ARTICLES

A CONSTITUTIONAL THEORY OF IMPERATIVE PARTICIPATION: DELEGATED RULEMAKING, CITIZENS’ PARTICIPATION AND THE SEPARATION OF POWERS DOCTRINE

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ABSTRACT

There is a need for a constitutional theory of imperative participation, as no comprehensive theory of participation exists to date and people everywhere in the world are asking for more influence in the exercise of public authority. The United States, as the oldest still-functioning democracy, with its well-developed participatory mechanisms, is the natural place to turn in order to find such a theory. Still, the United States Constitution only tacitly addresses participation, aside from the provisions governing the election of Congress and the President. However, participation can be conceptualized through the separation of powers doctrine. The latter can be understood not only as a system of checks and balances, but as an organizational principle balancing democracy (i.e., collective self-determination) and rule of law (i.e., individual self-determination). The United States Constitution’s implicit rules on participation will be made explicit in this article in order to answer the two most important questions about any public participation in

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any given case. Firstly, who may participate in the exercise of public authority? Secondly, what legal effect does the participation possess? 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

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 right. Still, nearly fifty years after the beginning of the participation debate,¹ no overarching constitutional theory of participation exists which encompasses all three branches of government and demonstrates what is meant by “participation done right.” This lacuna will be filled by this article, which develops 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 in the exercise of public authority.² The United States, as the oldest still-functioning democracy, with its well-developed participatory mechanisms,³ is the natural place to turn in order to find such a theory. Like all constitutions—except the South African one, which explicitly refers to the principle of responsiveness⁴—the United States Constitution only tacitly addresses participation, aside from the provisions governing the election of Congress and the President.⁵ Still, participation is conceptualized through the United States Constitution’s separation of powers doctrine.⁶ The latter can be understood not only as a system of checks and balances, but as the organizational principle balancing democracy (i.e., collective self-determination) and rule of law (i.e., individual self-determination).⁷

The implicit rules on participation will be made explicit in this article in order to answer the two most important questions about any public participation in any given case. Firstly, who may participate in the exercise of public authority? Secondly, which legal effect does the participation possess? In this analysis, participation in the executive’s delegated rulemaking procedures—which touches

² See id. at 7–8, 39.
⁴ S. APA. CONST., 1996, ch. 1(d).
⁷ See WILLIAM E. HUDSON, AMERICAN DEMOCRACY IN PERIL: EIGHT CHALLENGES TO AMERICA’S FUTURE 9 (7th ed. 2013).
all three branches of government—will serve as the theory's litmus test.

This 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 with regard to who shall participate (the people, the affected public, or one individual) and which powers flow from that participation (decision-making, commenting, or procedure-initiating). These structures are connected to the three functions of participation, i.e., the democratic, rule of law and efficiency functions.\textsuperscript{8} Second, an understanding of the separation of powers doctrine will be developed alongside the functions of participation.\textsuperscript{9} 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.\textsuperscript{10} Finally, the theory will be put to the test by applying it to delegated rulemaking.\textsuperscript{11}

II. PARTICIPATION

Much trust in the governing class has been lost in democratic states in recent times and many citizens are turning their backs on their states in dismay.\textsuperscript{12} There has been extensive commentary on this development,\textsuperscript{13} and various terms have been coined to describe this process of withdrawal from the public sphere due to the powerlessness of the individual vis-à-vis the collective, or rather vis-

\textsuperscript{8} See infra Part II.
\textsuperscript{9} See infra Part III.
\textsuperscript{10} See infra Part IV.
\textsuperscript{11} See infra Part V.
\textsuperscript{12} See MIKE LOFGREN, THE PARTY IS OVER: HOW REPUBLICANS WENT CRAZY, DEMOCRATS BECAME USELESS, AND THE MIDDLE CLASS GOT SHAFTED 1, 5, 6 (2012).
à-vis a few individuals. "Post-democracy" may be the most known among these terms. This powerlessness is not only perceived, but truly exists, 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.”

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, as well as win back constituents to the political systems and make them truly democratic. Many have pondered on these theories, and while participation certainly is not the magic 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 better ways for citizen involvement in the exercise of state power. Following an inductive approach, the already existing participation opportunities need to be analyzed, as they have never been examined in a holistic manner.

Before starting to find a pattern of participation in all three branches, participation needs to be defined. Many definitions of

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15 Id. at ix.
18 See BARBER, supra note 17, at 8.
19 See id. at 155.
20 See Glen Staszewski, Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy, 56 VAND. L. REV. 395, 400 (2003) (noting how direct democracy has been accomplished in the United States through the lawmaking powers of some administrative agencies); Stephanie Tai, Three Asymmetries of Informed Environmental Decisionmaking, 78 TEMP. L. REV. 659, 671–72 (2005) (explaining how public participation through direct democracy allows for interested citizens to demand judicial review of administrative actions).
21 See HUDSON, supra note 7, at 140.
participation are sociological, political, or rights-based. As a constitutional theory will be developed here, the definition of imperative participation will ultimately be much narrower. The United States Constitution’s 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: it has different legal effects, different actors are involved, and different functions are being fulfilled.

A. Participation’s Legal Effect: Imperative Participation

Participation, as it is understood in this article, possesses a legal effect that 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 participants’ submission (though not necessarily to follow it). 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).

