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Dominik Steiger

THE SEPARATION OF POWERS DOCTRINE AND THE POWER OF PARTICIPATION

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The Separation of Powers Doctrine and the Power of Participation

Citizen's Influence in Delegated Rule-Making in the United States,

the European Union and Germany

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Abstract: Participation by the people is a powerful tool which influences the exercise of public authority within all branches of government and may enhance the legitimacy of public authority – but only if it is done correctly. The United States, the European Union and Germany all facilitate forms of citizens' participation but differ with regard to the actors involved and the degree of influence exerted. Just under fifty years have passed since the participation debate began, yet there is no overarching constitutional theory of participation that encompasses all three branches of government and demonstrates what is meant by "participation done correctly". This lacuna must be filled in order to further develop participatory mechanisms. This Jean Monnet Working Paper seeks to do so by developing a constitutional theory of imperative participation based on the separation of powers doctrine which may be found in all three legal

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orders. To do this, the two most important questions about public participation in any given case will be answered: Firstly, who may participate in the exercise of public authority? Secondly, what legal effect does the participation have? In this analysis, participation in the executive's delegated rulemaking procedures – which touches all three branches of government – will serve as the theory's litmus test.

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I. Introduction

Calls for more involvement by citizens in the exercise of public authority are increasingly heard around the world. Participation by the people is indeed a powerful tool which influences the exercise of public authority within all branches of government and may enhance the legitimacy of public authority – but only if it is done properly. The United States, the European Union and Germany all facilitate forms of citizens' participation but differ with regard to the actors involved and the degree of influence that is exerted. In the latter two legal orders participation has been punctually enhanced in recent years. This process of developing further participation opportunities has commenced as the people demand more voice and influence outside the democratic election cycle. However, it is nearly fifty years since the participation debate began[2] and yet we still have no overarching constitutional theory of participation that encompasses all three branches of government and demonstrates what is meant by "participation done correctly". The lack of a guiding principle hinders the development of participatory mechanisms. This lacuna will be filled by this Jean Monnet Working Paper through the development of a constitutional theory of imperative participation.

There is a need for such a theory, as people everywhere in the world are asking for more influence over the exercise of public authority.[3] This theory is required to answer two important questions: firstly, who shall participate in the exercise of public authority and secondly, what is the legal effect of participation. As these questions cannot be answered by participation itself, an understanding of the separation of powers doctrine as the organizational principle balancing democracy, i.e. collective self-determination, and rule of law, i.e. individual self-determination, shall be utilized in order to conceptualize participation. In this analysis, participation in the executive's delegated rulemaking procedures – which touches all three branches of government in the United States, the European Union and Germany – will serve as the theory's litmus test.

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2 Barbara L. Bezdek, *Citizen Engagement in the Shrinking City: Toward Development Justice in an Era of Growing Inequality*, 33 S. Louis U. Pub. L. Rev. 3, 3 (2013).

3 *Id.* at 7–8, 39.

The article proceeds as follows: First, in an inductive overview of participation, a constitutional understanding of imperative participation will be developed. It will be shown that certain structures exist and show who may participate (the people, the affected public, one individual) while explaining the powers that flow from participation (decision-making, commenting and procedure-initiating). These structures are connected to the three functions of participation, i.e. the democratic, rule of law and efficiency functions (II.). Second, an understanding of the separation of powers doctrine will be developed along the lines of the functions of participation (III.). The congruence of the functions of participation and of the separation of powers doctrine allows for the deduction of a constitutional theory of imperative participation (IV.). Finally, the theory will be put to the test by applying it to delegated rulemaking in all three legal orders (V.). Here, the participatory system developed in the United States since 1946 should – despite its many shortcomings – serve as a role model for Germany and the European Union which both have almost no participatory procedures in place to inform executive rulemaking.

II. Participation

Recent times have seen the governing class lose trust of the electorate with many citizens turning their backs on their States in dismay. There has been extensive commentary on this development,[4] and various terms have been coined to describe this process of withdrawal from the public sphere into the private sphere because of the powerlessness of the individual vis-à-vis the collective, or rather vis-à-vis a few

[4] *e.g.* Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (2008); Jacob S. Hacker & Paul Pertson, *Winner-Take-All Politics: How Washington Made the Rich Richter – and Turned its Back on the Middle Class* (2011); William E. Hudson, *American Democracy in Peril: Eight Challenges to America´s Future* (7th ed. 2012); Robert B. Reich, *Beyond outrage: Expanded Edition: What has gone wrong with our Economy and our Democarcy, and how to fix it* (2012); Lawrence Lessing, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop it* (2012); Mickey Edwards, *The Parties versus the People: How to turn Republicans and Democrats into Americans* (2012); Thomas E. Mann & Normann J. Ornstein, *It´s even worse than it looks: How the American Constitutional System collided with the new Politics of Extremism* (2013); Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (2013); Mike Lofgren, *The Party is over: How Republicans went crazy, Democrats became useless, and the Middle Class got Shafted* (2013); Nadia Urbinati, *Democracy Disfigured: Option, Truth, and the People* (2014); Robert C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (2014).

individuals. "Post-democracy" may be the most known among these terms.[5] This powerlessness is not only perceived but real as recent empirical research has shown that "the preferences of economic elites [...] have far more independent impact upon policy change than the preferences of average citizens do."[6]

The most cited example in the German context is the planned new train station – named Stuttgart 21 – in the city of Stuttgart, the capital of the Land of Baden-Württemberg. This train station forms part of a wider European Network which connects Paris to Bratislava and thus not only affects the city of Stuttgart and the surrounding Land of Baden-Württemberg but also Germany and Europe – and also tourists from the U.S. who want to experience Europe via train. After a planning process that took nearly twenty years and involved diverse forms of citizen's participation and numerous court rulings on the legality of the train station, the Deutsche Bahn (German Railway) finally announced the start of the construction works. This announcement was met with considerable resistance including weekly demonstrations with tens of thousands of protesters, including people chaining themselves to trees that were supposed to be cut down and police's use of water cannons against protesters. Massive media coverage and public debate accompanied these events. Bumper stickers against Stuttgart 21 could be spotted as far away as Kigali, the capital of Rwanda. The protests went on over a very long period of time. Eventually a new government was voted into power in the Land of Baden-Württemberg, which is now governed by a coalition government led by the Green Party – a novelty in German history. The Greens were in favor of stopping the construction work and their junior-partner, the Social Democrats, favored the new train station. Both favored a referendum – in which the people upheld station's construction. In the referendum's aftermath the protests died down and the train station is now being built.

The events surrounding Stuttgart 21 show the different means of participation: during the planning phase the public was invited to participate. Submissions were received and heard and considered. Some changes were made but the process was not stopped and in

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5 Colin Crouch, *Post Democracy* (2004).

6 Martin Giles & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 Perspectives of Pol. 564, 576 (2014).

the end the plan was approved. Some of those who participated in the administrative proceedings sued against the plan approval order but the courts largely upheld the plans. Then for a long time nothing happened and just before the plan approval order expired, the Deutsche Bahn started the construction works. This long period heavily contributed to the new protests as most people thought the original order had lost its legitimacy. This led to the massive demonstrations and finally the election of a new government. After this exercise in representative democracy an exercise in direct democracy followed which turned things around one final time.

The Stuttgart 21 experience also showed different participants: in the planning process the affected public were able to participate. As this term is not well defined it allows for a rather wide range of people to participate. As the actual construction works were still a long time ahead many people did not participate at that time. The courts could only be engaged by those who already participated in the administrative planning proceedings. The protests were sparked by rather affluent and older citizens of Stuttgart and high school students, i.e. two special interest groups. In the elections all Germans living in Baden-Wuerttemberg could participate and this included the more conservative rural population. The same was true for the referendum.

It has been claimed that participation is *the* path to increase the citizens' impact on the exercise of State authority and to engage citizens anew with their states, to draw constituents back to the political systems and to make them truly democratic.[7] Many have pondered on these questions, and while participation certainly is not the silver bullet that will carry the (democratic) day, it is of considerable importance. Although much thought has been invested in direct democracy and in participation in administrative and judicial proceedings, surprisingly no (theoretical) legal thought has been invested in analyzing participation comprehensively in all three branches of government. As citizens demand more voice and question the (democratic) legitimacy of public authority, it is becoming an urgent and practical need to think about new and

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7 *Inter alia* Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age* 117, 152 (1984); Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. A. I. P. 216 (1969); Sherry R. Arnstein, *A Working Model for Public Participation*, 35 Pub. Admin. Rev. 70 (1975); Theodora Ziamou, *Rulemaking, Participation and the Limits of Public Law in the USA and Europe* (2001).

better ways of citizen involvement in the exercise of State power. Although the existing participation opportunities seem to follow a certain pattern – which allows for an inductive approach to create a theory of participation – they have never been regarded in a holistic manner in order to lay out that pattern.

In order to find that pattern and to answer the "who" and the "how" of participation in all three branches, participation needs to be defined. Many definitions of participation are sociological,[8] political[9] or rights-based.[10] As a constitutional theory will be developed here, the definition of imperative participation will be much narrower. The US and the German constitution as well as the founding treaty of the EU serve as a starting point. Constitutions' main focus lies on enabling and limiting the exercise of public authority. Participation will thus be understood as citizens' partaking in the exercise of public authority where the organ addressed is legally obliged to react to the citizens' action and must do so via a legal procedure. Participation comes in different forms, *i.e.* it has different legal effects (A.), different actors are involved (B.) and different functions are being fulfilled (C.).

A. Participation's Legal Effect: Imperative Participation

Participation, as it is understood in this article possesses a legal effect which is imperative on the State. It will therefore be referred to as "imperative participation". The imperative effect of citizens' participation can differ: direct democracy allows for legislating directly, while voting leads to newly constituted organs. Participation in rulemaking and other acts of state forces the state to react to and consider the submissions made (though not necessarily to follow them). Participation in judicial matters forces the state to activate the judicial process and to deliver a judgment (though not to decide in favor of the plaintiff).

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8 *e.g.* Damien Contandriopoulos, *A sociological perspective on public participation in health care*, 58 Soc. Sci. & Med. 321 (2004) with further references.

9 Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community 31 *et subseq* (2000).

10 Joana Mendes, *Participation in EU Rule-Making: A Rights-Based Approach* (2011).

In contrast, important democratic rights and forms of action, such as freedom of speech or assembly, do not form part of this definition of participation.[11] As important as the fundamental rights to free speech and of assembly are for the democratic state,[12] they do not force the state to listen. They are the soil in which participation is rooted and which it needs to live and prosper and are thus especially protected – but they are not forms of imperative participation.

B. Participation's Actors: From the People to one Individual

The participation's actors differ. The people act in instances of representative and direct democracy. In contrast, in the case of an administrative decision that in principle affects only one person (e.g. any order such as a building permit or a police order) it is only certain individuals that participate as petitioners (or as plaintiffs in judicial proceedings). In instances of public planning, more people may participate, such as the affected public. In delegated rulemaking, different NGOs and experts might participate. In the United States, – and that is different to the European Union and mostly to Germany – the public may participate in rulemaking procedures.

If one regards the actors on a continuum, they move gradually in quantitative terms from everybody (i.e. the people) to a group of people (i.e. the affected public) to just one person (i.e. the plaintiff). In qualitative terms, this clear graduation becomes more complex. For example, the people are not composed of everybody, but only of citizens – an increasingly contested principle.[13] The affected public may also include legal aliens. Plaintiffs can even be aliens not residing within the country. From these qualitative observations, it follows that a mechanical quantitative differentiation is a generalization and simplification. However, the qualitative approach does not contradict the

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11 *For an understanding of participation that also encompasses these fundamental rights, see e.g.* James Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation* (2009).

12 *Cf.* Burt Neobor, *Madison´s Music* (2015).

13 *See in the South African context* Wessel le Roux, *Representative Democracy, Migration and Residence Based Voting Rights in Post-Apartheid South Africa and Post-Unification Germany (1990-2015)*, in: Henk Botha & Nils Schaks & Dominik Steiger eds., *The End of the Representative State? Democracy at the Crossroad* (to be published 2016).

quantitative approach, but even confirms it in general while making the specifics more complex.

C. Participation's Functions: Individual Rights, Efficiency and Democracy

Lastly, the functions of participation differ. One can differentiate three main functions that steer the different legal effects and different actors and thus act as a switch.

First, participation protects the rule of law.[14] The rule of law can be understood in many ways.[15] In this article, it is understood as a thick concept not only encompassing the primacy of law, but also the protection of individual rights and the furthering of individual self-determination.[16] The terms will be used interchangeably to underline the notion that the rule of law serves individual rights and individual self-determination.

Second, participation enhances the public authority's efficiency by informing the competent organs via special expertise that is based on expert knowledge and/or familiarity with the subject.[17]

Third, participation enhances democratic legitimacy. Similarly to the rule of law, the term democracy can be understood in many different ways. In this article, democracy is

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14 J. Mendes, *Participation in EU-Rulemaking: A Rights-Based Approach passim* (2011); Ingo Appel, *Staat und Bürger im Umweltverwaltungsverfahren* 31 NVwZ 1361, 1362 (2012); Armin von Bogdandy, *Gubernative Rechtsetzung* 68 (2000); Elke Gurlit, *Neue Formen der Bürgerbeteiligung? Planung und Zulassung von Projekten in der parlamentarischen Demokratie* 67 JZ 833, 834 (2012); Jutta Stender-Vorwachs, *Neue Formen der Bürgerbeteiligung?* 31 NVwZ 1061, 1063 (2012); Jan Ziekow, *Neue Formen der Bürgerbeteiligung? Planung und Zulassung von Projekten in der parlamentarischen Demokratie*, Gutachten D zum 69. Deutschen Juristentag 15 (2012).

15 *For different readings of the rule of law, see* J. Mendes, *Rule of Law and Participation: A Normative Analysis of Internationalized Rulemaking as Composite Procedures* 20 *et* subseq. with *further references* (Jean Monnet Centre, NYU School of Law, Working Paper No. 13, 2013), *available at* http://jeanmonnetprogram.org/wp-content/uploads/2014/12/Mendes.pdf.

16 *Cf.* Jeremy Waldron, *The Rule of Law an Essentially Contested Concept (in Florida)?* 21 L. & Phil. 137 (2002).

17 *With regard to US rulemaking, see* Cornelius M. Kerwin & Scott R. Furlong, *Rulemaking: How Agencies write Law and make Policy* 157 (4th ed. 2010); c*f.* BVerfGE 33, 125 (159); J. Gurlit, note 14, 834; I. Appel, note 14, 1362; A. v. Bogdandy, *Gubernative Rechtssetzung* 68 *et subseq.* (1999).

understood as a thick concept, not only encompassing majority rule but also deliberative and participatory notions that allow for collective self-determination by the people.[18]

D. Summarizing Imperative Participation: Citizen's partaking in all State Affairs

To summarize: Participation allows the people to exert the power to create laws or make state organs react to citizens' action. Everybody is not always allowed to participate. Furthering the rule of law, promoting democracy and guaranteeing efficiency are the functions of participation.[19] But a tension exists between these functions – which is the reason for involving different actors and allowing them different kinds of influence on decisions.

The following hypothetical example demonstrates this tension quite well: If the affected public could decide on the building of a cross-country oil pipeline – like on the proposed and heavily disputed pipeline Keystone XL which would connect the tar sand oilfields of Canada to United States refineries in the Gulf of Mexico area –, there would never be any pipeline, because most affected people would say "NIMBY – Not in my backyard!" Such a decision by the affected public could be contrary to a law which Congress might have passed deciding the pipeline would be built[20] or a potential decision approving the pipeline by the Environmental Protection Agency (EPA).

Which decision would prevail? The one of the affected public, or the one of Congress or the EPA – organs which are both fully legitimized by all the American people? Such a

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[18] *Cf.* Jürgen Habermas, *Faktizität und Geltung*151 *et subseq*., 349 *et subseq* (1994); Huber Heinelt, *Governing modern Societies. Towards Participatory Governance* 8 (2010); Jon Elster(ed.), Deliberative Democracy (1998); J. Fishkin, note 11; Andreas Fisahn, *Demokratie und Öffentlichkeitsbeteiligung* (2002), *passim*; BVerfGE 44, 125, 142; Andreas Fisahn, *Abgeleitete Demokratie*, 79 KritV 267, 278 *et subseq*. (1996); Niels Petersen, *Demokratie und Grundgesetz*, MPI Preprint 28 *et subseq*. (2008).

[19] *Furthermore, these three criteria are the decisive criteria for the success and survival of liberal democracies*, Francis Fukuyama, *The Origins of Political Order* (2011); Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (2014).

[20] *Such a law regarding Keystone XL passed the House in November 2014 and was narrowly defeated by one vote in the Senate*, Bill Chappel, *Senate Rejects Keystone XL Pipeline Bill, In A Close Vote*, November 18, 2014, the two-way, breaking news from npr, www.npr.org/sections/thetwo-way/2014/11/18/365048998/senate-rejects-keystone-xl-pipeline-bill-in-a-close-vote.

decision by the affected public might also infringe on the fundamental rights held by the companies building the pipeline. However, if the affected public had no say whatsoever, their interests and their rights would be nearly worthless. Protests and resistance by the people would follow, and effective enforcement might become impossible or at least severely hampered.

The tension thus needs to be resolved by balancing the conflicts between the rule of law and democracy. This tension mirrors the tension of collective (democratic) and individual (rule of law based) self-determination, which is unraveled by the separation of powers doctrine. This will also lead to a more efficient government, as the absence of protests and resistance – or formulated in a positive way: general acceptance of majority decisions and general recognition of individual rights – will allow for effective enforcement of government authority. This insight with regard to the separation of powers doctrine bears fruit by answering the questions of who may participate and which form participation must take in a specific situation.

III. Separation of Powers

The three functions of participation – protection of individual rights, guaranteeing efficiency and enabling democracy – are mirrored in the separation of powers doctrine, which is the decisive constitutional norm in conceptualizing participation. Participation will thus be aligned with the separation of powers doctrine. Although it has been stated that the separation of powers "has dramatically different contours in the Federal Republic and in the United States"[21] and – one can easily add – the European Union which is not even a state, the separation of powers in all three legal orders share the same functions. The doctrine – which is understood (both in this article and in all three legal orders) not as a strict separation doctrine but rather as a checks and balances doctrine[22] – classically protecting the rule of law and preserving individual freedom by

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21 David P. Currie, *Separation of Powers in the Federal Republic of Germany*, Ger. L. J. 2113-2178, 2177 (2008).

22 Peter L. Strauss, *The Place of Agencies in Government, Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 577-578 (1984) (differentiates between separation of powers (strict),

dividing public authority into different branches and limiting their power.[23] The doctrine also enhances the public authority's efficiency by assigning public power not only to different organs, but to the organs that are best equipped to execute that function.[24] Often overlooked, but inherent to the second function, is the creation of organs and their empowerment with specific competences and functions to exercise public authority in the first place. As all public authority in the three legal orders needs to be traced back to the people, the democratic aspect is intrinsic to the separation of powers doctrine.[25]

To implement the separation of powers doctrine to a theory of participation one needs to do more than simply show that the functions overlap. The most important task is to balance these functions. This entails assigning certain powers to certain branches and organs, in order to fulfill the promises of a functioning and efficient state in which democracy and the rule of law, collective and individual self-determination, individual rights and collective interests are brought into equilibrium.

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of functions (less strict, can be called a Madisonian view) and "checks and balances"): *see also at* 617 *et subseq.* ("core functions"), *see also* The Federalist No. 47 (James Madison).

23 Myers v. U.S., 272 U.S. 52, 293 (1926); "prevention of tyranny", Geoffrey R. Stone & Louis M. Seidman & Cass R. Sunstein & Mark v. Tushnet, Constitutional Law 368 (7th ed. 2013); *cf. also* The Federalist No. 48 (James Madison); BVerfGE 34, 52 (59).

