸ See *id.*; Administrative Procedure Act, 5 U.S.C. § 706.

¹⁹ See STRAUSS, *supra* note 3, at 8–9.

²⁰ See *id.*

²¹ See *id.* at 19.

tives.²² Regulating in accordance with statutory mandate, while remaining sensitive to the needs of the diverse industries subject to regulation, is an enterprise too complex and technical for legislative bodies to resolve on their own.²³ Regulation is therefore left to expert decision-makers through the delegation of legislative powers, i.e., rulemaking authority to the administrative agencies.²⁴

The Supreme Court has held that an agency has the unquestioned authority to promulgate its own rules and to interpret the meaning of the enabling statute itself.²⁵ As a practical matter, delegation of rule-making authority is desirable.²⁶ Agencies in charge of regulating highly technical fields need the ability to adapt to new circumstances in the industries with which they deal.²⁷ An administrative agency should not

²² See STRAUSS, *supra* note 3, at 19; ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA*, 15–16 (1992); Lowi, *supra* note 7, at 296–97; Pierce, *supra* note 6, at 393. Congress has also created a system of legislative committees. See STRAUSS, *supra* note 3, at 15–19. The legislative committees serve essentially investigative functions, conducting detailed oversight hearings of executive branch functioning, and generally investigations of perceived social ills or scandals. See *id.* The powers and duties of the legislative committees raise a host of constitutional issues touching on separation of, and delegation of, power. See *id.* Debate is particularly acute in matters relating to the action and authority of independent counsel investigations. See *id.* In fact, “[s]uch investigations have prompted enormous growth in congressional staff attached to the committees. This growth, in turn, has fueled investigations: committee staffs, once assembled, have a continuing need for satisfying work and visibility in the political atmosphere of Washington.” *Id.* at 19. Although legislative committee function is subject to judicial review, this topic is beyond the scope of this note. See *id.* at 15–19.

²³ See *id.* at 9; AMAN, *supra* note 22, at 15–21. Separate committees and agencies were also established in response to a system of government that separates the legislative branch from the executive branch. See STRAUSS, *supra* note 3, at 15–21.

²⁴ See *id.*

²⁵ See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984). The need for government transparency in this context seems clear, although the standard applied by the court appears minimal. See *id.*; STRAUSS, *supra* note 3, at 22. According to the Supreme Court, “The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” *Chevron U.S.A., Inc.*, 467 U.S. at 843–44.

²⁶ See STRAUSS, *supra* note 3, at 21–22. That the Court so held should not be taken for granted. See *id.* at 22.

Courts in some national systems might react to this conceded legislative failure by disapproving the agency’s action—saying, for example, that the agency’s authority was not sufficiently clear to uphold its action. Or it might be expected that the Court would simply resolve the disputed question of statutory meaning, so that it could be known for the future whether the “bubble” approach was or was not to be used.

Id.

²⁷ See *id.*; see also AMAN, *supra* note 22, at 7.

need to mobilize the legislature in order to change a rule or regulation every time it acts.²⁸

The delegation of legislative powers, however, has generated vast amounts of administrative regulations, rules and decisions under sometimes extremely vague enabling authority.²⁹ The judiciary assumes a key role in monitoring the legality of administrative action through the standard it applies when reviewing agency action.³⁰ The courts' role in enforcing the legality of administrative action is a direct result of the manner in which a democracy holds its government accountable.³¹

When a government actor is a legislative body, such as Congress, it is required to give reasons for its actions so that the voting public can exercise its choice not to elect a representative it feels does not adequately represent its interests.³² If the government actor is an administrative official who is appointed rather than elected, however, the "giving reasons" requirement does not increase the public's control over the administrative official through its power to vote.³³ Transparency of government action nevertheless requires a bureaucrat to state

²⁸ See AMAN, *supra* note 22, at 7. "This is particularly true in the absence of any dramatic crisis to place an issue on the legislative agenda and muster the necessary political support to pass it." *Id.*

²⁹ See *id.*

³⁰ See STRAUSS, *supra* note 3, at 239–41.