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. As important as the fundamental rights to free

26 See infra Part II(A).
27 See infra Part II(B).
28 See infra Part II(C).
29 See Hudson, supra note 7, at 143.
30 See id. at 160, 177.
31 See Hubert Heinelt, Governing Modern Societies: Towards Participatory Governance 8 (2010).
32 See id. at 9; Tai, supra note 20, at 672.
33 See James S. Fishkin, When the People Speak: Deliberative Democracy and Public Consultation 45 (2009) (exemplifying that these fundamental rights are missing from this definition of participation).
speech and assembly are for the democratic state,34 they do not force the State to listen. They are the soil in which participation is rooted and which participation needs to live and prosper—and are thus especially protected—but they are not forms of imperative participation.35

B. Participation’s Actors: From the People to One Individual

The actors of participation differ. The people as a whole act in instances of representative and direct democracy.36 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, only certain individuals participate as petitioners. The same is true for the plaintiffs in judicial proceedings.37 In instances of public planning, more people may participate, such as the affected public.38 In delegated rulemaking, different NGOs and experts might participate.39 In the United States, the public may also participate in rulemaking procedures.40

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 rather clear graduation becomes more complex. For example, the people are not composed of everybody, but only of citizens—a more and more contested principle.41 The affected public may also include legal aliens. Plaintiffs can even be aliens not residing within the country.42 From these qualitative observations, it follows that a mechanical quantitative differentiation is a generalization and simplification. However, the qualitative approach does not contradict the quantitative approach, but actually confirms

55 See id.
56 See HEINELT, supra note 31, at 9–10.
58 See HEINELT, supra note 31, at 28.
59 See id. at 11, 28.
60 See FISHKIN, supra note 33, at 76 (noting that participation should be more than just the election of policymakers, but should also include direct policymaking).
62 See, e.g., id. at 22.
it in general, yet simultaneously makes it more complex in the specifics.

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

Lastly, the functions of participation differ. One can differentiate three main functions of participation which determine the different legal effects and actors, and thus serve as a switch.

First, participation protects the rule of law. The rule of law concept can be understood in many ways. In this article, it is understood as a broad concept, not only encompassing the primacy of law, but also the protection of individual rights and the furthering of individual self-determination. 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.

Third, participation enhances democratic legitimacy. Similar to the rule of law concept, the term democracy can be understood in many different ways. In this article, democracy is also understood as a broad concept, not only encompassing majority rule, but also deliberative and participatory notions that allow for collective self-determination by the people.

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43 MENDES, *supra* note 24, at 33.
D. Summarizing Imperative Participation: Citizens 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. However, not everyone is always allowed to participate. Furthering the rule of law, promoting democracy, and guaranteeing efficiency are the functions of participation, but a tension exists between these functions, which is the reason for involving different actors and allowing those actors different kinds of influence on decisions.

The following hypothetical demonstrates this tension quite well: If the affected public could decide on the building of a cross-country oil pipeline, like the proposed and heavily disputed Keystone XL pipeline, which would connect the tar sands 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!” The affected public’s decision, however, could be contrary to a law passed by Congress deciding the pipeline would be built, or to 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 decision by the affected public might also infringe upon the fundamental rights of the companies building the pipeline. However, if the affected public had no say whatsoever, their interests and 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


Furthermore, these three criteria are the decisive criteria for the success and survival of liberal democracies. See Francis Fukuyama, Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy 25, 26–27 (2014); Francis Fukuyama, The Origins of Political Order: From Prehuman Times to the French Revolution 15, 16 (2011).


between democracy and the rule of law. 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, speaking positively, the 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 can be fructified 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. The doctrine—which is not understood as a strict separation doctrine, but rather as a checks and balances doctrine—classically protects the rule of law and preserves individual freedom by dividing public authority into different branches and limiting their power. 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. Often overlooked, but

55 See supra Part II.C.
56 See The Federalist No. 47 (James Madison); Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 577–78, 616 (1984) (differentiating between: “separation of powers” (strict); “separation of functions” (less strict and can be called a “Madisonian view”); and “checks and balances”).
58 While this is explicitly denied in Myers, 272 U.S. at 293, 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. In United States v. Nixon, 418 U.S. 683, 707 (1974), the Supreme Court speaks of “the constitutional balance of a workable government.” The Court in Mistretta v. United States, 488 U.S. 361, 372 (1989), allowed for delegations because “Congress simply cannot do its job absent an ability to delegate power under broad general directives.” See also Opp Cotton Mills, Inc. v. Adm’r of Wage & Hour Div., 312 U.S. 126, 145 (1941) (“In an increasingly complex society Congress obviously could not perform its functions if it were
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.

It is not enough, however, that participation and separation of powers share the same functions. 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 all brought into equilibrium.

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:

1. Is the public authority rather bound or unbound by law?
2. Does the public authority mainly have retrospective or prospective effects?
3. Does the public authority primarily affect one individual or obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy . . . .”) (quoting Morrison v. Olson, 487 U.S. 654, 680–81 (1988));

See Möllers, supra note 54, at 80.

Id. at 51, 80.

The Federalist No. 48, supra note 57.

See Möllers, supra note 54, at 63.

See id. at 108, 109.

Id. at 50.
potentially everybody?

The public authority exercised by the legislature is characterized by its low degree of legal predetermination, as it is only bound by the Constitution; its temporal orientation, which is prospective; 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. Judicial proceedings mainly protect the rule of law and individual self-determination. Of course, constitutional courts differ from this analysis. But this is the reason their judgments and even their existence is 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. The focus on the protection of individual self-determination might not be as strong in the United States as in the German system, for example, with its particular emphasis on subjective rights. However, the United States Supreme Court not only held that “[i]t is emphatically the province and duty of the judicial department to say what the law is,” but that “[t]he province of the court is, solely, to decide on the rights of individuals . . . “.

66 Id. at 80, 84; Peter L. Strauss, *Was There a Baby in the Bathwater?: A Comment on the Supreme Court’s Legislative Veto Decision*, 1983 DUKE L.J. 789, 796, 798.
67 MÖLLERS, supra note 54, at 84; see also Bundesverfassungsgericht [BVerF] [Federal Constitutional Court] Dec. 17, 2013, *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT* [NVwZ] 577 (580) 2014 (Ger.) (explaining the legislature’s responsibility is the present, not the past); Strauss, supra note 65, at 798 (noting the legislature’s “future effect”). In fact, the United States Constitution forbids retroactive and individual laws. U.S. CONST. art.1, § 9, cl. 3.
68 See MÖLLERS, supra note 54, at 84.
69 See The Federalist No. 39 (James Madison).
70 MÖLLERS, supra note 54, at 80, 89; Strauss, supra note 65, at 798.
71 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. See MÖLLERS, supra note 54, at 68.
72 See id. at 95.

Even if, of course, the Supreme Court articulates norms and uses its certiorari power according to the importance of the questions before it, it primarily protects individual self-determination.

