

# Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance

Jerry L. Mashaw\*

There are broad similarities between conceptions of “good administration” in the United States and in the European Union (“E.U.”). These similarities are combined with considerable variations, both in the understanding of the scope of these “rights” or “expectations” and the institutional context within which they are articulated and enforced. On the European side of the Atlantic, article 41 of the Charter of Fundamental Rights—incorporated as article II-101 of the (as yet unratified) Treaty Establishing a Constitution for Europe—provides a similar definition of the “Right to good administration”:

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
  - the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
  - the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
  - the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.<sup>1</sup>

---

\* Sterling Professor of Law and Management, Yale University. My thanks to David Fontana and Kevin Stack for comments on an earlier draft and to Ruslan Dimitriev, Henry Lui, and Eugene Nardelli for their able research assistance. An earlier version of this essay was published in *LE TUTELE PROCEDIMENTALI: PROFILI DI DIRITTO COMPARATO* 123–48 (Alberto Massera ed., 2007).

<sup>1</sup> Charter of Fundamental Rights of the European Union art. 41, Dec. 7, 2000, 2000 O.J.

These principles of good administration are surely familiar to American lawyers as well. The right to be heard and to have decisions on one's interests made fairly and impartially are embodied in the Due Process Clauses of the U.S. Constitution and in a wide range of statutes, including the Administrative Procedure Act ("APA").<sup>2</sup> The right of access to government information is guaranteed by the Freedom of Information Act.<sup>3</sup> In addition, the rights to petition administrative institutions, to receive responses to those petitions, and to obtain reasons for administrative decisions are guaranteed both by the APA<sup>4</sup> and numerous judicial determinations. The right to compensation for damage caused by administrative officials is defined largely by American common law, whereas the government's liability for damages is structured by statutes such as the Tucker Act<sup>5</sup> and the Federal Tort Claims Act.<sup>6</sup>

Nevertheless, when pursuing any of these principles in more detail, one would find some significant differences in U.S. and E.U. practices. Although richly embellished by judicial interpretations, American lawyers can generally point to a text: the U.S. Constitution, the APA, or some more specific statute as the source of a particular right to good administration. In the European Union, the treaty articulating a number of these rights remains to be ratified, and that ratification effort may stall indefinitely.<sup>7</sup> "Good administration" is, up to now, often a function of judicial decisions<sup>8</sup> and agency codes of behavior. Access to information in the Freedom of Information Act is a

---

(C 364) 1, 18, available at [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf); see Treaty Establishing a Constitution for Europe art. II-101, Oct. 29, 2004, 2004 O.J. (C 310) 1, 50, available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2004:310:SOM:EN:HTML>.

<sup>2</sup> Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

<sup>3</sup> Freedom of Information Act, 5 U.S.C. § 552 (2000).

<sup>4</sup> See 5 U.S.C. § 555(e).

<sup>5</sup> 28 U.S.C. § 1491 (2000).

<sup>6</sup> See, e.g., 28 U.S.C. §§ 1346, 2674, 2680.

<sup>7</sup> See Matthew Tempest, *Q&A: The EU Constitution*, GUARDIAN UNLIMITED (London), June 18, 2007, <http://politics.guardian.co.uk/eu/story/0,,2105890,00.html>.

<sup>8</sup> Klara Kanska suggests that the rights included in article 41 of the Charter of Fundamental Rights and article II-101 of the Treaty Establishing a Constitution for Europe are a somewhat incomplete compilation of the separate rights developed by the Court of Justice and the courts of the member states. Klara Kanska, *Towards Administrative Human Rights in the EU: The Impact of the Charter of Fundamental Rights*, 10 EUR. L.J. 296, 299–305 (2004); see also Lord Millet, *The Right to Good Administration in European Union Law*, 47 PUB. L. 309, 313 (2002) (dating this process of development to Joined Cases 7/56 & 3/57-7/57, *Algera v. Common Assembly*, 1957 E.C.R. 39).

general right to most government documents,<sup>9</sup> not, as in the European Union, just those relating to a person seeking access to his or her own file.<sup>10</sup> Moreover, the exceptions to the Freedom of Information Act are spelled out in great detail and backed by an expedited enforcement procedure. On the other hand, a right to damages for official misconduct, error, or nonfeasance begins in the United States from a premise of governmental immunity. Compensation is permitted only to the extent that statutes specifically waive the government's immunity from suit.<sup>11</sup>

Exploring the many similarities and differences in the “right to good administration” in the European Union and the United States is the task of many books, not the task of one essay. This Article focuses, therefore, on the right to reasons and the practice of administrative reason giving. This is a common and important feature of both E.U. and U.S. administrative law and, I will argue, a somewhat undertheorized one. This Article therefore seeks to explain why reason giving is so prominent a part of both administrative systems, how it functions juridically, and, most crucially, what the reasons are for demanding reasons or for providing a “right” to reasoned administration. In the course of that exploration, I hope to show that the reasons most commonly advanced for reason giving in both the E.U. and the U.S. systems tend to ignore reason giving's most fundamental function—the creation of authentic democratic governance.

### I. Reason Giving as a Social Practice

In a recent book, Charles Tilly sets out to explain the reason for reasons.<sup>12</sup> According to Tilly's view, which, as he explains, has a long intellectual history, reason giving is an entirely relational enterprise.<sup>13</sup> Reasons are given to negotiate, establish, repair, affirm, or deny relationships.<sup>14</sup> Moreover, the type of relationship (that exists or that is claimed to exist) determines the type of reasons that are appropriate and, therefore, potentially acceptable or persuasive.<sup>15</sup> Tilly demonstrates with many arresting examples how various reasons work relationally, that is, to justify our behavior depending upon the type of

---

<sup>9</sup> See 5 U.S.C. § 552.

<sup>10</sup> Treaty Establishing a Constitution for Europe art. II-101(2)(b).

<sup>11</sup> See, e.g., *United States v. Mitchell*, 463 U.S. 206, 212 (1983).

<sup>12</sup> CHARLES TILLY, *WHY?* ix (2006).

<sup>13</sup> See *id.* at x, 14–15.

<sup>14</sup> See *id.* at 19–20.

<sup>15</sup> See *id.* at 15.

relationship involved and whether our purpose is to establish, affirm, negotiate, or repair relations with others.<sup>16</sup>

This relational account is perfectly understandable, indeed illuminating, when placed in the context of the relations of administrative officials with those to whom they might give reasons. When carrying out their administrative tasks, officials have relationships of at least three types: relations with other officials, the general public affected by administrative actions or policies, and particular individuals or firms who are the specific addressees of administrative orders or the direct or personal beneficiaries of administrative decisions.