³¹ See *id.* at 51–100; see also AMAN, *supra* note 22, at 27. It should be noted that judicial review is not the only type of control of administrative action. See STRAUSS, *supra* note 3, at 191. Judicial review is:

merely the most formal and lawyerly of controls that may be brought to bear
Judicial review usually occurs after the fact, and in any event is limited to assessing the legality of particular actions rather than the appropriateness, direction, or distribution of policy effort. Thus, it will often be far from the consciousness of important agency officials as they shape their agency's business.

Id.

Political intervention and oversight, "open government" regulations such as the Freedom of Information Act, and in-record proceedings are just some of the available non-judicial controls of administrative action. See *id.* at 192–204.

³² See Shapiro, *supra* note 6, at 180–84; STRAUSS, *supra* note 3, at 191–92; see also *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

When a challenge to an agency [decision], fairly conceptualized, really centers on the wisdom of the policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

Chevron, U.S.A., Inc., 467 U.S. at 866.

³³ See Shapiro, *supra* note 6, at 180–84; Anne-Marie Burley, *Democracy and Judicial Review in the European Community*, 1992 U. CHI. LEGAL F. 81, 81–83 (1992).

reasons for his or her actions, albeit as a different basis of accountability.³⁴

The public holds an administrative agency accountable for its actions through the exercise of legal rights, i.e., by resort to judicial review of the agency action.³⁵ In order to meet minimal requirements of accountability, therefore, an agency must "give reasons" sufficient to allow an individual to determine whether his rights have been violated.³⁶ Of greater importance, the agency's reasons must be sufficiently detailed to allow a judge to perform meaningful judicial review.³⁷

Meaningful judicial review involves a substantive analysis of the agency's action.³⁸ The court does not merely ask, "Did the agency provide reasons?" The court queries, "Can good reasons be given for this statute or regulation? Are the reasons adequate? Are the reasons legal?"³⁹ The "giving reasons" requirement becomes more than a simple procedural formality.⁴⁰ The "giving reasons" requirement is one of the fundamental means through which a democracy controls the actions of its non-elected government actors.⁴¹

The APA codifies the standard and scope of judicial review of agency action.⁴² A reviewing court has the power to decide all relevant questions of law, to interpret constitutional and statutory provisions, and to determine the meaning or applicability of the terms of an agency action.⁴³ When reviewing an agency action, the court shall:

hold unlawful and set aside agency action, findings, and conclusions found to be—

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;

³⁴ See Shapiro, *supra* note 6, at 180–84.

³⁵ See *id.* at 188–89.

³⁶ See *id.* at 192; AMAN, *supra* note 22, at 27.

³⁷ See Shapiro, *supra* note 6, at 193–96.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See Administrative Procedure Act, Pt. I, Ch. 7, 5 U.S.C. § 706 (Scope of Review).

⁴³ *Id.*

- (E) unsupported by substantial evidence . . . on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.⁴⁴

Under the APA, a court may hold an administrative act unlawful for any of the above reasons, as well as for lack of compliance with other provisions of the APA.⁴⁵ Judicial authority to review the adequacy of administrative reasons places the court in the challenging position of second-guessing what is essentially a legislative or executive function.⁴⁶ The paradox inherent in this judicial role, given that the judiciary is arguably the least democratic branch and that it assumes the power to regulate the “level of democracy” of the other governmental branches, is not new.⁴⁷ The APA’s standard of review establishes the courts’ own level of transparency, theoretically limiting its ability to reverse administrative action.⁴⁸

II. “GIVING REASONS” IN THE U.S.—APPLICATIONS OF THE APA STANDARD OF JUDICIAL REVIEW

The APA requires agencies, when adopting rules, to provide a “concise general statement of their basis and purpose.”⁴⁹ Even this minimal “giving reasons” requirement imposes a substantive duty on an administrative agency.⁵⁰ This is true even when an agency is acting within its

⁴⁴ *Id.*

⁴⁵ *Id.* These other provisions include extensive procedural requirements for formal and informal rule making, notice requirements, and individual rights to appeal. *See id.* §§ 555–706.