Since democracy and the rule of law are always co-existent in all branches, the sliding scale character of this model must be emphasized: Parliament also has to respect and protect individual rights; court cases—de facto in civil law countries and, via precedent, de jure 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. Independent from whether it acts as a rule maker or an adjudicator,
the executive’s action is to some degree determined by a statute.\textsuperscript{83} 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.\textsuperscript{84}

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.\textsuperscript{85} If the administration’s action is less legally pre-determined, prospective,\textsuperscript{86} and concerns everybody (as in delegated rulemaking), it rather acts in a legislative mode.\textsuperscript{87}

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.\textsuperscript{88} 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.\textsuperscript{89}

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.\textsuperscript{90}

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

\textsuperscript{83} See MÜLLERS, supra note 54, at 96, 97.
\textsuperscript{84} See id.
\textsuperscript{85} See id. at 89–90.
\textsuperscript{87} See MÜLLERS, supra note 54, at 84.
\textsuperscript{88} See id. at 66, 84, 90, 100.
\textsuperscript{89} See id. at 100.
\textsuperscript{90} See id. at 66, 79, 95, 97.
how public authority is exercised and assigned to the proper branch.\textsuperscript{91} Participation is the partaking in the exercise of public authority.\textsuperscript{92} Both control and limit public authority in order to protect individual self-determination.\textsuperscript{93} Both follow the logic of democracy and efficiency in order to allow for collective self-determination.\textsuperscript{94} 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”\textsuperscript{95}—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.\textsuperscript{96} This is evident in instances of direct democracy where the people—i.e., everybody—decide on general laws.\textsuperscript{97} But it also holds true with regard to representative democracy where a parliament, which is elected and therefore decided upon by the people,\textsuperscript{98} decides on general laws.\textsuperscript{99} 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.\textsuperscript{100} Here, the State is forced to react and render a verdict if the individual’s rights have been affected.\textsuperscript{101} 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.\textsuperscript{102}

\textsuperscript{91} See \textit{The Federalist No. 48}, supra note 57.
\textsuperscript{92} See Möllers, supra note 54, at 78–79.
\textsuperscript{93} See id. at 69, 78.
\textsuperscript{94} See id. at 66, 109; see supra notes 50, 58 and accompanying text.
\textsuperscript{95} Möllers, supra note 54, at 4.
\textsuperscript{96} See id. at 66 (explaining that collective self-determination involves decision-making from several people and can take priority over the individual’s interest).
\textsuperscript{99} See id.
\textsuperscript{100} See Möllers, supra note 54, at 95.
\textsuperscript{101} See id.
\textsuperscript{102} In re Enforcement of a Subpoena, 972 N.E.2d 1022, 1029 (Mass. 2012); Möllers, supra
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 more legislative (i.e., a rule, and thus more about collective self-determination) or more 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 organ, it has to consider the results of participation: the more discretion the state organ has been accorded by the 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 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 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 of the U.S. 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. Article II, Section 1 U.S. Constitution entrusts the President, as the head of the executive, with the task of taking care that these laws are faithfully executed. Article III of the U.S. Constitution confers on the judiciary the power to decide cases and controversies. Since 1789, Congress has

103 DAVID E. GRAY, DOING RESEARCH IN THE REAL WORLD 16 (Jai Seaman et al. eds., 3rd ed. 2014).
104 Id.
105 See THE FEDERALIST NO. 48, supra note 57.
108 U.S. CONST. art. I, § 8, cl. 18; see § 551(4); Humphrey’s Ex’r, 295 U.S. at 628.
109 U.S. CONST. art. I, §§ 1, 8 cl. 18.
111 U.S. CONST. art. II, § 1, cl. 8.
112 U.S. CONST. art. III, § 2, cl. 1.
delegated some of its power to the President and other organs of the executive branch. 113 Although delegated rulemaking is nowhere mentioned in the Constitution, it is nevertheless accepted in principle. 114 This has been confirmed by the Supreme Court, which watches over the legality of delegated rulemaking. 115

In the following, this article will explore the legislature’s delegation process, 116 executive rulemaking, 117 and judicial review function, 118 and how the separation of powers doctrine steers 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. 119 Like all laws, delegating laws are prospective, general, and only bound by the Constitution. 120 Participation in passing delegation laws must encompass the people, i.e., everybody, and must allow for decision-making power. 121 This follows from the democratic character of lawmaking.

The separation of powers doctrine is the decisive constitutional standard to be applied in regulating the delegation of powers from Congress to the administration. 122 The democratic legislature cannot simply delegate broad powers to the executive, as this might be in breach of the separation of powers doctrine. 123 Imagine that 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. 124 In order to adhere to the separation of

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116 See infra Part V.A.

117 See infra Part V.B.

118 See infra Part V.C.

119 See MÖLLERS, supra note 54, at 85.

120 U.S. CONST. art. I, §§ 1, 8, cl. 18; MÖLLERS, supra note 54, at 84.

121 See Strauss, supra note 114, at 748 (noting that when it comes to rulemaking power, the people act as an external oversight).


123 See id. at 1944.

124 In fact, the German Enabling Act of 1933 (Ermächtigungsgesetz) foresaw exactly that and turned Germany from a democracy to a dictatorship. See Peter L. Lindseth, The Paradox
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.

1. Democratic Control: Standards of Rulemaking and Oversight Mechanisms

Delegation is mentioned nowhere in the United States Constitution. Article I of the U.S. 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, and only bound by the Constitution. They thus allow for collective self-determination. Article II of the U.S. 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. Via the intelligible principle test, the courts undertook the effort to structure the delegation of rulemaking powers from congress to the agencies. Legislative oversight by legislative veto has been limited by the Supreme Court, but is still in use. Often overlooked, Congress also possesses further instruments which provide strong

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125 See infra Part V.A.1.
126 See infra Part V.A.2.
127 See infra Part V.A.2.
129 See U.S. CONST. art. I, § 8, cl. 18.
130 U.S. CONST. art. II, § 1, cl. 8.
131 See, e.g., J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (stating that the legislature, through the intelligible principle, can steer the executive).
132 See Mathew D. McCubbins et al., Administrative Procedures as Instruments of Political Control, 3 J. L. ECON. & ORG. 243, 244 (1987).
133 See infra Part V.A.1.a; see e.g., Mistretta v. United States, 488 U.S. 361, 382 (1989) (“[W]e have invalidated attempts by Congress . . . to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch.”).
134 See infra Part V.A.1.b; see e.g., J.W. Hampton & Co., 276 U.S. at 409 (showing an example of the courts attempting to structure legislative delegation).
oversight mechanisms.\textsuperscript{136}

