

Stanford – Vienna
Transatlantic Technology Law Forum

A joint initiative of
Stanford Law School and the University of Vienna School of Law



European Union Law Working Papers

No. 117

(De)analogizing US and EU Administrative Adjudications: Balancing Accountability, Fairness, and Efficiency

Kyle Melatti

2025

European Union Law Working Papers

Editors: Siegfried Fina and Roland Vogl

About the European Union Law Working Papers

The European Union Law Working Paper Series presents research on the law and policy of the European Union. The objective of the European Union Law Working Paper Series is to share "works in progress". The authors of the papers are solely responsible for the content of their contributions and may use the citation standards of their home country. The working papers can be found at http://ttlf.stanford.edu.

The European Union Law Working Paper Series is a joint initiative of Stanford Law School and the University of Vienna School of Law's LLM Program in European and International Business Law.

If you should have any questions regarding the European Union Law Working Paper Series, please contact Professor Dr. Siegfried Fina, Jean Monnet Professor of European Union Law, or Dr. Roland Vogl, Executive Director of the Stanford Program in Law, Science and Technology, at:

Stanford-Vienna Transatlantic Technology Law Forum
http://ttlf.stanford.edu

Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Author

Kyle Melatti is a rising third-year student at Stanford Law School and Managing Editor of the *Stanford Law Review*. Before law school, he was a Business Analyst at the D.C. office of McKinsey & Company. He holds a Bachelor of Arts from Duke University with Highest Distinction and Phi Beta Kappa. His interest in comparative studies began at Duke as Chairman of the American Grand Strategy Council. He plans to practice appellate litigation before pursuing a career in legal academia. Kyle was born and raised in Las Vegas, Nevada to Brazilian parents and has traveled to over thirty countries. He will be at an appellate litigation firm this summer in Los Angeles.

General Note about the Content

The opinions expressed in this student paper are those of the author and not necessarily those of the Transatlantic Technology Law Forum, or any of TTLF's partner institutions, or the other sponsors of this research project.

Suggested Citation

This European Union Law Working Paper should be cited as:
Kyle Melatti, (De)analogizing US and EU Administrative Adjudications: Balancing Accountability, Fairness, and Efficiency, Stanford-Vienna European Union Law Working Paper No. 117, http://ttlf.stanford.edu.

Copyright

© 2025 Kyle Melatti

Abstract

This Paper queries a field rarely studied in Europe but frequently debated in US classrooms and courtrooms: administrative adjudications. The European Union houses numerous agencies and empowers them to conduct a broad range of regulations. But the lack of primary and secondary law directly addressing the topic stands in contrast to decades of statutory and constitutional discourse across the pond. The European Union's flexibility and its agencies' novelty mitigates much of this underdevelopment, but consequences are already fomenting in recent decisions by the European Court of Justice. Meanwhile, a bedrock principle of American administrative adjudication has been shaken by the US Supreme Court's recent decision in Loper Bright v. Raimondo. This Paper therefore timely compares the two adjudicatory systems to draw lessons for the future. As a threshold matter, EU and US agencies serve analogous governmental purposes but with vastly different underlying processes and substantive law. To develop these differences, this Paper walks through the typical course of an administrative adjudication: (1) the initial agency decision, (2) internal administrative reconsideration, and (3) judicial review by non-agency tribunals. Some lessons are clear. Notwithstanding Loper Bright, US agencies have stronger footing in both procedure and substance than their EU counterparts. The European Union needs an Administrative Procedure Act. However, the EU legal and philosophical principles emphasizing a respect for individual rights permeate throughout its agencies' adjudications. Many recent US cases may make it more difficult for individuals to challenge agency decisions that run afoul of the Constitution or broader views of a limited federal government. The United States and European Union therefore have an opportunity to learn from each other's pitfalls and triumphs to strike a better balance between accountability, fairness, and efficiency.

Table of Contents

Introduction **1**

I. US Framework **2**

II. EU Framework **7**

III. Comparative Analysis **12**

IV. Lessons Learned **16**

Conclusion **20**

Introduction

Scholars of administrative systems recognize that adjudications[1] take place in three stages: (1) the initial decision, (2) administrative reconsideration, and (3) judicial review.[2] This Paper expands on the work of Professor Michael Asimow and others by comparing specific doctrinal underpinnings in each step solely between US and EU adjudications. This analysis is timely. The often-called Fourth Branch of US government is under fire after a recent Supreme Court decision shook over forty years of doctrine.[3] Many view *Loper Bright v. Raimondo* as a pathway to deregulation and ossification.[4] On the other side of the pond, however, the EU's concern for individuals' rights and good governance continues to work at the forefront of its actions.[5] Although duties between both adjudicatory systems overlap in many respects, they differ in such inherent ways that drawing lessons from each other is invaluable independent of legal turbulence. This Paper therefore answers the question: whether US and EU administrative adjudications, specifically by the European Commission and its supporting agencies, share useful similarities.

The answer follows in three Parts. Part II lays the foundational US adjudicatory doctrine for comparative analysis under what is normally described as "administrative law,"[6] a field less

[1] For purposes of this Paper, adjudication refers to an administrative action over the rights of specific private parties, such as an enforcement proceeding against an allegedly monopolist corporation. *See, e.g.*, Jack M. Beermann, *Administrative Adjudication and Adjudicators*, 26 GEO. MASON L. REV. 861, 861 (2019). Therefore, administrative actions over public parties—such as Member States via Article 258 TFEU—or litigation more broadly are excluded.
[2] *E.g.*, Michael Asimow, *Five Models of Administrative Adjudication*, 63 AM. J. COMP. L. 1, 5-6 (2015) [hereinafter Asimow, *Five Models*]. As relevant here, an "initial decision" includes denials of benefits and petitions as well as regulatory enforcement.
[3] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).
[4] *See, e.g.*, Christopher J. Walker, *What* Loper Bright Enterprises v. Raimondo *Means for the Future of Chevron Deference*, YALE J. ON REG. (June 28, 2024), https://tinyurl.com/38mjffzf.
[5] *See, e.g.*, Koen Lenaerts, *Some Thoughts on the State of the European Union as a Rights-Based Legal Order*, GIAPPICHELLI (2015), https://tinyurl.com/2uxsz869 ("The very essence of EU law is the principle that the individual rights it creates are directly enforceable before national courts and prevail over conflicting national norms.").
[6] *See generally* NEIL HAWKE & NEIL PARPWORTH, INTRODUCTION TO ADMINISTRATIVE LAW (1996).