⁴⁶ *See* William F. Funk, *To Preserve Meaningful Judicial Review*, 44 ADMIN. L. REV. 171, 174 (1997). In fact, some U.S. scholars believe that courts and administrative agencies function as partners in the furtherance of the public interest. *See id.* That is, in “this collaborative enterprise, the courts are often asked to depart from the traditional modes of judicial decision-making and to assume an essentially legislative role.” *Id.* Judicial review in both the United States and Europe, is vested with:

an essential and delicate mission: to decide political issues in legal terms [The court] incurs the risk of displeasing both the executive and the legislature. In both systems, the Court is subject to the same criticism, sometimes for being too timid, sometimes, to the contrary, for being too “activist” or “daring.”

FAVOREAU, *supra* note 7, at 42.

⁴⁷ *See id.*; *see also* Burley, *supra* note 33, at 83.

⁴⁸ *See* STRAUSS, *supra* note 3, at 133.

⁴⁹ Administrative Procedure Act, 5 U.S.C. § 553(c).

⁵⁰ *See* Shapiro, *supra* note 6, at 192–93.

own area of expertise and discretion.⁵¹ As stated by Chief Judge Bazelon in *Environmental Defense Fund, Inc. v. Ruckelshaus*:

Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought.⁵²

The "concise, general statement of purpose and basis" requirement increases the accountability of administrative action by requiring agencies, at a minimum, to act reasonably.⁵³

Under the APA, when the court reviews an agency's interpretation of a statute committed to its administration, the court performs a two-step inquiry.⁵⁴ The court first asks whether Congress spoke directly to the precise question at issue.⁵⁵ If "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."⁵⁶ Judicial review ends and the action is not reversed if consistent with congressional intent.⁵⁷ If the statute is silent or ambiguous, however, the court reviews the agency's interpretation of its enabling legislation and defers to the agency's interpretation if it is reasonable and consistent with the statute's purpose.⁵⁸

⁵¹ See STRAUSS, *supra* note 3, at 22.

⁵² *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971).

Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it, the requirement that administrators articulate the factors on which they base their decisions.

Id.

⁵³ See *id.* at 598; see also Shapiro, *supra* note 6, at 192-93; STRAUSS, *supra* note 3, at 22.

⁵⁴ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency"); *Environmental Defense Fund, Inc.*, 439 F.2d at 598.

⁵⁵ See *Chevron, U.S.A., Inc.*, 467 U.S. at 842-43.

⁵⁶ *Id.* at 843.

⁵⁷ *Id.*

⁵⁸ *Id.*

The APA, therefore, requires that an administrative agency provide sufficient reasons for its interpretation of a statute so that a court may determine whether the agency's actions are reasonable.⁵⁹ Recall, for example, the court's deference to agencies acting within the bounds of linguistic possibility, purpose and reason.⁶⁰ Implicit in the court's analysis is the conclusion that an agency's interpretation of a statute is reversible if it is unreasonable.⁶¹ Judicial review of administrative action thus protects individuals from unreasonable state action, even in areas where administrative agencies enjoy a significant level of discretion.⁶²

In the case of administrative action based upon a record, the courts apply the "arbitrary and capricious" standard of review.⁶³ Although this standard of review involves a close scrutiny of the record, courts are still highly deferential to the agency action, which is presumed to be valid.⁶⁴ A rational basis for the agency's decision is once again the fundamental requirement imposed on the agency.⁶⁵

The aim of the judges is not to exercise expertise or decide technical questions, but simply to gain sufficient background orientation Our role is not as demanding when we are engaged in review of agency decisions, where we exercise restraint, and affirm even if we would have decided otherwise so long as the agency's decision-making is not irrational or discriminatory. The substantive review of administrative action is modest, but it cannot be carried out in a vacuum of understanding. Better no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably.⁶⁶

⁵⁹ See STRAUSS, *supra* note 3, at 22, 248; Shapiro, *supra* note 6, at 186–88; Administrative Procedure Act, 5 U.S.C. § 706.