24 *While this is explicitly denied in* Myers v. U.S., 272 U.S. 52, 293 (1926), the U.S. Supreme Court in Buckley v. Valeo, 424 U.S. 1, 121 (1976) *refers to the effectiveness of government in the context of the separation of powers; also* U.S. v. Nixon, 418 U.S. 707-13 (1974) *speaks of "the constitutional balance of 'a workable government'"*; *in* Mistretta v. U.S., 488 U.S. 361, 372 (1989) *allows for delegations "Congress simply cannot do its job absent an ability to delegate power under broad general directives. See* Opp Cotton Mills v. Administrator, Wage and Hour Div. of Dept. of Labor, 312 U.S. 126, 145 (1941) ("In an increasingly complex society, Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy"); *see also* Nicholas W. Barber, *Prelude to the Separation of Powers*, 60 Cambridge L. J. 59, 63 *et subseq.* (2001); *see also* Stone & Seidman& & Sunstein & Tushnet, note 23, at 368; Strauss, Separation of Powers, note 22, at 616 *et subseq.*; BVerfGE 68, 1 (86); *See also* Justice Jackson who pleaded for a workable government: "[w]hile the Constitution diffuses power to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government.", Youngstown, Sheet & Tube Co. v. Sawyer, 343 U.S. 570 (1952), Jackson, J. concurring, at 635, cited approvingly by Mistretta v. U.S., 488 U.S. 361, 381 (1989); *See also ibid.,* at 383: "[I]n cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed "tasks that are more properly accomplished by [other] branches," Morrison v. Olson, 487 U.S. 654, 680-681 (1988).

25 Christoph Möllers, *The Three Brances: A Comparative Model of Separation of Powers* 41 et subseq (2013); Hans-Detlef Horn, *Die grundrechtsunmittelbare Verwaltung* 261 *et subseq.*(1999); Peter Lerche, *Gewaltenteilung – deutsche Sicht*, in: Josef Isensee (ed.), *Gewaltenteilung heute* 75, 782000); Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee* 179 *et subseq.* (2nd ed 2004).

In order to balance the aims of participation and determine who may participate, and with how much power, in any given case, this article will make use of a new and important understanding of and insight into the separation of powers doctrine. This insight emphasizes that the claims of democracy and the rule of law – i.e. of collective self-determination and of individual self-determination, which are often said to be contradictory – are legally unraveled in the procedures foreseen by the separation of powers doctrine.

The organizational principle of the separation of powers achieves this balancing act by assigning public authority to the "proper" branch and organ according to three criteria:[26] First, is the public authority rather bound or unbound by law? Second, does the public authority mainly have retrospective or prospective effects? Third, does the public authority primarily affect an individual or potentially everybody?

The public authority exercised by the legislature is characterized by its low degree of legal pre-determination, as it is only bound by the Constitution;[27] its temporal orientation, which is prospective[28]; – in fact Article I, section 9, para. 3 US Const. forbids retroactive and individual laws[29] as does the German Rechtsstaatsprinzip (Article 20 III GG) – and finally, the scope of its decisions, which potentially affects everybody. The legislative proceeding is a mainly democratic one and allows for collective self-determination.

Public authority exercised by the judiciary principally affects one person, is retrospective and is clearly defined by law.[30] Judicial proceedings[31] mainly protect the rule of law and individual self-determination. Of course, constitutional courts differ from this

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26 Möllers, note 25, at 4, at 67 *et subseq*.

27 Möllers, note 25, at 80-81; Peter L. Strauss, *Was there a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 32 Duke L. J. 789, 798 (1983), referring to Owen M. Fiss, *Foreword: The Forms of Justice*, 93 Harv. L. REV. 1, 2 (1979).

28 C. Möllers, note 25, at 80-81; *see also* BVerfG Dec. 17, 2013, NVwZ] 577, para. 55, 2014 (Ger.); Strauss, *Legislative Veto*, note 27, at 798. In fact, Article I, section 9, para. 3 US Constitution forbids retroactive and individual laws.

29 U.S. Supreme Court, Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988); for an overview of the U.S. jurisprudence in this regard s. Ronald M. Levin, *Judicial Remedies in Administrative Law*, 53 Duke L. J. 348 *et subseq*. (2003).

30 Möllers, note 25, at 80-81; Strauss, *Legislative Veto*, note 27, at 798.

31 Of course, individual self-determination is primarily based on a decision and on the will of a single person. But from a legal point of view, individual self-determination necessitates legal rights and mechanisms to protect individual self-determination, *cf.* Möllers, note 25, at 68.

analysis.[32] But it is because of this reason that their judgments and even their existence are so disputed: they are in a way a foreign concept in the court system as well as in the democratic system, protecting democracy against itself.[33] The focus on the protection of individual self-determination is strongest in the German system with its particular emphasis on subjective rights[34] and seemingly weaker in the U.S. and the EU. However, although direct access to the ECJ is hard to obtain for individuals and easy for states and European Institutions, most cases are preliminary reference procedures according to Article 267 TFEU and involve individuals litigating in order to have their rights protected. Furthermore, in the United States the Supreme Court not only held that, "[i]t is emphatically the province and the duty of the judicial department to say what the law is"[35] but that "[t]he province of the court is, solely, to decide on the rights of individuals."[36] Even if, of course, the Supreme Court articulates norms and uses its certiorari power according to the importance of the questions before it,[37] it primarily protects individual self-determination.

Since democracy and the rule of law are always co-existent in all branches,[38] the sliding scale character of this model must be emphasized: Parliament also has to respect and

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32 *See* Möllers, note 25, at 126 *et subseq*.

33 *For a discussion see* John H. Ely, *Democracy and Distrust. A Theory of Judicial Review* (1980); Alexander M. Bickel, *The Last Dangerous Branch* (1962).

34 *Cf.* Alexander Blankennagel, *The Concept of Subjective Rights as the Focal Point of German Administrative Law*, 11 Tel Aviv University Studies in Law 79-96 (1992).

35 Marbury v. Madison, 5 U.S. 137, 177 (1803), cited by City of Arlington, Texas v. FCC, 569 U.S. ___, 17 (2013) (Roberts, C.J. dissenting,).

36 Marbury v. Madison, 5 U.S. 137, 170 (1803). *But see* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363 (1973); Richard H. Fallon, *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 California L. REV. 1 (2003); *see also* Ronald Dworkin, *Taking Right Seriously* 131-49 (1977); Joseph Vining, *Legal Identity: The Coming of an Age of Public Law* (1978); Susan Bandes, *The Idea of a Case*, 42 Stanford L. Rev. 227 (1990); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976); Abram Chayes, *Foreword: Public Law Litigation at the Burger Court*, 96 Harv. L. Rev. 4 (1982); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. Rev. 1033 (1968); Robert J. Pushaw, *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447 (1994); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 Colum. L. Rev. 1432 (1988); Mark v. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 Cornell L. Rev. 633 (1977); see the overview of the law declaration model vs. the dispute resolution model in Richard H. Fallon, Jr. & John F. Manning & Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler´s the Federal Courts and the Federal System 72-75 (6th ed. 2009).

37 Fallon, Jr. & Manning & Meltzer & Shapiro, note 36, at 75.

38 *Cf.* Francesca Bignami, *The Administrative State in a Separation of Powers Constitution: Lessons for European Community Rulemaking from the United States,* Chapter II A (Jean Monnet Centre,

protect individual rights; court cases – *de facto* in civil law countries and via precedent *de iure* in common law countries – do not only concern the individual plaintiff. Still, Parliament is predominantly concerned with the collective good and courts are predominantly concerned with individual rights.

The executive branch, situated in between the two other branches, is especially "two-faced": as a rule-maker, it is close to the legislative branch; as an adjudicator, it is close to the judiciary, and hence mediates on a continuous and gradual scale between the two poles. Whether the executive acts as a rule-maker or an adjudicator its actions are to some degree determined by statute. Other than that, its exercise of public authority has different effects, as it differs in scope, in its temporal orientation and in the degree of legal pre-determination.

If the administration's action is strictly pre-determined (leaving no or only some discretion), retrospective (i.e. regulating a case that originated in the past even if the act affects the future, such as the granting of a building permit) and regulates one single case (for example, in the case of a demolition order), then the administration acts in the adjudicative mode. If the administration's action is less legally pre-determined, prospective, and concerns everybody (as in delegated rule-making), it rather acts in a legislative mode.

Elements of collective self-determination in the rulemaking mode are far more distinct than in the administration's adjudicative actions, but less so than in the actions of the legislature, because the administration is bound more strictly by law. Elements of individual self-determination in the administration's adjudicative mode are far more distinct than in the in the administration's rulemaking mode, but less so than in the judiciary, as there is more discretion yielded to the administration.

From the separation of powers point of view, delegated rulemaking belongs primarily to the democratic sphere of collective self-determination, while the adjudicative mode is situated more in the sphere of the rule of law and individual self-determination.

NYU School of Law, Working Paper, 1999), *available at* http://www.jeanmonnetprogram.org/archive/papers/99/990501.html.

IV. Conceptualizing Participation via the Separation of Powers Doctrine: A Constitutional Theory of Imperative Participation

The functions of participation and the functions of the separation of powers doctrine overlap. Both are concerned with the subject matter of public authority: the separation of powers doctrine governs how public authority is exercised and assigned to the proper branch; participation is the partaking in the exercise of public authority. Both control and limit public authority in order to protect individual self-determination; both follow the logic of democracy and efficiency in order to allow for collective self-determination. Owing to this overlap of functions and subject matter, the fourth function of the separation of powers doctrine – which unravels the "contradictory claims of individual and democratic collective autonomy"[39] – serves as the guiding principle in creating a constitutional theory of imperative participation:

Participation in legislative proceedings, which enables collective self-determination, requires the people to decide on future matters concerning everybody. This is evident in instances of direct democracy where the people – i.e. everybody – decide on general laws. But it also holds true with regard to representative democracy where a parliament, which is elected and therefore decided upon by the people, decides on general laws. As the mode of collective self-determination also needs to respect individual self-determination, the people's laws will have to respect the rule of law and individual self-determination.

In contrast, participation in judicial proceedings, which protect individual self-determination, requires only one person to partake – i.e. the person who wants to restore her or his individual self-determination that was impaired by the State in the past. Here, the State is forced to react and render a verdict if the individual's rights have been affected. The decision-making powers remain with the public authority and are executed strictly according to the law, in order to respect democracy/collective self-determination.

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39 Möllers, note 25, at 4.

The executive branch, with its different functions and organs, requires a deeper analysis. As the second branch mediates on a continuous and gradual basis between the two poles of democracy and the rule of law, it first needs to be determined which form of self-determination is the focus of the particular exercise of public authority. The "who" and the "how" of participation depends on whether the administrative act is rather legislative (i.e. a rule, and thus more about collective self-determination) or rather adjudicative (i.e. an order, and thus more about individual self-determination). From this theory, it follows that fewer and fewer people can participate in administrative action as it moves on the sliding scale from the legislative mode (which allows everybody to participate) to the adjudicative mode (which allows only the ones whose rights have been breached to participate). The decision-making power will always stay with the state in order to protect individual *and* collective self-determination. Still, within the discretion accorded to the state's organs, it has to consider the results of participation: the more discretion a specific state organ has been accorded by law, the more it has to consider the results of the participation, and *vice versa*. If the citizens want to decide themselves on administrative questions, they have to convince the people to either vote for a new government, or – if available – to decide on a law via means of direct democracy.

In short, the separation of powers doctrine serves as an organizational principle balancing democracy (or collective self-determination) and the rule of law (encompassing individual rights and thus individual self-determination) by assigning public authority to the "proper" branch: The legislature enables collective self-determination, the judiciary protects individual self-determination and the executive is situated in between the two on a sliding scale. From this, it follows that in legislative matters, everybody must be able to participate and decide (elections, direct democracy); in judicial matters, an individual must be able to participate but the state decides. Finally, participation in the second branch must never allow for the public to decide, as the executive is already more rule-bound than the legislature. At its democratic end (rulemaking) everybody must be able to participate, at its rule of law end (adjudication) only the affected individuals must be able to do so.

The methodological path chosen is inductive with regard to public participation and deductive with regard to principles of democracy and the rule of law. An inductive approach reasons from specific events to an underlying principle. A deductive approach reasons from a general principle to a specific answer. With the help of the deductive approach, the constitutional theory of imperative participation has been developed by deducing the modes of participation from the democracy principle, the rule of law principle and the separation of powers doctrine. The inductive approach will confirm that theory by showing that the way participation is already articulated in the legal order of the United States, the European Union and Germany accords to the constitutional theory of imperative participation.

V. Delegated Rulemaking: The Theory's Litmus Test

The constitutional theory of imperative participation, outlined above, needs to be tested thoroughly. As delegated rulemaking is situated at the heart of the separation of powers doctrine – the executive acts in a quasi-legislative function[40] on the basis of a delegation by the legislature and is scrutinized by the judiciary – it serves as the litmus test for the theory, which strives to find an answer with regard to all three branches. A rule is – in short – a binding government statement of general applicability and future effect. It thus resembles a law, but has not been passed by the legislature. This constellation therefore carries certain separation of powers implications.

According to Article I Section 1 US Constitution, Congress, as the legislature, is charged with the task of making laws. This task is further refined in Article I Section 8, which inter alia contains the necessary and proper clause.[41] Article II Section 1 US Constitution entrusts the President, as the head of the executive, with the task of taking care that these laws are faithfully executed. Article III US Constitution confers on the judiciary the power to decide cases and clarify controversies. Since 1789, Congress has delegated some of its power to the President and other organs of the executive branch. Although

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40 Humphrey's Executor v. U.S., 295 U.S. 602, 628 (1935).

41 *Cf.* John Mikhail, *The Necessary and Proper Clauses*, 102 Geo. L. J. 1045 (2014).

delegated rulemaking is not mentioned in the Constitution, it is nevertheless accepted in principle.[42] This has been confirmed by the Supreme Court, which watches over the legality of delegated rulemaking.

In Germany, the Bundestag together with the Bundesrat (the higher chamber, made up of representatives of state governments) are charged with the task of making laws. Article 80 of the Basic Law foresees that parliament can delegate rulemaking powers to the federal government, federal ministers or a Land Government. As this power is applied in a rather strict way, the Federal Constitutional Court, in contrast to the US Courts,[43] has struck down many delegating laws as well as rules.

Although the European Union is not a state but a supranational organization, Parliament and Council can be understood to be the principal "lawmakers". They may delegate rulemaking powers to the European Commission according to Articles 290 TFEU (non-legislative acts of general application) and 291 TFEU (implementing acts). As the two other courts, the European Court of Justice has expressed itself on cases concerning delegated rulemaking.

In the following, it will be explored how the delegation process by the legislature (A.), executive rulemaking (B.) and judicial review (C.) function, and how the separation of powers doctrine guides citizens' involvement in these processes.

A. The Legislature: Democratic Delegation of Powers

The legislature first and foremost serves democratic ends and allows for collective self-determination. All three systems foresee – albeit in different ways – delegating laws. They are like all laws prospective, general and only bound by the Constitution. Participation in passing delegation laws must encompass the people, i.e. everybody, and must allow for decision-making power. This follows from the democratic character of

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42 For a timeline of different phases of rulemaking see Peter L. Strauss, *From Expertise to Politics: the Transformation of American Rulemaking*, 31 Wake Forest L. Rev. 745, 750 *et subseq.* (1996).

43 The Supreme Court has only struck down twice a delegating law: Panama Refining v. Ryan, 293 U.S. 388 (1935). A..L.A. Schechter Poultry Corp. v. U. S., 295 U.S. 495, 498 (1935).

lawmaking. Although the delegating process, the oversight mechanisms and the citizens' participation in the United States (1.), in Germany (2.) and in the European Union (3.) differ, delegation in all three legal orders is governed by the separation of powers doctrine and foresees for indirect but decisive participation of the people.

1. United States

The separation of powers doctrine is the decisive constitutional standard to be applied in regulating the delegation of powers from Congress to the administration. The democratic legislature cannot simply delegate broad powers to the executive, as this might be in breach of the separation of powers doctrine. Imagine if Congress were to delegate all lawmaking powers to the President – by doing so, it would abolish the separation of powers doctrine, and with it, the Constitution itself.[44] In order to adhere to the separation of powers doctrine, certain delegation standards must be followed (a.). Participation in the delegation process is equally governed by the separation of powers doctrine. As it is the legislature – and thus the most democratically-oriented branch – that delegates, participation involves everybody and allows everybody to decide (b.).

a. Democratic Control: Standards of Rulemaking and Oversight Mechanisms

Delegation is not mentioned within the United States Constitution. Article I US Constitution provides that the legislature will make laws. Laws are widely understood to be binding norms of general character regulating future events, passed by Congress that is only bound by the Constitution. They thus allow for collective self-determination. Article II US Constitution provides that the executive will faithfully execute these laws. From the principle of democracy and the separation of powers doctrine, it follows that Congress has to guide and steer the executive. In order to do so, different standards and oversight mechanisms have been employed and can be distinguished. The point of departure for all research on delegation is the non-delegation doctrine, which suggests that delegation is unconstitutional (aa). Via the intelligible principle test, the courts undertook the effort to structure the delegation of rulemaking powers from congress to

44 In fact the German Enabling Act of 1933 (Ermächtigungsgesetz) foresaw exactly that and turned Germany from a democracy to a dictatorship.

the agencies (bb.). Legislative oversight by legislative veto has been limited by the Supreme Court but is still in use (cc.). Often overlooked, Congress also possesses further instruments which provide strong oversight mechanisms (dd.).

aa. Non-delegation doctrine

The starting point of every inquiry into delegation is the so-called non-delegation doctrine. It is rooted in the separation of powers doctrine and said to prohibit the delegation of rulemaking power to the executive.[45]

Supporting the claim of the existence of a non-delegation doctrine, in 1892, the Supreme Court without further argument simply held non-delegation to be "a principle universally recognized."[46] Similarly, in Youngstown Sheet and Tube Co. v. Sawyer, a case that was not about delegated rulemaking in particular but about presidential powers in general, the Supreme Court referred to the vesting clauses of Article I and II US Constitution and held that "the framework of our Constitution, the President's [or any other executive branch's] power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[47]

On the contrary, the first delegation already took place in 1789;[48] Chief Justice John Marshall declared delegation which "fill[s] up the details" to be "certainly" lawful;[49] the Supreme Court speaks affirmatively of the quasi-legislative function of agency activity;[50] and only in two cases did the Supreme Court actually invalidate a delegating law.[51] Strikingly, these two laws were not invalidated on the grounds of the non-delegation doctrine, but because Congress delegated overly broad powers to the executive. It is thus an overstatement to say that the doctrine "has had one good year, and 211 bad ones (and counting)."[52] Rather, the non-delegation doctrine is "no doctrine at all."[53]

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45 Mistretta v. U.S., 488 U.S. 361, 487 (1989).
46 Field v. Clark, 143 U.S. 649, 692 (1892); *see also* The Brig Aurora, 11 U.S. (7 Cranch), 382 (1813).
47 As Justice Black for the majority stated flatly in Youngstown, Sheet & Tube Co. v. Sawyer, 343 U.S. 570, 587 (1952); *see also* Buckley v. Valeo, 424 U.S. 1, 123.
48 1 Stat 95 (1789); 1 Stat 137 (1790).
49 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).
50 Humphrey's Executor v. U.S., 295 U.S. 602, 628 (1935).
51 A.L.A. Schechter Poultry Corp. v. U.S., 295 U.S. 495 (1935); Panama Refining. v. Ryan, 293 U.S. 388 (1935).
52 Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000).