studied by EU scholars.[7] Part II adapts the US vocabulary to describe EU agencies' adjudicatory powers and procedures. Part III details the similarities and differences between the two systems at each stage noted above. Part IV draws lessons learned from both systems along the dimensions of structure, procedural due process, and accountability.

I. US Framework

Background. Any comparative venture involving the highly comprehensive U.S. administrative law should begin by laying down foundational terms and principles. Adjudication takes place against two important backdrops: the Constitution and the Administrative Procedure Act (APA)[8] enacted in 1946. All provisions of the APA apply to every federal agency absent Congressional intent to the contrary.[9] And Congress creates or removes agencies as it sees fit.

Two critical definitions follow. First, the APA defines an "agency" as "each authority of the Government of the United States."[10] That broad definition, however, excludes the entire legislative and judicial branches in the tripartite system, as well as the President.[11] Therefore, the APA covers "agencies" located in the executive branch but beyond the White House, such as the Federal Bureau of Investigation (FBI), the Environmental Protection Agency (EPA), and the Department of Homeland Security (DHS). Second, the APA defines an "adjudication" as the "process for the formulation of an order," which in turn means "a matter other than rule

---

[7] Herwig C.H. Hofmann, *Seven Challenges for EU Administrative Law*, 2 REV. EUR. ADMIN. L. 37, 37 (2009) [hereinafter Hofmann, *Seven Challenges*] (noting that "administrative law virtually disappeared from the horizon of EU legal scholars" after the founding period); *see also* Ieva Deviatnnikovaitė, *EU Administrative Law—What Are EU-Level Public Administrators?*, 58 HUNG. J.L. STUD. 19 (2018) ("The concept of European administrative law is quite new . . . .").
[8] Pub. L. No. 79-404, 60 Stat. 237 (codified at 5 U.S.C. § 500 *et seq*.).
[9] 5 U.S.C. § 551; *see, e.g.*, Webster v. Doe, 486 U.S. 592 (1988).
[10] 5 U.S.C. § 551(1).
[11] *Id.* § 551(1)(A)-(H); *see* Franklin v. Massachusetts, 505 U.S. 788, 801 (1992) ("[The President's] actions are not subject to [the APA's] requirements.").

making."[12] The Supreme Court found this distinction unworkable, and therefore defined adjudication using its pre-APA decisions.[13] An agency action becomes adjudication when it triggers the Constitution's Due Process Clause[14]—that is, when a specific "number of persons [are] concerned, who [are] exceptionally affected" and whose rights are altered "upon individual grounds."[15]

Initial Decision. An agency's adjudicatory authority rests solely on powers delegated by Congress.[16] In other words, Congress confers some of its constitutional powers to the executive branch while setting statutory parameters, including the APA, as outer contours. Adjudications therefore have two components: (i) procedure and (ii) substance. For example, Congress can grant the EPA authority to issue fines and other penalties over river pollution through the Clean Water Act[17] (substance), while the way the EPA conducts its proceedings must comply with the APA (procedure). Enabling statutes also grant the agency discretion, akin to prosecutorial discretion.[18] Agencies are not required to take any action if they decline to do so. The President's political control and the agency's resource capacity drive these decisions.[19]

Once an agency decides to exercise its power, it must appear in an adversarial setting overseen by an independent decision-maker. Administrative Law Judges (ALJs) oversee these proceedings[20] as required both by the APA and the Due Process Clause. The purpose of both statutory and due process protections is to provide notice to the affected party and an opportunity

---

[12] 5 U.S.C. § 551(6)-(7).
[13] *See, e.g.,* Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, 435 U.S. 519 (1978) (citing Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915)).
[14] U.S. CONST. amend. V (forbidding natural and legal persons in the US to "be deprived of life, liberty, or property, without due process of law.").
[15] *Bi-Metallic*, 239 U.S at 446.
[16] *See, e.g.*, Gundy v. United States, 588 U.S. 128 (2018).
[17] Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended in scattered sections of 33 U.S.C.).
[18] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985).
[19] Nicholas M. Bednar, *Presidential Control and Administrative Capacity*, 77 STAN. L. REV. (forthcoming 2025).
[20] 5 U.S.C. § 3105; 5 U.S.C. § 554-557.

(almost always orally) to be heard, with the potential that a hearing will result in a favorable outcome. The Court has blessed the APA's impartiality and fairness guarantees as the minimum procedural requirements the Constitution demands.[21] But even minor deviations from these protections may void a decision.[22] These protections therefore recognize a legal person's fundamental freedom from arbitrary agency decision-making.

This adversarial proceeding shares similarities with civil trials but differs from them in important respects. First, because ALJs work *within* the agency, they are not properly considered "judges" by Article III of the Constitution. Nevertheless, the sheer volume of cases (e.g., social welfare benefits) and expertise required to render an opinion necessitate an initial hearing before ALJs rather than generalist, less numerous Article III judges.[23] Second, ordinary rules of evidence do not apply to administrative hearings.[24] Third, ALJs can engage in limited ex parte contacts with others inside of the agency *after* the hearing's conclusion but *before* a decision.[25] But, for the most part, ALJs enjoy "separation of functions"[26] akin to separation of powers within agencies such that they are guaranteed independence from excessive internal influence from enforcement staff and policymakers.