⁶⁰ See STRAUSS, *supra* note 3, at 22, 249–61 (discussion of statutory interpretation); Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 37 n.78 (D.C. Cir. 1976) ("We do not weigh the evidence introduced before the Commission; we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported").

⁶¹ See Shapiro, *supra* note 6, at 187–88.

⁶² See *id.*; STRAUSS, *supra* note 3, at 61–62.

⁶³ See *Ethyl Corp.*, 541 F.2d at 33–34; *SCM Corp. v. United States*, 487 F.Supp. 96, 99–100 (Cust. Ct. 1980).

⁶⁴ See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *SCM Corp.*, 487 F.Supp. at 232.

⁶⁵ See *Citizens to Preserve Overton Park*, 401 U.S. at 415; *SCM Corp.*, 487 F.Supp. at 232; Shapiro, *supra* note 6, at 189 ("the ultimate test of a statute or other government action is reasonableness").

⁶⁶ See *Ethyl Corp.*, 541 F.2d at 69 (J. Leventhal, concurring).

In U.S. jurisprudence, therefore, the "giving reasons" standard is clearly a substantive requirement.⁶⁷ Even under a deferential approach, the court requires administrative action to be reasonable.⁶⁸ Administrative agencies are therefore held accountable to individuals through a legal system that has the power to reverse unreasonable state action.⁶⁹

III. ARTICLE 190 AND "GIVING REASONS" IN THE EU

The EU is comprised of specific institutions that bring together the Member States in a variety of ways.⁷⁰ The EU has both supranational bodies, that are above the control of national governments acting individually, and intergovernmental bodies, that are more accountable to their individual governments.⁷¹ The principal supranational institutions of the EU follow a threefold separation of powers similar to that of the U.S. government: the executive European Commission ("Commission"), the legislative-consultative European Parliament, and the judicial European Court of Justice.⁷² The European Council ("Council") is composed of representatives from each of the member governments, and is one of the principal legislative bodies of the EU.⁷³

The Commission and Parliament, like their U.S. counterparts, have the authority to create and delegate powers to administrative agencies.⁷⁴ Unlike the U.S., however, the EU does not have a comprehensive system of codified administrative law.⁷⁵ Although the EU treaties con-

⁶⁷ See Shapiro, *supra* note 6, at 187–88.

⁶⁸ See *Ethyl Corp.*, 541 F.2d at 13 ("Without going so far as to hold that the Agency's construction of the Act was the only one it permissibly could have adopted, we conclude that it was at the very least sufficiently reasonable it should have been accepted by the reviewing courts."); *Industrial Union Dept., AFL-CIO, v. American Petroleum Institute*, 448 U.S. 607, 670 (1980) (concurring opinion) ("No rational system of regulation can permit its administrators to make policy judgments without explaining how their decisions effectuate the purposes of the governing law, and nothing in the statute authorizes such laxity in these cases.").

⁶⁹ See STRAUSS, *supra* note 3, at 239–44; *Citizens to Preserve Overton Park*, 401 U.S. at 413–14; *SCM Corp.*, 487 F.Supp. at 100; Administrative Procedure Act, 5 U.S.C. § 706; *but see Industrial Union Dept., AFL-CIO*, 448 U.S. at 687 (Rhenquist, J., concurring) ("Under our jurisprudence, it is presumed that ill-considered or unwise legislation will be corrected through the democratic process; a court is not permitted to distort a statute's meaning in order to make it conform with the Justices' own views of sound social policy.").

⁷⁰ See DAVID M. WOOD & BIROL A. YESILADA, *THE EMERGING EUROPEAN UNION* 2 (1996).