Consider first an administrator's relationship with other officials. Those would include relationships with hierarchical superiors in the administration, political controllers (legislatures, parliaments, ministers, or elected chief executives), legal controllers (courts), and coordinate officials (officials at essentially the same level in the same or other agencies). With respect to the first three of these relationships, administrators have a particular sort of reason to offer reasons if requested. Hierarchical superiors, political controllers, and the judiciary have the power to impose unpleasant consequences on administrators who fail to explain themselves successfully. And coordinate officials are unlikely to provide cooperation (or withhold complaint) unless provided with an acceptable explanation of why they should do so. To be sure, the types of reasons one official gives to another are likely to vary. Although "my immediate supervisor told me to do so" may be sufficient for the head of the bureau, it is not likely to satisfy a parliamentary investigating committee, an official in a coordinate agency or coordinate national administration, or a court reviewing the legality of official action. Yet, in each case, officials have strong prudential reasons to give reasons. They need to supply justifications, or at least excuses, to avoid or mitigate unpleasant consequences, or to solicit cooperation or acceptance.

For present purposes, we might describe these official-to-official reason giving relationships as "bottom-up" (to bureaucratic, political, or legal controllers) and "side-to-side" (to coordinate officials). They proceed according to the power relationships established by law and custom among official actors. They facilitate control, accountability, and coordination amongst institutions that have been placed in certain relationships to each other in what we might loosely call the constitu-

---

<sup>16</sup> See generally TILLY, *supra* note 12 (explaining how reasons work in four categories: conventions, stories, codes, and technical accounts).

tional arrangements of a particular polity, whether national or supranational.

The power relations between officials and the general public, or officials and particular individuals or firms, are rather different. Acting within their jurisdiction or authority, administrative officials exercise consequential legal power. Private parties are accountable to or dependent upon them, not the other way around. The relationship is “top-down.” Why should officials give reasons to nonofficials rather than simply issuing edicts or orders? To some degree, the answer might parallel that suggested for coordinate officials. Explanations may assist officials in obtaining public cooperation and in avoiding complaints or lawsuits, which have their own unpleasantness even if the officials are ultimately found to be blameless. And the degree to which the officials feel the need to solicit cooperation or avoid complaint may determine the specificity and style of their explanation. Or, alternatively, political or legal controllers might demand that reasons be given to otherwise powerless citizens as a way of facilitating bottom-up monitoring or oversight. What better way for these controllers to assure that officials accountable to them are behaving properly than to require transparency in decisionmaking with respect to private parties who have an interest in calling official error or malfeasance to account?<sup>17</sup>

In some sense, the simple difference between bottom-up, side-to-side, and top-down relations may explain why it is thought necessary to provide a right to reasons in the latter case. A right to reasons facilitates hierarchical, legal, and political accountability. As we shall see, most of the reasons for reason giving articulated by courts or legal commentators are precisely of this consequentialist sort. They explain the reasons for reasons in terms of maintaining appropriate institutional relationships in the legal order, or as a means of policing official behavior. But this observation gets somewhat ahead of the story. Before turning to what courts and commentators say about reasons within the legal orders of the United States and the European Union, we should consider a quite different explanation for reason giving.

---

<sup>17</sup> Indeed, some literature on positive political theory in the United States suggests that this monitoring feature of private rights is the major explanation for procedural safeguards such as the APA. See Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243, 244–46 (1987); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 442 (1989).

This second account denies that reason giving can be fully understood in consequentialist terms. A good example is a recent essay by John Gardner on the concept of responsibility.<sup>18</sup> Gardner does not deny that reason giving is often relational or that much of it is designed to justify or excuse behavior in contexts in which we might anticipate unpleasant consequences.<sup>19</sup> But, on Gardner's view, this relational account does not go very deep into the reasons for reason giving.<sup>20</sup> He contrasts this "Hobbesian" consequentialist view with what he styles as an "Aristotelian" one.<sup>21</sup> On this account, to be a rational being is to have reasons for our actions; without reasons for our actions, our lives make no sense to us.<sup>22</sup> According to Gardner's account, "[w]e cannot but want there to have been adequate reasons why we did (or thought or felt) what we did (or thought or felt)."<sup>23</sup>

The implication for Gardner is that although we might give differing reasons depending upon social contexts and social relations, there is certainly no necessity that we do so.<sup>24</sup> Hence, the relational account is at best incomplete. Moreover, to make rational sense of our lives, this tailoring of reasons to particular relationships may have unhappy consequences.<sup>25</sup> It makes us appear incoherent to ourselves. Indeed, tailoring our reasons differently for different purposes, particularly if we are thinking of justifications or excuses, tends to deny that we had some reason that explains ourselves to ourselves. And to deny that is to deny, in some sense, that we are responsible actors with rational life plans. In carrying out this Aristotelian project, we want to give a good account of ourselves. It is that sort of accounting or reason giving that affirms our own rationality and our status as responsible moral agents.

But what does this account of reason giving have to do with reasoned administration or the right to reasons as a part of a right to "good administration"? Just this: to be subject to administrative authority that is unreasoned is to be treated as a mere object of the law or political power, not a subject with independent rational capacities. Unreasoned coercion denies our moral agency and our political stand-

---

<sup>18</sup> John Gardner, *The Mark of Responsibility (With a Postscript on Accountability)*, in *PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES* 220, 221–22 (Michael W. Dowdle ed., 2006).

<sup>19</sup> *See id.*

<sup>20</sup> *Id.* at 221.

<sup>21</sup> *Id.* at 221–22.

<sup>22</sup> *Id.* at 221.

<sup>23</sup> *Id.*

<sup>24</sup> *See id.* at 228–29.

<sup>25</sup> *See id.* at 229–30.

ing as citizens entitled to respect as ends in ourselves, not as mere means in the effectuation of state purposes. This sort of explanation begins to illuminate why we might think of reasoned administrations as an individual right, indeed a fundamental individual right, not just as a contingent feature of accountability regimes.

I will come back to this reason for reason giving toward the end of this Essay, but first, we should take a look at the reasons for reasons that are common in the jurisprudence and literature of administrative law in the United States and European Union. As we shall see, the common reasons generally track Tilly's relational, consequentialist description with little attention to Gardner's more fundamental explanation.<sup>26</sup> In so doing, American and European administrative law tend to treat the right to reasons as a contingent right, one that is parasitic on other substantive or procedural rights or institutional arrangements. I will argue that this approach fails to explain not only why reason giving is ubiquitous as a human practice, but why reason receiving should be instantiated as an important and independent human right. I shall argue further that recognizing this more fundamental grounding for reason giving has important implications for the ongoing project of democratic governance in unavoidably administrative states.

## II. Reasons and Law

### A. Reasons in American Administrative Law

The right to reasons in American administrative law is conventionally understood as parasitic on other rights or on the necessities of effective judicial review. In the world of American administrative law, rights to hearings and reasons are sharply divided between cases involving individual claims of right and situations in which administrative action takes place by general rule or regulation.