Administrative Reconsideration. Agencies hold specific and latent control over an initial decision, such as guidelines for decisions and quotas for caseloads. Both the APA and the Constitution require that all ALJ decisions are reviewable by the heads of agencies or the

[21] Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, 435 U.S. 519 (1978).
[22] *See, e.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977).
[23] *See* Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109 (1981).
[24] *See* Richardson v. Perales, 402 U.S. 389 (1971).
[25] *Cf., e.g.*, Sierra Club v. Costle, 657 F.2d 298, passim (D.C. Cir. 1981).
[26] *See* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 760 (1981).

President.[27] In the Supreme Court's recent renewed interest in administrative law, it has also suggested that ALJs must be removable by the President at-will if its agency's leaders have for-cause protection.[28] A reviewing body holds the same powers as the ALJ—such as granting or denying benefits or hearing arguments.[29] Such review is only unnecessary when the agency heads themselves conduct the adjudication in the first instance, such as the Commissioners of the Securities and Exchange Commission (SEC).[30] Some agencies, however, have intermediate review bodies, such as the Board of Immigration Appeals. Even though the agency must have the *possibility* of review, they are not required to do so and almost always decline.[31] Nevertheless, an adversely affected party must exhaust all administrative recourses before proceeding to judicial review. This requirement ties to Article III standing doctrine—the barriers to invoke a federal court's jurisdiction.[32] After reconsideration, the agency's action is considered final.

Judicial Review. All administrative adjudications carry the possibility of judicial review, so long as they meet the Supreme Court's definition of "adjudication."[33] When an agency alters the rights of specific parties, Article III standing poses a minimal barrier compared to, say, a third-party beneficiary of the agency's action.[34] Once an affected party exhausts all administrative recourses, it may invoke federal jurisdiction in district court and obtain the right to appeal to both or either the Courts of Appeals and the Supreme Court.[35]

---

[27] *See* United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021).
[28] *See* Free Enter. Fund v. PCAOB, 561 U.S. 477 (2010); Seila Law LLC v. CFPB, 591 U.S. 197 (2020).
[29] *See* 5 U.S.C. § 554.
[30] *See Free Enterprise*, 561 U.S. at 482-87.
[31] *Cf.* Heckler v. Chaney, 470 U.S. 821 (1985).
[32] *See* Kenneth Culp Davis, *Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction*, 28 TEX. L. REV. 168 (1950).
[33] *See supra* notes 12-15 and accompanying text.
[34] *Cf., e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
[35] *See id.* at 563-66.

Both the APA and the Constitution provide a menu of legal bases to challenge an agency's final decision. The former, however, is much more commonly used. So long as the Constitution allowed Congress to pass the relevant law in the first place, the agency's *constitutional authority* to adjudicate is rarely questioned.[36] This holds true even for vague, open-ended delegations.[37] For this reason, challenges to adjudications most often address statutory violations rather than constitutional ones.[38] The Supreme Court's approach to administrative law enabled this conclusion. When a plaintiff brings a constitutional challenge to agency action (that the agency bases in a statute), the reviewing court will apply the "canon" of statutory interpretation called constitutional avoidance.[39] If the court can resolve the dispute between the parties without addressing the Constitution, it will do so. Should a court reach constitutional questions, they are most often due process violations intertwined with the APA.

Therefore, judicial review of the agency's statutory violations draws from six options in 5 U.S.C. § 706 ("Scope of Review"). Two are most relevant: 706(2)(A)'s "arbitrary and capricious" inquiry and 706(2)(C)'s *ultra vires* inquiry. The former has a quasi-procedural and quasi-substantive component.[40] Did the agency consider the correct *statutory* factors (quasi-procedural)? Did it apply them correctly (quasi-substantive)? The latter asks whether the agency conducted its adjudication based off an incorrect interpretation of statute. Under *Loper Bright v.*

[36] *Cf.* Whitman v. Am. Trucking Assoc., Inc., 531 U.S. 457 (2001).
[37] *See id.*; J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); Gundy v. United States, 588 U.S. 128 (2018).
[38] 5 U.S.C. § 706 (providing a menu of reviewable agency actions under the section titled "Scope of Review"). *But see* West Virginia v. EPA, 604 U.S. ___ (2024) (Gorsuch, J., concurring) (suggesting that some statutory interpretation surrounding § 706, including whether Congress properly delegated the agency action in question, have constitutional underpinnings).
[39] *See* Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275 (2016).
[40] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29 (1983).

Raimondo,[41] the court reviews this question *de novo* and does not give agencies deference. It may, however, give agencies some "respect" on highly interpretations of technical statutes.[42]

II. EU Framework

Background. The Union hosts voluminous agencies that meet the US definition notwithstanding limited scholarship on EU administrative law.[43] The European Commission itself is an administrative authority of the EU government, empowered by delegations in Articles 290 and 291 TFEU.[44] This holds true notwithstanding the Commissions' multi-hat role as legislative agenda-setter and the executive. For purposes of this paper, the Commission's administration authority also includes supporting "agencies empowered to play roles in making individual decisions."[45] For example, these include the Office of Harmonization in the Internal Market, the European Medicines Agency, and the European Food Safety Authority. Under the *Meroni* principle, the Court of Justice of the European Union (ECJ) highlighted three conditions for the Commission's sub-delegations to agencies: powers must have been previously conferred to the Commission, the Commission must have control over the exercise of the sub-delegation, and the Commission cannot generally sub-delegate administrative power to private parties.[46] In broad legal terms, EU adjudications are therefore agency actions of specific applicability, not

[41] 603 U.S. 369 (2024).
[42] *See id.* at 372-74 (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944)).
[43] For further discussion of how a lack of scholarship harms EU law generally, see Hofmann, *Seven Challenges*, *supra* note 7.
[44] Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]; *see* TFEU arts. 290-291; Herwig C.H. Hofmann, *General Principles of EU Law and EU Administrative Law*, *in* EUROPEAN UNION LAW 212, 217 (Steve Peers & Catherine Barnard eds., 4th ed. 2023) [hereinafter Hofmann, *General Principles*].
[45] Michael Asimow & Lisl Dunlop, *The Many Faces of Administrative Adjudication in the European Union*, 61 ADMIN L. REV. 131, 132 (2009).
[46] Joined Cases 9/56 & 10/56, Meroni & Co. et al. v. ECSC High Authority, 1958 E.C.R. 133; *see also* Hofmann, *General Principles*, *supra* note 44, at 217-19.

general applicability,[47]but this does not include legislation by the European Parliament. Most EU agencies are the products of secondary legislation—finding legal bases in Articles 114 TFEU regarding internal market measures and Article 352 TFEU granting the EU "residual power to attain one of objectives."[48] Their adjudicatory authority is robust and akin to US powers above.