⁷¹ See *id.*

⁷² See *id.* at 2–3. Although a proper comparison of the EU institutions to those of the U.S. is more complex, this analogy is appropriate for a basic understanding of the EU structure. See *id.*

⁷³ See Paul H. Vishny et al., *European Union Law: An Introduction*, SB04 A.L.I.-A.B.A. 1, 4–5 (1996).

⁷⁴ See *id.*

⁷⁵ See SCHWARZE, *supra* note 3, at 864.

tain various provisions regarding the procedure for promulgating directives and regulations, Article 190 is the only article stating something comparable to a standard of judicial review.⁷⁶ Article 190 requires that “regulations, directives and decisions of the Council and of the Commission state the reasons on which they are based”⁷⁷

The ECJ, and more recently, the CFI, have developed the minimal “stating reasons” requirement of Article 190 into a substantive basis of judicial review.⁷⁸ The ECJ could have followed the plain language of Article 190 which requires no more than a statement of reasons on which an agency action is based.⁷⁹ Instead, the ECJ has consistently held that in order to satisfy the Article 190 standard, “Community measures must include a statement of the facts and law which led the institution in question to adopt them, so as to make possible review by the Court and so that the Member States and the nationals concerned may have knowledge of the conditions under which the Community institutions have applied the treaty.”⁸⁰

In *In re Generalised Tariff Preferences: EC Commission v. EC Council*, the ECJ’s holding illustrates the substantive power of its Article 190 interpretation.⁸¹ The case involved three regulations adopted by the Council regarding generalized tariff preferences for certain products originating in developing countries.⁸² Rather than specifying a particular treaty article as the basis of its action, the Council adopted the regulations based on the European Economic Community (“EEC”) Treaty generally.⁸³ The Commission, on the other hand, had based its draft of the tariff regulations on Article 113.⁸⁴

The Commission brought suit against the Council seeking annulment of the regulations.⁸⁵ The Commission alleged that the Council acted unlawfully by not stating a specific article on which the regula-

⁷⁶ See Burley, *supra* note 33, at 83–84; Shapiro, *supra* note 6, at 197–98; Treaty on European Union (“Maastricht Treaty”), Art. G, 31 I.L.M. 247 (Feb. 7, 1992).

⁷⁷ See Treaty of the European Economic Communities, Art. 190.

⁷⁸ See Shapiro, *supra* note 6, at 210–17; Burley, *supra* note 33, at 83–84.

⁷⁹ See Shapiro, *supra* note 6, at 210–17; Burley, *supra* note 33, at 83–84.

⁸⁰ Case 45/86, *In re Generalised Tariff Preferences: Commission v. Council*, 1987 E.C.R. 1493, [1988] 2 C.M.L.R. 131, ¶ 5 (1988).

⁸¹ See *id.* ¶¶ 5–6.

⁸² See *id.* ¶¶ 1–4, 8–9.

⁸³ See *id.*

⁸⁴ See *id.* ¶¶ 8–9.

⁸⁵ See *In re Generalised Tariff Preferences*, 1987 E.C.R. 1493 ¶1–2.

tions were based, therefore infringing the requirements of Article 190 to state reasons.⁸⁶

The Council responded that it was not possible to specify more precisely the legal basis for the contested regulations.⁸⁷ The Council further stated that the basis of the regulations could be imputed from the regulations themselves, and that failing to state a specific treaty article was not an infringement of an essential procedural requirement.⁸⁸ Moreover, the Council argued, stating reasons was a purely procedural requirement with no substantive effect.⁸⁹

The dispute whether the "stating reasons" requirement is merely procedural, or substantive, goes to the heart of Article 190 and the ECJ's power of judicial review.⁹⁰ If judicial review is limited to merely "giving reasons," as opposed to "giving good reasons," then the Council's argument is persuasive.⁹¹ That is, if the purpose of Article 190 is solely to force an EU body to adopt boilerplate statements of reasons that merely recite the statutory language as a "whereas" and decisions as a "therefore," there would be no legal significance between passing the regulation based on a specific treaty article versus just the treaty generally.⁹²