Individual hearing rights in American administrative law are grounded in either the Due Process Clauses of the U.S. Constitution or in particular statutes as supplemented by the APA. It has been long established that the Constitution makes no independent requirement for hearings, including reason giving, where general rules or regulations are at issue.<sup>27</sup> Indeed, as a constitutional matter, not all

---

<sup>26</sup> See TILLY, *supra* note 12, at 14–15. See generally Gardner, *supra* note 18.

<sup>27</sup> Compare *Londoner v. Denver*, 210 U.S. 373, 386 (1908) (holding that a small group of plaintiffs in a taxation proceeding were denied due process of law when a local board adjusted their tax liabilities on individualized grounds but without providing them with a hearing), with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (finding that individu-

administrative decisions in individual cases are protected by hearing rights or rights to reasons. Those protections are limited to actions affecting individual interests that fall within the Supreme Court's evolving definition of "life, liberty, and property" under the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>28</sup> Of course, Congress may, and does, provide for hearings that would not be demanded by the Constitution. When a statute requires that actions be taken only on the basis of a record made at a hearing, the APA provides a standard set of formal hearing requirements.<sup>29</sup> Whether the hearing is required by the Constitution or by a statute supplemented by the APA, the giving of reasons is one of the standard features of the hearing right itself.

In a celebrated article,<sup>30</sup> Judge Henry Friendly identified eleven features that might be regarded as essential to a fair administrative hearing: (1) an unbiased tribunal; (2) notice of the proposed action and the grounds asserted for it; (3) an opportunity to present reasons why proposed action should not be taken; (4) the right to call witnesses; (5) the right to know the evidence against oneself; (6) the right to have a decision based exclusively on the evidence presented; (7) the right to counsel; (8) the making of a record; (9) the availability of a statement of reasons for the decision; (10) public attendance; and (11) judicial review of the final decision.<sup>31</sup>

All of these legal protections are meant to ensure that when significant individual interests are at stake, the government acts only on the basis of reliable evidence and within its proper authority. In one of the most famous cases on due process of law in the United States, *Goldberg v. Kelly*,<sup>32</sup> the Supreme Court explained the requirement of reason giving in wholly instrumental terms.<sup>33</sup> In two brief sentences, the Court said:

Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decision maker should

---

als have no constitutional right entitling them to a hearing before a local taxing commission when changes in their tax liabilities result from a general increase in taxable property rates).

<sup>28</sup> See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 599 (1972); *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 569–70 (1972).

<sup>29</sup> 5 U.S.C. § 554 (2000).

<sup>30</sup> Henry Friendly, "Some Kind of Hearing," 123 U. PA. L. Rev. 1267 (1975).

<sup>31</sup> *Id.* at 1279–95.

<sup>32</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>33</sup> *Id.* at 271.

state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.<sup>34</sup>

In short, reason giving is meant to ensure that the hearing itself is not a charade. Reasons must be linked to the legal rules and evidence that were a part of the hearing record. Reasons help to ensure that the individual's right to contest, present evidence, make legal arguments, and so on, have been respected in making a final judgment on the case.

Moreover, these hearing rights are themselves viewed essentially in instrumentalist terms. The leading case on due process in the United States, *Mathews v. Eldridge*,<sup>35</sup> sets forth a "balancing" formula for determining whether particular procedures are required as a part of a hearing process.<sup>36</sup> According to the *Eldridge* Court:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.<sup>37</sup>

In short, due process requirements of procedural protection, including the requirement of reason giving, are part of a social welfare calculation that weighs and balances the importance of the individual's substantive claim, and the likely contribution of any particular procedural requirement to the accurate determination of that claim against the government's interest in effectiveness and efficiency. The right to reasons where individual interests are concerned is therefore dependent upon: (1) the legal status of that interest (that is, whether it qualifies as a substantive right protected by the Constitution, statute, or common law); and (2) the contribution that the provision of procedural protections, including a right to reasons for the decision, will

---

<sup>34</sup> *Id.* (citations omitted).

<sup>35</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976).

<sup>36</sup> *Id.* at 334–35.

<sup>37</sup> *Id.* (citation omitted).

make to an accurate determination of that claim of right. Or so it would seem.

One can find in American jurisprudence, however, a somewhat more general ground for reason giving that is not parasitic on individual rights to a hearing. In any case subject to the APA,<sup>38</sup> which covers the vast majority of federal administrative decisions having legal effect, a reviewing court is instructed to reverse the administrative determination where the actual choice made was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>39</sup> To make that finding, or reject it, the reviewing court must know the agency’s basis for its decision: as the Supreme Court put it in yet another iconic case, *Citizens to Preserve Overton Park, Inc. v. Volpe*,<sup>40</sup> “[t]o make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”<sup>41</sup> The problem in the *Overton Park* case was that the Secretary of Transportation, in making a location decision for an interstate highway, had not provided a contemporaneous statement of the reasons for his choice.<sup>42</sup> The Supreme Court recognized that there was no statutory or constitutional requirement of contemporaneous reason giving that applied to this sort of decision.<sup>43</sup> Yet the Court declined to approve a review based upon affidavits from the Secretary and other administrative officials concerning the reasons for their decision.<sup>44</sup> In the Court’s terms, “[t]hese affidavits were merely ‘*post hoc*’ rationalizations, which have traditionally been found to be an inadequate basis for review.”<sup>45</sup>

Under these circumstances, the Court felt it necessary to remand the case to the district court for a plenary inquiry into the Secretary’s decision, including, if necessary, calling the Secretary and other officials to testify concerning their rationale.<sup>46</sup> The Court closed with this suggestion:

The District Court is not, however, required to make such an inquiry. It may be that the Secretary can prepare formal findings . . . that will provide an adequate explanation

---

<sup>38</sup> See 5 U.S.C. § 701 (2000).

<sup>39</sup> *Id.* § 706(2)(A).

<sup>40</sup> *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>41</sup> *Id.* at 416.

<sup>42</sup> *Id.* at 408.

<sup>43</sup> *Id.* at 409.

<sup>44</sup> *Id.* at 419.

<sup>45</sup> *Id.* (citation omitted).