\textbf{a. 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.\textsuperscript{137}

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.”\textsuperscript{138} Similarly, in \textit{Youngstown Sheet and Tube Co. v. Sawyer},\textsuperscript{139} a case that was not about delegated rulemaking in particular but about presidential powers in general,\textsuperscript{140} the Supreme Court referred to the vesting clauses of Article I and II of the U.S. 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.”\textsuperscript{141}

On the contrary, the first delegation already took place in 1789;\textsuperscript{142} Chief Justice John Marshall declared delegation which “fill[s] up the details” to be “certainly” lawful;\textsuperscript{143} the Supreme Court spoke affirmatively of the quasi-legislative function of agency activity;\textsuperscript{144} and only in two cases did the Supreme Court actually invalidate a delegating law.\textsuperscript{145} 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.\textsuperscript{146} It is thus an

\begin{footnotesize}
\begin{enumerate}
\item See infra Part V.A.1.d.
\item Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).
\item Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
\item Youngstown, 343 U.S. at 582.
\item As Justice Black for the majority stated flatly. \textit{Id.} at 587. See also Buckley v. Valeo, 424 U.S. 1, 123 (1976) (emphasizing the words of Justice Black more than two decades later) (quoting \textit{Youngstown}, 343 U.S. at 587).
\item Appropriations for the Support of Government, ch. 23, 1 Stat. 95 (1789); Regulation of Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790).
\item Wayman v. Southard, 23 U.S. 1, 43 (1825).
\item Humphrey’s Ex’r v. United States, 295 U.S. 602, 628, 629 (1935).
\end{enumerate}
\end{footnotesize}
overstatement that the doctrine “has had one good year, and 211 bad ones (and counting).” Rather, the non-delegation doctrine is “no doctrine at all.”

The constitutionality of delegated rulemaking is not only necessary to allow for effective and efficient exercise of public authority, 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. 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.

b. 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. This principle was the decisive argument in striking down the first delegating act ever in the Panama Refining decision. 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 (somewhat conflicting) 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

150 THE FEDERALIST NO. 47, supra note 5.
152 See J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).
153 See id.
155 Id. at 406.
the transportation is to be allowed or prohibited.”157 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.”158 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 what the intelligible principle exactly demands.159 In Schechter, the Supreme Court declared unconstitutional the centerpiece of the National Industrial Recovery Act.160 Section 3 of the Act was about “codes of fair competition” created by a round table of union and industry representatives, which were then to be adopted by the President in order to become effective.161 The Supreme Court concluded that section 3:

[S]upplies 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 section one.162

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.163 Other delegating statutes were upheld by the Supreme Court,

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157 Panama Refining, Co., 293 U.S. at 430.
159 The Supreme Court did not mention the intelligible principle but spoke of “standards” that are not met. See KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 176 (2nd ed. 1979). But see LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 60 (1965) (finding the standards to be narrower).
162 Id. at 541.
163 Kagan, supra note 148, at 2365; see also STONE ET AL., supra note 57, at 425 (comparing Panama Refining and Schechter); ZIAMOU, supra note 17, at 55 (“After the famous Panama Refining and Schechter cases, where the Supreme Court struck down acts of Congress for enabling an unconstitutionally broad delegation of power by not providing sufficient standards to limit the scope of agency discretion, they have been hesitant to invalidate statutes on delegation grounds, thus upholding the granting of vaguely defined powers to administrative agencies.”). The National Recovery Act of 1933 foresaw that the President was supposed to approve the code if several criteria were met, inter alia, that (a) “no inequitable restrictions on admission to membership” existed and, (b) that the codes were not used to get rid of competition. A. L. A. Schechter Poultry Corp., 295 U.S. at 521 n.4; see also DAVIS, supra note 159, at 176 (“[M]ost sweeping congressional delegation of all time.”).
including delegations that granted power to make rules “as public convenience, interest, or necessity requires” 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.” Even statutes that authorize regulations in the “public interest” have been found constitutional by the Supreme Court. The Agricultural Adjustment Act allows the Secretary of Agriculture to make rules with regard to agricultural marketing, only requiring that agricultural marketing should be “orderly.” The Patient Protection and Affordable Care Act authorized different agencies to issue “such regulations as may be necessary.” 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. In Whitman v. American Trucking Ass’n, the Court held that the development of procedural standards by the agency cannot cure an unlawful delegation of Congress. In this decision, the Court at least gave

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165 Kischel, supra note 156, at 220.
166 See, e.g., National Broadcasting Co., 319 U.S. at 225, 226, 227 (1943) (discussing the Federal Communications Commission’s power to regulate airwaves); New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24, 25 (1932) (discussing Interstate Commerce Commission’s power to approve railroad consolidations); see also Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 475 (2001) (discussing the Environmental Protection Agency’s power to regulate air quality).
170 See generally Carey, supra note 167, at 4 (discussing how Acts, such as the Agricultural Adjustment Act, and the Patient Protection and Affordable Care Act, grant agencies significant discretion as to how rules are established and what they require).
173 Id. at 473. For developments up until the District of Columbia Circuit Court’s decision in Whitman, see Cass R. Sunstein, Is the Clean Air Act Unconstitutional?, 98 Mich. L. Rev.
some structure to the principle by holding that “the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.” 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.

c. 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, is subject to a presidential veto. In order to avoid the presidential veto, the “legislative veto” was developed. In the delegating statutes, the two chambers of Congress—or sometimes, only one of the chambers or even a committee—were empowered to veto an order or a rule made by the agency, thus taking back Congress’ power. But in INS v. Chadha, the Supreme Court decided that the separation of powers doctrine demands Congress give the President the opportunity to veto a congressional act reversing an agency order. That same year, the Supreme Court extended its Chadha finding to rules as well. These cases sounded “the death knell for nearly 200 other statutory provisions in which

303, 342 (1999). See also Kischel, supra note 156, at 226 (discussing various other famous cases with regard to how the issue of delegation has been analyzed).