The constitutionality of delegated rulemaking is not only necessary to allow for effective and efficient exercise of public authority,[54] but is furthermore in accordance with the vision of the founding fathers. Madison has already explained in The Federalist No. 47 that separation of powers was never meant as a clear-cut separation of either form or function. Rather, this doctrine allows for overlaps and intersections.[55] The United States Constitution consequently allows Congress to delegate rulemaking power – as long as it stays within the constitutional boundaries set by the separation of powers doctrine.

bb. Intelligible principle

The Supreme Court has held – though without further elaboration – that Congress, as the lawmaker, needs to uphold its responsibility and thus steer the administration via an intelligible principle.[56] This principle was the decisive argument in striking down the first delegating act ever in the *Panama Refining* decision.[57] Section 9 (c) of the National Industrial Recovery Act gave the President the power to prohibit the transport of hot oil, *i.e.* oil produced in excess of state quotas, in interstate and foreign commerce. As the Court could find no standard but only a "declaration of policy" in which certain (if conflicting[58]) goals of the act were announced, it found the delegation too broad and unconstitutional: "As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."[59] This act was an extreme example of the absence of any standards and "paled in comparison (even at the time) to the vagueness associated with countless delegations to administrative agencies."[60] But neither in this case – nor in the Schechter decision of the same year, which was the last delegating act ever invalidated by the Supreme Court – did the Court positively state

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53 Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2256, 2364 (2001).
54 *For reasons speaking favor of the necessity of delegation see* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1695 *et* subseq. (1975).
55 *See* Mistretta v. U.S., 488 U.S. 361, 380 *et subseq*. (1989).
56 J.W. Hampton& Co v. U.S., 276 U.S. 394, 409 (1928).
57 Panama Refining v. Ryan, 293 U.S. 388 (1935).
58 Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analyses of United States and German Law*, 46 Admin. L. Rev. 213, 219 (1994).
59 Panama Refining v. Ryan, 293 U.S. 388, 430 (1935).
60 Kagan, note 53, at 2365-2366.

what exactly it is that the intelligible principle demands.[61] In Schechter, the Supreme Court declared the centerpiece[62] of the National Industrial Recovery Act to be unconstitutional. Its section 3 was about "codes of fair competition" created by a round table of union and industry representatives and requiring adoption by the President in order to become effective. The Supreme Court concluded that section 3 "supplies no standards for any trade, industry or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead, it authorizes the making of codes to prescribe them. For that legislative undertaking, it sets up no standards, aside from the statement of the general aims of rehabilitation, correction and expansion found in § 1."[63] This delegation went even further than the one in Panama Refining, especially as it allowed for private parties to have a considerable influence in the preparation of the rules.[64]

Other delegating statutes were upheld by the Supreme Court, including delegations that granted power to make rules "as public convenience, interest, or necessity requires"[65] or to fix prices "in order to stabilize commodity prices, be fair and equitable, and be fixed with due consideration to prevailing prices during a designated base period".[66] Even statutes that authorize regulations in the "public interest" have been found constitutional by the Supreme Court.[67] The Agricultural Adjustment Act allows the Secretary of Agriculture to make rules with regard to agricultural marketing; only

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61 The Supreme Court did not mention the intelligible principle but spoke of "standards" that are not met. Kenneth Culp Davis, 2 Administrative Law Treatise 160 (2nd ed. 1979), finds the intelligible principle to be narrower; *but see* Louis Leventhal Jaffe, *Judicial Control of Administrative Action* (1965), at 60 who finds the standards to be narrower; others do not want to differentiate e.g. Kischel, note 58, at 225.

62 Kischel, note 58, at 220.

63 A.L.A. Schechter Poultry Corp. v. U. S., 295 U.S. 495, 498 (1935).

64 Kagan, note 53, at 2365; *see also* Ziamou, note 7, at 55 *et subseq*. and Stone & Seidman & Sunstein & Tushnet, note 23, at 425. The National Recovery Act of 1933 foresaw that the President was supposed to approve the code if several criteria were met, inter alia that (1) 'no inequitable restrictions on admission to membership' existed and (b) that the codes were not used to get rid of competition. Also Davis, note 27, at 176-77: "most sweeping congressional delegation of all time."

65 National Broadcasting v. U.S., 319 U.S. 190, 214, 216-26 (1943).

66 Kischel, note 58, at 220, *referring to* Yakus v. U.S., 321 U.S. 414, 420-421 (1944).

67 *See, e. g.*, National Broadcasting. v. U.S., 319 U. S. 190, 225-226 (1943) (Federal Communications Commission's power to regulate airwaves); New York Central Securities Corp. v. U.S., 287 U.S. 12, 24-25 (1932) (Interstate Commerce Commission's power to approve railroad consolidations. *See ibid* and Whitman v. American Trucking Associations, 531 U.S. 457, 475 (2001).

requiring that agricultural marketing should be "orderly."[68] The Patient Protection and Affordable Care Act[69] authorized different agencies to issue "such regulations as may be necessary".[70] Neither law has been challenged on these grounds.

While upholding these rather broad statutes, the Supreme Court has failed to give content and meaning to the intelligible principle. Undertakings in the lower courts to argue that procedural safeguards developed by the agency form part of the principle, and thus implement a higher standard, have failed.[71] In Whitman v. American Trucking Associations, Inc., the Court held that the development of procedural standards by the agency cannot cure an unlawful delegation of Congress.[72] In this decision, the Court at least gave some structure to the principle by holding that "[t]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."[73] In addition, one important and often undervalued consequence of the intelligible principle is its interpretative effect, which leads the Supreme Court to give a narrow interpretation to statutes in order not to be forced to invalidate them.[74]

cc. Legislative Veto

Other methods remain to control the administration and allow Congress to stay true to the separation of powers doctrine while delegating. Congress delegates rulemaking powers via laws – which can be repealed by Congress. But a repeal of a law is a law in itself, and as such subject to a presidential veto. In order to avoid the presidential veto,

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68 Maeve P. Carey, Cong. Research Serv., RL32240, The Federal Rulemaking Process: An Overview (2013), at 4, refers to examination of the amount of regulatory discretion afforded to the agencies, U.S. General Accounting Office, Regulatory Burden: Some Agencies' Claims Regarding Lack of Rulemaking Discretion Have Merit, GAO/GGD-99-20, January 8, 1999.

69 ACA, P.L. 111-148.

70 Carey, note 68, at 4, refers to Curtis W. Copeland, Cong. Research Serv., R41180, *Regulations Pursuant to* the Patient Protection and Affordable Care Act *(P.L. 111-148)* (2010).

71 In Amalgamated Meat Cutters v. Connally, F337 F.Supp. 737 (1971), Ziamou, note 7, at 56; *see also* Loving v. U.S., 517 U.S. 748 (1996); Touby v. U.S., 500 U.S. 160 (1991), both upholding delegation acts against non-delegation complaints.

72 Whitman v. American Trucking Associations, 531 U.S. 457, 473 (2001). For developments up until the D.C. Court decision in Whitman, see Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich.. L. Rev. 303, 342 *et subseq*. (1999); see also Kischel, note 58, at 226.

73 Whitman v. American Trucking Associations, 531 U.S. 457, 475 (2001). This is also true in cases in which fundamental rights are touched upon, Kent v. Dulles, 351 U.S. 116 (1958). This can be compared to the German Wesentlichkeitstheorie; Ziamaou, note 7, at 56.

74 See Kischel, note 58, at 222 *et subseq*. The Supreme Court has e.g. read the word "significant" into the risk requirement in the Benzene Case.

the "legislative veto" was developed. In the delegating statutes, the two chambers of Congress, or sometimes even only one of them or solely a committee, were empowered to veto an order or a rulemaking by the agency, thus taking back Congress' power.[75] But in INS v. *Chadha*, the Supreme Court decided that the separation of powers doctrine demands of Congress to give the President the opportunity to veto the congressional act reversing an agency order.[76] The same year, the Supreme Court extended its *Chadha* finding to rules as well.[77] These cases sound "the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto'".[78] Still, more than 400 legislative vetoes were enacted between the decision and 2005. Although the President proclaims them to be unconstitutional on a regular basis, they have an important impact on the agencies, as they need to work with the committees to which the veto's competence is usually transferred. Consequently Congress still heavily impacts on the agencies through the rulemaking process.[79]

dd. Other Congressional Oversight Mechanisms

In order to steer the administration, Congress possesses a wide set of tools in addition to the ones already analyzed above. Contrary to the perception that the leeway is so wide that the agencies have even been called "a junior-varsity congress,"[80] congressional oversight mechanisms allow for a considerable amount of control and accountability.[81] Congress can phrase its delegating laws in very strict language;[82] withhold funding if it

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75 *See* Herrmann Pünder, *Exekutive Normsetzung in den Vereinigten Staaten von Amerika und der Bundesrepublik Deutschland* 158 *et subseq.* (1996). Even if Congress has not used it quite often, *see* Kagan, note 53, .at 2257, the existence of it already has a controlling effect on the Administration.

76 INS v. Chadha, 462 U.S. 919 (1983).

77 U.S. Senate v. FTC, 463 U.S. 1216 (1983).

78 Chevron USA Inc. v. Natural Resources Defense Council (NRDC), 462 U.S. 919, 967 (1984) (White, J. dissenting).

79 Louis Fisher, Cong. Research Serv., RS22132, Legislative Vetoes After Chadha (2005).

80 Mistretta v. U.S., 488 U.S. 361 (1989).

81 *See* Kerwin & Furlong, note 17, at 216-229; see also the works by Mathew McCubbins & Roger Noll & Barry Weingast ("McNollgast"), *Administrative Procedures as Instruments of Political Control*, 3 J. L. Econ. & Org. 243, 244 (1987), who argue that the design and structure of agencies was decisive in controlling rulemaking through Congress.

82 If it does not, one can even argue that a form of delegation has taken place: From Chevron follows that in case of ambiguity the statute takes on the meaning that the agencies have given to it (Sunstein, *Canons*, note 52, at 322 *et subseq.*). This can be regarded as a case of implicit delegation, *ibid,* at 329; Chevron USA Inc. v. NRDC, 67 U.S. 837, 842 et subseq. (1984). Thus some voiced concern against the Chevron judgment precisely on non-delegation grounds, *see* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 511-26

is not content with the work of the executive;[83] or make use of appropriations riders in order to restrict the use of funds for special purposes[84] or in order to direct the use of funds for special purposes.[85] Despite the *Chadha* decision, Congress can still legislatively override an agency's decision so long as the President does not veto it, as well as revise statutory mandates.[86] All agencies must also submit their rules to the United State's Government Accountability Office – both houses of Congress can then issue a joint resolution of disapproval,[87] or even require the agency to get a positive affirmation by Congress before the rule enters into force.[88] Moreover, Congress can hold "serious"[89] and "embarrassing"[90] oversight hearings and finally block presidential nominees, which has been called the "perhaps most effective means of influence."[91] Although it has been argued that Congress has no great interest in overseeing the administration,[92] the opposite is true: Congress uses its tools in such a way that the rulemaking procedure can be called a system of "congressional dominance."[93]

ee. Delegating Rulemaking Powers in the United States: Some Conclusions

The most important insight is that the separation of powers doctrine governs the delegation of powers and allows for the delegation of rulemaking powers from the democratic legislature to the executive. The doctrine is indeed a system of checks and

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(1989); *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 38 Duke L. J. 511, 519-520 (1989).

83 Kagan, note 53, at 2256; Reeve T Bull, *Making the Administrative State 'Safe for Democracy': A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking*, 65 Admin. L. Rev. 611, 619 (2013); *see e.g.* Congressional Review Act, 5 U.S.C. §§ 801–08 (2006).

84 E. Donald Elliott, *INS v. Chadha: The Administrative Constitution, The Constitution and the Legislative Veto*, 1983 Sup. Ct. Rev. 125, 156 (1983) with further references.

85 Copeland, note 70, at 17.

86 Kagan, note 53, .at 2256; Elliott,note 84, at 156; Bull, note 83, at 619; *see e.g.* 5 U.S.C. §§ 801-08 (2006).

87 *See* Richard S. Beth, Cong. Research Serv., RL 31160, Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act and CRA, 5 U.S.C. sections 801-808 (2001).

88 Elliott, note 84, at 156 with further references.

89 *Kagan,* note 53, at 2256.

90 Elliott, note 84, at 156 with further references.

91 Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. Pol. Econ. 765, 769 (1983) who argue later on that especially the Congressional Committees yield influence; Kagan, note 53, at 2256.

92 Kagan, note 53, at 2256 *et subseq.*

93 Weingast & Moran, note 91, at 767, 792 *et subseq.*; based on empirical research. *See also* Elliott, note 84, at 156 *et subseq*. for even more different means of controlling the administration.

balances, not a clear-cut separation. The delegating laws are – like all laws – prospective, general and only bound by the constitution. This shows that Congress is acting in a democratic manner and allows for collective self-determination – not only by controlling the administration, but also by empowering it to act and pursue the democratic will of the people. Allowing delegation is not only permissible but also of considerable importance in today's administrative state, as delegation is necessary to heighten the state's effectivity and efficiency.[94]

Although the underdeveloped intelligible principle and the finding of the unconstitutionality of the legislative veto seems not to provide a safeguard against too much delegation of powers,[95] which would run contrary to the demands of the separation of powers doctrine, the checks against uncontrolled delegation are rather strong, and Congress is left with ample tools in order to control the Executive. The democratic control that Congress asserts is stronger than one might think and is in accordance with the separation of powers doctrine.

b. Imperative Participation in the Delegation Process

Participation in the delegation process involves everybody and allows everybody to decide. This can be deduced from the democratic character of lawmaking. Participation in the actual delegation process on the federal level is rather sparse. But before Congress can delegate, it must be elected. In addition, the people vote for the President, who also possesses control mechanisms over the agencies and their rulemaking.[96] Electing a President who is in favor of deregulation, like Ronald Reagan, or in favor or regulation, like Bill Clinton, does lead to significant differences in the actions of agencies.[97]

Different from this first mode of imperative participation concerning elections, the second mode of imperative participation on the federal legislative level is only available

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94 For reasons in favor of the necessity of delegation see Stewart, *Reformation*, note 54, at 1695 *et subseq.*

95 Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States* (2nd ed. 1971); Kenneth F. Warren, *Administrative Law in the Political System* 207, 217 *et subseq.* (5th ed. 2010). For German law see David P. Currie, The Constitution of the Federal Republic of Germany 133 (1994).

96 *See infra* p. 39 *et subseq.*

97 *See* Kagan, note 53, at 2248 *et subseq.*

in theory, but well known on the state level.[98] Without delving further into the state level, the existence of direct democracy here shows that it is not just a theoretical possibility but a constitutional reality. Direct democracy allows the people to pass delegating laws themselves. One can differentiate between a referendum, where the state asks its people to decide on a certain legislative issue,[99] and an initiative, where any group of its people may bring a legislative issue to a national vote. [100]

A third mode of imperative participation in the legislative process exists, but again only in theory on the federal level. This is the right to petition and to partake in congressional lawmaking. Although everybody can petition Congress, as enshrined in the First Amendment, the right to petition does not form part of imperative participation, as the Supreme Court held that "[n]othing in the First Amendment or in this court's case law [...] suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to communications of members of the public on public issues."[101] Neither does a right to partake in congressional lawmaking exist. Although the committee hearings in both the Senate and the House allow for witnesses to state their point of view, these witnesses need to be invited by the chair or the minority leader to testify. The invitees almost always include an administration official and the bill's sponsor or most important co-sponsor(s). In addition, the chair invites lobbyists or local governments likely affected by the bill. These hearings do not give everybody a chance to be heard in the lawmaking process. That things can be done differently may be observed in countries like South Africa where citizens' submissions in the legislative process have to be considered,[102] or states like Montana, where everybody

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98 *See* John Matsusaka, *Direct democracy works,* 19 J. of Econ. Persp. 185 (2005).

99 A referendum "is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." California Constitution Art. 2. Sec. 9.(a).

100 An initiative is "the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." California Constitution Art. 2. Sec. 8.(a).

101 Minnesota Board for Community Colleges v. Knight, 465 U.S. 271 (1984).

102 South African Constitutional Court, *Doctors for Life International v. the Speaker of the National Assembly and Others*, 2006 (6) SA 416 (CC); South African Constitutional Court, *Matatiele Municipality and Others v President of the Republic of South Africa and Others*, 2007 (1) BCLR 47 (CC). *See* Theunis Roux, *The Principle of Democracy in South African Constitutional Law*, in: Stu Woolman & Michael Bishop (eds.), *Constitutional conversations* 79 (2008); Danie Brand, *Reply: Writing the Law Democratically*, in: Stu Woolman & Michael Bishop (eds.), *Constitutional conversations* 97 (2008); Barbara Loots, *The Represented and the Representatives Hand in Hand:*

holds the right to speak in congressional committees.[103] This form of participation differs from the two aforementioned modes of legislative participation in two very important aspects: first, it is not the people as an organ that is participating, but citizens as individuals; second, citizens cannot decide on the issues themselves. Of course, if the citizens constitute themselves as the people, they take up the lawmaking function, either by voting for a new legislature or by using means of direct democracy.

With regard to the two last modes of imperative participation, normative reality is obviously not in conformity with the theory. This is not surprising, as the inductive approach only reaches as far as today's representative system. But on a theoretical level, one can deduce this mode of direct democracy from the separation of powers and the democracy principle.

2. Germany

As in the United States, the separation of powers doctrine is the decisive constitutional standard in Germany to be applied in regulating the delegation of powers from parliament to government. In order that the democratic legislature does not delegate too broad powers to the executive a special constitutional provision makes provision for constraints to the delegating law (a.). Participation in delegation is equally governed by the separation of powers doctrine. As the legislature, and thus the most democratic oriented branch, delegates, participation involves everybody and allows everybody to decide (b.).

Parliamentary Legislation and the Principle of Responsive Government, in: Henk Botha & Nils Schaks & Dominik Steiger (eds.), *The End of the Representative State? Democracy at the Crossroads* ((to be published 2015); Karen S. Czapanskiy & Rashida Manjoo, *The Right of Public Participation in the Law-Making Process and the Role of the Legislature in the Promotion of this Right*, 19 Duke J. Comp. & Int'l L. 1 (2008).

[103] "Committee hearings allow you to speak your mind before the committee takes any action and before the bill is brought to the attention of the House and Senate for debate and a final vote. [Congress is] eager to hear your thoughts and perspective. Don't be intimidated, and don't let stage fright stop you from taking this opportunity to participate in your government!", The Montana Legislature, Testifying Before a Committee, http://leg.mt.gov/css/About-the-Legislature/Lawmaking-Process/testify.asp.

a. Democratic Control: Standards of Rulemaking and Oversight Mechanisms

Delegation as such is not disputed, there is no such thing as a non-delegation doctrine. It is all about the how. Delegation is linked to the rule of law, the democracy principle[104] and consequently the separation of powers doctrine. Article 80 of the basic law, a special norm governing delegation, specifies the separation of powers requirements and states that the delegating act needs to specify the content – the subject matter of the rule –, the purpose – the intended aim to be achieved by the rule –, and the scope of the authority – the limits and the extent of the rule – conferred.[105] These requirements are rather strict and might be understood as a real and genuine intelligible principle.[106] In addition, issues touching upon fundamental rights need to be decided by Parliament (so called *Wesentlichkeitstheorie*).[107] Finally, Parliament can veto every rule.[108]

As in the United States, the separation of powers doctrine governs the delegation of powers and allows for the delegation of rulemaking powers from the democratic legislature to the executive. The delegating laws are prospective, general and only bound by the constitution, the Bundestag acts in a democratic manner and allows for collective self-determination. Through the German version of the intelligible principle and the existence of a legislative veto, the Grundgesetz allows for a strict oversight over the executive.[109] Especially in a parliamentary system like Germany's where the rule-maker is very close to the lawmaker due to party affiliations,[110] such a strict oversight by the

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104 Ziamou, note 7, at 44.