<sup>46</sup> See *id.* at 420.

for his action. Such an explanation will, to some extent, be a “*post hoc* rationalization” and thus must be viewed critically. If the District Court decides that additional explanation is necessary, that court should consider which method will prove the most expeditious so that full review may be had as soon as possible.<sup>47</sup>

On this view of reason giving, reasons are necessary whenever an administrative decision is subject to judicial review. Moreover, because judicial review is meant to determine the real reasons for the action, it should proceed, wherever possible, on the basis of contemporaneous reasons explaining both the factual and legal bases for the administrative determination. And, from a practical standpoint, any administrator who does not want to spend his or her time in court testifying about past decisions would be well advised to provide a contemporaneous statement of reasons when a decision is made. For, if that is done, another well known decision, *United States v. Morgan*,<sup>48</sup> provides that reviewing courts should make no further inquiry into the mental processes of administrative decisionmakers (absent some special showing of corruption or bad faith).<sup>49</sup>

American jurisprudence on the making of general rules has elaborated on this notion of administrative reason giving as a requirement in aid of judicial review. Section 553 of the APA contains the relatively innocuous requirement that, when making rules or regulations having binding effect on private parties, the agency must provide notice of its proposal, an opportunity for affected parties to comment, and “a concise general statement of their basis and purpose” in the order issuing the rule or regulation.<sup>50</sup>

This language lay relatively dormant in the APA until the late 1960s and early 1970s when Congress passed a series of health and safety statutes concerning motor vehicle safety, occupational safety and health, and environmental protection that were themselves almost empty of substantive legal requirements.<sup>51</sup> These new statutes gave federal administrators extremely broad discretion to develop general

---

<sup>47</sup> *Id.* at 420–21.

<sup>48</sup> *United States v. Morgan*, 313 U.S. 409 (1941).

<sup>49</sup> *See id.* at 422.

<sup>50</sup> 5 U.S.C. § 553(b)–(c) (2000).

<sup>51</sup> *See, e.g.*, National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718 (recodified at 49 U.S.C. §§ 30101–30170 (2000)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678 (2000)); National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347 (2000)).

regulations governing virtually every industry and occupation in the United States. Resistance to this relatively novel exercise of federal power was to be expected, and litigation about these rulemaking activities proceeded apace. In one of the first cases to come before the Court of Appeals for the District of Columbia, the U.S. court that reviews much federal administrative rulemaking activity, Judge McGowan cautioned against an “overly literal reading” of the APA’s requirement of a “concise general statement”:

These adjectives must be accommodated to the realities of judicial scrutiny, which do not contemplate that the court itself will, by a laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution. We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rule making. We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the “concise general statement of . . . basis and purpose” mandated by [the APA] will enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.<sup>52</sup>

Since the *Automotive Parts* decision, a focus on an agency’s reasons for a regulation has become the hallmark of judicial review of rulemaking activity under the APA. Courts routinely return decisions to administrative agencies on the ground that the rationale provided is inadequate to explain some critical fact or issue that the agency was required to consider.<sup>53</sup> Indeed, one of the Supreme Court’s most famous cases supporting a so-called “hard look” standard of judicial review, *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Automobile Insurance Co.*, rejects the rescission of a rule by the National Highway Traffic Safety Administration because of the agency’s failure to consider amending its rule rather than rescinding it.<sup>54</sup> In the Court’s words, “[n]ot having discussed the possibility, the agency submitted no reasons at all.”<sup>55</sup> Lack of adequate discussion alone was sufficient for a finding that the agency’s determination was arbitrary under the APA.<sup>56</sup>

---

<sup>52</sup> *Auto. Parts & Accessories Ass’n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968).

<sup>53</sup> *See, e.g., Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

<sup>54</sup> *See id.* at 51.

<sup>55</sup> *Id.* at 50.

<sup>56</sup> *See id.* at 50–51.

The requirement that agencies give understandable and relatively complete reasons for rulemaking as well as for decisions in individual hearings does more than facilitate judicial review. It also increases the power of participants in informal rulemaking processes to force agencies to consider problems and issues that they raise by submitting comments concerning the agency's proposals. Hence, a demand for reason giving is also in some practical sense a demand for responsiveness to the submissions of affected parties. It therefore reinforces their rights of participation as provided by the APA. The judicial demand for reasons to facilitate judicial review reinforces participatory rights concerning general regulations in the same fashion that reason giving protects individualized hearing rights concerning particularized decisions.

Reason giving as a requirement of administrative law in the United States is thus a common—but a contingent—enterprise. With respect to individual cases, reason giving is parasitic on the requirement of a hearing, and the entitlement to a hearing is itself a function of a right to defend some particular substantive legal entitlement. With respect to general regulations or rulemaking, reason giving is demanded as a facilitator of judicial review. It is also a *protector* of judicial review in a constitutional system dedicated to separation of powers. It allows judicial review of policy choices for reasonableness, a practice made problematic by the Supreme Court's aggressive use of "substantive due process" to strike down New Deal legislation in the 1930s, while insulating the judiciary from the charge that it is inappropriately second-guessing the political branches of government. The judicial demand for *reasons* has become a legitimate procedural version of an otherwise illegitimate substantive demand for *reasonableness*, as judicially determined.

The proceduralization of rationality—the conversion of the demand for nonarbitrariness into a demand for understandable reason giving—rephrases the question of whether the agency's action is reasonable in some substantive sense as a demand that the agency demonstrate a reasoning process. The demand for reasons and yet more reasons, at least rhetorically, keeps the court within its appropriate domain. The agency may make policy choices, so long as it explains how its exercise of discretion is connected to its statutory authority and to the technical facts that have been developed through the rulemaking proceeding. That this "restrained" judicial posture may in fact disable or seriously impede regulatory activity is merely an ironic, unintended consequence of the maintenance of the American

understanding of the court's role within its constitutional, legal structure.<sup>57</sup>

*B. Reason Giving in the Law of the European Union*

The obligation of the administration to give reasons for its decisions, as set out in the European Charter of Fundamental Rights and incorporated into the proposed European Constitution, has been elaborated in the European Code of Good Administrative Behavior ("ECGAB").<sup>58</sup> The ECGAB supplements and explains the obligations set out in the Charter.<sup>59</sup> According to article 18 of the ECGAB, the requirement of reason giving applies to decisions "which may adversely affect the rights or interests of a private person."<sup>60</sup> In addition, decisions should not be based on "brief or vague grounds or which do not contain individual reasoning";<sup>61</sup> this requirement suggests that the right to receive reasons is contemplated for circumstances described in the preceding Parts, involving individualized adjudication, rather than the enunciation of general rules or regulations. Nevertheless, article 253 of the Treaty Establishing the European Community ("EC Treaty") demands the following:

Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.<sup>62</sup>

As in the United States, the case law and scholarly writing suggest almost exclusively instrumental grounds for these reason giving requirements: the necessity to permit judicial monitoring of institutional decisionmaking and the need to facilitate the capacities of individuals to contest official determinations that are contrary to their interests.<sup>63</sup> Indeed, two decades ago, the European Court of Justice

---

<sup>57</sup> See, e.g., Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 *YALE J. ON REG.* 257, 305 (1987).

<sup>58</sup> European Ombudsman, *The European Code of Good Administrative Behaviour*, at 16 (Jan. 5, 2005), available at [http://www.euro-ombudsman.eu.int/code/pdf/en/code2005\\_en.pdf](http://www.euro-ombudsman.eu.int/code/pdf/en/code2005_en.pdf).

<sup>59</sup> *Id.* at 7.