174 Whitman, 531 U.S. at 475 (citing Loving, 517 U.S. at 772; United States v. Mazurie, 419 U.S. 544, 556–57 (1975)). This is also true in cases in which fundamental rights are touched upon. See Kent v. Dulles, 357 U.S. 116, 125 (1958). This can be compared to the German Wesentlichkeitstheorie. See ZIAMOU, supra note 17, at 56.


180 Chadha, 462 U.S. 919.

181 Id. at 952, 956–58.

Congress has reserved a ‘legislative veto.’\textsuperscript{183} Still, more than four hundred legislative vetoes were enacted between the decision and 2005.\textsuperscript{184} Although the President proclaims them to be unconstitutional on a regular basis, legislative vetoes have an important impact on the agencies, as the agencies need to work with the review committees to which the veto competence is usually transferred.\textsuperscript{185} There is thus still a heavy impact by Congress on the agencies in the rulemaking process.\textsuperscript{186}

d. Other Congressional Oversight Mechanisms

In order to steer the administration, Congress possesses a wide set of tools beside the ones already analyzed. Contrary to the perception that the leeway is supposedly so wide that the agencies have even been called a “junior-varsity congress,”\textsuperscript{187} congressional oversight mechanisms allow for a considerable amount of control and accountability.\textsuperscript{188} Congress can phrase its delegating laws in very strict language;\textsuperscript{189} withhold funding if it is not content with the work of the executive;\textsuperscript{190} or make use of appropriations riders in order to restrict the use of funds for special purposes\textsuperscript{191} or in order to direct the use of funds for special purposes.\textsuperscript{192} Despite the Chadha decision, Congress can still legislatively override an agency’s decision as long as the President does not veto it, as well as revise statutory

\textsuperscript{183} Chadha, 462 U.S. at 967 (White, J., dissenting).
\textsuperscript{184} FISHER, supra note 178, at 5.
\textsuperscript{185} Id.
\textsuperscript{186} See id. at 6.
\textsuperscript{188} See Kerwin & Furlong, supra note 37, at 221–29 (reviewing various mechanisms by which Congress maintains control); McCubbins et al., supra note 132, at 244 (arguing that the design and structure of agencies was decisive in controlling rulemaking through Congress).
\textsuperscript{189} If Congress does not, one can even argue that a form of delegation has taken place: from Chevron it follows that in case of ambiguity, the statute takes on the meaning that the agencies have given to it. See Sunstein, supra note 147, at 329. This can be regarded as a case of implicit delegation. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984); Sunstein, supra note 147, at 329–30. 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. 511–12 (1989); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 38 DUKE L.J. 511, 519–20 (1989).
\textsuperscript{192} Copeland, supra note 169, at 17.
mandates. All agencies must also submit their rules to the United States Government Accountability Office—both houses of Congress can then issue a joint resolution of disapproval, or even require the agency to get a positive affirmation by Congress before the rule enters into force. Moreover, Congress can hold “serious” and “embarrassing” oversight hearings, and finally block presidential nominees, which has been called the “perhaps most effective means of influence.” Although it has been argued that Congress has no great interest in overseeing the administration, the opposite is true: Congress uses its tools in such a way that the rulemaking procedure can be called a system of “congressional dominance.”

e. Delegating Rulemaking Powers: 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 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 effectiveness and efficiency.

195 See Elliott, supra note 191, at 157.
197 Elliott, supra note 191, at 157.
199 See Kagan, supra note 148, at 2256.
200 See Weingast & Moran, supra note 198, at 767 (basing this upon empirical research). See Elliott, supra note 191, at 156–57, for even more different means of controlling the administration.
201 The Federalist No. 47, supra note 56.
202 For reasons in favor of the necessity of delegation, see Stewart, supra note 149, at 1695.
Although the underdeveloped intelligible principle and the finding of the unconstitutionality of the legislative veto seem not to provide a safeguard against too much delegation of powers, 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.

2. 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. Although participation in the actual delegation process on the federal level is rather sparse, the people decide on the personnel that acts in the delegation process: 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. Electing a President who is in favor of deregulation, like Ronald Reagan, or in favor of regulation, like Bill Clinton, does lead to a significant difference in the action of the agencies. The first mode of imperative participation is a representative mode based on elections of the political personnel.

Different from this first mode, the second mode of imperative participation on the federal legislative level is only available in theory, but well known on the state level: Direct democracy allows the people to pass delegating laws themselves. One can
differentiate between a referendum, where the State asks the people to decide on a certain legislative issue, and an initiative, where a group of people ask the people to decide on a legislative issue. Without further delving into the state level, the existence of direct democracy here shows that it is not just a theoretical possibility but a constitutional reality.

In addition, 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 individuals’ communications on public issues.” 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. Examples from other countries or states demonstrate that things can be done differently. In South Africa, citizens’ submissions in the legislative process have to be considered. In Montana, everybody has the right to speak in

210 CAL. CONST. art. II, § 9(a) (West, Westlaw through Ch. 807 of 2015 Legislative Session).
211 CAL. CONST. art. II, § 8(a) (West, Westlaw through Ch. 807 of 2015 Legislative Session).
213 Czapanskiy & Manjoo, supra note 208, at 35.
216 See DAVIS, supra note 214, at 1; HEITSHUSEN, supra note 214, at 1.
congressional committees.  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.

To sum it up, Congress 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. Participation in delegation is governed decisively by the democracy principle, which is balanced by the separation of powers doctrine with the rule of law. Thus, participation in passing delegation laws 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

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219 See HUDSON, supra note 7, at 143, 160.

220 See supra notes 208, 212 and accompanying text.
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.

Like laws, rules are prospective, general, and bound by the Constitution, and—in addition to general laws—by the respective delegating laws. In addition, the agencies are bound by their governing statutes / executive orders and Congress’ influence upon them. 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).

1. 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. These legal constraints also materialize with regard to the legal character of the rules. Therefore, rulemaking as a democratic process will be discussed against the background of the rise of the administrative state.