The ECJ, however, applied a more stringent standard of review, requiring "a statement of fact and law . . . so as to make possible review by the Court."⁹³ Therefore, the ECJ, like its U.S. counterpart, expressly requires bureaucrats to provide reasons in order to enable effective judicial review.⁹⁴ Implicit in the ECJ's holding is that incorrect reasons, the wrong legal basis, or insufficient facts would result in annulment of the adopted regulations.⁹⁵ Thus, even in the absence of codified administrative law, the ECJ, with its implicit powers of annulment,

⁸⁶ See *id.* ¶ 10.

⁸⁷ See *id.* ¶¶ 10–14.

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *In re Generalised Tariff Preferences*, 1987 E.C.R. 1493 ¶¶ 20–22; Shapiro, *supra* note 6, at 210–12.

⁹¹ See *In re Generalised Tariff Preferences*, 1987 E.C.R. 1493 ¶¶ 20–22; Shapiro, *supra* note 6, at 210–12.

⁹² See Shapiro, *supra* note 6, at 210–12.

⁹³ See *id.* at 197–212; Lenaerts, *supra* note 8, at 122–24; *In re Generalised Tariff Preferences: Commission v. Council*, 1987 E.C.R. 1493 ¶ 22 (council directive annulled by E.C.J. for failure to state legal basis as required by Article 190).

⁹⁴ See Shapiro, *supra* note 6, at 210–17; Lenaerts, *supra* note 8, at 122–24.

⁹⁵ See Shapiro, *supra* note 6, at 210–17.

applies a standard of judicial review that requires government action to be rational.⁹⁶

The standard of review applied in *In re Generalised Tariff* has acquired more teeth over time.⁹⁷ Thus, in *United Kingdom v. EU Council*, the Court reiterated that the choice of a legal basis for a measure must be based on objective factors amenable to judicial review.⁹⁸ These factors include the aim and content of the measure.⁹⁹ The ECJ also held that judicial review of the exercise of institutional discretion is limited to whether the discretion has been vitiated by manifest error or misuse of powers.¹⁰⁰ The duty to state reasons, however, does not require a specific statement of reasons for each technical choice made by an institution if the measure clearly discloses the essential objective pursued by the responsible institution.¹⁰¹

Although the standard for judicial review applied in these cases originated in actions between the Council and Commission, the same standards are applied to administrative agencies.¹⁰² Thus, in an action by the World Wildlife Fund contesting the building of a visitors' center in an Irish national park using EU structural funds, the CFI explained the requirement to state reasons under Article 190 as follows:

[I]t should be noted that the duty to give reasons for every decision has a twofold purpose, namely, on the one hand, to permit interested parties to know the justification for the measure in order to enable them to protect their rights; and, on the other, to enable the Community judicature to exercise its power to review the legality of the decision.¹⁰³

⁹⁶ See *id.*

⁹⁷ See, e.g., Case C-84/94, *United Kingdom v. Council (Re Working Time Directive)*, 1996 All E.R. (E.C.) 877 (1996) 3 C.M.L.R. 671 (1996); Case C-300/89, *Commission v. Council (Re Titanium Dioxide Directive)*, 1991 E.C.R. I-2867, (1991) 3 C.M.L.R. 359 (1993); Case T-105/95, *WWF UK v. European Commission*, 1997 All E.R. (E.C.) 300 (1997).

⁹⁸ See Case 84/94, *United Kingdom v. Council (Re Working Time Directive)*, 1996 All E.R. (E.C.) 877 ¶ 26.

⁹⁹ See *id.*

¹⁰⁰ See *id.* ¶ 59 ("Judicial review of the exercise of . . . discretion must . . . be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion.")