<sup>60</sup> *Id.* at 16.

<sup>61</sup> *Id.*

<sup>62</sup> Treaty Establishing the European Community, Feb. 26, 2001, 2002 O.J. (C 325) 135 [hereinafter EC Treaty].

<sup>63</sup> Klara Kanska asserts:

[A]ccording to the case law of the Courts, the duty to state reasons has two objectives: it is necessary in order to ensure that the individual has an opportunity to

(“ECJ”) bundled these two instrumental grounds together. In *Union Nationale Des Entraîneurs et Cadres Techniques Professionnelles du Football (UNECTEF) v. Heylens*,<sup>64</sup> the Court held:

Effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general that the court to which the matter referred may require the competent authority to notify its reasons. But where, as in this case, it is more particularly a question of securing the effective protection of a fundamental right [the right of free movement] conferred by the Treaty on Community workers, the latter must also be able to defend that right under the best possible conditions and have the possibility of deciding, with full knowledge of the relevant facts, whether there is any point in their applying to the courts. Consequently, in such circumstances the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decisions itself or in a subsequent communication made at their request.<sup>65</sup>

In many ways, this approach directly parallels what we might call the “double instrumentalism” of the American due process jurisprudence. A right of defense (“hearing” in the U.S. vernacular) is essential where fundamental rights are at stake, and reasoned decisionmaking is critical to an effective right of defense.

In a recent article, Lord Millet explains the genesis of the requirement of reason giving in E.U. law as derivative from or inspired by member states’ administrative laws.<sup>66</sup> In France, for example, administrators generally have wide discretion in making administrative decisions, they are held to a duty of care and reasonableness in their decisionmaking, which according to Millet “would be unenforceable in the absence of . . . [an additional] duty to give reasons.”<sup>67</sup> Millet thus emphasizes the contribution of reason giving to judicial review

---

consider whether it is feasible to challenge a given measure, and it serves to ensure that the Court can exercise its powers to review the legality of the measure.

Kanska, *supra* note 8, at 320 (footnotes omitted). Bo Vesterdorf echoes this view: “The statement of reasons . . . must provide information to all persons interested in the measure and ultimately the reasoning must be sufficient to allow the Community Courts to ascertain whether or not the Community measure has been adopted *ultra vires*.” Bo Vesterdorf, *Transparency—Not Just a Vogue Word*, 22 *FORDHAM INT’L L.J.* 902, 904 (1999).

<sup>64</sup> Case 222/86, *Union Nationale des Entraîneurs et Cadres Techniques Professionnels du Football (UNECTEF) v. Heylens*, 1987 E.C.R. 4097.

<sup>65</sup> *Id.* at 4117.

<sup>66</sup> Millet, *supra* note 8, at 311.

<sup>67</sup> See Millet, *supra* note 8, at 314.

for reasonableness.<sup>68</sup> But a requirement of reasoned administration is common to the administrative systems of many member states.<sup>69</sup> And other authors also emphasize its contribution to the right of defense and to transparency.<sup>70</sup> Because reason giving contributes to the general transparency of official decisionmaking, it also to that degree facilitates oversight and accountability to political actors and the general public, not just to courts and litigants.

Although it is not possible here to make a detailed comparison between the jurisprudence of U.S. and E.U. courts (the ECJ and the Court of First Instance) concerning the demands of reason giving, the cases reveal many similarities.<sup>71</sup> As in the United States, reasons need not cover every detail of the contested proceeding but must be sufficient to show how the major issues of fact and law were resolved.<sup>72</sup>

---

<sup>68</sup> See *id.*

<sup>69</sup> Dr. Juli Ponce provides the following examples:

The 1947 Italian Constitution establishes that Italian agencies must be organized so as to achieve administrative impartiality and *buon andamento*. The last words have been considered by many Italian scholars to be a duty of good administration (*buona amministrazione*). . . .

The current Spanish Constitution of 1978 is especially interesting. It provides in Articles 31 and 103 that public administration must act with objectivity and impartiality, in accordance with the *principles of effective action, efficiency, economy and coordination*; it also establishes a *prohibition of arbitrariness*.

See Juli Ponce, *Good Administration and Administrative Procedures*, 12 *IND. J. GLOBAL LEGAL STUD.* 551, 556 (2005) (footnotes omitted). Similar provisions can be found in other countries.

<sup>70</sup> For example, Bo Vesterdorf states:

Inadequate reasoning means *insufficient transparency*, because the consequence is, firstly, that the parties affected by the measure are unable to determine whether the measure is issued on a sound legal basis or whether it could be challenged before the courts and, secondly, that the courts are unable to examine whether the arguments on a given point are well-founded.

Vesterdorf, *supra* note 63, at 906 (emphasis added); see also Kanska, *supra* note 8, at 320 (asserting that “motivation of decisions promotes transparency of administrative actions”).

<sup>71</sup> A detailed comparison of U.S. and E.U. jurisprudence up through 1992 can be found at Martin Shapiro, *The Giving Reasons Requirement*, 1992 *U. CHI. LEGAL F.* 179, reprinted in MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS AND JUDICIALIZATION* 228, 228–57 (2002).

<sup>72</sup> The ECJ does not require European institutions to discuss every item of law or fact “which may have been dealt with during the administrative proceedings”; however, “the reasons on which a decision adversely affecting a person is based must allow the Court to exercise its power of review as to the legality of the decision.” Joined Cases 43 & 63/82, *VBVB & VBBB v. Comm’n*, 1984 *E.C.R.* 19, 58–59, 1 *C.M.L.R.* 27, 81 (1985); see Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v. Comm’n*, 1983 *E.C.R.* 3461, 3500, 1 *C.M.L.R.* 282, 319 (1985), cited in Julian M. Joshua, *The Right to Be Heard in EEC Competition Procedures*, 15 *FORDHAM INT’L L.J.* 16, 34 (1991); see also Francesca Bignami, *Creating European Rights: National Values and Supranational Interests*, 11 *COLUM. J. EUR. L.* 241, 345 (2005) (“[K]nowing the grounds for a Commission decision is one thing, obtaining a reply on every objection of fact, policy, and law is another thing. The European Courts require only that the statement of reasons be complete

And like their American colleagues, E.U. judges have tended to proceduralize rationality, that is, to demand more careful attention to articulation of the bases for decisions precisely where they are most within the technical expertise of the administrative authorities. In this way the judges can hope to assure conformity to law without invading the political or policy discretion reserved for administration.<sup>73</sup>

Hence, it seems fair to say that in both American and European Union jurisprudence, the right to receive reasons is a sort of derivative right. It facilitates individual decisionmaking about whether to contest official decisions, protects rights to individualized adjudication, and promotes the monitoring activities of both political and legal institutions. And reasons in both systems have a special value in maintaining vigorous judicial review along the treacherous boundary between law and policy. From this perspective, the fundamental value of reason giving is political and legal accountability. The requirement that administrative officials give reasons is merely a crucially important means to that end.