221 See Möllers, supra note 54, at 71, 97.
222 See infra Part V.B.1.
223 See, e.g., Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 295 (4th ed. 2006) (explaining that the APA requires agencies to provide opportunity for written comment, but leaves the decision of whether to even allow oral presentation to the agency).
224 See infra Part V.B.2.
225 See infra Part V.B.1.a.
226 See infra Part V.B.1.b.
227 See infra Part V.B.1.c.
a. 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: for example, 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”; the Environmental Protection Agency (“EPA”) is competent to ensure the “establishment and enforcement of environmental protection standards consistent with national environmental goals”; and the Federal Trade Commission is competent “to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce.”

A second constraint might follow from the agency’s status, which is determined according to the influence 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. While both of these types of agencies can be created by Congress or the President, the President possesses different powers to direct and influence the executive branch, while the independent regulatory

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228 See DAVIS, supra note 159, at 3; KERWIN & FURLONG, supra note 37, at 7–8.
233 See id. at 1074.
235 William G. Howell & David E. Lewis, Agencies by Presidential Design, 64 J. POL. 1095 1098 tbl.1, 1101 (2002). About half of the 425 agencies created between 1946 and 1995 were created by the President (including the National Security Administration and the Peace Corps) and included more than twenty independent regulatory branches. See id. at 1096, 1097, 1098 tbl.1. As they need to be financed by Congress, the President is not politically independent from Congress in creating agencies. See id. at 1101.
agencies are outside of his legal influence.\textsuperscript{236} Does this difference influence their rulemaking powers and/or participation opportunities?

Departments and the executive branch agencies\textsuperscript{237} 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.\textsuperscript{238} They can either be created by Congress, like the National Military Establishment (two years later renamed the Department of Defense),\textsuperscript{239} or by the President through a Presidential Reorganization Plan, like in the case of the EPA,\textsuperscript{240} or through an executive order, like in the case of the United States Department Of Homeland Security.\textsuperscript{241} Their scope of action is restrained to the competences conferred on them by the governing statute/order.\textsuperscript{242} 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 most notable difference from the independent agencies.\textsuperscript{243}


\textsuperscript{237} Strauss, supra note 56, at 583 ("[C]abinet agencies, independent executive agencies, [and] independent regulatory commissions.")


No. 12,291\textsuperscript{244} and 12,866\textsuperscript{245} allowed Presidents Reagan and Clinton,\textsuperscript{246} respectively, to gain far more oversight over the executive agencies, and thus centralized control over rulemaking.\textsuperscript{247} 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.\textsuperscript{248} This office reviews rules and makes changes, sometimes substantial in nature.\textsuperscript{249}

Independent regulatory agencies seem to be very similar to the executive agencies, as both are more rule-bound than Congress\textsuperscript{250} and concerned with specific issues.\textsuperscript{251} The first “independent” agency was the Interstate Commerce Commission, founded in 1887.\textsuperscript{252} Congress set up the Commission and gave it, \textit{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].”\textsuperscript{253}
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.”254 Other examples include the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission,255 the Federal Communications Commission, and the Occupational Safety and Health Review Commission.256 They are all endowed with certain competences identified in the governing statutes, thus constraining their powers.257 Different from the executive agencies, the President’s control is quite limited.258 He may name the agencies’ head(s), but otherwise the agencies cannot be legally steered by the President’s Office of Management and Budget.259 The President’s executive orders also do not apply to them de iure260 and their leading officers cannot be fired by the President at will.261 The President thus has no legal power to supervise and control the agencies’ decisions.262 However, the independent agencies

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256 29 U.S.C. §§ 656(a), 661(a) (2013); 47 U.S.C. § 151 (2013). However, the Occupational Safety and Health Administration would be an executive agency. John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 630 n.106 (1996). Both OSHA and OSHRC are placed in the Department of Labor. Id.
259 See id. at 185, 187, 199 n.50.
261 See Humphrey Ex’r v. United States, 295 U.S. 602, 631–32 (1935); Pünder, supra note 179, at 359–60. Furthermore, the President has only a say in appointing the Commissioner but nobody else. See Strauss, supra note 56, at 589.
262 See STONE ET AL., supra note 57, 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
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. \(^{263}\) “The characteristics of the oversight relations of President and Congress with ‘executive’ and ‘independent’ agencies owe as much (or more) to politics as to law.”\(^ {264}\)

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 wield.\(^ {265}\) Legal constraints on rulemaking and participation are rather found in the statutes that delegate lawmaking functions to the agencies.

**b. Rules**

Delegating statutes empower the executive to make rules and limits this power at the same time.\(^ {266}\) Rules are both prospective and

\(^{263}\) See id. at 583.

\(^{264}\) Id.; see also Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 Am. U. L. Rev. 557, 565, 566 (1987) (discussing the President’s relationship with agencies); Kagan, *supra* note 148, at 2288 (arguing that President Clinton included the independent agencies in his Executive Order No. 12,866 and subjected “the independents to the regulatory planning process” and oversight); Strauss, *supra* note 65, at 797 (discussing the President’s powers). Furthermore, for the executive agencies, the President assumed that he had the final word in the decision-making process, which he inter alia showed by issuing frequent directives. See Kagan, *supra* note 148, at 2290.

\(^{265}\) See id. at 2360, 2362. With regard to participation, and 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.” Id. at 2360. “[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.” Id. at 2362.

\(^{266}\) See, e.g., Strauss & Sunstein, *supra* note 258, at 185, 187 (noting that the President only has some powers over agencies).
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 5 U.S.C. § 551(4) 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 differentiation between rules from laws on the one hand, and from orders and adjudications—which are defined in 5 U.S.C. § 551—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. But the acting institution is not the only difference, only the most obvious. As 5 U.S.C. § 551(4) 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. One final distinction 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. But apart

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267 See Kerwin & Furlong, supra note 37, at 6.
269 Id.
270 Id. § 551(6)–(7) (“[O]rder’ 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 rule making but including licensing. ‘[A]djudication’ means agency process for the formulation of an order.”).
271 U.S. Const. art. I, §§ 1, 8, cl. 18.
272 5 U.S.C. § 551(4). The Supreme Court has held that: Article I, § 1, of the Constitution vests “all legislative Powers herein granted . . . in a Congress of the United States.” This text permits no delegation of those powers. [W]e 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.” Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 472 (2001) (first citing Loving v. United States, 517 U.S. 748, 771 (1996); id. at 776–77 (Scalia, J., concurring) and then quoting J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). But see Whitman, 531 U.S. at 488 (Stevens, J., concurring) (lamenting that the Court pretends that rulemaking is not lawmaking); INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)) (“the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker”).
274 See, e.g., Strauss, supra note 114, at 747 (discussing how a legislature directs agencies via law to make rules for specific issues).
275 Id. at 746, 749.
from that, a rule and a law share the same features in principle: they are both of general applicability (and thus concern everybody) and are of future effect (and thus prospective). Famous examples of agency rules are the 1971 EPA National Ambient Air Quality Standards, which establishes six common classes of pollutants, or the SEC Rule 10b-5, which prohibits insider trading.