Initial Decision. EU follows French and other European administrative systems' inquisitorial, rather than adversarial adjudicatory frameworks.[49] In other words, the same staff members deciding the agency's position, such as the decision to bring an enforcement action for an internal market infraction, are the same staff that decide the outcome of the adjudication. The investigation and adjudication take place concurrently. Some regulatory fields,[50] however, do require an independent hearing officer's involvement. Competition and merger cases involve a Commission staff member "rather than a case handler."[51] Nevertheless, the hearing officer's judgment is not considered binding on the inquisitorial staff.[52]

Procedural guarantees during the initial decision come in a wide variety. For example, an oral hearing is only available upon request in trade or pharmaceutical licensing proceedings, rarely used in trademark cases, and never held in food & safety and state aid situations.[53] As noted, although some initial decisions involve a hearing officer, the "great majority" of hearings

[47] Asimow & Dunlop, *supra* note 45, at 133.
[48] Hofmann, *General Principles*, supra note 44, at 219. *But see* TFEU art. 88 (Europol's legal basis); TFEU art. 85 (same for Eurojust).
[49] *See* Asimow & Dunlop, *supra* note 45, at 136 (noting that adjudications are "usually conducted by the team of case handers who are engaged in investigating the matter"); *id.* at 132 ("The procedure for investigation and hearing is inquisitorial rather than adversarial."); *see also* Ján Klučka, *The General Trends of EU Administrative Law*, 41 INT'L LAW. 1047, 1048 (2017). *See generally* T.C. HARTLEY, THE FOUNDATIONS OF EUROPEAN UNION LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN UNION (2014).
[50] EU scholars agree that the six primary regulatory fields include "competition, government subsidies, trademarks, food safety, foreign trade regulation, and pharmaceutical licensing." *E.g.,* Asimow, *Five Models*, *supra* note 2, at 15.
[51] *Id.* at 16.
[52] *Id.* at 17 (noting that the "preliminary decision on the merits" is still the obligation of ordinary staff).
[53] Asimow & Dunlop, *supra* note 45, at 136.

are conducted before the investigators themselves.[54] But there are some explicit procedural rights that apply to all adjudications, many of which are incorporated into primary law.[55] Most importantly, Article 6(3) TFEU incorporates the general principle of good administration.[56] Procedural guarantees under this right include the right to access one's file, full agency information, and completion of an adjudication within a reasonable time.[57] However, good administration does not include the right to oral argument. Some adjudications take place entirely in writing.

Two other critical procedures apply to all agency adjudications. First, Article 48 of the Charter requires a "right of . . . defen[s]e of anyone who has been charged."[58] This right to counsel includes the very preliminary stages of the inquisitorial proceeding.[59] When the agency concludes the first stage of its adjudication, Article 296 TFEU requires agencies to "state the reasons on which [the adjudication is] based."[60] Both stages that follow the initial decision rely on these statements, especially on questions of law.

Administrative Reconsideration. In general, there is "no opportunity for administrative reconsideration" in EU adjudications.[61] In most cases, the only recourse for adversely affected parties is to seek judicial review. Some agencies, however, grant the Commission or internal

---

[54] *Id.* at 133, 143.
[55] *See, e.g.*, Case T-326/13, Commission v. Thales Développement et Coopération, ECLI:EU:T:2016:403 (July 12, 2016). Note, however, that unlike US law, primary and secondary EU law do not cover administrative *inaction*. *See* THE SOUND OF SILENCE IN EUROPEAN ADMINISTRATIVE LAW (Dacian C. Dragos, Polonca Kovač & Hanna D. Tolsma eds., 2020).
[56] TFEU art. 6(3).
[57] *See* Hofmann, *General Principles*, supra note 44, at 229-30; *see, e.g.*, Case C-54/95, Germany v. Commission, 1999 E.C.R. I-35, ¶ 118; *see also* EVA NIETO-GARRIDO & ISAAC MARTIN DELGADO, EUROPEAN ADMINISTRATIVE LAW IN THE CONSTITUTIONAL TREATY (2007).
[58] Charter of Fundamental Rights of the European Union art. 48(2), 2012 O.J. (C 326) 391 [hereinafter Charter].
[59] *Cf., e.g.*, Case 155/79, AM & S v. Commission, 1982 E.C.R. 1575.
[60] TFEU art. 296.
[61] Asimow & Dunlop, *supra* note 45, at 137.