105 Ziamou, note 7, at 58; BVerfGE 20, 283, 306; BVerfGE 19, 354, 364; BVerfGE 5, 71, 77.

106 *For these see* Kischel, note 58, at. 213 *et subsq.*; Georg Nolte, *Ermächtigung der Exekutive zur Rechtsetzung* 118 Archiv des öffentlichen Rechts 378-413 (1993); ; Currie, note 21 , 2131 *et subsq.*; Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 Yale L. J. 1341, 1387 *et subsq.* (2004).

107 BVerfGE 8, 274, 321. There is even a "Rechtsverordnung mit parlamentarischem Zustimmungsvorbehalt: which is inter alia criticized by Udo di Fabio, *Gewaltenteilung*, in: Josef Isensee & Paul Kirchhof (ed.), *Handbuch des Staatsrechts Band II* (3rd ed. 2004), para. 44, because it leads to a diffusion of accountability; *see also* Ralf Poscher, Funktionenordnung, at 567; *see also* Johannes Saurer, *Die Funktionen der Rechtsverordnung* 371 et subseq. (2005) referring to BVerfGE 114, 196, 234-242.

108 BVerfGE 22, 330, 346; BVerfGE 114, 196, 235 *et subsq.*; Arnd Uhle, *Art. 80* para. 29-30, in: BeckOK *GG*; Ingo v. Münch & Phillip Kunig, *GG Art 80* para. 75; Horst Dreier & Hartmut Bauer, *GG Art. 80* para. 54; Arnd Uhle, §24 para. 108, in: Winfried Kluth & GünterKrings, *Gesetzgebung* (2014).

109 Pünder, *Normsetzung,* note 75, at 113.

110 *See* Kischel, note 58, pp. 251-256.

legislature shows the importance of the separation of powers doctrine and the importance of the only directly democratically legitimated organ in the parliamentary system.

b. Imperative Participation in the Delegation Process

Participation in the delegating process involves everybody and allows everybody to take part in the decision. This follows from the democratic character of lawmaking. Participation in the actual delegation process on the German federal level is similar to that in the United States: the delegator is elected by popular vote, direct democracy does not exist on the federal level but only on the State level[111] and participation in Parliament's lawmaking process is restricted to experts.[112] Thus, although participation works according to the constitutional theory of imperative participation, it does so in a limited manner and can – and from a democratic point of view: should – be expanded.

3. European Union

Although the European Union is not a state and the institutional make-up makes it hard to delineate clearly between three branches, some kind of separation of powers doctrine exists[113] – often called institutional balance – and controls the delegation of powers. Parliament and the Council of the European Union (Council) as lawmakers can delegate to the Commission. This delegation power is restricted by TFEU provisions (a.). Participation in delegation is equally governed by the separation of powers doctrine. Different from the United States and Germany, the two institutions that delegate together are not both elected directly by the people. The discussions about the EU's

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111 Johannes Rux, *Direkte Demokratie in Deutschland: Rechtsgrundlagen und Rechtswirklichkeit der unmittelbaren Demokratie in der Bundesrepublik Deutschland und ihren Ländern* (2008).

112 Section 70 Joint Rules of Procedure of the Federal Ministries.

113 *See* Paul P. Craig, *Institutions, Power and Institutional Balance*, in: Paul Craig & Grainne de Burca (eds.), *The Evolution of EU Law* 41-84 (2011); Merijn Chamon, *The Institutional Balance, an Ill-Fated Principle of EU Law?* 21 European Pub. L. 371-391 (2015); Thomas Christiansen, *The European Union after the Lisbon Treaty: An Elusive 'Institutional Balance'?*, in: Andrea Biondi & Piet Eeckhout & Stefanie Ripley (eds.), *EU Law after Lisbon* (2012) at 228-247; Jörg Monar, *The European Union's institutional balance of power after the Treaty of Lisbon*, in: Enrique Banús Irusta (ed.), *The European Union after the Treaty of Lisbon: Visions of leading policy-makers, academics and journalists* 60-89 (2011); Torsten Siegel, *Das Gleichgewicht der Gewalten in der Bundesrepublik Deutschland und in der Europäischen Gemeinschaft*, 63 Die Öffentliche Verwaltung 1-11 (2010); Torsten Siegel, *Das institutionelle Gleichgewicht in der Bundesrepublik Deutschland und in der Europäischen Gemeinschaft* (2009).

democratic deficit fill volumes.[114] For the purpose of this article it suffices to say that the EU lawmaker is the most democratically oriented institution in the EU. Participation on this level thus in principle must involve everybody and must allow everybody to decide (b.).

a. Democratic Control: Standards of Rulemaking and Oversight Mechanisms

The delegation of acts from the European Parliament to the European Commission is regulated in two different manners: The rulemaking standards and oversight mechanisms differ between non-legislative acts of general application (Article 290 TFEU) and implementing acts (Article 291 TFEU). Parliament and Council possess some discretion in deciding whether they apply Article 290 or 291 TFEU.[115] These two articles are closely related to the separation of powers doctrine.[116]

According to Article 290 TFEU, the Council and the European Parliament may delegate rulemaking power to the Commission to supplement or amend certain non-essential elements of the legislative act. Article 290 TFEU foresees an intelligible principle comparable to Article 80 GG: The delegating act must define the objectives, content, scope and duration of the delegation of power.[117] The essential elements of the area shall

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114 *See inter alia* Simona Piattoni (ed.), *The European Union: Democratic Principles and Institutional Architectures in Times of Crisis* (2015); Marija Bartl, *The Way We Do Europe: Subsidiarity and the Substantive Democratic Deficit* 21 European L. J. 23-43 (2015); Jürgen Habermas, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible* 21 European L. J. 546-557 (2015); Henrik Banga & Mads Dagnis Jensenb & Peter Nedergaard, '*We the People*' *versus* '*We the Heads of States*': *the debate on the democratic deficit of the European Union* 36 Policy Studies 196-216 (2015); BVerfGE 123, 267, 364 *et subseq*., Daniel Halberstam & Christoph Möllers, *The German Constitutional Court says „Ja zu Deutschland!"*, 9 G. L. J. 1241 (2009); Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht´s Epigones At Sea*, 9 G. L. J. 1201 (2009); Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 Columbia L. Rev. 628.738 (1999); Kalypso Nicolaïdis, *The New Constitution as European Democracy*, 7 Critical Rev. of Int. Soc. & Pol. Phil. 76-93 (2004); Andreas Follesdal & Simon Hix, *Why There is a Democratic Deficit in the EU:. A Response to Majone and Moravcsik*, 44 J. C. M. S. 533-562 (2006).

115 ECJ, C-427/12 Commission v. Parliament and Council, Judgment of 18 March 2014, para. 40; *see* Alberto Alemanno, *The Biocides judgment: In search of a new chemistry for the principle of EU institutional balance*, http://europeanlawblog.eu/?tag=case-c-42712-commission-v-parliament-and-council.

116 Herwig Hofmann, *Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality*, 15 European L. J.al 482-505, 483, 497 (2009)..

117 Hofmann, note 116, at491 et subseq. (2009).

be reserved for the legislative act and accordingly shall not be the subject of a delegation of power. A legislative veto is explicitly foreseen by Art. 290 TFEU and comes in two ways.[118] Either the European Parliament or the Council may decide to revoke the delegation altogether if so foreseen in the legislative act or the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act. Here, the oversight mechanisms are comparable to the German Grundgesetz rather than to the US system: While delegation is especially foreseen by the treaties, a rather strict intelligible principle applies. Furthermore, the legislative acts may provide for the possibility of a legislative veto.

The oversight mechanisms for the implementation acts of article 291 TFEU differ fundamentally. These implementing acts can be called "the third category in the hierarchy of norms"[119] apart from Article 289 (ordinary legislative procedure) and 290 TFEU. Article 291 TFEU foresees that member states shall adopt all measures of national law necessary to implement legally binding EU acts. In case uniform conditions for implementing legally binding EU acts are needed, those acts shall confer implementing powers on the Commission, or, under specific circumstances, on the Council. European Parliament and the Council, via the regular lawmaking mechanism, shall lay down in advance the rules and general principles concerning mechanisms for control by member states of the Commission's exercise of implementing powers. Here, no intelligible principle applies and the European Parliament does not hold a legislative veto. Only via the comitology procedure[120] does the European Parliament, or the Council, retain a right of scrutiny. But even this scrutiny is not strongly developed as it only gives Parliament the power to force the Commission to "review the draft implementing act, taking account of the positions expressed, and shall inform the

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118 *See* Thomas Christiansen & Mathias Dobbels, *Delegated Powers and Inter-Institutional Relations in the EU after Lisbon: A Normative Assessment*, 36 West European Politics 1159-1177, 1168 et subseq. (2013).

119 Paul Craig, *EU Administrative Law* 126 (2nd ed. 2012).

120 *See* Christiansen & Dobbels, note 118, at 1160 *et subseq.;* Herwig Hofmann, note 116, at 493.

European Parliament and the Council whether it intends to maintain, amend or withdraw the draft implementing act"[121]

Whether Article 290 TFEU or Article 291 TFEU applies is thus of decisive importance as Article 290 TFEU allows for far more legislative oversight than Article 291 TFEU which via its comitology procedure allows for a greater influence of the Member States, even if Parliament is involved as well.[122] This delineation between the two articles is disputed.[123] In its first case concerning the newly drafted Article 290 TFEU, (instituted by the Lisbon Treaty,) the ECJ stated that Article 290 TFEU is about achieving "the adoption of rules coming within the regulatory framework".[124] It has thus decided that Article 290 TFEU is about regulating and is thus rather concerned with the breadth of the rule and not its depth as is the case with Article 291 TFEU.

b. Imperative Participation in the Delegation Process

As the act of delegating forms part of the democratic arena and allows for collective self-determination, it follows that participation therein is supposed to involve everybody and empower everybody to decide. The specific characteristics of a supranational institution and the ensuing different institutional design make the delegation process less democratic as the delegator is only partly elected by popular vote (European Parliament) and partly by the national parliaments (Council). To allow for more democratic participation the Lisbon Treaty introduced a so called citizens' initiative (Article 11 (4) TEU).[125] No legal act follows directly from the citizens' initiative. However, it has legal effect as it forces the Commission to consider the initiative. It is thus in a way placed between the mechanisms of direct democracy and representative democracy and might be called an elaborate form of the right to petition. Other forms of

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121 Article 11, Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (so called Comitology Act).

122 Christiansen & Dobbels, note 118, at 1166.

123 *Cf.*Christiansen & Dobbels, note 118, at 1167.

124 ECJ, C-427/12 Commission v. Parliament and Council, Judgment of 18 March 2014, para. 38.

125 *Cf.* Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations*, 23 E. J. I. L. 315-334 (2012); *see also* Helmut Goerlich & Benedikt Assenbrunner, *Das Europäische "Bürgerbegehren" als Element eines supranationalen Demokratieverständnisses nach dem Vertrag von Lissabon*, 26 Zeitschrift für Gesetzgebung 268 et subseq. (2011).

participation in the lawmaking process are restricted to experts or representatives of some special interest groups, e.g. as foreseen in the European Economic and Social Committee (Article 301-305 TFEU) or in the Rules of Procedure of the European Parliament according to Article 232 TFEU. Thus, although participation works according to the constitutional theory of imperative participation, it only does so on a basic democratic level, i.e. elections.

4. Conclusion on the Legislature

Despite all the differences, the legislature first and foremost serves democratic ends and allows for collective self-determination. The separation of powers doctrine is the decisive constitutional standard to be applied in regulating the delegation powers from the legislature to the administration. Delegating laws, like all laws, are prospective, general and only bound by the constitution. The restrictions that apply are founded in the separation of powers doctrine and in the case of the EU and Germany of specific constitutional norms. Participation in delegation is governed decisively by the democracy principle – which is balanced by the separation of powers doctrine and the rule of law. Thus, participation in passing delegating law encompasses the people, i.e. everybody, and allows for decision-making power of the people.

B. The Executive: Delegated Rulemaking

Now we have arrived at the heart of delegated rulemaking. The executive serves democratic ends by allowing for collective self-determination on the one hand, and serves rule of law ends by allowing for individual self-determination on the other hand. Viewed from the perspective of the separation of powers' balancing function, rulemaking is situated on the democratic outer rim of the executive's sliding scale (or continuum) from democracy to the rule of law. The rulemaking process is the most democratic form of action that the executive can take, but less democratic than the lawmakers' actions. Consequently, the participation process will allow everybody to participate – but the decision will rest with the state. This holds true for all three legal orders, even if the participation procedures are far more advanced in the United States (1.) than in Germany (2.) or the European Union (3.)

1. United States

Rules, like laws, are prospective, general and bound by the Constitution and, in addition to laws, by the respective delegating laws. In addition, the agencies are bound by their governing statutes/executive orders and Congress' influence upon them (a.). From this and the underlying separation of powers doctrine, it follows that the participation process in rulemaking proceedings must accommodate the stronger impact of the rule of law: although everybody is allowed to participate, it is the State that decides. Only this construction can ease the tension between democracy and the rule of law, balance the two principles and lead to efficiency in this exercise of public authority, i.e. the rulemaking process (b.).

a. Bound and Democratic: The Character of Agencies and Rulemaking

The rulemaking process is the most democratic form of action in which the executive can engage. However, the rule of law principle infuses the rulemaking process. This is shown by the fact that the agencies are more constrained than Congress and are only competent to act in certain sectors of public life according to their governing statutes (aa.). The legal constraints also materialize with regard to the legal character of the rules (bb.). In concluding, rulemaking as a democratic process will be discussed against the background of the rise of the administrative state (cc.).

aa. Institutions: Executive and Independent Agencies

Rulemaking institutions form an integral part of the second branch, are created by either the first branch or another organ of the second branch, and are controlled to varying degrees by organs of both branches. They are legally constrained in their scope of action by the governing statutes: the mission of the Department of Homeland Security "shall be to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks";[126] the

[126] Executive Order 13228 of October 8 (2001), Establishing The Office Of Homeland Security and the Homeland Security Council, Sec. 2.

EPA is competent to ensure that the "establishment and enforcement of environmental protection standards consistent with national environmental goals";[127] the Federal Trade Commission is competent "to prevent persons, partnerships, or corporations [...] from using unfair methods of competition in commerce."[128]

A second constraint might follow from the agency's status, which is determined according to the influence that the President can legally exert upon it. The latter then affects the influence that Congress can still exert. The status of an agency can either be that of an executive branch agency or an independent regulatory agency.[129] While both of these types of agencies can be created by Congress or the President,[130] the President possesses different powers to direct and influence the executive branch, while the independent regulatory agencies are outside of his legal influence. Does this difference influence their rulemaking powers and/or participation opportunities?

Departments and the executive branch agencies[131] are concerned with specific issues such as finance or the environment. The best known examples – next to the departments headed by a Secretary, such as the Department of the Treasury – are the EPA and the Food and Drug Administration. They can either be created by Congress, like the National Military Establishment (two years later renamed the Department of Defense),[132] or by the President through a Presidential Reorganization Plan, like in the

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127 Pub. L. 91-190, § 2 Jan. 1, 1970, 83 Stat. 852, National Environmental Policy Act of 1969, 42 U.S.C. § 4321, at 1255.

128 § 5, FTC Act 1914.

129 In addition, the President can also be the delegee of power; Ziamou, note 7, at 40 *et subseq*.; Kagan, note 53, at 2247, 2319 *et subseq*. Today, delegation to the President seems uncommon, but the first delegation ever undertaken by the first Congress delegated authority to the President, Jeffrey S. Lubbers, *The Transformation of the U.S. Rulemaking Process – For Better or Worse*, 34 Ohio N.U. L. Rev. 469, 470 (2008). (Act Providing for the Payment of the Invalid Pensioners of the United States, ch. 24, Section 1, 1 Stat. 95, 95 (1789). *See also* 1 Stat 137 (1790); *see also S*unstein, *Canons*,note 52, at 322 *et subseq*.

130 About half of the 425 agencies created between 1946 and 1995 were created by the President, e.g. the NSA, and included more than twenty independent regulatory branches, *see* William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. Pol. 1095, 1096 *et subseq*. (2002). As they need to be financed by Congress, the President is not politically independent from Congress in creating agencies, *ibid.*, at 1101.

131 Strauss, *Separation of Powers*, note 22, at 583 speaks of "cabinet agencies, independent executive agencies, independent regulatory commissions".

132 National Security Act of 1947, Public Law 80-253, Section 201.

case of the EPA,[133] or through an executive order, like in the case of the United States Department Of Homeland Security.[134] Their scope of action is restrained to the competences conferred on them by the governing statute/order. In addition, the President can influence them in different ways. Most importantly, he appoints the heads of the agencies and numerous other leading officials, and can also remove them without reason – which is perhaps the single biggest difference from the independent agencies.[135] The Executive Orders No. 12,291[136] and 12,866[137] allowed Presidents Reagan and Clinton[138] respectively to gain far more oversight over the executive agencies, and thus centralized control over rulemaking. These orders, of which the main rules are still in force today, installed a system of review through the Office of Information and Regulatory Affairs (OIRA), which was placed within the Office of Management and Budget. This office reviews rules and makes changes, sometimes substantial in nature.[139]

Independent regulatory agencies seem to be very similar to the executive agencies, as both are more rule-bound than Congress[140] and concerned with specific issues. The first

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133 Reorganization Plan No. 3, prepared by President Nixon, sent to the Senate and House of Representatives on July 9, 1970, 5 USC Reorg Plan of 1970 No 3, App (1988). A reorganization is not available to the President anymore, as the time limit of 5 U.S. Code § 905 (b) expired at the end of 1984. For an overview of the different Reorganization Statutes see Henry B. Hogue, Cong. Research Serv., R42852, Presidential Reorganization Authority: History, Recent Initiatives, and Options for Congress (2012).

134 Presidential Executive Order No. 13228. Because of the Reorganization Act of 1977, the creation of executive agencies might be unconstitutional, *see* Jeremiah Goulka & Michael A. Wermuth, *The Law and the Creation of a New Domestic Intelligence Agency in the United States*, in: Brian A. Jackson (ed.), *The Challenge of Domestic Intelligence in a Free Society: Multidisciplinary Look at the Creation of a U.S. Domestic Counterterrorism Intelligence Agency* 110 (2009).

135 *See* Myers v. U.S., 272 U.S. 52, 293 (1926); Humphrey's Executor v. U.S., 295 U.S. 602, 628 (1935); Bowsher v. Synar, 478 U.S. 714 (1986); Morrison v. Olson, 487 U.S. 654 (1988).

136 3 C.F.R. 127 (1981). For executive orders see Ziamou, note 7, at 75: they are constitutional as decided in Sierra Club v. Costle, 657 F.2d 298, 400-410 (D.C. Cir. 1978); Chevron USA v. NRDC, 467 U.S. 837, 865 (1984).

137 3 C.F.R. 638 (1993).

138 *See also* Executive Order No. 13422, 3 C.F.R. 191 (2008) and Executive Order No. 13563, 3 CFR 215 (2012).

139 Wendy Wagner, *The Participation-Centered Model meet Administrative Process*, 2013 Wisconsin L. Rev. 671, 688 (2013); Kagan, note 53, at 2277 *et subseq.*; *see* James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 Duke L. J. 851, 858-59 (2001); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1, 3 (1995); Cynthia R. Fiorina, *Undoing the New Deal Through the New Presidentialism*, 22 Harv. J. L. & Pub. Pol'y 227 (1998).