Future effects 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/Bi-Metallic distinction, which has been maintained by the Administrative Procedure Act ("APA"), disputes involving parties that are particular and identifiable are handled via adjudicative acts, which are based on the rule of law. Such disputes can be called "bipolar" and involve a “relatively circumscribed resolution of discrete claims involving identifiable firms or individuals.” In contrast, rules are “polycentric” and involve “relatively open-ended policymaking potentially affecting and involving trade-offs among broad social groups.” Thus, the number of people affected differentiates between whether a certain act is a rule or an adjudicative act. Adding a time frame to that definition can further help in differentiating the two: adjudicative acts are retrospective

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276 AMERICAN BAR ASSOCIATION, A GUIDE TO FEDERAL AGENCY ADJUDICATION: SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE 6 (Michael Asimow ed., 2003); MÖLLER, supra note 54, at 84; see KERWIN & FURLONG, supra note 37, at 6. Although § 551(4) of the APA also speaks of “particular applicability,” this will be of no further concern. 5 U.S.C. § 551(4). 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.” AMERICAN BAR ASSOCIATION, supra, at 6 n.30.

277 See Sunstein, supra note 173, at 310, 321.


280 Kagan, supra note 148, at 2362 n.435 (referring to § 554 which requires trial-type proceedings in adjudications).


285 See ZIAMOU, supra note 17, at 6, 7 (noting the relationship of a time frame, specifically, a prospective one).
while rules—like laws—are generally prospective.286

c. 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 the former in recent decades, is the consequence of an epic shift in administrative law not just in the United States, but worldwide.287

This development is owed to the ascent of the administrative state in the 1930s in the United States.288 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.289 “[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.”290

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 gotten more complicated and more complex.291 The way laws are shaped has changed deeply in the last one hundred years, from a conditional structure to a final structure: the laws often only name the goal that is to be achieved by the

287 See, e.g., Benedict Kingsbury, et al., The Emergence of Global Administrative Law, 68 L. CONTEMP. PROBS. 15, 31–32 (2005) (noting changes in administrative law and efforts to regulate administrative law on a worldwide level in recent decades); see also Reuel E. Schiller, Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s, 3 ADMIN. L. REV. 1139, 1139, 1144–45 (2001) (discussing the increased use of rulemaking by agencies since the late 1960s in the United States).
290 Stewart, supra note 288, at 442; see also Stewart, supra note 149, at 1673–74 (explaining the traditional model of case-by-case adjudication by agencies). 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 a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision.” Id. at 1670.
291 Id. at 1684.
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” 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. “[T]he 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.” This development “seeks to assure an informed, reasoned exercise of agency discretion that is responsive to the concerns of all affected interests.” As democracy in the administration has become more important, so has participation.

2. 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 mainly a 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.


Stewart, supra note 149, at 1684.

See Schiller, supra note 287, at 1145, 1147, 1148, 1149.

Stewart, supra note 149, at 1683.

Stewart, supra note 288, at 442.

See supra notes 83–90 and accompanying text.

(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. 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, while 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: an informal rulemaking

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301 See Negotiated Rulemaking Act of 1990 § 584; Toxic Substances Control Act § 21; Consumer Product Safety Act § 7; Federal Advisory Committee Act § 10; Occupational Safety and Health Act of 1970 § 6; Administrative Procedure Act § 4.

302 See Negotiated Rulemaking Act § 584(a)(7); Toxic Substances Control Act § 21(b)(2); Consumer Product Safety Act § 7(3)(B); Federal Advisory Committee Act, § 10(3); Occupational Safety and Health Act § 6(b)(1); Administrative Procedure Act § 4(d).

303 See, e.g., Administrative Procedure Act, § 4 (noting that any interested person can participate, and participation is therefore open to everyone); Czapisiski & Manjoo, supra note 208, at 1–2, 2 n.2 (discussing the lack of a required mechanism for discussion between legislative leaders and the public, but also Congress’s custom of open hearings); William G. Young & Jordan M. Singer, Bench Presence: Toward a More Complete Model of Federal District Court Productivity, 118 PENN ST. L. REV. 55, 85 (2013) (describing public participation in the judicial process through jurors).
procedure,304 a formal rulemaking procedure,305 and the negotiated rulemaking procedure.306 They all differ in the way participation affects the procedure.

a. Informal Rulemaking Procedure

Informal rulemaking can be regarded as the default participation procedure.307 Its centerpiece is the notice and comment procedure, which allows everybody to comment on the proposed rules.308 Because of the comment procedure, informal rulemaking is a “deliberative-constitutive” process,309 and therefore, truly democratic. The notice and comment procedure starts310 with a notice311 of proposed rules, which is published in the Federal Register.312 The agency can only dismiss the procedure if it is “impracticable, unnecessary, or contrary to the public interest.”313 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.314 Accordingly, 5 U.S.C. § 553(e) prescribes that the agency shall give an interested person the right to petition for the “issuance, amendment, or repeal of a rule.”315 The agency is forced to react and give a reasons statement.316