Boards of Appeals to render binding decisions on the agency and parties.[62] For example, an adversely affected entity in competition and merger cases may seek internal review "conducted by the College of Commissioners."[63] As applied to these cases, the College of Commissioners acts as an intermediate review board, but there are plenty of others. Secondary legislation both enables and sets the outer contours for such boards.[64] If the possibility of intermediate review applies, the Court of Justice has held that parties should exhaust all prior administrative remedies prior to judicial review.[65] However, board proceedings provide no guarantee to a fair hearing.[66]

Judicial Review & General Principles of EU Law. The ECJ bases mandatory review[67] on compliance with primary law,[68] akin to EU constitutional law. Its authority to do so is conferred by Articles 263 and 217 TFEU.[69] Even though most EU agencies are the product of secondary legislation,[70] compliance with the Treaties remains the gravamen inquiry. The ECJ's decisions are technically non-precedential, but "the Court has consistently stated that deference is due to a well[-]established line of case law."[71] Should the ECJ void the adjudication, the Court may impose positive obligations on the agency to correct past and future errors under Article 266

---

[62] *See id.* at 137; Paola Chirulli & Luca De Lucia, *Specialized Adjudication in EU Administrative Law: The Boards of Appeal of EU Agencies*, 40 EUR. L. REV. 832 (2015) (discussing intermediate review commissions in, for example, the European Aviation Safety Agency).
[63] Asimow, *Five Models*, *supra* note 2, at 16.
[64] *See* Chirulli & De Lucia, *supra* note 62, at 835; *see also* Case C-625/11, PPG and SNF v. ECHA, EU:C:2013:594.
[65] *See, e.g.*, Chirulli & De Lucia, *supra* note 62, at 835 (collecting cases).
[66] *Id.*
[67] *See* Jorgen Schwarze, *Judicial Review of European Administrative Procedure*, 68 LAW & CONTEMP. PROBS. 85, 85 (2005).
[68] Gareth Davies, *The European Union Legislature as an Agent of the European Court of Justice*, 54 J. COMMON MKT. STUD. 846, 846 (2016) (stating that the EU "constitutionalized its policy goals and methods, by embedding them in the Treaties"); *id.* at 848 ("[A]ll institutions and acts of the EU must comply with [the Treaties'] text."); *see also* PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW ch. 1 (Armin von Bogdandy & Jürgen Bast eds., 2d ed. 2011).
[69] *See* TFEU art. 263, ¶¶ 1, 5; TFEU art. 217.
[70] *See* Hofmann, *General Principles*, supra note 44, at 217 ("Most are created by legislative act.").
[71] Miguel Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 EUR. J. LEGAL. STUD. 137, 146 (2008); *see also, e.g.*, Case C-310/97, AssiDoman Kraft Products v. Commission, 1999 E.C.R. I-5363, *appeal against* Case T-227/95, 1997 E.C.R. II-1195.

TFEU, including the payment of damages.[72] And "because most [ECJ] judgments are Treaty interpretations . . . they cannot be corrected by legislation."[73]

Therefore, review of an adjudication necessarily asks whether the agency's action complies with the general principles of EU law. *First*, proportionality. Under Article 5(4) TFEU, an administrative action "shall not exceed what is necessary to achieve the objectives of the Treaties."[74] The ECJ laid out a framework for this inquiry in the *Afton Chemical*[75] and *Nelson*[76] cases. Most relevant here, agencies should not base adjudications off the most onerous or the most disproportionate means. Only in purely discretionary choices will judicial review ask for "manifest error of misuse of powers."[77] Frequently, however, an adversely affected party can claim that their fundamental rights and freedoms are infringed, which the Court reviews *de novo*.[78] *Second*, the rule of law. This principle requires adjudications to stay within boundaries set by secondary legislation and the Treaties, as well as "take into account all relevant factors."[79] Relatedly, Article 15 TFEU imposes transparency on agency decision-making.[80] The rule of law also requires legal certainty[81] and the protection of legitimate expectations.[82] *Third*, an inquiry based on the principle of good administration will ask whether certain procedural rights were

---

[72] TFEU art. 266; *see* Mario Kresic, *Compulsory Adjudication: An Emerging Principle of European Law and the Western Balkans' Accession to the European Union?*, *in* ETHNIC DIVERSITY, PLURAL DEMOCRACY AND HUMAN DIGNITY 37, 40 (Mario Krešić et al. eds., 2022) ("Positive action may have to be taken to undo the effects of past enforcement.").
[73] Davies, *supra* note 68, at 849; *see also* Alec Stone Sweet & Thomas L. Brunell, *The European Court of Justice, State Noncompliance, and the Politics of Override*, 106 AM. POL. SCI. REV. 204 (2012).
[74] TFEU art. 5(4).
[75] Case C-343/09, Afton Chemical, 2010 E.C.R. I-7027, ¶ 45,
[76] Joined Cases C-581/10 & C-629/10, Nelson, EU:C:2012:657, ¶ 71.
[77] *See* Hofmann, *General Principles*, supra note 44, at 221.
[78] *See, e.g.*, Case T-170/06, Alrosa v. Commission, 2007 E.C.R. II-2601, ¶¶ 108-10.
[79] *See* Hofmann, *General Principles*, supra note 44, at 223; *see also* Case 18/57, Nold KG v. ECSC High Authority,1959 E.C.R. 89.
[80] *See* Case C-345/06, Gottfried Heinrich, 2009 E.C.R. I-1659, ¶¶ 42-44; 59-63.
[81] Case C-199/03, Ireland v. Commission 2005 E.C.R. I-8027, ¶ 69 ("Legal rules [must] be clear and precise[] and aim to ensure that situations and legal relationships governed by Community law remain foreseeable.").
[82] *See* Case T-176/01, Ferriere Nord Spa v. Commission, 2004 E.C.R. II-3931; Case C-368/89, Crispoltoni I, 1991 E.C.R. I-3695, ¶ 17.

met, discussed above.[83] The General Court almost always refers "to the right to good administration in a[n administrative] case before it."[84] Lastly, the principles of equivalence and effectiveness do arise in EU law, but not typically in the context of EU agency adjudications.[85]

At all times, however, the ECJ applies the principle of *ubi ius ibi remedium*[86] to verify that an aggrieved party has an appropriate remedy available. Unlike agency decisions of general applicability, adjudications with specific applicability will virtually always carry some possible remedy—e.g., vacatur of the administrative action or reversal of an improper result. The *Factortame* doctrine,[87] linked to the general principle of effectiveness, empowers the ECJ to guarantee "real and effective judicial protection" in this context.