140 For an overview, see the Paperwork Reduction Act, 44 U.S.C. § 3502(5): "the term 'independent regulatory agency' means the Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal

agency was the Interstate Commerce Commission, founded in 1887. Congress set up the Commission and gave it, inter alia, the "authority to inquire into the management of the business of all common carriers subject to the provisions of [the Interstate Commerce Act]".[141] Rulemaking was not mentioned in that very first statute setting up an agency. This is different nowadays – for example, the Federal Trade Commission in its governing statute is explicitly endowed with the power "to make rules and regulations for the purpose of carrying out the provisions of this subchapter".[142] Other examples include the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission,[143] the Federal Communications Commission and the Occupational Safety and Health Review Commission.[144] They are all endowed with certain competences identified in the governing statutes, thus constraining their powers. Different from the executive agencies, the President's control is quite limited. He may name the agencies' head(s), but otherwise the agencies cannot be legally steered by the President's Office of Management and Budget. The President's executive orders also do not apply to them *de iure*,[145] and their leading officers cannot be fired by the President at will.[146] The

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Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, Office of the Comptroller of the Currency, and any other similar agency designated by statute as a Federal independent regulatory agency or commission".

141 Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, approved 1887-02-04, Section 12: "That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and for the purposes of this act the Commission shall have power to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the Provisions of this section." See Ziamou, note 7, at 53 *et subseq*.

142 15 U.S. Code § 46.

143 42 U.S.C. §§ 5841-5851 (1976 & Supp. V 1981).

144 However, the Occupational Safety and Health Administration would be an executive agency. Both are placed in the Department of Labor, 29 U.S.C. §§ 656, 661 (1982).

145 Although there always have been efforts to do so, the latest Obama Executive Order on Delegated Rulemaking urged the independent agencies to follow the same proceedings as those set up for executive agencies.

President thus has no legal power to supervise and control the agencies' decisions.[147] However, the independent agencies are not as independent as one might think – the President still possesses political means of controlling the independent regulatory agencies in a way similar to the executive agencies. "The characteristics of the oversight relations of President and Congress with 'executive' and 'independent' agencies owe as much to politics as to law (if not more)."[148]

To sum up, all agencies are created by a governing statute/order which regulates their field of action and yields them certain competences. Within this field, the agencies act, with their governing statutes limiting them. However, the institutional setup, *i.e.* whether the agency is constructed as an independent or an executive agency, does not tell us much about the legal constraints on rulemaking or on participation therein, but only something about the legal – not practical – influence the President wields.[149] Legal constraints on rulemaking and participation are rather found in the statutes that delegate lawmaking functions to the agencies.

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146 *See* Humphrey's Executor v. U.S., 295 U.S. 602 (1935), see Pünder, note 75, at 75 et subseq. Furthermore, the President has only a say in appointing the Commissioner but nobody else, see Strauss, *Separation of Powers*, note 22, at 589.

147 Stone & Seidman & Sunstein & Tushnet, note 23, at 437. However, independent agencies usually also follow President's orders directed to executive agencies: "they have participated in the Regulatory Council, publish regular agendas of rulemaking, are attentive to White House inquiries about their progress, and otherwise behave as if they were in fact subject to the discipline from which they have been excused", Strauss, *Separation of Powers*, note 22, at 593. Thus all Supreme Court decisions concerned with agencies have pondered thoroughly on separation of powers issues, *see* Myers v. U.S., 272 U.S. 52 (1926); Humphrey's Executor v. U.S., 295 U.S. 602 (1935) and Wiener v. U.S., 357 U.S. 349 (1958); *see also* Morrison v. Olson, 487 U.S. 654, 685-696 (1988), Bowsher v. Synar, 478 U.S. 714 (1986). See the overview in Strauss, *Separation of Powers*, note 22, at 609 *et subseq.*

148 Strauss, *Separation of Powers*, note 22, at 583. See also the critique by Strauss, *Legislative Veto*, note 27, at 797 *et subseq.*; *see also* Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 Am. U. L. Rev. 557, 566 (1987), Kagan, note 53, at 2288 argues that President Clinton included the independent agencies in his Executive Order No. 12, 866 and subjected "the independents to the regulatory planning process administered by OMB and overseen by the Vice President." § 4(c). Furthermore, for the executive agencies, the President assumed that he had the final word in the decision-making process, § 7, 3, which he inter alia showed by issuing frequent directives, Kagan, note 53, at 2290.

149 *See* Kagan, note 53, at 2360 with regard to the effects of presidential influence on the rulemaking process with regard to participation, thus the most important influence for the purposes of this paper: "There is little reason to think, however, that presidential administration changes fundamentally the ability of interest groups to provide effective input within the formal (though nominally "informal") process of notice-and-comment."; at 2362:"[A]n active presidential role in agency rulemaking, however exercised, in no way interferes with the function of the participatory process in ensuring an adequate record for judicial review."

bb. Rules

Delegating statutes empower the executive to make rules – and limits this power at the same time. Rules are prospective and general, and thus quite similar to democratic laws. However, laws are only limited by the Constitution, while rules are also limited by laws. A rule is defined by § 551 (4) of the Administrative Procedure Act (APA)[150] as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy [...]." This definition requires us to differentiate between rules from laws on the one hand and from orders and adjudications – which are defined in § 551 (6) and (7) APA[151] – on the other hand.

The first differentiation between laws and rules is connected to the acting institution. Only Congress can enact laws. Thus, every other act that is reminiscent of a law, but not enacted by Congress, cannot be a law but must be something else. Where an agency acts, it will be called a rule.[152] But the acting institution is not the only difference, only the most obvious. As § 551 (4) APA further states, rules need to be designed in a certain way, which is to "implement, interpret, or prescribe law". Thus, a rule is in itself bound by law, depends upon the law and is restricted to the confines set by the delegating law. It can be described as being at a tertiary level, subordinate to the Constitution and the delegating statute. A last differentiation concerns its binding effect. Laws and rules are binding, except for so-called interpretative rules, which interpret other rules and offer ways and means to fulfill the binding rules.[153] But apart from that, a rule and a law share the same features in principle: they are both of general applicability (and thus concern

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150 Administrative Procdeure Act § 6, 5 U.S.C. § 555 (2006).

151 § 551 APA: (6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing; (7) "adjudication" means agency process for the formulation of an order.

152 *Cf.* Whitman v. American Trucking Associations, 531 U.S. 457, 473 (2001) where the Supreme Court held that 'Article I, § 1, of the Constitution vests "[a]ll legislative Powers herein granted ... in a Congress of the United States." This text permits no delegation of those powers, Loving v. U.S., 517 U.S. 748, 771 (1996); *see ibid.,* at 776-777 (Scalia, J., concurring in part and concurring in judgment), and so we repeatedly have said that when Congress confers decision-making authority upon agencies Congress must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." J. W Hampton, Jr., & Co. v. U.S., 276 U.S. 394, 409 (1928).' But see the Concurring Opinion of Justice Stevens who laments that the Court pretends that rulemaking is no lawmaking, at 488 *et subseq.; see also* INS v. Chadha, 462 U.S. 919, 953, footnote 16 (1983) *eferring to* Youngstown, Sheet & Tube Co. v. Sawyer, 343 U.S. 570 (1952).

153 Peter L. Strauss, *From Expertise to Politics: the Transformation of American rulemaking*, 31 Wake Forest L. Rev. 745, 746 (1996).

everybody) and are of future effect (and thus prospective).[154] Famous examples of agency rules are the 1971 EPA National Ambient Air Quality Standards for six common classes of pollutants, or the SEC Rule 10b-5, which prohibits insider trading.

Their future effect and general applicability are the main differentiating factors with regard to orders, adjudications and rules. According to the well-known and nearly century-old Londoner/Bimetallic distinction,[155] which has been maintained by the APA, disputes involving parties that are particular and identifiable are handled via adjudicative acts which are based on the rule of law.[156] Such disputes can be called "bipolar"[157] and involve a "relatively circumscribed resolution of discrete claims involving identifiable firms or individuals".[158] In contrast, rules are "polycentric"[159] and involve "relatively open-ended policymaking potentially affecting and involving trade-offs among broad social groups".[160] Thus, the number of people affected differentiates between whether a certain act is a rule or an adjudicative act. Adding a timeframe to that definition can further help in differentiating the two:[161] Adjudicative acts are retrospective while rules – like laws – are generally prospective.

cc. The Democratic Nature of Rulemaking in the Administrative State

The democratic character of the executive branch became far more important owing to the rise of the administrative State. The differentiation between quasi-legislative (and therefore democratic) rules and quasi-judicial adjudicative orders, as well as the rise of

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154 Although § 551 (4) APA also speaks of "particular applicability", this will be of no further concern. The qualification of particular applicability can be understood as still referring to general rules, but those which are not as wide. Furthermore, the Administrative Conference of the United States, as well as the American Bar Association, have proposed to eliminate the word "particular", *cf.* Michael Asimow (ed.), *A Guide to Federal Agency Adjudication* 6 (2003); Kerwin & Furlong, note 17, at 6.; Concurring Opinion of Justice Stevens, Whitman v. American Trucking Associations, 531 U.S. 457, 488 (2001).

155 Londoner v. Denver, 210 U.S. 373 (1908) (adjudicative act); Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915) (rule).

156 Kagan, note 53, at 2362, referring to § 554 which requires trial-type proceedings in adjudications.

157 Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 394-404 (1978).

158 Kagan, note 53, at 2362.

159 Fuller, note 157, at 394-404.

160 Kagan, note 53, at 2363; *see* Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls over Administrative Actions Affecting the Community*, 39 Ucla L. Rev. 1251, 1256-1257 (1992).

161 Ziamou, note 7, at 6, 14 *et subseq*.

the former in the last decades, is the consequence of an epic shift in administrative law not just in the United States but worldwide.

This development is owed to the ascent of the administrative state in the 1930s in the United States. The administrative state is first and foremost a regulatory state – a state that moves from a world with bipolar relations to a world with polycentric relations. "[A]gencies shifted, often in accordance with congressional mandates, from case-by-case adjudication to rulemaking as a more efficient, explicitly legislative procedure for implementing the new, far reaching regulatory programs."[162]

The administration no longer acts as the transmission belt to the will of the people, transforming laws enacted by Congress into specific acts, as the world has become more complicated and more complex. The way laws are shaped has changed deeply in the last 100 years, from a conditional structure to a final structure: the laws often only name the goal that is to be achieved by the administration, but not the ways of getting there anymore. A lack of substantive specifications from the legislature to the administration requires the administration to balance policies – "an inherently discretionary, ultimately political"[163] function. Therefore, a democratic, deliberative procedure has emerged on the administrative level. This is reflected by an increased use of rules by the administration in order to translate the will of Congress (and thus of the people) into manageable clauses. "The exercise of agency discretion is inevitably seen as the essentially legislative process of adjusting the competing claims of various private interests affected by agency policy."[164] This development "seeks to assure an informed, reasoned exercise of agency discretion that is responsive to the concerns of all affected interests."[165] As democracy in the administration has become more important, so has participation.

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162 Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. Rev. 437, 442 *et subseq.* (2003); *see also* Stewart, *Reformation*, note 54, at 1674 *et subseq.* According to Stewart, this has led to a transformation of the typical administrative model, moving away from the mere "protection of private autonomy [to] the provision of surrogate political process to ensure the fair representation of a wide range of affected interest in the process of administrative decision.", at 1670.

163 Stewart, *Reformation*, note 54, at 1684.

164 Stewart, *Reformation*, note 54, at 1683.

165 Stewart, *Twenty-First Century*, note 162, at 442 *et subseq.*

b. Imperative Participation in Rulemaking

Participation in executive proceedings is closely connected to the executive's adjudicative acts/rules divide and the rise of the agencies. From this democracy/rule of law divide, it follows that participation is neither fully democratic nor fully adjudicative. As rulemaking is a mainly legislative process, the democratic aspect of participation must be emphasized. But democracy can conflict with the rule of law, as the hypothetical oil pipeline example has shown. Only if this tension is resolved by the separation of powers' balancing function, does participation become fully constitutional. This requires everybody to participate while the decision-making power stays with the executive. Either by electing a new leadership in Congress and/or the presidency, or via means of direct democracy (though in practice only on the State level), the people can still decide themselves on delegating laws, and thus influence the executive.

In order to reach this democratic ideal, different forms of participation have evolved over the years.[166] They differ with regard to how they allow for participation and how they facilitate participation. However, they are all in agreement that the State has to listen to and consider the will of the people, although the final decision is taken by the public organ and not by the participants. Thus, all three aims of participation are furthered – democracy, individual rights and efficiency. Further, there is congruence in the sense that everybody may participate and influence the decision-making process on the one hand; on the other hand, participation is not restricted to those individuals who are directly and legally affected. This fits the constitutional theory of imperative participation: While participation in delegated rulemaking is open to everybody, as it is on the legislative level, participants' influence on the decision-making process is not as restricted as on the judicial level. One can differentiate among three main forms of participation in delegated rulemaking:[167] an informal rulemaking procedure (aa.), a

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166 Administrative Procedure Act of 1946 (APA) and the Negotiated Rulemaking Act of 1990; See also the Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972); Consumer Product Safety Act of 1972, Oub. L. No. 92-573, 86 Stat. 1207 (codified as amended at 15 U.S.C. §§ 2051-2084 (1994)); Toxic Substances Control Act opf 1976, Pub. L. No. 94-469, 90 Stat. 2003 (codified as amended at 15 U.S.C. §§ 2601-2692 (1994)); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1592 (codified as amended at 29 U.S.C. §§ 651-678 (1994)).

167 *See* Ziamou, note 7, at 162-165.

formal rulemaking procedure (bb.) and the negotiated rulemaking procedure (cc.). They all differ in the way participation affects the procedure.

aa. Informal rulemaking procedure

Informal rulemaking can be regarded as the default participation procedure.[168] Its centerpiece is the notice and comment procedure, which allows everybody to comment on the proposed rules.[169] Because of the comment procedure, informal rulemaking is a "deliberative-constitutive process"[170] and therefore truly democratic. The notice and comment procedure starts[171] with a notice[172] of proposed rules, which is published in the Federal Register. The agency can only dismiss the procedure if it is impractical, unnecessary or contrary to the public interest.[173] If it does so – and in general there is some agency discretion on whether to initiate a rulemaking procedure – the public can petition the agency to start a procedure.[174] Accordingly, § 553(e) APA prescribes that the agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. The agency is forced to react and give a reasoned statement in response.

The notice must, inter alia, include a statement of the time, place, and nature of public rulemaking proceedings, and either the terms or substance of the proposed rule or a description of the subjects and issues involved.[175] Before reaching this stage, the agency will work out a proposal on its own. In order to allow participation at an early stage, the

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168 Catherine Donnelly, *Participation and expertise: judicial attitudes in comparative perspective*, in: Susan Rose-Ackerman & Peter L. Lindseth (eds.), Comparative Administrative Law 357, 358 ((2010); Robert W. Hamilton, *Procedures for the adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 Cal. L. Rev. 1276, 1276 (1972). For a critique of informal rulemaking, see E. Donald Elliott, *Re-Inventing Rulemaking*, 41 Duke L. J. 1490, 1492 *et subseq*. (1992) arguing that the notice and comment procedure is only good in order to compile a record for the judiciary. He prefers to get rid of public participation and would like to focus on representation, *ibid.*, at 1495-1496.

169 That all can partake makes it the "most democratic of procedures", Kenneth Davis, *Discretionary Justice: A Preliminary Inquiry* 66 (1969).

170 Elisabeth Fiher, Risk Regulation and Administrative Constitutionalism33, 95 (2007).

171 For the timing of the notice procedure, see Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 US 519 (1978).

172 For the necessary information which needs to be submitted to the public, see U.S. v. Novia Scotia Food Prods. Corp., 568 F. 2d 240, 251 (2d Cir. 1977).

173 § 553 (b) (3) (B) APA.

174 Pünder, note 75, at 121, who ascribes positive effects to this possibility, as the agencies are not always able to tackle all problems or fields of interest.

175 According to § 553(b)(1) and (3) APA.

1976 Administrative Conference of the United States suggested an advanced notice of proposed rulemaking. Indeed, some delegating norms foresee this procedure specifically.[176] After the notice, the next step consists of the actual participation. Everybody who is interested is afforded the opportunity to submit data, views or arguments according to § 553 (c) APA. Although it has not been specified how long the period of the public comment procedure should last, agencies usually allow 30 days.[177] For "significant" rules, Executive Order 12,866 – which *de iure* applies only to executive agencies – foresees 60 days. Oral hearings are discretionary.[178] These hearings are – in contrast to trial-type proceedings – more like the ones used by legislatures.[179]

After the input has been gathered, it needs to be considered by the agency,[180] which requires giving "good faith attention"[181] to the comments. This is the centerpiece of the deliberative and democratic approach of agency rulemaking. The deliberations or meetings[182] of the independent regulatory commissions are usually public, as foreseen by the Government in the Sunshine Act, a "showpiece of administrative democracy."[183] The courts have argued that the "significant comments"[184] or "comments of cogent materiality"[185] have to be considered, but not all arguments.[186] After this deliberative

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176 § 57 a(b)(2) (A) Federal Trade Commission Improvements Act, 15 U.S.C. § 6295(i); Energy Policy and Conservation Act, 43 U.S.C. 6201.

177 Carey, note 68, at 6.

178 Article 553(c) APA. Sometimes they are required by some statutes, see e.g. Hamilton, note 168, at 1318.

179 Neil D. McFeeley, *Judicial Review of Informal Administrative Rulemaking*, 33 Duke L. J. 347, 349 (1984).

180 § 553 (c) APA., *cf.* Ziamou, note 7, at 71.

181 Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 554 (9th Cir. 1977), see 40 C.F.R. § 1503.4 (a) (2012).

182 *See* § 552 (b)(a)(2) APA for a definition.

183 Alfred C. Aman Jr. & William T. Mayton, Administrative Law 701 (3rd ed. 2014). Further amendments to the APA that helped "to define and structure rulemaking procedures so that the process is fair to the citizenry", Warren, note 95, at 204, are the Freedom of Information Act, Privacy Act, Negotiated Rulemaking Act, Federal Advisory Committee Act, The National Environmental Policy Act of 1969 and the Paperwork Reduction Act. The Regulatory Flexibility Act Unfunded Mandates Reform Act did not change the essential procedures that rulemaking agencies employed as much as they required agencies to consider certain specific consequences of proposed rules when making their own evaluations, Ziamou, note 7, at 72-73.

184 Portland Cement Association v. Ruckelshaus, 486 F.2d, p. 375, 393, 402 (D.C. Circ. 1973), cert. denied, 417 U.S. 921 (1974): "(C)omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response becomes of concern."

185 U.S. v. Novia Scotia Food Products Corp., 568 F.2d 240 *et subseq.*, 252 (2d Circuit 1977): "It is not in keeping with a rational process to leave vital question[s], raised by comments which are of cogent materiality, completely unanswered."

process has taken place, the agency must incorporate in the rules adopted a concise general statement of their basis and purpose. This general statement, which used to be quite short, has evolved into a rather lengthy rulemaking record which includes "notice, comments and documents submitted by interested persons, transcripts, other factual information considered, reports of advisory committees, and agency's concise general statement or final order."[187]

Thus, everybody possesses influence and voice – not just some special interest groups. The agency must deliberate on the comments and consider them. Still, the decision stays with the agency. This is as democratic as it can get inside the second branch.

bb. Formal Rulemaking

Formal rulemaking is regulated by §§ 556 and 557 APA and requires trial-type hearings.[188] Its determinations are record-based.[189] "By allowing the submission of evidence and arguments, the examination and cross-examination of witnesses, fact-findings and the compilation of a record, trial type hearings are ideal for exposing in detail the advantages and disadvantages of an issue and permitting the active involvement of the parties. On the other hand, they tend to be costly, time-consuming and unsuitable for the resolution of complex issues."[190] Because of this inability to deal with complex issues, formal rulemaking is said to be "dead".[191] However, as in informal rulemaking, everybody possesses influence, and democratic aims are being followed. Still, the decision remains with the agency.