### III. A Revisionist Account of Reason Giving

As suggested earlier in this Essay, there is more to reason giving as an aspect of good administration than is suggested by these instrumental accounts. Indeed, there are clues that this must be true in the positive law of both the European Union and the United States. Arti-

---

enough to enable the parties to determine that the administration acted according to law or that they must go to court to vindicate their right to a government of laws and not of men.”).

A similar principle appears in E.U. member countries’ practices. For example, Julian Joshua cites several British cases in this regard. *See* *R v. Sec’y of State for the Home Dep’t, ex parte Swati*, [1986] 1 All E.R. 717 (A.C.); *Greater London Council v. Sec’y of State for the Env’t*, [1985] 52 P. & C.R. 158 (A.C.); *Norwest Holst Ltd. v. Dep’t of Trade*, [1978] 3 All E.R. 280, 296 (A.C.); *Elliott v. Southwark London Borough Council*, [1976] 1 W.L.R. 499, 508 (A.C.); *Metro. Prop. Holdings Ltd. v. Laufer*, [1975] 29 P. & C.R. 172 (Q.B.); *Howard v. Borneman*, [1974] All E.R. 862 (A.C.). In addition, Joshua notes, “Where there is a duty to give reasons, they have to be intelligible and adequate and deal with the substantial points at issue, but they neither have to set out the full reasoning process of the decision maker nor record all the evidence given or submissions made.” Joshua, *supra*, at 88.

The ECJ supported this principle in Case T-323/99, *Industrie Navali Meccaniche Affini SpA (INMA) & Italia Investimenti SpA (Itainvest) v. Commission*, 2002 E.C.R. II-545, finding it unnecessary to address “all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question.” *Id.* at II-562 (citing Case C-56/93, *Belgium v. Comm’n*, 1996 E.C.R. I-723).

<sup>73</sup> Jürgen Schwarze comments, “The rigorous control of administrative procedure is particularly intended to counter-balance the far-reaching discretionary powers of the executive.” Jürgen Schwarze, *Judicial Review of European Administrative Procedure*, 68 *LAW. & CONTEMP. PROBS.* 85, 105 (2004).

cle 253 of the EC Treaty requires reasons for general acts,<sup>74</sup> even though there is no right to judicial review of all general decisions in the European Union,<sup>75</sup> and general acts do not implicate the individual right to defense. Similarly, the Supreme Court has interpreted § 555(e) of the APA, although in a concurring opinion, to demand reasons in some cases where no right to hearing or to judicial review of the decision's substance is available.<sup>76</sup> What more then is at stake when we demand reasoned administration?

At an abstract level, just this: reason giving is fundamental to the moral and political legitimacy of the American and European legal orders. To be sure, the United States does not suffer quite the same "democratic deficit" that exists in the European Union. Therefore, it might be superficially plausible to argue that the legitimacy of administrative decisionmaking in the United States is a function of (1) the electoral accountability of Congress, which creates, structures, funds, and monitors administrative institutions; and (2) the elected President, who appoints and removes high administrative officials. On this view, administrative legitimacy lies in tracing administrative authority to the mandate of democratically elected institutions. But this electoral connection is notoriously thin. Administrators have enormous discretionary authority, and the exercise of that authority cannot be

---

<sup>74</sup> EC Treaty art. 253, *supra* note 62, at 135; see Kanska, *supra* note 8, at 319–20; see also Vestendorf, *supra* note 63, at 903 (emphasizing former EC Treaty article 190's—now article 253's—requirement to give reasons). Reason giving in the European context has also been influenced substantially by the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221, and its reasons requirement. See David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in *COMMON LAW THEORY* 134, 144–45 (Douglas E. Edlin ed., forthcoming Oct. 2007). Dyzenhaus and Taggart also demonstrate that this influence has pushed the United Kingdom in the direction of a general requirement of reason giving which was absent from common-law jurisdictions outside of Australia until late in the Twentieth Century. See *id.* at 145.

<sup>75</sup> See Case 25/62, *Plaumann v. Comm'n*, 1963 E.C.R. 95, 1964 C.M.L.R. 29, 35–37. Although the *Plaumann* decision has been much criticized, the ECJ has reaffirmed its view of standing to review general orders of the Community. See Cornelia Koch, *Commission of the European Communities v. Jégo-Quéré & Cie SA.*, Case C-263/02, 98 AM. J. INT'L L. 814, 818–19 (2004). In many cases, a claimant will be able to contest the national measures that implement a Community regulation in national courts on the ground that the regulation being implemented is itself illegal. *Id.* at 816. Such a case can then produce a referral to the ECJ for a determination of the legality of the Community norm. *Id.* The ECJ, however, has declined to accept an appeal along the claim that no national review possibility existed and that the denial of standing would therefore constitute a denial of justice. See Femke de Lange, Case Note, *European Court of Justice*, *Unión de Pequeños Agricultores v. Council*, 12 RECIEL 115, 118 (2003).

<sup>76</sup> *Heckler v. Chaney*, 470 U.S. 821, 841–42 (1985) (Marshall, J., concurring).

explained and legitimated as, in any realistic sense, the direct expression of the will of the people's representatives.<sup>77</sup>

As Max Weber noted long ago, the legitimacy of bureaucratic action resides in its promise to exercise power on the basis of knowledge.<sup>78</sup> Administrative legitimacy flows primarily from a belief in the specialized knowledge that administrative decisionmakers can bring to bear on critical policy choices. And the only evidence that this specialized knowledge has in fact been deployed lies in administrators' explanations or reasons for their actions. "The statute made me do it" is sometimes an adequate explanation for a ministerial, i.e., nondiscretionary, administrative act. But, in a much wider class of cases, the acceptability or legitimacy of an administrative decision will hinge not just on the authority or jurisdiction provided by a statute or treaty, but on the reasons provided for exercising that authority or jurisdiction in a particular way—either in deciding individual cases or in promulgating general norms.

So far, so good. But what makes reason giving legitimating? The answer I think relates back to the Aristotelian view of responsibility, that is, the human capacity both to have and to give reasons for one's behavior, which I earlier associated with John Gardner's account of responsibility.<sup>79</sup> That vision of reasoning and reason giving has particular moral force in a democratic polity. For in a democracy, the basic unit of social value is the individual: persons are viewed from a Kantian perspective as ends in themselves, and governments are democratically legitimate to the extent that they seek to carry out the collective desires of the citizenry. Those desires are, of course, only vaguely and imperfectly expressed through electoral processes and representative institutions, which themselves, of necessity, delegate large amounts of discretionary authority to unelected officials. But, in a polity where the individual is the basic unit of social value, the fundamental reason for accepting law, or any official decisionmaking, as legitimate, is that

---

<sup>77</sup> See Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 728, 782 (2001). For a more detailed inquiry into the comparative "democracy" of the European Union, the United States, and Swiss federations, see generally Thomas D. Zweifel, *Democratic Deficits in Comparison: Best (and Worst) Practices in European, US and Swiss Merger Regulation*, 41 J. COMMON MARKET STUD. 541 (2003) (comparing the "accountability and independence of merger regulation in the European 'regulatory state'" with those of the United States and Switzerland).