III. Comparative Analysis

Initial Decision. Although the purpose of US and EU adjudications share similarities, the initial decision between the two would likely violate each other's (quasi-)constitutional guarantees. First, the inquisitorial system patently violates US due process rights by breaking down the separation of functions required for a decision by an impartial decisionmaker (ALJ), even if that decisionmaker is paid and works within the agency. On the other side, US agencies are under little to no obligation to engage in the depth of transparency and fairness that EU general principles demand. There is also no inherent right to counsel in the Constitution for civil administrative cases, such as those which result in a monetary penalty.

---

[83] *See supra* notes 53-60 and accompanying text.
[84] Schwarze, *supra* note 67, at 89 (quoting Case T-54/99, max.mobil Telekommunikation Service GmbH v. Comm'n, 2002 E.C.R. 11-313, ¶ 48).
[85] *See* Hofmann, *General Principles*, supra note 44, at 215 (discussing, for example, Case C-231/96, Edis, E.C.R. I-4951, ¶ 36).
[86] Case C-362/14, Schrems v. Data Protection Commissioner, EU:C:2015:650, ¶ 95.
[87] Case C-213/89, Factortame, 1990 E.C.R. I-2433, ¶¶ 19-20; *see also* Case 14/83, Sabine von Colson and Elisabeth Kamann v. Land Nordrhein-Westfalen, 1984 E.C.R. 1891, ¶ 23.

But, although the EU does not explicitly call its protections "procedural due process," primary law does confer some procedural due process rights onto interested parties through the general principle of good administration and the rights of defense and to be heard.[88] For example, where quasi-adversarial proceedings are required, the ECJ has held that parties have a right to a "fair hearing."[89] The ECJ also requires agencies to follow their own rules, akin to the *Accardi* principle in US law.[90] For example, in the *Hercules* case,[91] the ECJ held that the Commission could not deny access to its files when it created a procedure for party's review in competition cases. The Court tied this requirement to the good administration principle, which squarely aligns with *Accardi*'s interpretation of the Constitution's Due Process Clause.

Nevertheless, the EU splits from US doctrine by granting hearing rights in some rulemaking where private parties are affected and denying them in most classes of adjudication. In the US, administrative decisions of general applicability carry no due process rights, and therefore neither the APA nor the Constitution require notice or an opportunity to be heard by any private party—unlike *Denmark v. Commission*, where the Court of Justice held that generally applicable decisions may require hearings to meet the general principle of a fair hearing and good administration.[92] Denying oral argument during hearings also patently violates due process.

Administrative Reconsideration. Where an EU agency's initial decision carries the possibility of reconsideration, both adjudicatory systems align. Both the ECJ and US federal courts require exhaustion to seek judicial review in this context. However, reconsideration *must*

[88] *See* Schwarze, *supra* note 67, at 85.
[89] *Compare* Case 17/24, Transocean Marine Paint Association v. Commission, ECLI:EU:C:1974:106 (Oct. 23, 1947), *with* Goldberg v. Kelly, 397 U.S. 254 (1970).
[90] *See* Accardi v. Shaughnessy, 347 U.S. 260 (1954).
[91] Case T-7/89, S.A. Hercules Chemicals N.V. v. Commission, 1991 E.C.R. II-1711.
[92] Case C-3/00, Denmark v. Commission, 2003 E.C.R. I-2643.

be possible in US agencies to avoid running afoul of the Take Care Clause—such that unreviewable bureaucratic decisions harm the President's democratic responsibility to govern over the entire executive branch. Foregoing reconsideration can increase the agency's flexibility and efficiency. But in instances where internal review would have allowed the agency to further develop or reverse controversial decisions at the staff-member level, the agency may open itself up to longer and more arduous litigation that it could have avoided. Therefore, because EU lacks reconsideration in most decisions, technocrats may make unreviewable, final decisions that lead to costly judicial review for all parties. The US system trades off some agency efficiency for both better accountability through cabinet-level oversight and more opportunity for a favorable decision for the affected private party.

Judicial Review. EU and US Courts' inquiries share common substantive inquiries and gatekeeping features, although they differ greatly in remedies and jurisprudential approaches. First, similarities. Judicial review by an impartial court[93] is mandatory.[94] But courts will not hear cases unless certain conditions are met. Both systems impose some concept of standing.[95] US courts require exhaustion in every case, and the ECJ does too when there are agencies' Boards of Appeals or similar structures allow for internal reconsideration. Both require redressability, i.e., the principle of *ubi ius ibi remedium*. But in the adjudicatory context, virtually all administrative decisions are reviewable—expressly in the EU by Article 47 of the Charter, and implicitly by the Due Process Clause of the Constitution. Congress, though, has more control over judicial review because it may strip federal court jurisdiction over statutory claims (the most common) including

[93] *See supra* notes 20-22 and accompanying text; *cf.* Case T-85/09, Kadi v. Commission (*Kadi II*), 2010 E.C.R. II-5177, ¶¶ 171-80.
[94] *See supra* notes 33-34 and accompanying text; Schwarze, *supra* note 67, at 85.
[95] It is noteworthy that the EU distinguishes between acts of general and specific applicability for its quasi-standing inquiry. *See* Schwarze, *supra* note 67, at 86.

APA violations.[96] Congress could in theory strip federal jurisdiction over constitutional claims arising from agency action, but the Supreme Court expressed serious doubts.[97] Between the two systems, then, the ECJ has greater express and direct responsibility to ensure that individual rights are properly adjudicated. The Supreme Court places the burdens of invoking federal jurisdiction on the plaintiff, whereas the ECJ emphasizes individuals' rights over any singular EU agency's actions.