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186 Ziamou, note 7, at 163.

187 Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L. J. 1, 14 Fn. 77 (1982).

188 Hamilton, note 168, at 1277.

189 From which it follows that it is always required in case a statute foresees rules being made "on-the-record", Carey, note 68,at 5, *refers to* U.S. v. Florida East Coast Railway, 410 U.S. 224 (1973).

190 Ziamou, note 7, at 163, *referring to* Glen O. Robinson, *The Making of Administrative Policy*, 118 U. Pa. L. Rev. 485 (1970).

191 Pünder, note 75, at 121. *See* Vermont Yankee Nuclear Power Corp v. Natural Resources Defense Council, 435 U.S. 519 (1978), which struck down so-called hybrid rulemaking, an intersection between formal and informal rulemaking. *See* Pünder, note 75, at 129 *et subseq*. with further references; Ziamou, note 7, at 71 *et subseq*. Very few statutes foresee for formal rulemaking, e.g. the Food, Drug and Cosmetic Act of 1938, 21 U.S.C., § 371 (e)(3). See also the critique of Warren, note 95, at 201.

cc. Negotiated Rulemaking

Negotiated rulemaking takes place prior to the publication of a notice of proposed rulemaking.[192] It might be applied in cases where a limited number of identifiable interests will be significantly affected by the rule, and there is a reasonable likelihood that a committee can be convened with a balanced representation of persons who can adequately represent the said interests (§ 563(3) APA). The people who are significantly affected will be represented.[193] Representatives of various interest groups, together with the agency, negotiate the text. The final text will be decided upon solely by the agency. [194] This participation mode does not seem to fit the theory, as not everybody can participate, but only a selected few. However, a notice and comment procedure will follow the negotiations.[195]

2. Germany

As in the United States, rules – like laws – are prospective, general and bound by the constitution and – in addition to laws – by the respective delegating laws (a.). From this democratic aspect and the underlying separation of powers doctrine follows that the participation process in rulemaking proceedings must accommodate the stronger impact of the rule of law: although everybody is allowed to participate, it is the State that decides. Only this construction can ease the tension between democracy and the rule of law, balance the two principles and lead to efficiency in the exercise of public authority, i.e. the rulemaking process (b.).

a. Bound but Democratic: The Character of Rulemaking

The rulemaking process is the most democratic form of action that the executive can engage in.[196] Nearly everything stated above with regard to the United States also holds

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192 The Negotiated Rulemaking Act of 1990, 5. U.S.C. §§ 561-570a APA.

193 See in general Warren, note 95, at 221 *et subseq*., who is highly critical. See also Ziamou, note 7, at 103 *et subseq*.

194 George H.W. Bush emphasized upon signing the act, "Under the Appointments Clause of the Constitution…governmental authority may be exercised only by officers of the United States.", Statement on Signing the Negotiated Rulemaking Act of 1990, 1990-11-29, http://bush41library.tamu.edu/archives/public-papers/2512.

195 Sheldon Kamieniecki & Michael Kraft (eds.), The Oxford Handobook of U.S. Environmental Policy 381 (2012).

196 *See* Dominik Steiger, *Der partizipative Staat* 125 et subseq. (Cap. IV, B. I.) (to be published 2016).

true for Germany. Again, it is the rule of law that infuses the rulemaking process because it is the executive that is responsible for the rulemaking and thus the second branch of government that is legally more constrained than the first branch.

The rulemaking agency according to Article 80 of the Basic Law is either the Federal government, or a ministerial department or a Land government. These organs are less constrained than US executive and independent agencies as no governing statutes exist and only the separation of powers doctrine and the Grundgesetz' positive order of competence (positive Kompetenzordnung) govern the governments and ministerial departments. Comparatively the US system's tighter legal constraints materialize with regard to the scope of the rulemaking power. Again as with the US, the rules made by the executive are prospective and general but different from legislative laws not only bound by the constitution but also by the delegating statutes. The specifications of the delegating laws are rather strict. In addition parliament can veto every rule. These differences allow for a greater influence of the German Bundestag and make the process more rule bound than in the United States.

b. Participation in Rulemaking

Article 80 GG does not make provisions for any public participation. Instead, in particular instances, the delegating statute and the Joint Rules of Procedure of the Federal Ministries, include special provisions for public participation. Only in very few instances will everybody be allowed to participate.

The Joint Rules foresee in a very general manner the participation of associations and specialist groups (Article 47 (3)) and do not even specify the forms of participation.

Some special statutes know more elements of participation: section 51 of the Federal Act on the Prevention of Harmful Effects on the Environment Caused by Air Pollution, Noise, Vibration and Similar Phenomena (Federal Immission Control Act) states that "[w]here the issue of ordinances and general administrative provisions require a hearing of the parties concerned, an ad-hoc group shall be heard which is to be constituted in each individual case from representatives of the parties directly affected, the scientific community and, where applicable, the business community and the transport sector, as well as of the supreme Land authorities responsible for immission control." Who exactly

will be chosen from these groups is not regulated and is thus left to the discretion of the administration.[197] A notice and comment procedure does not exist, information duties are underdeveloped. No rules exist on how the administration has to deal with the comments.

Some other statutes include more detailed rules. Whereas the Federal Emission Control Act foresees only for representatives of the affected groups to participate, the Federal Regional Planning Act (Raumordnungsgesetz, ROG) allows everybody to participate in the creation of development plans. These plans are rule created by the Federal Ministry of Transport and Digital Infrastructure. According to section 10 ROG the public is to be notified of the planned creation of a development plan. Then the public can comment on the plan and the comments must be considered and weighed in the decision-making process. This is a true notice-and-comment procedure and a role model for how participation should take place in the process of delegating lawmaking in general.

This corresponds to the Aarhus-Convention[198] which applies to certain environmental matters and binds not only Germany but also the European Union. According to its Article 8 (Public Participation during the Preparation of Executive Regulations and/or Generally Applicable Legally Binding Normative Instruments) "[e]ach Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment." In order to achieve this, a notice-and-comment procedure is foreseen. This procedure – different from the US notice-and-comment procedure – can take place through representative consultative bodies. The result of the public participation shall be taken into account as far as possible.

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197 von Bogdandy, note 14, at 404. But see § 63 of the Federal Protection Statute of 2009, which is mainly based on European Law and which allows special nature interest groups that have been recognized by the Government according to the rules foreseen by the Environmental Appeals Act of 2006 to be heard; BVerfGE 83, 130, 149-154 (and 12, 205, 261-261; 83, 238, 333-334; 60, 53).

198 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998.

3. European Union

Similar to laws and rules in the United States and Germany, the non-legislative acts and implementing acts are – like a regulation and directive – prospective, general and bound by the TFEU and – in addition to a regulation and directive – by the delegating act (a.). The participation process in the making of these acts must accommodate the impact of both democratic elements and the rule of law: although everybody is allowed to participate, it is the European Union that decides. This construction can help in easing the tension between democracy and the rule of law, balance the two principles and lead to efficiency in the exercise of public authority (b.).

a. Bound and Democratic: The Character of Rulemaking

The rulemaking process is the most democratic form of action that the Executive can engage. However, the rule of law infuses the rulemaking process as the second branch of "Government" is legally more constrained than the first branch. With regard to lawmaking this is shown by Articles 290 and 291 TFEU which allows the Commission to act in a quasi-legislative manner only within the rules provided for by Articles 290 and 291 TFEU and the delegated and implementing acts themselves. Apart from the (few) legal constraints, delegated acts and implementing acts are both comparable to legislative acts as they are of general applicability and possess future effect: With regard to the delegated act Article 290 TFEU explicitly states that these are acts of "general application". Furthermore, Article 290 TFEU demands that the "duration" of the delegation must be regulated and is thus future-oriented. The same is true for implementing acts: Their aim according to Article 291 TFEU is to create "uniform conditions" for the national acts and are thus also of general applicability and concern the future, i.e. the future national acts.

In theory, it is not only the Commission that may act: the European Court of Justice in 2014 entertained the idea that a delegation might also be possible on the basis of other treaty articles other than Articles 290 and 291 TFEU[199] thus allowing the lawmaker to

[199] ECJ, C-270/12 United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union , Judgment of 22 January 2014, paras.78 *et subseq.*: "It should be noted in that regard that, while the treaties do not contain any provision to the effect that powers may

empower agencies to rulemaking. However, until today no rulemaking powers have been delegated to agencies. Rather, some agencies[200] assist the Commission and make recommendations in mostly technical and scientific matters and are called "quasi-regulatory agencies".[201] The Commission still needs to – and should according to the respective Regulations – "endorse those draft regulatory technical standards by means of delegated acts under Article 290 TFEU in order to give them binding legal effect."[202] In addition, some agencies can adopt decisions, binding third parties. They are confined to specific cases though and thus do not constitute rule-making powers.[203]

b. Participation in Rulemaking

Participation in rulemaking is underdeveloped in the European Union context, which is especially troublesome as it indicates a democratic deficit in the European Union. Neither the TFEU nor the Comitology Act of 2011[204] which concerns only Article 291 TFEU and determines that for so called implementing acts committees staffed with national representatives have to be involved in the norm-setting process and

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be conferred on a Union body, office or agency, a number of provisions in the FEU Treaty none the less presuppose that such a possibility exists. Under Article 263 TFEU, the Union bodies whose acts may be subject to judicial review by the Court include the 'bodies, offices' and 'agencies' of the Union. The rules governing actions for failure to act are applicable to those bodies pursuant to Article 265 TFEU. Article 267 TFEU provides that the courts and tribunals of the Member States may refer questions concerning the validity and interpretation of the acts of such bodies to the Court. Such acts may also be the subject of a plea of illegality pursuant to Article 277 TFEU."

200 *E.g.*, European Medicines Agency (EMEA); European Food Safety Authority (EFSA); European Maritime Safety Agency (EMSA); European Railway Agency (ERA).

201 Madalina Busuioc, *European Agencies: Law and Practices of Accountability* 41 (2013); *see also* Craig, note 119, at 128.

202 Para. 23 of the Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ L 331/84.

203 Busuioc, note 201, at 40; *see also* Craig, note 119, at 127, referring to agencies have been built in which the Member States are accorded significant weight ('decisional autonomy') like the European Securities and Markets Authority (ESMA, Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), OJ L 331/84); the European Banking Authority (EBA, Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), OJ L 331/12), or the European Insurance and Occupational Pension Authority (EIOPA, Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pension Authority), OJ L 331/48.); *see also* fn. 82, 83 in: Deidre Curtin & Herwig Hofmann & Joanna Mendes, *Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda*, 19 European L. J. 1-21 at 19 (2013).

204 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011.

incorporate rules on public participation.[205] At least, Article 10(5) Comitology Act provides for the duty to publish the references of inter alia draft legislation "whilst also informing [the public] of the availability of such documents." This is in line with Article 15 TFEU foreseeing broad information duties for the EU organs. In addition, in some cases the delegation act contains the duty to consult scientific committees composed of independent experts.[206] Who exactly will be chosen from these groups is not regulated and is thus put into the discretion of the administration. Although the Commission is under the general duty to reason its decisions[207] no rules exist that determine how the Commission has to deal with the advice received. Still, it can be argued that it needs to consider the advice given.[208] Although not placed under a clear and distinct legal duty to do so, the Commission often asks for comments by the public on its proposed rulemaking. This is in line with Article 11 TEU which determines that the European institutions shall maintain an open, transparent and regular dialogue with representative associations[209] and civil society (Article 11(2) TEU) and that the Commission shall carry out broad consultations with parties concerned in order to ensure that the EU's actions are coherent and transparent (Article 11 (3) TEU).[210] Still,

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205 *Cf.* Francesca Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment Comitology*,40 Harv. Int. L. J. 451-515 (1999).

206 For an account with regard to the OH&S legislative directives, see Smismans, at 606 *et subsq*. The General Court held that "the duty of diligence is essentially an objective procedural guarantee arising from an absolute and unconditional obligation on the Community institution relating to the drafting of an act of general application and not the exercise of any individual right.", T-369/03, Arizona Chemical and oters v. Commisson [2005] ECR II-5839, para. 86. and thus "primarily and essential and objective procedural requirement impose in the public interest [to ensure regulation] meeting the requirements of scientific objectivity and based on the principles of excellence, transparency and independence." *Ibid*., para. 88; Alexander H. Türk, *Oversight of Administrative Rulemaking: Judicial Review*, 19 European L. J. 126-142, 133 (2013).

207 *See* Article 296 TFEU which also applies to administrative rulemaking, Türk, note 206, at 134.

208 The court calls the administration "to examine carefully and impartially all the relevant elements of the case.", T-326/07, Cheminova and others v. Commission [2009] ECR II-2685, para. 228: *see also* ECJ, C-505/09 P, Estonai v. Commission, Judgment of 29 March 2012, para. 95. (are those rulemaking cases??); "This duty imposes certain standards on how the competent institution assesses information.", Türk, note 206, at 132; In Noelle, "the information contained in the documents in the case [need to be examined] with all due care required.", ECJ, C-16/90, Noelle [1991] ECR I-5163, para. 29. Then Türk, note 206, at 132, refers to TU Muenchen and Pfizer which both concern cases with expert hearings and how they need to be considered.

209 See the Judgment of the Court of First Instance (Fourth Chamber, extended composition) of 17 June 1998, T-135/96 – UEAPME v. Council, paras. 92 *et subsq*.

210 The few official statements of different European Union institutions do not refer to delegated rulemaking: Opinion of the European Economic and Social Committee on 'Principles, procedures and action for the implementation of Article 11(1) and (2) of the Lisbon Treaty' (own-initiative opinion)'

the Commission does not regard their "notice-and-comment"-like procedure as mandatory and accordingly does not feel obliged to gather a rulemaking record. The public has no right to initiate rule making proceedings, a right to petition exists only vis-à-vis the European Parliament and the European Ombudsman (Article 24 TFEU).

4. Delegated Rulemaking and Participation: Executive and Collective Self-Determination

Delegated rulemaking and participation therein first and foremost serve democratic ends and are ruled by the separation of powers doctrine. As delegated rulemaking belongs mainly to the democratic sphere, everybody is called upon to participate. Furthermore, the administration is forced to listen to and consider this input, and thus enter into a dialogue. But from this, no decision-making powers follow for the public: As delegated rulemaking takes place in the second branch of government, and is thus governed by the laws enacted by the lawmakers, it is not the participants who decide but the democratically legitimated administrators. If the people want to decide on administrative issues, they have to concentrate their efforts at another level and vote for another government. This is what happened with Stuttgart 21 and this would also be the way to follow in case of the above example, Keystone XL. Despite the major differences in the three systems they all function according to the constitutional theory of imperative participation. While the United States' system fulfills this ideal – at least from a general legal point of view –, Germany and the European Union[211] know rules that are pointing in the direction but still have a long way to go to achieve the democratic ideal of allowing more participation in the rulemaking process.

(2013/C 11/03); European Parliament, A6-0475/2008 4.12.2008 REPORT on the perspectives for developing civil dialogue under the Treaty of Lisbon (2008/2067(INI)) Committee on Constitutional Affairs; European Economic and Social Committee SOC/423 Articles 11(1) and 11(2) of the Lisbon Treaty Brussels, 6 February 2012 Working Document of the Section for Employment, Social Affairs and Citizenship on the Principles, procedures and action for the implementation of Articles 11(1) and 11(2) of the Lisbon Treaty (own-initiative opinion).

211 *See* Ziamou, note 7, at 160-161, *referring to* Denis J. Galligan, *Due Process and Fair Procedure* 473-474 (1996); Peter Cane, *An Introduction to Administrative Law* 365 (3rd ed. 1996).

C. The Judiciary: Adjudicating Rulemaking and the Rule of Law

The judiciary in all three legal orders first and foremost serves the protection of the rule of law and allows for individual self-determination.[212] Judgments on the rulemaking process – like all judgments – are retrospective, react to an individual complaint, deal with an individual case, and are bound by the constitution and the law. They are based on reason, not will, as Alexander Hamilton famously stated.[213] Based on a collective (and thus democratic) will are the decisions of the legislature – and to a lesser extent, the decisions of the executive where it acts as a rulemaker.

The century-old dilemma that presents itself in all democracies which are based on the rule of law, is how the judiciary can respect the democratic will and protect individual self-determination at the same time.[214] Judicial protection in general is important in order to protect individual self-determination. However, judicial review should not reach too far in order to allow for collective self-determination. The separation of powers doctrine ensures that democratic will-based decisions are made by the legislature and the executive, not the judiciary, by restricting the judicial control of legislative and administrative acts. While reviewability and the scope of review, as well as the awarded remedy, determine how the State's decision on participation in administrative proceedings is framed, standing determines who is allowed to participate in this decision.

1. United States

Restricting the courts' judicial review powers prohibits the courts from rendering judgment on certain aspects of a case in order to preserve the separation of powers (a.) While a judgement will usually vacate a rule, the possibility of remand without vacation allows for the rule's legal effect to continue (b). Standing limits the participation of individuals in the courts' proceedings and is equally controlled by the separation of powers (c.). Only a delicate balance between the scope of review, the judgment's effect

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212 *See* at 16.
213 The Federalist No. 78 (Alexander Hamilton).
214 *See* Ely, note 33; Bickel, note 33.

and legal standing satisfies the separation of powers doctrine by balancing collective and individual self-determination (d).

a. Separation of Powers and Judicial Review

The courts protect the rule of law and allow for individual self-determination. Based on reason, judgments that follow the rule of law, are "wholly retrospective"[215] and concern mainly the plaintiffs and the defendants. The courts review the agencies' rules.[216] The separation of powers doctrine bars them from political activity and overreaching into the democratic realm of the other two branches by restricting the courts' review powers. This restriction plays out on different levels. First, judicial review can be excluded (aa.). Second, the scope of review might be restricted, inter alia by deferring to the administration (bb.).

aa. Exclusion of Judicial Review/Reviewability (§ 701 APA)

The exclusion of judicial review usually guards a core area or "'special province' of the Executive"[217] against judicial review and is based on the separation of powers doctrine. The APA allows Congress to preclude judicial review via statutes.[218] The Supreme Court tries to contain this wide exclusion with an assumption of the reviewability of the decision (or non-decision).[219] But the courts have been reluctant to apply the presumption of reviewability.[220] In its much-criticized Heckler v. Chaney judgment, the Supreme Court even turned the assumption upside-down in cases where the agency refused to act.[221] Far-reaching exclusion of judicial review has rightly been attacked on grounds of the separation of powers by Justices Reed and Douglas, in their dissent in

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215 Strauss, *Transformation*, note 153, at 766. From this, it follows that in general, judicial holdings must be applied retroactively, *see* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 754-759 (1995).

216 The review of delegating laws does not protect participation and will not be considered here.

217 *Cf.* U.S. v. Armstrong, 517 U.S. 456, 464 (1996).

218 *See* Jeffrey S. Lubbers (ed.), *A Guide to Federal Agency Rulemaking* 405 *et subseq* (4th ed. 2006).

219 Abbott Laboratories v. Gardner, 387 U.S. 131, 140 *et subseq*. (1967); Association of Data Processing Organizations v. Camp, 397 U.S. 150 *et subseq*. (1970); Citizens to Protect Overton Park v. Volpe, 401 U.S. 402, 410 (1971); *see* John Fitzgerald Duffy & Michael E. Herz (eds.), *A Guide to Judicial and Political Reviw of Federal Agencies* 12 *et subseq*. (2005).