¹⁰¹ See Case 84/94, *United Kingdom v. Council (Re Working Time Directive)*, 1996 All E.R. (E.C.) 877 ¶ 74 ("While the reasoning required by Article 190 . . . must show clearly and unequivocally the reasoning of the . . . authority which adopted the . . . measure . . . the authority is not required to go into every relevant point of fact and law."); Case C-122/94, *EC Commission v. Council*, 1996 I.E.C.R. 881 ¶ 29.

¹⁰² See Case T-105/95, *WWF UK v. European Commission*, All ER (EC) 300 (1997).

¹⁰³ *Id.* ¶ 66.

Furthermore, the duty to state reasons enshrined in Article 190 must be "disclosed in a clear and unequivocal fashion . . . to make the persons concerned aware of the reasons and able to defend their rights, and . . . to enable the Court to exercise its supervisory jurisdiction."¹⁰⁴

In the absence of a codified system of administrative law, the EU courts have relied on various unwritten legal doctrines in order to develop a substantive standard of judicial review under Article 190.¹⁰⁵ The principle of proportionality, for example, requiring (1) that the means employed are suitable for achieving the desired objective, and (2) that the means do not go beyond what is necessary to achieve the objective, figures prominently in discussions of Article 190.¹⁰⁶ Article 190 serves as the treaty basis through which the ECJ accesses the doctrine of proportionality, thereby infusing the "giving reasons" requirement with substantive review power.¹⁰⁷ The "giving reasons" requirement, as applied to review of administrative action, has therefore developed into a significant standard of judicial review that, as in the U.S., protects individuals from unreasonable government action.¹⁰⁸

IV. COMPARATIVE ANALYSIS—U.S. JUDICIAL REVIEW UNDER THE APA AND EU COURT REVIEW UNDER ARTICLE 190

A comparison of the language used by the U.S. courts and the EU courts suggests that both systems review administrative agency action in terms of a general standard of "reasonableness."¹⁰⁹ Both judicial systems require a minimum statement of reasons to enable effective judicial review.¹¹⁰ Moreover, neither system is satisfied with a merely procedural, rhetorical statement of reasons for agency actions.¹¹¹ The duty to "give reasons," therefore, is a duty to "give the right reasons," i.e., reasons correct as a matter of law and right.¹¹² The absence of a

¹⁰⁴ See Case T-19/95, *Adia Interim SA v. EC Commission*, [1996] 3 C.M.L.R. 849 ¶ 31 (1996).

¹⁰⁵ See SCHWARZE, *supra* note 3, at 864. "However, where, as is the case in Community law, there is no detailed and comprehensive system of administrative law, and in the absence of clearly defined rules laying down fundamental rights, making the administration subject to the law and to judicial review can take place only by requiring a relationship to exist between the objective pursued and the methods used." *Id.*

¹⁰⁶ See *id.* at 865.

¹⁰⁷ See *id.*; Shapiro, *supra* note 6, at 217–18.

¹⁰⁸ See Shapiro, *supra* note 6, at 217–18.

¹⁰⁹ See *id.* at 198–200.

¹¹⁰ See STRAUSS, *supra* note 3, at 239–68; Shapiro, *supra* note 6, at 217–18.

¹¹¹ See STRAUSS, *supra* note 3, at 239–68; Shapiro, *supra* note 6, at 217–18.

¹¹² See STRAUSS, *supra* note 3, at 239–68; Shapiro, *supra* note 6, at 205–06.

codified standard of review has not deterred the EU courts from developing a standard of review substantially similar to that of the U.S.¹¹³

For example, where a U.S. court states that effective judicial review requires a reasonable statement of the agency's legal basis ("principled reasons"), the ECJ implies the same when stating that Article 190 requires reasons to be "disclosed in a clear and unequivocal fashion . . . to enable the Court to exercise its supervisory jurisdiction."¹¹⁴ Similarly, where U.S. courts have the power under the APA to reverse administrative action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," the EU courts rely on the principle of proportionality to hold that agency discretion is "viti-ated by manifest error or misuse of powers, or whether the institution . . . has manifestly exceeded the limits of its discretion."¹¹⁵