Once the courts reach legal issues, the form of review shares the most commonality between both systems. The ECJ's "manifest error" and "right factors" test is substantially identical to the APA's arbitrary and capricious review in § 706. Both inquiries ask whether the agency's conduct failed to adequately protect affected parties from government overreach.[98] The courts also invalidate administrative decisions for procedural defects that but-for their inadequacy could have altered the outcome of the administrative decision below.

But the systems approach adjudication from different fundamentals. US courts expressly avoid resolving agency actions on constitutional bases, while the General Court and the ECJ base their decisions of the "spirit, general scheme, and wording" of primary law—the EU equivalent to US constitutional law.[99] The latter decisions are further complicated by a "plurality of constitutional sources" that "fed the . . . general principles of law."[100] The effects of ECJ opinions therefore apply to all agency actions, whereas US decisions are normally cabined to adjudication

---

[96] *Cf.* Webster v. Doe, 486 U.S. 592 (1988).
[97] *Id.* at 600.
[98] *See also* COMPARATIVE ADMINISTRATIVE LAW: AN INTRODUCTION 1 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).
[99] Maduro, *supra* note 71, at 139; *see also* Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, ECLI:EU:C:1963:1 (Feb. 5, 1963).
[100] Maduro, *supra* note 71, at 137.

under a particular statute—sometimes a specific word or phrase. Broad-sweeping decisions have their costs and benefits, but ultimately the US better promotes concepts like judicial minimalism.

Judicial review also results in starkly different outcomes. Imposing positive obligations, including paying damages, on agencies based on Treaty violations runs in stark contrast to US vacatur. Federal courts will not vacate an administrative decision because it violates the spirit of the Constitution, but rather if it violates a particular textual hook. Even then, constitutional violations are extremely rare and commonly involve invalidating the enabling statute itself. Reviewing courts are much more likely to invalidate agency action under the major questions doctrine, where an agency brings an enforcement action against a private party using a "newfound power" from a "long-extant statute." Such action constitutes a statutory violation, not a constitutional one on par with violating the Treaties.[101] The ECJ has no equivalent major questions doctrine, nor could it when most agencies are recent creations and regulate primarily in the same six fields.[102] Furthermore, imposing positive obligations on US agencies violates the principle of judicial minimalism and would negatively incentivize agencies to adjudicate less. The EU's voluntary cooperation legitimizes its approach, but agencies compensating parties for their mistakes or invalidating rules and procedures based on a single case is a concept wholly foreign to US administrative law.

IV. Lessons Learned

Procedure and Substance. The EU needs an APA. Given that the EU and US agencies share such similar scopes and duties, a concrete skeletal guideline for agency conduct supports

[101] For further discussion of the importance of primary law on EU administrative adjudications, see PAUL CRAIG, EU ADMINISTRATIVE LAW (3d ed. 2018).
[102] *See supra* note 50.

the EU's principles of transparency and good administration. The European Parliament has asked for an EU-version of the APA,[103] and the ReNEAUL project proposed model rules that covers both adjudications and rulemaking.[104] EU agencies may also learn the uniformity between US agency actions. Depending on the regulatory field, there may be entirely different procedures applied to an EU regulatory object. That difference also stems from the source of administrative power. American agencies are powerless to adjudicate absent legislation from Congress,[105] whereas the Commission is both quasi-legislator and executive. The flow of authority differs from traditional separation of powers and creates lingering legal issues beyond just adjudication.

Respect for Individual Rights. The US has much room to grow. The EU allows for varied and comprehensive judicial review for agency decisions that effectively protect individual rights more than US administrative law. The "dispersed system of . . . national courts coupled with . . . rulings from the" ECJ emphasize the importance of avoiding arbitrary government action in the face of competing political, economic, and social schemes.[106] The ECJ operates in a broader international and supranational context.[107] If anything, the rise in composite adjudications[108]

---

[103] *See, e.g.*, Deviatnnikovaitė, *supra* note 7, at 25 (citing RENEAUL, MODEL RULES ON EU ADMINISTRATIVE PROCEDURE (2014)).
[104] *See* sources cited *supra* note 103; *see also* European Parliament, Resolution for an Open, Efficient and Independent European Union Administration, 2016/2610 (RSP); Resolution with Recommendations to the Commission on a Law of Administrative Procedure of the European Union, 2012/2024 (INL).
[105] *See supra* note 16 and accompanying text. *But see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Frankfurter, J., concurring) (suggesting there are certain powers that the Executive Branch can take alone if assigned by the Constitution or with sufficient historical acquiescence from Congress).
[106] HERWIG C.H. HOFMANN, GERARD C. ROWE & ALEXANDER H. TURK, ADMINISTRATIVE LAW AND POLICY OF THE EUROPEAN UNION 678 (2011) [hereinafter HOFMANN ET AL., ADMINISTRATIVE LAW]. *But see* Herwig C.H. Hofmann, *Decisionmaking in EU Administrative Law—The Problem of Composite Procedures*, 61 ADMIN. L. REV. 199, 220 (2009).
[107] For further lessons about EU adjudications in its international context, see generally AIDA TORRES PEREZ, CONFLICTS OF RIGHTS IN THE EUROPEAN UNION: A THEORY OF SUPRANATIONAL ADJUDICATION (2009) (drawing lessons from US federalism to EU adjudication in the human rights context, ultimately concluding that the ECJ should engage in increased dialogue with the national courts to convince them of their interpretations). *See also* Rike Krämer-Hoppe, *Adjudication and Positive Integration: The Role of the European Court of Justice and the Dispute Settlement Body in the "Trade and Environment" Debate*, *in* POSITIVE INTEGRATION - EU AND WTO APPROACHES TOWARDS THE "TRADE AND" DEBATE (2020) (discussing similar in the trade context).
[108] *See* Hofmann, *Seven Challenges*, *supra* note 7, at 52.

involving both national government involvement and EU agencies support this claim. In the US system, however, composite procedures involving state agencies typically hurt individual claimants and parties. In fact, the exhaustion burden in the standing inquiry—already placed on the plaintiff and not the agency—increases when state agencies offer redress and multiple levels of review. *Loper Bright v. Raimondo* means that federal courts are less concerned with empowering agencies to protect individual liberties, and it punishes Congress for inadvertently failing to foresee potential gaps in administration legislation. As a result, EU agencies are much more flexible than their US counterparts to respect legal and natural persons.