<sup>78</sup> Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 23 (2001) (citing MAX WEBER, 3 ECONOMY AND SOCIETY 955-1003 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968)).

<sup>79</sup> See Gardner, *supra* note 18.

reasons can be given why those subject to the law would affirm its content as serving recognizable collective purposes.

To be sure, there may be much disagreement and dispute about which public policies are preferable, and which decisions affecting individual interests are justified. Nevertheless, a law or decision with which one disagrees can be recognized as acceptable or legitimate only because it is explicable as a plausible instance of rational collective action. Reason giving thus affirms the centrality of the individual in the democratic republic. It treats persons as rational moral agents who are entitled to evaluate and participate in a dialogue about official policies on the basis of reasoned discussion. It affirms the individual as subject rather than object of the law.

This is not to argue, of course, that the instrumental grounds for reason giving that courts and commentators routinely provide are unimportant. It is to suggest, instead, that there is a deeper ground for reason giving in a democracy and therefore a reason for treating a right to reasons as a fundamental, rather than as a contingent or derivative, human right. Authority without reason is literally dehumanizing. It is, therefore, fundamentally at war with the promise of democracy, which is, after all, self-government.

This view of reason giving as an aspect of good administration is, I think, more than an academic or philosophical quibble about the grounds of a common practice. Whether one views reason giving as instrumental to other rights, or to the monitoring functions of political and legal institutions, or as a fundamental aspect of democratic governance, has implications for the reach and strength of the right in a democratic legal order.

The first implication is that if reason giving, or the right to receive reasons, is not a right parasitic on the protection of hearing rights, legal entitlements, or the facilitation of judicial review, it is a general one that should be demanded outside of those particular contexts. As I have noted, the generality of the right to reasons is already recognized by the broad statements of article 253 of the EC Treaty and by the language of § 555(e) of the APA. The latter provides not only for reasons in connection with general rules, but also demands “prompt notice” of the denial in whole or part of any written application or petition by any interested person “in connection with an agency proceeding,” including a statement of the grounds for denial.<sup>80</sup>

---

<sup>80</sup> 5 U.S.C. § 555(e) (2000).

Yet, these broad statements cannot be taken completely at face value. Article 253 applies to actions of E.U. institutions that have the force and effect of law.<sup>81</sup> The same is true of the United States' APA, where reason giving is specified only for administrative hearings determining individual rights or the issuance of regulations having the effect of law.<sup>82</sup> And, although it is sometimes given a broader application, the requirement in APA § 555(e) for reason giving with respect to applications, petitions, or requests applies only to the extent that those petitions are “made in connection with any agency proceeding.”<sup>83</sup> “Agency proceeding” is a defined term in the APA which refers only to agency processes of rulemaking, adjudication, and licensing.<sup>84</sup>

These limitations have not gone unchallenged. Justice Marshall, for example, dissenting in *Board of Regents of State Colleges v. Roth*, stated boldly, “In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment.”<sup>85</sup> Marshall objected to the notion that because applicants or employees without tenure had no legal “right” to their jobs, the Due Process Clause of the Fourteenth Amendment had no application to their situation.<sup>86</sup> Justice Marshall seemed to take the position that the language “life, liberty or property” in the Constitution was merely a placeholder for any significant human interest.<sup>87</sup> For him, the Due Process Clause was “our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.”<sup>88</sup> And to the argument that it would be too burdensome to always give reasons, Marshall replied, “The short answer to that argument is that it is not burdensome to give reasons when reasons exist.”<sup>89</sup>

Commentators, myself included, have also objected to the Supreme Court's instrumentalist conception of due process and reason giving. In a somewhat apoplectic vein, I wrote some years ago that

---

<sup>81</sup> See EC Treaty art. 253, *supra* note 62, at 135 (requiring reasons for “[r]egulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission”).

<sup>82</sup> See 5 U.S.C. §§ 553–554.

<sup>83</sup> *Id.* § 555(e).

<sup>84</sup> *Id.* § 551(12).

<sup>85</sup> *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 588 (1972) (Marshall, J., dissenting).

<sup>86</sup> *Id.* at 588–89.

<sup>87</sup> See *id.*

<sup>88</sup> *Id.* at 589.

<sup>89</sup> *Id.* at 591.

limiting due process protections, including the right to reasons, to situations in which legal entitlements were at stake, produced both an incoherent jurisprudence and bizarre assignments of constitutional value to individuals' interests.<sup>90</sup> As I said then and believe now:

Such an approach is functionally inadequate to address the problems of governmental or bureaucratic discretion that the due process clause was meant to address. [Providing hearings only to protect preexisting legal entitlements] gives legal protection, or at least due process attention, where some legal protection already exists, while excluding due process concern where a legal regime seems to permit official arbitrariness. Although many have a taste for irony, few would choose Kafka or Ionesco as constitutional draftsmen.<sup>91</sup>

The current position in the United States is particularly disadvantageous for persons who are the potential beneficiaries of state regulatory action against others, or persons who suffer indirectly from official actions concerning another party's legal rights. In general, persons who seek the enforcement of existing regulatory provisions against violators who are injuring their interests, or who would be benefited by the exercise of dormant official regulatory authority, have no right either to a hearing before the responsible officials,<sup>92</sup> or to judicial review of their refusal to act.<sup>93</sup> And, so long as the requirement of reasoned decisionmaking is parasitic on either hearing rights or the facilitation of judicial review, these potential beneficiaries or indirect victims have no right to reasons either.<sup>94</sup> "Standing" requirements in the United States also tend to deny judicial review to anyone not having been directly and concretely affected by state action.<sup>95</sup> This denial of access to judicial review, which is almost always available to directly regulated parties, further reduces the capacity of potential beneficiaries to engage regulatory authorities in reasoned discourse about their policies.

A similar analysis would seem to apply in E.U. law.<sup>96</sup> To be sure, there is broad language in some decisions suggesting that the "right to

---

<sup>90</sup> Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433, 437 (1987).

<sup>91</sup> *Id.*

<sup>92</sup> *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 775 (1980).

<sup>93</sup> *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

<sup>94</sup> For a recent general treatment of this topic, see Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 403-33 (2007).