Not hindered by the absence of a statutory system of administrative law, the ECJ is seeking the same democratic goal as its U.S. brethren: the desire for administrative accountability.¹¹⁶ The ECJ's use of "judge-made" law is also comparable to similar developments in the U.S.¹¹⁷ In the classic administrative law case, *Goldberg v. Kelly*, the U.S. Supreme Court created a new, legally recognized form of property.¹¹⁸ By holding that a person's right to welfare benefits constituted property in the sense that termination of such benefits could violate the Due Process clause of the Fourteenth Amendment, the Court boldly went where the legislators had not gone before.¹¹⁹ Both the U.S. and EU courts, even in the absence of an express system of administrative law, rely on their judicial powers to apply the rule of law in such a manner as to protect individual rights from unreasonable administrative action.¹²⁰

¹¹³ See Shapiro, *supra* note 6, at 205-06.

¹¹⁴ Compare *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971) with Case T-19/95, *Adia Interim SA v. EC Commission*, 1996 3 C.M.L.R. 849 ¶ 31 [1996].

¹¹⁵ Compare *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971); *SCM Corp. v. United States*, 487 F.Supp. 96, 232 (Cust. Ct. 1980) with Case 84/94, *United Kingdom v. EU Council (Re Working Time Directive)*, 1996 All E.R. (E.C.) 877.

¹¹⁶ See Shapiro, *supra* note 6, at 209-10; STRAUSS, *supra* note 3, at 239-41; see also Burley, *supra* note 33, at 83-84; SCHWARZE, *supra* note 3, at 5 (describing expansion of administrative law through judicial decisions).

¹¹⁷ See Shapiro, *supra* note 6, at 209-10; STRAUSS, *supra* note 3, at 239-41; see also Burley, *supra* note 33, at 83-84.

¹¹⁸ See *Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970).

¹¹⁹ See *id.*

¹²⁰ See Shapiro, *supra* note 6, at 220; see also, LORD MACKENZIE STUART, *THE EUROPEAN COMMUNITIES AND THE RULE OF LAW* (1977).

CONCLUSION

Judicial review of government action is a fundamental principle of democracy.¹²¹ Judicial review of administrative action, by requiring transparency in bureaucratic decision-making, is one method of regulating non-elected government actors.¹²² Unlike the U.S., which has a statutory scheme of administrative law, the EU relies on general legal principles to develop a standard of judicial review comparable to that applied by U.S. courts under the APA.¹²³

The ECJ, when it expanded the potentially simple procedural requirement "to state reasons" enshrined in Article 190, developed a substantive standard of judicial review.¹²⁴ The ECJ's expansion of the "stating reasons" verbiage into a duty to state the laws and facts on which the administrative agency relied in order to enable effective judicial review, created an implicit duty to state not just any reasons, but good reasons.¹²⁵ Thus, even in the absence of an explicit system of administrative law, the ECJ has created its own substantive standard of judicial review of administrative action.¹²⁶ Both legal systems therefore seek to protect individual rights from unreasonable government action by imposing a duty to "give reasons" sufficient to enable effective judicial review, implicitly yielding the power to annul administrative action that is unreasonable, i.e., that is "arbitrary and capricious."

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¹²¹ See Shapiro, *supra* note 6, at 179; SCHWARZE, *supra* note 3, at 259–60 (discussing ECJ review of unlawful administrative conduct).

¹²² See Shapiro, *supra* note 6, at 217–20; SCHWARZE, *supra* note 3, at 259–60; see also Burley, *supra* note 33, at 83–84.

¹²³ See SCHWARZE, *supra* note 3, at 259–60, 864.

¹²⁴ See Shapiro, *supra* note 6, at 210–11. "Where the government organ did give reasons but the ECJ says the reasons are not good enough, the court was often actually disagreeing with the government organ on the substance of the policy." *Id.* at 210.

¹²⁵ See *id.* at 209.

¹²⁶ See *id.* at 218–19; Burley, *supra* note 33, at 84.