220 Warren, note 95, at 381-382, citing Court judgments going in either this or that direction. See *ibid*., at 370 *et subseq*.

221 Heckler v. Chaney, 470 U.S. 821 (1985); Warren, note 95, at 371; Cass R. Sunstein, *What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 195 (1992).

United States v. Wunderlich: "[The exclusion of judicial review] makes a tyrant out of every contracting officer. He is granted the power of a tyrant even though he is stubborn, perverse or captious. He is allowed the power of a tyrant though he is incompetent or negligent. He has the power of life and death over a private business even though his decision is grossly erroneous. Power granted is seldom neglected. The principle of checks and balances is a healthy one. An official who is accountable will act more prudently. A citizen who has an appeal to a body independent of the controversy has protection against passion, obstinacy, irrational conduct, and incompetency of an official."[222]

The exclusion of judicial review, rather than the more specific limitation of its scope, might lead to too much discretion for the other branches, which in fact often do not comply with the legal rules binding them without judicial oversight[223] and thus leave individual self-determination unprotected. Because of this, courts indeed need to follow the presumption of reviewability.

bb. Scope of Judicial Review (§ 706 APA)

The scope of judicial review is governed by § 706 APA. It has been said that the article's different provisions are rather vague and wide open to interpretation.[224] However, two undisputed basic principles exist: the first one is that at least some deference is granted to the agencies. This principle is rooted in the separation of powers doctrine.[225] Equally rooted in the doctrine is the second principle, that under no circumstances may courts substitute the agency's decision with their own.[226] Both principles guard the collective decision-making process from the courts' influence. Aside from that, disputes arise as to the exact scope of review. One can differentiate between an approach that allows for a wide discretion of some aspects of the agencies' actions (ii) and one that allows for close scrutiny of some other aspects (iii). The former is said to be applied to substantive

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222 U.S. v. Wunderlich, 342 U.S. 98, 101-102 (1951) (Reed J., Douglas, J., dissenting).
223 Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 Wm. & Mary L. Rev. 805 (2010).
224 Warren, note 95, at 395; *see also* Ziamou, note 7, at 172 *et subseq*.
225 Warren, note 95, at 395 *et subseq*.; Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 Admin. L. J. 269 *passim* (1988).
226 *See* Citizens to Protect Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

rights, the latter to procedural rights. Therefore, procedural rights will first be differentiated from substantive rights (i.).

i. Substantive and Procedural Rights

Already in the 1970s, Professor *Richard Stewart* wrote that as a reaction to the rise of the administrative state, "courts have changed the focus of judicial review so that its dominant purpose is no longer the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for all affected interest in the exercise of the legislative power delegated to agencies."[227] The differentiation that Stewart makes is one between individual self-determination ("private autonomy") and collective self-determination ("fair representation"). This *focus* of review translates on the level of *scope* of review into the differentiation between procedural and substantive laws, as observed by Justice, then Professor, *Elena Kagan* nearly thirty years later. She describes that because of the rise of the administrative state, courts "shy away from such substantive review of agency outcomes, perhaps in recognition of their own inability to claim either a democratic pedigree or expert knowledge [they] incline instead toward enforcing structures and methods of decision-making."[228]

Substantive laws are created by statute and are concerned with a certain subject matter, the "what". They confer substantial rights on an individual and affect the outcome of the process, but not the process itself. Procedural laws, in contrast, are concerned with the "how", the way substantive laws are applied and come into being. Procedural laws thus affect the decision-making process and the participation process. They can be further sub-divided into quasi-procedural norms, which concern the decision-making process, and procedural norms, which concern participation in the process.[229]

Agency decisions can run counter to substantive laws as well as procedural laws. Consequently, the courts review agencies' actions against both sets of norms. When using the substantive law yardstick, the courts protect individual self-determination: if

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227 Stewart, *Reformation*, note 54, at 1712, referring to the expansion of the traditional model.

228 Kagan, note 53, at 2269.

229 Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 525 (1985) differentiates procedural from quasi-procedural: participation as such is procedural, but the agency's handling of the results of participation is quasi-procedural, *ibid*., footnote 23.

an administrative decision breaches a substantive law, it will be declared unlawful. This is old-fashioned, standard judicial review, which protects individual self-determination against administrative acts.

Individual self-determination is also protected by judicial review in light of the procedural norms. However, different from the protection of substantive rules, the courts not only protect the individual and individual self-determination – e.g. by protecting an individual's right to participate in an administrative proceeding – but extend their protection to the decision-making process.[230] This reaches beyond the courts' original task of protecting the individual against the collective, as now the courts are protecting the collective decision-making process against the agency: "[A]dministrative procedures […] simultaneously please the Baptists and the bootleggers."[231] This protection of collective self-determination can have two negative, mutually exclusive, consequences that render procedural rights far more complicated than substantive rights.[232] If the courts exercise too much scrutiny, collective self-determination is seriously impaired by non-elected federal judges. If the courts do not exercise enough scrutiny, individual participation rights become seriously impaired. Chief Justice *John Roberts* – looking at the problem from an institutional point of view and arguing in favor of judicial scrutiny of agency action – framed this dilemma by stating that the Court's "duty to police the boundary between the Legislature and the Executive is as critical as [the Court's] duty to respect that between the Judiciary and the Executive."[233] Whether the courts have succeeded in striking the right balance between the three branches, and consequently of individual and collective self-determination, depends on the courts' protection of substantive rights (ii.) and procedural rights (iii.).

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230 Courts protect the process *ex negativo,* also in cases involving substantive rights. The case here is different though, as the protection is not counter to individual rights but parallel to them.

231 Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 Colum. L. Rev. 1749, 1805 (2007).

232 This tension between individual self-determination and collective self-determination seems to mirror the influence the legislature has on individual self-determination. But it is far more difficult to conceive too much protection of individual self-determination through a process of collective self-determination than the other way round.

233 City of Arlington, Texas v. FCC, 569 U.S. ___, 17 (2013) (Roberts, C.J. dissenting,).

ii. Substantive Laws and the Chevron Doctrine

According to § 706 (2)(C) APA, a rule that is in excess of statutory jurisdiction, authority, or limitations, or that falls short of a statutory right, must be held to be unlawful and set aside by the court. The Supreme Court granted agencies wide discretion in interpreting whether a statutory right is indeed a statutory right in the landmark decision of Chevron USA Inc. v. Natural Resources Defense Council (NRDC).[234] The Court applies a broad scope of review and allows for wide discretion[235] in rulemaking procedures in cases in which an agency interprets a statute. A two-step inquiry is necessary: "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[236] But, if "the statute is silent or ambiguous with respect of the specific issue", the courts can only decide on "whether the agency's answer is based on a permissible construction of the statute"[237] or – in other words – whether it "has adopted a reasonable interpretation of the statute."[238] In the absence of clear congressional intent, the Chevron test gives the agencies a wide margin of rulemaking by allowing them to interpret substantive laws as they see fit, as long as the interpretation is reasonable. The determination of whether a statute allows a certain rule of course impacts on the substantive rights – and obligations – of the individual: In the case of *King v. Burwell*, the second case on the legality of "Obamacare", the decisive question was whether individuals are entitled to federal health care subsidies in states that have not established their own exchange yet. Although the statute uses the words "established by the state" in the particular section, it can be inferred from other sections that it needs to be read as "established by the state or by the federal government." The latter

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234 Chevron USA v. NRDC, 467 U.S. 837 (1984). See Warren, note 95, at 375 *et subseq*. Chevron has been the most cited US Supreme Court decision ever, Thomas M. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. Chi. L. Rev. 823, 823 (2006).

235 Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 39 Admin. L. Rev. 363, 364 (1986); Robert C. Dolehide, *A Comparative "Hard Look" at Chevron: What the United Kingdom and Australia Reveal About American Administrative Law*, 88 Tex. L. Rev. 1381, 1384 (2010).

236 Chevron USA v. NRDC, 467 U.S. 837, 841 (1984).

237 Chevron USA v. NRDC, 467 U.S. 837, 843 (1984); *see also* U.S. v. Erika, 102 S.Ct. 1650 (1982), Capital Cities Cable v. Crisp, 104 S.Ct. 2694 (1984) and Chevron USA v. Echazabal, 122 S.Ct. 2045 (2002).

238 Kagan, note 53, at 2373.

understanding was the one supported by the agency. This reading led to a substantive individual right to health care subsidies in all of the United States; the plaintiff's reading did not. The Appeals Court upheld the agency's reading on grounds of step two of the Chevron test[239] as did the Supreme Court.[240] The court's decision to grant agencies discretion over defining statutory rights – albeit with some caveats – was decisive. But the agency could have also decided otherwise, as long as this differing understanding would also be reasonable.

Two main accounts of the Chevron jurisprudence are in dispute: The first account argues that the interpretation of the law is essentially a task which adheres to the rule of law, and therefore is not an open and democratic procedure. As Chevron was about the outcome of the process and substantive rights, no deference should have been accorded to the agencies.[241] By deferring, the courts instead limited their ability to protect individual self-determination. The Obamacare example shows that by deferring, the agency is granted the power to decide on substantive rights: had the agency decided to interpret the statute in a way that no subsidies had been awarded in States where no state exchange had been set up, the courts would not have determined that a substantive right to subsidies existed. This reading diminishes individual self-determination and should be corrected by the courts. But, one has to add, the courts do not always follow their own doctrine, but sometimes apply a narrower scrutiny in order to protect individual rights.

A second account of the Chevron doctrine does not focus on its limits to the protection of individual self-determination through the courts, but on the fact that its limited scope of review protects collective self-determination. This is because the agencies – acting in a democratic fashion as rule-makers because of the openness of the decision-making process and thus of the procedure[242] – are provided with discretion in making their policy decision. This different reading is due to the Supreme Court's failure to

239 King v. Burwell, No. 14-1158 (4th Cir., July 22, 2014).
240 King v. Burwell, 576 U.S. ___ (2015).
241 Breyer, note 235, at 383; Kagan, note 53, at 2372.
242 See supra, at 31.

"adequately distinguish between outcome review and process review".[243] According to the second reading it is not only the interpretation of law falls within Chevron's purview, but also matters of policy.[244] Then, "[j]udicial deference to agency 'interpretation' of law is simply one way of recognizing a delegation of lawmaking authority [and thus policy] to an agency."[245] To use the Obamacare example again, the agency's decision to interpret the law either way would not so much be a legal decision, but a policy decision based on the rulemaking process and its inherently democratic character.

No matter which account one follows, it is certainly true that the Court limits the protection of individual self-determination by allowing for wide deference in the interpretation of substantive laws. Maybe, in order to counter this limited review on substantive norms, the courts' review of the rulemaking process can make up for this limitation?

iii. Procedural Laws and the Hard-Look Doctrine

The Supreme Court's scrutiny of the rulemaking process and the corresponding procedural laws and rights differ from the scrutiny of substantive rights. The sub-division of procedural rights into (quasi-)procedural norms, which concern the decision-making process, and procedural rights, which concern the participation in the process, is reflected by § 706 (2)(A) and (D) APA.

According to § 706 (2)(D) APA, the reviewing court must hold unlawful and set aside agency action, findings, and conclusions which are found not to have observed the

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243 Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 88 Rutgers L. Rev. 313, 338 (1996).

244 *See e.g.*, Matthew Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 Va. L. Rev. 597, 604 (2009). The second step, it is argued, is about the decision-making process, where "[w]e have the doctrinal equivalent of musical chairs, with three doctrines (Chevron Step one, Chevron Step Two, State Farm) and only two chairs (interpretative reasonableness and reasoned decision-making)"; *see also* Ronald M. Levin, *The anatomy of Chevron: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253 (1997), wants to abolish the second step in Chevron, arguing that the D.C. circuit court has transformed the question of whether the agency's decision was reasonable to whether it was "reasoned", at 1263; Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 Yale J. On Reg. 283, 307 (1986), Kmiec, note 225, at 287-90; Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 Tex. L. Rev. 469, 520-24 (1985), all just assuming that Chevron applies to policy.

245 Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 26 (1983); *see also* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201 (2001).

procedure required by law. This latter norm encompasses the requirements of Article 553 APA:[246] a notice of proposed rulemaking, an opportunity to participate, the publication of a statement of basis and purpose, and the publication of the notice procedure, as well as following special procedural norms made up of the delegation norms and the procedural requirements set by the agency itself. This protection is of considerable importance, as it protects the right to participate. From this norm, it follows that in case no participation took place where required by law, the rule must be held unlawful and set aside.[247] However, the "harmless error" rule applies, which ensures that a rule will be upheld "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached."[248] It thus depends on whether the same result could be expected in a new proceeding.[249]

However, a right to participate is depleted of meaning if the agency does not consider the results of the participation and take them into account. This is where Article 706 (2)(A) APA comes into play, which foresees that the reviewing court must hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The ensuing test is best understood as a procedural standard,[250] as it is about reasoned decision-making[251] – it is essentially about the policy decision the agency makes and not its legal interpretation of the statute.[252] The courts apply the so-called hard-look doctrine. The doctrine is

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246 Lawson, note 243, at 316 differentiates between procedures and process of decision-making. As most authors refer to the decision-making process as procedural this term will be used in a broad sense.

247 See e.g., Community Nutrition Institute v. Young, 818 F.2d 943, 260, 294 (D.C. Cir. 1987) (differentiating interpretative rules for which no notice-and-comment procedure is necessary and legislative rules).

248 U.S. Steel Corp. v. EPA, 595 F.2d 207 (5th Cir.1979), quoting Braniff Airways v. Civil Aeronautics Board, 379 F.2d 453, 466 (D.C.Cir.1967).

249 Lubbers, note 218, at 524 *et subseq*. In McLouth Steel Prods v. Thomas, 838 F.2d 1317, 1324 (D.C.Cir.1988), it has been held "utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure", Sugar Cane Growers Cooperative of Florida v. Veneman, 289 F.3d 89 (D.C. Cir. 2002), para. 18. *See also* Craig Smith, *'Due Account' of the APA's Prejudicial Error Rule*, 96 Va. L. Rev. 1727 (2010).

250 Thomas Miles & Cass R. Sunstein, *The Real world of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 761 (2008); Stewart, *Reformation*, note 54, at 1783; *cf.* Garland, note 229, at 525.

251 Bressman, note 231, at 1761, 1777 *et subseq.*; *cf.* Stephenson & Vermeule, note 244, at 598, 603; McFeeley, note 179, at 353; Lawson, note 243, at 318 who remarks that the test can also encompass decisions.

252 Breyer, note 235, at 364; Stephenson & Vermeule, note 244, at 603; Patrick M. Garry, *The Values and Viewpoints Affecting Judicial Review of Agency Actions: A Focus on the Hard-Look Doctrine*, 53

understood by the Supreme Court as a very strict standard which needs to be "thorough" and "searching".[253] It first and foremost demands that the agency develops a rulemaking record, in order to allow the courts to review the decision-making process. Because of this, the hard-look doctrine has been blamed for inflating the rulemaking records to hundreds of pages.[254] The procedural requirements demand that the record supports the conclusions which led to the rule; tests the basis of the agencies' conclusions;[255] and reviews whether the policy choices are rationally connected with the facts[256] and have been adequately articulated, defended, and adhered to.[257] Alternatives must have been taken into account.[258] Courts require agencies to address and respond to the factual, analytical, and policy submissions made by the various participating interests, and justify their policy decisions with detailed reasons supported by the rulemaking record."[259] Thus, the hard-look doctrine is about whether the agency has considered the facts before it and has adequately balanced the results of the participation.[260] The courts closely guard the collective process of decision-making.[261] In theory, they do not scrutinize the outcome of the collective process. In reality, they sometimes do though, as it is a thin line – easily overstepped – between requiring agencies to address and respond to submissions, and requiring agencies to create a different rule even though the legal preconditions have been met (but not to the satisfaction of the judge(s)). As the process of collective decision-making encompasses the individual right to have one's participation considered, the scrutiny of the agency's duty to consider the results of the

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Washburn L. J. 71 (2013); Dolehide, note 235, at 1384; *see* Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 Admin. L. Rev. 61, 71–72 (1997); Richard J. Pierce, Jr., *The APA and Regulatory Reform*, 10 Admin. L. Rev. Am. U. 81, 83 (1996). Critics also argue that hard-look review can be used by judges to overturn agency actions to which they have ideological objections, thus allowing those judges to engage in inappropriate policymaking. *See* Matthew C. Stephenson, *A Costly Signaling Theory of "Hard-Look" Judicial Review*, 58 Admin. L. Rev. 753, 764 (2006) (discussing criticisms of hard-look review); *cf.* Bressman, note 231, at 1767.

253 Citizens to Protect Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

254 Strauss, *Transformation*, note 153, at 760, who explains in the subsequent pages how this led the agencies to circumvent participation.

255 Benjamin W. Mintz & Nancy G. Miller, *A Guide To Federal Agency Rulemaking* 323 (1991).

256 Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 51 (1983).

257 *Cf.* Sunstein, *Clean Air*, note 72, at 344.

258 Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 45, 48, 55-56 (1983); Breyer, note 235, at 383; Cass R. Sunstein, *Deregulation and the Hard Look Doctrine*, 1983 Sup. Ct. Rev. 177, 182 (1983).

259 Stewart, *Twenty-First Century*, note 162, at 442 *et subseq.*

260 Garland, note 229, at 527; *referring to* HBO v. FCC, 567 F. 2d, 9. 35 (D.C. Cir), cert denied, 434 U.S. 829 (1977).

261 Garry, note 252, at 77.

participation process also protects individual self-determination. Thus, the hard-look doctrine indeed protects individual self-determination – even if it might over-scrutinize collective self-determination in some instances.

A Supreme Court decision in 2009 recognized the dilemma that the courts must only scrutinize the boundaries of agency rulemaking, and points in the right direction by underlining an argument that Chief Justice *William Rehnquist* already made in his dissenting opinion in State Farm.[262] In F.C.C. v. Fox Television Stations, the Supreme Court held that not only rational reasons but also political reasons may inform the agency's policy decision, and thus allowed for some discretion in the essentially political and democratic process of rulemaking: "[T]he agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate."[263] It seems as if the Supreme Court has indeed found a sensible balance between strict scrutiny of and leeway for procedural norms in rulemaking.

To conclude, the scope of review of substantive rules allows for a lot of deference to the agencies, and primarily protects the agencies' policy choices rather than individual self-determination. Still, often the courts do not defer, despite Chevron, and thus protect individual self-determination. The review of procedural rules, even if rather aimed at protecting collective self-determination, also protects individual self-determination. In addition, the Supreme Court softened this hard-look-doctrine with regard to the decision-making process, and thus leaves leeway for the process of collective self-

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[262] *Cf.* Motor Veh. Mfrs. Ass'n v. State Farm Ins., 463 U.S. 29, 59 (1983) (Rehnquist, C.J. dissenting): "A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."