Accountability. The EU's democracy deficit[109] likely exacerbate accountability concerns in adjudications far more than for US agencies. Administrative accountability carries a legal and a political dimension.[110] First, legal. Blurring the lines between legislative and executive powers runs rampant in EU governance,[111] bolstering separation of powers concerns. Inquisitorial adjudication creates poor incentives when agencies act as prosecutor and first-line judge. The agency's only pragmatic legal concern is facing judicial review, whereas US agencies regularly face defeat on legal issues in front of ALJs. That none of the decisionmakers were directly elected, or appointed by those who were, creates a lack of direct accountability that the President must have over US agencies by the Constitution's Take Care Clause. The President constraints agency adjudications by issuing executive orders and reviewing regulations prior to their enactment.[112] The EU laid out similar principles in *The Better Regulation Agenda*,[113] asking for

[109] *See* Torbjörn Larsson & Guenter F. Schaefer, *The Problem of Democratic Legitimacy in a Supranational Government*, *in* HERWIG C.H. HOFMANN & ALEXANDER TURK, EU ADMINISTRATIVE GOVERNANCE 541 (2006).
[110] HOFMANN ET AL., ADMINISTRATIVE LAW, *supra* note 106, at 679.
[111] *Id.* at 678 (noting a "lack of a very distinct system of separation of powers in the EU legal system").
[112] *See* Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 103-10 (2011).
[113] *The Better Regulation Agenda - Impact Assessment Guidelines*, COM (2005) 791, COM (2009) 92, and COM (2015) 215 final (May 19, 2015); *see also* Julian Nowag & Xavier Groussout, F*rom Better Regulation to Better*

cost-benefit analysis in *rulemaking*—but notably not adjudication. Nevertheless, the Commission's influence over the legislative agenda while overseeing EU administrative functions[114] potentially offers some legal accountability over overzealous agencies.[115]

However, EU adjudications better reflect a balance between normative,[116] political,[117] and efficiency judgments.[118] EU agency leadership is more equipped to avoid the partisan politicking most common at the top of US agencies, even more likely after *Loper Bright*. Member States, for example, are "represented on agency boards."[119] Member States and the Commission select leadership based more on expertise than ideology.[120] This political dimension of accountability may countermand some legal concerns. Additionally, US agencies employ over 3,000,000 personnel,[121] while EU agencies carry just over 13,000 staff even though they serve a larger population.[122] If accountability is a function of capacity and control,[123] one can argue that EU agencies are more politically accountable to its executive and legislative powers than the US agencies are to Congress and the President.

Adjudication? Impact Assessment and the Court of Justice's Review in THE EU BETTER REGULATION AGENDA: A CRITICAL ASSESSMENT 4 (Sacha Garben & Inge Govaere eds., 2018).

[114] *See* Larsson & Schaefer, *supra* note 109, at 11.

[115] *See generally* COMPARATIVE ADMINISTRATIVE LAW, *supra* note 98, at 9-18 (comparing the President's OIRA review to Regulatory Impact Analysis at the EU level).

[116] *See* Maduro, *supra* note 71, at 146 (stating that "one of the functions" of EU agencies is to propose to the ECJ "deeper normative choices involved in a particular case").

[117] *See* Hofmann, *Seven Challenges*, *supra* note 7 at 41-45.

[118] *Id.* at 46-50.

[119] COMPARATIVE ADMINISTRATIVE LAW, *supra* note 98, at 7.

[120] *Id.* at 7-9.

[121] *BLS Data Viewer*, U.S. BUREAU LAB. STAT. (updated Mar. 2025), https://tinyurl.com/mr3bhfey.

[122] EU AGENCIES NETWORK (last visited Mar. 2025), https://tinyurl.com/2dxkwfd6.

[123] *See* Nicholas M. Bednar, *Presidential Control and Administrative Capacity*, 77 STAN. L. REV. (forthcoming 2025); *see also* John O. Brehm & Scott Gates, Working, Shirking, and Sabotage: Bureaucratic Response to a Democratic Public (1999).

Conclusion

This Paper achieved two objectives: descriptively comparing EU and US adjudicatory systems and analytically drawing lessons learned from each. The EU "legal order is particularly dynamic,"[124] rendering it especially prepared to develop more comprehensive administrative law. Scholarship in this area is sparse but growing. Future research, for example, can focus on whether and to what extent the ECJ's decisions have already adopted much of US Due Process Clause jurisprudence.[125] Should the EU take on Parliament and academia's request for an EU APA, many features can draw from the decades of development in American government. On the reverse, recent Supreme Court decisions spark serious concerns that federal courts primarily empower first-mover corporate interests rather than meaningfully adjudicating individual rights, whether a natural person or a late-coming private entity. Notwithstanding its disagreement with twentieth century opinions, the Supreme Court has an opportunity to learn from the EU's plurality of constitutional sources that suggest individual liberties take highest priority. In sum, any administrative system should deeply inquire into its purposes and procedures. Comparative research like this Paper can and should draw further attention to the deficits and benefits of accountability, fairness, and efficiency between administrative systems.[126] The stakes in adjudications are high for parties involved, so a critical and thoughtful approach to design, process, and substance deserves special consideration.

---

[124] *See* Hofmann, *General Principles*, supra note 44, at 213.
[125] For an initial piece discussing this relationship in part, see Klučka, *supra* note 49, at 1048.
[126] COMPARATIVE ADMINISTRATIVE LAW, *supra* note 98, at 19 (arguing that comparative administrative law scholarship supports "protecting individuals against an overreaching state and providing external checks that enhance the democratic accountability and competence of the administration").