<sup>95</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

<sup>96</sup> In particular, the requirement that individuals have both a concrete and individualized

good administration” implies a general requirement of responsiveness to complaints and requests that the Commission use its enforcement power, including the requirement that the Commission’s response be sufficient to give the court an adequate basis for judicial review.<sup>97</sup> A closer reading, however, suggests that these obligations are contingent upon a finding that the particular Treaty provision under which action is requested imposes an obligation on the Commission to take appropriate measures. And although one senses a general disposition in the European jurisprudence to take a more favorable view toward judicial review of inaction by enforcement authorities, American courts have also been willing to put aside standing and reviewability concerns where particular statutes seem to impose more specific obligations on enforcement officials.<sup>98</sup>

There may, of course, be good reasons for limiting rights to hearings and rights to judicial review. All such rights run risks of providing legal opportunity for the harassment of officials or of others over whom those officials have some authority. Formal hearings and judicial review are also expensive and time consuming legal enterprises. But, as Justice Marshall suggested, reason giving alone does not necessarily burden administration or provide opportunities for harassment through legal adversarialism.<sup>99</sup> Accommodations to practical necessities can be made. Article 18 of the ECGAB, for example, recognizes that its broad requirement that reasons be given any time a decision affects the “interests” of private persons may have to be modified where individualized reason giving produces significant administrative burdens.<sup>100</sup> Yet, even there, article 18 demands that where large numbers of people are affected similarly by a decision, an official must

---

interest in Community decisions will often exclude beneficiaries of regulatory regimes or other protective regimes because they will not be able to distinguish themselves from the general public, or a broad class of beneficiaries, who are also protected. For a recent case excluding beneficiaries on grounds of standing, see Case C-321/95P, *Greenpeace & Others v. Commission*, 1998 E.C.R. I-1651, 1998 3 C.M.L.R. 1, discussed in Nicole Gerard, Case Note, *Greenpeace & Others v. the Commission, C-321/95P*, 7 RECIEL 209, 209 (1998). See also *supra* note 75 and accompanying text (discussing how the ECJ has followed the *Plaumann* formula, refusing to broaden an individual’s standing on matters of general application).

<sup>97</sup> *E.g.*, Case T-54/99, *max.mobil Telekommunikation Serv. GmbH v. Comm’n*, 2002 E.C.R. II-313, II-333.

<sup>98</sup> See *Dunlop v. Bachowski*, 421 U.S. 560, 566 (1975).

<sup>99</sup> See *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 591 (1972) (Marshall, J., dissenting).

<sup>100</sup> See EUROPEAN OMBUDSMAN, *supra* note 58.

supplement a standardized statement of reasons with a detailed explanation if requested by particular individuals.<sup>101</sup>

These practicalities of legal enforcement suggest a second implication of treating reason giving as a general and fundamental right rather than as an instrumental one. The legal order should understand this right both as a “hard law” right, sometimes enforceable in court, and as a “soft law” right to be promoted through other means. Courts may decline to enforce legal rights to reasons in order to maintain a necessary separation between judicial and administrative judgment, that is, between legal constraints and administrative discretion. Courts cannot intervene in every dispute between individuals and government authorities while maintaining their own legitimacy as deciders. Responsible administration, however, reaches beyond those requirements that are judicially enforceable, and administrators can police themselves. Internal institutional codes of conduct and the oversight and publicity functions of audit institutions are two devices for internal monitoring and enforcement of the right to good administration. The Ombudsman in the European Union, and the departmental offices of inspectors general and the Government Accountability Office in the United States, are examples of the latter. The European Code of Good Administrative Behavior for E.U. administrative officials exemplifies the former.

Perhaps because of the very nature of its legal order, which is based importantly on consensus and progressive coordination of legal norms, the European Union may be somewhat ahead of the United States in recognizing the importance of these “soft law” regimes. With limited exceptions (such as the Office of the Taxpayer Advocate in the Internal Revenue Service), the United States has never created ombudsman offices for federal administrative agencies or departments, and the operations of the offices of inspectors general and of the Government Accountability Office are directed more toward uncovering corruption or systematic programmatic failure than in promoting standards of good administration governing the relationship of officials to individuals. The European Union’s interest in pressing forward the idea of “good administration,” including reason giving, through a host of techniques that are internal to administration rather than imposed by external legal guardians perhaps also reflects the general historical development of European administrative law, which

---

<sup>101</sup> *Id.*

has never been so judicio-centric as administrative law in the United States.

Finally, understanding reason giving by official institutions as fundamental to human rights in a democracy and as a part of the dynamic project of developing democratic government, suggests that reasoned administration should be understood both as a goal and as a right. It is a goal that Americans and Europeans have long shared. The organization of state power in ways that produce a nonalienating and authentic democratic dialogue has been a dream of American republican theorists since the American Revolution. The same objective is deeply embedded in European social theory of the sort now most prominently represented perhaps by the writings of Jürgen Habermas.<sup>102</sup> Reasoned administration is not only fundamental to our understanding of ourselves as independent moral agents, but to the future of the democratic project itself.

To be sure, there are many visions of democracy; not all are “dialogic” in their ambitions, and those that are may be too demanding for most twenty-first century contexts. Thomas Jefferson famously viewed the protection of democracy as demanding that virtually all government be conducted at an exquisitely local level.<sup>103</sup> If Jefferson’s localism seems quaint in a globalizing world, Jürgen Habermas’s “ideal speech situations” may be realizable only in the virtual world of the Internet.<sup>104</sup> Moreover, the protection of individual moral agency may be thought to be realized more through the “checks and balances” of Madisonian-style democratic institutions than through the direct participation of individuals in public decisionmaking,<sup>105</sup> and these three possibilities hardly scratch the surface of the variations to be found in democratic theory.<sup>106</sup>

Nevertheless, when unelected officials, whether judges or administrators, make collective decisions, visions of democracy that rely on the will of the electorate as the legitimating claim are contextually

---

<sup>102</sup> See *infra* note 104.

<sup>103</sup> See Letter from Thomas Jefferson to Governor John Tyler (May 26, 1810), reprinted in *The Life and Selected Writings of Thomas Jefferson* 604–05 (Adrienne Koch & William Peden eds., 1944); Letter from Thomas Jefferson to Joseph C. Cabell (Feb. 2, 1816), *id.* at 660–62.

<sup>104</sup> This possibility is explored in A. Michael Froomkin, *Habermas@Discourse.Net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 754, 796–97 (2003).

<sup>105</sup> See Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 192–94 (1997).

<sup>106</sup> For one overview among many on democratic theory, see generally IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* (2003) (exploring democratic theory in relation to the nature of power and domination).

irrelevant. We must either have some other view of democratic governance or declare all such decisionmaking democratically illegitimate. The alternative to will-based democratic theories are theories based on some vision of public reason. How “rational” is understood, through what devices it should be expressed, how demanding systems of rational accountability should be and so on, are all deeply contestable issues of institutional design. But this much seems clear: administration without reason cannot meet the challenge of defending its democratic legitimacy.