[263] F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009); Donnelly, note 168, at 361: "The case involved a change in policy of the Federal Communication Commission which was, as Justice Scalia put it, based on 'significant political pressure from Congress.' In a five-four split, the Court held that an agency need not always provide a more detailed justification for a policy change, thereby perhaps rendering it easier for agencies to justify a change of policy based on political, rather than expertise, considerations."

determination. At the same time, the basis of any decision-making process, i.e. the question of whether participation has taken place, is under strict scrutiny in order to protect both the individual's right to participate and the collective process. Justice Breyer's verdict that "current doctrine is anomalous [because i]t urges courts to defer to administrative interpretations of regulatory statutes, while also urging them to review agency decisions of regulatory policy strictly"[264] is not entirely true anymore, thanks to the 2009 Supreme Court decision *F.C.C. v. Fox Television Stations*. Still, the right balance has not been found yet between individual and collective self-determination – one which puts the protection of individual self-determination at center stage, and at the same time gives enough leeway to the administration's policy decisions which belong to the realm of collective self-determination.

b. Judicial Remedy

The standard judicial remedy would be to set aside a rule that violates the law – be it substantive or procedural – within the scope of review. But the courts, in order to protect the agencies' collective decision-making process, have taken to remand without vacation, especially when procedural rights have been breached. This might well be the right approach from a collective self-determination perspective,[265] at least as long as the administrative process can be repeated, will be repeated soon, and the repetition does not serve only as a fig leaf and may well lead to a new outcome. However, from an individual self-determination perspective, this remedy seems to be quite weak, as it leaves an illegal rule intact and thus turns a plaintiff's victory into a defeat. This speaks in favor of remand and vacate – at least as long as there no strong arguments against a vacation based on rules and/or the specific context (e.g. that people would go hungry if a food-stamp program were put on hold altogether).

c. Participation on the Judicial Level: Legal Standing

Different from participation in the two other branches, participation plays a far bigger role in judicial proceedings. The courts can never decide on their own on whether to act: they are obliged to pick up and decide on what an individual or a group brings to them,

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264 Breyer, note 235, at 364 *et subseq.*; *see also* Dolehide, note 235, at 1381 *et subseq.*

265 *See* Garland, note 229, at 563 *et subseq.*

and they are confined by the boundaries of the matter in dispute. Thus, the right to participate, i.e. the law of standing to initiate judicial proceedings, equals the right to engage the third branch.

Standing was developed only in the 1920s and 1930s as part of the struggle on how to deal with the regulatory state, [266] and was based on the "Case or Controversy" requirement of Article III (2) US Constitution. Standing was associated with a "legal right – one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."[267] Standing was understood to be very narrow and allowed only those whose rights were infringed to participate on the judicial level. This so called legal rights test was developed especially by Justices Frankfurter and Brandeis in order "to limit the occasions of judicial intervention into democratic processes."[268] In other words, standing flows from the separation of powers doctrine: "The idea of the separation of powers that underlies standing doctrine explains why [certain] suits, even when premised on allegations of several instances of violations of law, are rarely, if ever appropriate for federal-court adjudication [because, c]arried to its logical end, [respondent's] approach would have the federal court as virtually continuing monitors of the wisdom and soundness of Executive action, such a role is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action."[269]

The Supreme Court abandoned the legal rights test in favor of the injury in fact test in 1970, and thus opened the door to a wide array of cases.[270] The Supreme Court decided

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266 Sunstein, *Standing*, note 221, at 170.

267 Tennessee Elec. Power Co. v. TVA, 306 U.S. 118, 137-138 (1939).

268 Sunstein, *Standing*, note 221, at 179.

269 Allen v. Wright, 468 U.S. 737, 759-760 (1984), quoting Laird v. Tatum, 408 U.S. 1 (1972), *see also* Stone & Seidman & Sunstein & Tushnet, note 23, at 106: "Standing thus ensures "that courts will not hear cases simply because they want to; they require a concrete stake and thus give the executive and legislative branches a range of breathing space."; Christoph Möllers, *Steps to a Tripartite Theory of Multi-level-Government*, 2.5.3 (Jean Monnet Centre, NYU School of Law, Working Paper No. 5, 2003), *available at* www.jeanmonnetprogram.org/archive/papers/03/030501.pdf; Antonin Scalia, *The Doctrine of Standing*, 17 Suffolk U. L. Rev. 881 (1983); critique by Richard Pierce, *Lujan v. Defenders of Wildlife: Standing*, 42 Duke L. J. 1170 (1992-1993).

270 Association of Data Processing Services Organization v. Camp, 397 U.S. 150 (1970).

that an "injury in fact, economic or otherwise" would be sufficient for standing as long as "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[271] Within this zone of interest, nearly any interest can be named, such as any aesthetic, conservational and/or recreational interest.[272] The reason for the relaxation of the standing requirement was due to the perception that agencies were captured by the interests of big industry. Thus, the courts were supposed to control the agencies in order to balance the influence of the lobbies.[273] Relaxed standing rules did not aim at more individual self-determination, but aimed to control the process of collective self-determination via the judiciary. Only in one regard did this development in the 1970s advance individual self-determination. This was the case in the Data Processing decision, in which the Supreme Court held that "beneficiaries of government regulation, not merely those trying to fend off government action, can have standing to sue."[274]

In addition to this relaxation through the courts, Congress developed the so-called citizen suit, which allowed standing for everybody based on specific statutes. The Supreme Court put this into reverse gear in the 1990s. In its Lujan decision, the court held that "[w]e have consistently held that a plaintiff raising only a generally available grievance about government — claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large — does not state an Article III case or controversy."[275] While the judgment accepted the "injury in fact" requirement, it emphasized the requirement of a concrete interest: "[T]he plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and

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271 Association of Data Processing Services Organization v. Camp, 397 U.S. 150, 153, 157 (1970), *see also* Air Courier Conference of Am. v. American Postal Workers Union, 111 S.Ct. 913 (1991) where standing was denied because the zone of interest test was not passed.

272 Association of Data Processing Services Organization v. Camp, 397 U.S. 150, 154 (1970); *see also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 *et subseq.* (1971); *see further* U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 *et subseq.* (1973).

273 Sunstein, *Standing*, note 221, at 183 *et subseq.*

274 Stone & Seidman & Sunstein & Tushnet, note 23, at 108.

275 Lujan v. Defenders of Wildlife Decision, 504 U.S. 555, 573-574 (1991).

particularized, and (b) actual or imminent, not conjectural or hypothetical."[276] A plaintiff must show more than a mere "general interest [in the alleged procedural violation] common to all members of the public."[277] In a next step, the judgment turned to the citizen suit provision of the Endangered Species Act (ESA), which provides that everybody may enjoin the government where it is allegedly in breach of the ESA (§ 7 (a)(2)). By this, standing has been ordained expressively by Congress onto everybody as "part of a complex system in which Congress [...] enlists courts and citizens in order to produce compliance."[278] The court refused to accept this: "[T]he injury-in-fact requirement had been satisfied by congressional conferral upon all persons of an abstract, self-contained, non-instrumental 'right' to have the executive observe the procedures required by law. We reject this view."[279] While accepting standing on the basis of a concrete interest, the Court declared the citizen suit to be unconstitutional.

Some have voiced the fear that from this judgment, it follows that procedural rights cannot confer standing anymore. However, in a clarifying footnote, the Court held that a breach of a procedural right can lead to standing "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing."[280] This view is reinforced by Justices Blackmun and O'Connor's dissent, which insists that one "cannot be saying that 'procedural injuries' as a class are necessarily insufficient for purposes of Article III standing. Most governmental conduct can be classified as 'procedural'. Many injuries caused by governmental conduct, therefore, are categorizable at some level of generality as 'procedural' injuries."[281] According to the dissenters, "some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to

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276 Lujan v. Defenders of Wildlife Decision, 504 U.S. 555, 560-61 (1991); *see also* Summers v. Earth Island Institute, 555 U.S. 488, 493 (2009).

277 Ex Parte Lévitt, 302 U.S. 633, 634 (1937).

278 Sunstein, *Standing*, note 221, at 221.

279 Lujan v. Defenders of Wildlife Decision, 504 U.S. 555, 573 (1991). This understanding was later upheld later *inter alia* in Utah v. Evans, 122 S.Ct. 2191 (2002) and Horne v. Flores, 129 S.Ct. 2579 (2009).

280 Lujan v. Defenders of Wildlife Decision, 504 U.S. 555 (1991), footnote 8.

281 Lujan v. Defenders of Wildlife Decision, 504 U.S. 555, 602 *et subseq.* (1991) (Blackmun, J., O'Connor, J. dissenting).

demonstrate a sufficient likelihood of injury just through the breach of that procedural duty."[282]

Thus, all agree procedural breaches can lead to standing as long as the procedural norm protects a "concrete interest" [283] or if there is "an inextricable link between procedural and substantive harm"[284] – and thus the plaintiff's individual self-determination is threatened. Congress was only barred from naming the citizen a "public procurator" by the Supreme Court, which thus limited the influence of the judiciary to its original task: protecting individual rights. There is no disagreement on whether procedural administrative rights can confer standing. Lujan thus would have been decided differently if the plaintiffs had argued that a right to participate in a rulemaking proceeding was breached. Accordingly, in later cases, environmental special interest groups possessed standing. The alleged breach of procedural norm suffices, as long as the plaintiff shows "that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff."[285] Thus, "a procedural-rights plaintiff must show not only that the defendant's acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest."[286] Nearly any interest can be named, e.g. "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing."[287]

This corresponds to the rather broad standing identified earlier. To correct this broad standing, the Court of Appeals for the D.C. Circuit has developed a causation

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[282] Lujan v. Defenders of Wildlife Decision, 504 U.S. 555, 605 (1991) (Blackmun, J., O'Connor, J. dissenting).

[283] Lujan v. Defenders of Wildlife Decision, 504 U.S. 555, 572 (1991).

[284] Lujan v. Defenders of Wildlife Decision, 504 U.S. 555, 605 (1991) (Blackmun, J., O'Connor, J. dissenting).

[285] Florida Audubon Society v. Lloyd Bentsen and Margaret Richardson, 94 F.3d 658, 664 (D.C. Cir. 1996), *referring to* Lujan v. Defenders of Wildlife, 504 U.S. 555, 572-73 (1991); Schlesinger v. Reservists Committee, 418 U.S. 208, 223 (1974); Capital Legal Foundation v. Commodity Credit Corp., 711 F.2d 253, 258-60 (D.C.Cir. 1983).

[286] Center for Biological Diversity v. U.S. Department of the Interior and American Petroleum Institute, 563 F.3d 466, 479 (D.C. Cir. 2009), *referring to* Florida Audubon Society v. Lloyd Bentsen and Margaret Richardson, 94 F.3d 658, 664-665 (D.C. Cir. 1996).

[287] Lujan v. Defenders of Wildlife, 504 U.S. 555, 562-63 (1991); 563 F.3d 466 (2009), 563 F.3d 466 (2009); Center for Biological Diversity v. U.S. Department of the Interior and American Petroleum Institute, 563 F.3d 466, 479 (D.C. Cir. 2009).

requirement, which mirrors the harmless error rule: “To demonstrate standing, then, a procedural-rights plaintiff must show not only that the defendant’s acts omitted some procedural requirement, but also that it is substantially probable that the procedural breach will cause the essential injury to the plaintiff's own interest.”[288] If one accepts this argument as put forward, § 706 (2)(D) APA, which extends the scope of review to procedural laws, would be “effectively eliminate(d)”[289] as no plaintiff would be able to prove causation. The same would be true for § 706 (2)(A) APA, as the arbitrary and capricious standard is understood as (quasi-) procedural. Thus, the causation requirement must be read as putting the burden of proof on the agency: “A plaintiff who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result”.[290] This approach can also find some basis in the Lujan decision, where the Supreme Court held that “[t]here is this much truth to the assertion that ‘procedural rights’ are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.”[291]

Procedural rights are even more special if “the plaintiff is suing to enforce a procedural right that has not been made contingent on the plaintiff’s having such an interest. The most ubiquitous APA example [...] may be § 553(c)’s provision for adequate notice of, and opportunity to comment upon, a proposed rule”. This rule does not depend upon a substantive interest of the commentator, and thus the plaintiff possesses standing as long as he or she sought to participate in the administrative proceeding.[292]

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288 Florida Audubon Society v. Lloyd Bentsen and Margaret Richardson, 94 F.3d 658, 664 *et subseq.* (D.C. Cir. 1996)

289 Duffy & Herz, note 219, at 46.

290 *Cf.* Sugar Cane Growers Cooperative of Florida v. Veneman, 289 F.3d 89 (D.C. Cir. 2002), para. 13.

291 Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n. 7 (1991).

292 Duff & Herz, note 219, at 36, *referring to* Portland Audubon Soc'y v. Endangered Species Comm., 984 F.2d 1534, 1548 (9th Cir.1993), § 6: “The environmental groups have Article III standing if for no other reason than that they allege procedural violations in an agency process in which they participated. *Cf.* Lujan v. Defenders of Wildlife, 112 S.Ct. 2130, 2142-46, 119 L.Ed.2d 351 (1992) (Article III requires that plaintiff possess more than a "generally available grievance about government" in order to have standing).

d. Conclusion: Balancing Judicial Review and Standing

From the separation of powers, it follows that courts first and foremost protect individual self-determination and the rule of law while respecting the democratic process and outcome of the proceedings of collective self-determination. This balance is struck on the admissibility and merits level. While no coherent approach by the courts is displayed in the balancing of the different components, in the end they match up to reach a rather balanced result. On the one hand, by deferring the competence to interpret statutes to the agencies, the courts limit their ability to protect individual self-determination. On the other hand, everybody whose participation rights on the administrative level have been breached has standing. Other procedural rights confer standing if a concrete interest is at stake. Although this is a rather wide understanding of standing, it protects individual self-determination, keeps "public procurators" at bay and allows for collective self-determination. In addition, although the hard-look doctrine is primarily aimed at controlling the process of collective self-determination, it has been limited since 2009, as political issues have been admitted to the process. It also protects individual self-determination through scrutinizing procedural rights. Thus, in the end, the judiciary finds the right balance of ensuring individual self-determination while respecting collective self-determination.

2. Judicial Review in Germany

The German system, with its emphasis on subjective rights,[293] is firmly based upon the idea that judicial review is supposed to protect the individual. Thus, standing rules are very strict and in general claims can only be brought against an adjudicative act. Judicial scrutiny is strict – but not with regard to procedural rights.

Direct judicial recourse against rules is only available through the Federal Constitutional Court when it would be unconscionable for the plaintiff to wait until an adjudicative act would be implemented against him. The prerequisites for a claim to be admissible are very high. Standing requires an alleged breach of a fundamental right – but there is no

[293] *Cf.* Blankennagel, note 34.

constitutional right to participate in the rulemaking process. In contrast, the scope of review is relatively broad.

Administrative courts offer protection in cases where statutes make provision for participation rights.[294] If a participation procedure should have taken place but did not, German administrative courts will declare the rule unlawful and declare the adjudicative administrative act based on it null and void. However, in case only minor mistakes have taken place, the procedural error might be irrelevant and the rule upheld by the courts.[295] The US harmless-error rule has been transformed into law as part of the German Administrative Procedure Act (Verwaltungsverfahrensgesetz) which does not apply to rules though. Traditionally, procedural rights are not given great weight. Due to the influence of the ECJ and the Aarhus-Convention, this is changing and procedural rights become more and more important in German administrative law and can confer standing and lead to the invalidation of a rule. The ECJ has held that in order to protect participation "as a matter of principle [the] public must be able to invoke any procedural defect" as long as the procedural defect will affect the decision and can impair the individual's rights. If however, the decision would be the same even without the procedural defect, and this can be proven by the State,[296] then there will be no standing and no review shall take place. The ECJ adds that "[i]n the making of that assessment, it is for the court of law or body concerned to take into account, inter alia, the seriousness of the defect invoked and to ascertain, in particular, whether that defect has deprived the public concerned of one of the guarantees introduced with a view to allowing that

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294 As the Joint Rules of Procedure of the Federal Ministries possess only internal effect they cannot be judicially enforced.

295 *See* Dominik Steiger, *Entgrenzte Gerichte? Die Ausweitung des subjektiven Rechts und der richterlichen Kontrollbefugnisse – Parlament und Verwaltung im „Kooperationsverhältnis" der deutschen Verfassungs- und Verwaltungsgerichtsbarkeit mit dem EuGH*, Verwaltungsarchiv (to be published 2016); Ziamou, note 7, at 198, BVerfG 10, 221, 226-227; BVerwGE 59, 48, 52; VerfGH Kassel NVwZ 1982, 689, 691; BayVGH, BayVBl 1981, 719, 720.

296 ECJ, Judgment of 7 November 2013, C‑72/12 – Altrip, para. 53: If the "impairment of a right cannot be excluded unless, in the light of the condition of causality, the court of law or body covered by that article is in a position to take the view, without in any way making the burden of proof fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant."

public to have access to information and to be empowered to participate in decision-making."[297]

3. Judicial Review in the European Union

In Europe direct judicial review by individuals against legislative and rulemaking acts is exceptional, as the very narrow Plaumann-Formel needs to be fulfilled before standing is granted.[298] Although the Commission is obliged to reason its rules, the ECJ is in a rather weak position, since the rules on participation are not well developed. Even if delegated acts which do not adhere to this minimal participation requirement of involving committees composed of independent experts are null and void,[299] legal standing is difficult to obtain. In general – and also with regard to the rare existing participation rules – the scope of review is rather narrow. However, the new Article 263 (4) TFEU foresees for suits against a regulatory act according to Article 290 TFEU which is of direct concern to them and does not entail implementing measures in the sense of Article 291 TFEU. Thus, the applicant does not have to show individual concern anymore, but only direct concern.[300] It is thus expected that administrative rules which do not require implementing measures will more often be the subject of a direct challenge in the courts of the European Union.[301]

4. Conclusion on the Judiciary

To conclude, participation in the judicial process involves only the plaintiff whose rights and interests have been injured. He is not allowed to decide himself but only to make himself heard and have his cases considered and decided by the court. Participation on the judicial level thus works according to the constitutional theory of imperative participation laid out above.

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297 ECJ, Judgment of 7 November 2013, C‑72/12 – para. Altrip, 54.

298 ECJ, Judgment of 15 July 1963, Plaumann & Co. v Commission, Case 25-62, ECJ Rep. 1963 I-95.

299 ECJ, TU München, C-269/90. 1992 ECR I-5469; Craig, note 119, at 138: the courts denied participatory rights unless they were explicitly provided for by EU primary or secondary legislation: „C-104/97; Atlanta AG v. Commission, 1999 ECR I-6983; C-258/02 P Bactria Industriegygieny Service Verwaltungs GmbH v. Commission 2003 ECR I-15105, [43]; C-263/02 P Commission v. Jego Quere & Cie SA 2004 ECR-I-3245, [47]; T-13/99 Pfizer Animal Health SA v. Council 2002 ECR II-3305 [487]; Alphapharma [388]; T-134/96, UEAPME v. Council 1998 ECR II-2335, 69-80.

300 Türk, note 206, at 127.

301 Türk, note 206, at 127. *See also ibid.*, at 136 *et subseq.*

As participation rights hardly exist in Germany and the EU, their judicial protection is equally weak. But as procedural norms are given more weight in Germany due to EU influence, participation rights gain more judicial protection. In the EU system the new Article 263 (4) TFEU will lead to more legal protection. In the US, by comparison, direct judicial review by individuals on the grounds of the infringement of participatory rights is common, legal standing is rather broad compared to Germany and the EU and the scope of review works to protect individual self-determination.

VI. The Power of the Constitutional Theory of Imperative Participation

To wrap it up, the constitutional theory of imperative participation conceptualizes participation and makes the implicit rules of participation in the founding texts of the legal orders explicit. It shows who must be able to participate and how much influence this participation must have in order to add to the legitimacy of the exercise of public authority.

The litmus test of delegated rulemaking shows that participation consists of the following: first, everybody is able to participate on the legislative level, either indirectly via elections or directly via forms of direct democracy. Direct democracy of course does not exist at the US, German federal nor the EU level but only at state level, specifically in some US States and in all 16 German Laender. Second, the Executive will make rules but there can be general public comment on the issues, not only by those who are directly affected, and these comments must be taken into consideration. Third, with regard to judicial review, those whose participatory rights have been infringed upon have standing to challenge the executive proceedings. These criteria reflect not only the limits of participation but should be understood as its ideal, following from the principles of democracy and the rule of law as balanced by the separation of powers doctrine. Germany and the EU can certainly learn a lot from participation in the US in order to make their systems more participatory and responsive.

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