304 See infra Part V.B.2.a.
305 See infra Part V.B.2.b.
306 See infra Part V.B.2.c.
307 Catherine Donnelly, Participation and Expertise: Judicial Attitudes in Comparative Perspective, in COMPARATIVE ADMINISTRATIVE LAW 357, 358 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010); Robert W. Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 CALIF. L. REV. 1276, 1276 (1972). See E. Donald Elliott, Re-Inventing Rulemaking, 41 DUKE L.J. 1490, 1492 (1992) (critiquing informal rulemaking and arguing that the notice and comment procedure is only good in order to compile a record for the judiciary). Elliott prefers to get rid of public participation and would like to focus on representation. Id. at 1495–96.
309 See ELIZABETH FISHER, RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM 33 tbl.1, 95 (2007).
311 For the necessary information which needs to be included in the notice, see United States v. Novia Scotia Food Prods. Corp., 568 F.2d 240, 251 (2d Cir. 1977).
316 5 U.S.C. § 555(e).
The notice must, *inter alia*, include “a statement of the time, place, and nature of public rule making proceedings,” and “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” \(^{317}\) Before reaching this stage, the agency will work out a proposal on its own. \(^{318}\) In order to allow participation at an early stage, the 1976 Administrative Conference of the United States suggested an advanced notice of proposed rulemaking. Indeed, some delegating norms foresee this procedure specifically. \(^{319}\) 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 5 U.S.C. § 553(c). \(^{320}\) Although it has nowhere been specified how long the period of the public comment procedure should last, agencies usually allow 30 days. \(^{321}\) For “significant” rules, Executive Order 12,866—which *de iure* applies only to executive agencies—foresees 60 days. \(^{322}\) Oral hearings are discretionary. \(^{323}\) These hearings are—in contrast to trial-type proceedings—more like the ones used by legislatures. \(^{324}\) After the input has been gathered, it needs to be considered by the agency, \(^{325}\) which requires giving “good faith attention” to the comments. \(^{326}\) This is the centerpiece of the deliberative and democratic approach of agency rulemaking. The deliberations or meetings \(^{327}\) of the independent regulatory commissions are usually public, as foreseen by the Government in the Sunshine Act, a “showpiece of administrative democracy.” \(^{328}\) The courts have argued

\(^{317}\) 5 U.S.C. § 553(b)(1), (3).


\(^{320}\) 5 U.S.C. § 553(c).


\(^{322}\) *Id.* at 6 n.19; see *supra* notes 259–61 and accompanying text.


\(^{325}\) 5 U.S.C. § 553(c); see also ZIAMOU, *supra* note 17, at 71 (noting that the agency will consider all relevant material).

\(^{326}\) Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 554 (9th Cir. 1977); see 40 C.F.R. § 1503.4(a) (2015).


\(^{328}\) ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 677, 688 (3d ed. 2014). Further amendments to the APA that helped “to define and structure rulemaking procedures so that the process is fair to the citizenry” are the Freedom of Information Act, Privacy Act, Negotiated Rulemaking Act, and the Federal Advisory Committee Act. WARREN, *supra* note 203, at 204; see ZIAMOU, *supra* note 17, at 72. The Regulatory Flexibility Act, the Unfunded Mandates Reform Act, the National Environmental Policy Act of 1969, and the Paperwork Reduction Act “did not change the essential procedures that rulemaking agencies
that the “significant comments”\textsuperscript{329} or “comments of cogent materiality”\textsuperscript{330} have to be considered, but not all arguments.\textsuperscript{331} After this deliberative process has taken place, the agency must incorporate a concise general statement of the adopted rule’s basis and purpose.\textsuperscript{332} 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.”\textsuperscript{333}

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.

\textit{b. Formal Rulemaking}

Formal rulemaking is regulated by 5 U.S.C. §§ 556 and 557 and requires trial-type hearings.\textsuperscript{334} Its determinations are record-based.\textsuperscript{335}

By allowing the submission of evidence and arguments, the examination and cross-examination of witnesses, fact-finderings 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.\textsuperscript{336}

employed as much as they required agencies to consider certain specific consequences of proposed rules when making their own evaluations.” \textit{ZIAMOU, supra} note 17, at 72–73.

\textsuperscript{329} \textbf{Portland Cement Ass’n v. Ruckelshaus, }486 F.2d 375, 394 (D.C. Cir. 1973) (“[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern.”).

\textsuperscript{330} \textbf{United States v. Nova Scotia Food Prods. Corp., }568 F.2d 240, 252 (2d Cir. 1977) (“It is not in keeping with the rational process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered.”).

\textsuperscript{331} \textit{See id.} (citing \textbf{Auto. Parts & Accessories Ass’n v. Boyd, }407 F.2d 330, 338 (D.C. Cir. 1968)).

\textsuperscript{332} \textit{Id.} (citing \textbf{Auto. Parts & Accessories Ass’n v. Boyd, }407 F.2d 330, 338 (D.C. Cir. 1968)).

\textsuperscript{333} Philip J. Harter, \textit{Negotiating Regulations: A Cure for Malaise}, 71 GEO. L.J. 1, 14 n.77 (1982).

\textsuperscript{334} \textbf{Hamilton, supra} note 307, at 1277.

\textsuperscript{335} \textbf{CAREY, supra} note 167, at 5 (noting that trial-type hearings are always necessary when a statute requires rules be made on the record). \textit{See also} \textbf{United States v. Florida E. Coast Ry. Co., }410 U.S. 224, 241 (1973).

\textsuperscript{336} \textit{ZIAMOU, supra} note 17, at 163.
Because of this inability to deal with complex issues, formal rulemaking is said to be “dead.”[^337] However, as in informal rulemaking, everybody possesses influence, and democratic aims are being followed. Still, the decision remains with the agency.

c. Negotiated Rulemaking

Negotiated rulemaking takes place prior to the publication of a notice of proposed rulemaking.[^338] 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.[^339] The people who are significantly affected will be represented.[^340] Representatives of various interest groups, together with the agency, negotiate the text.[^341] The final text will be decided upon solely by the agency.[^342] This participation mode does not seem to fit the theory, as not everybody can participate, but only a selected few.[^343] However, a notice and comment procedure will follow the negotiations.[^344]

3. Delegated Rulemaking and Participation: The 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.[^345] As delegated rulemaking belongs mainly to the


[^339]: Id. § 563(a)(2)–(3).

[^340]: See [WARREN, supra note 203, at 221; ZIAMOU, supra note 17, at 103.]

[^341]: Id. at 103.

[^342]: Statement on Signing the Negotiated Rulemaking Act of 1990, [GEORGE BUSH PRESIDENTIAL LIBRARY & MUSEUM](http://bush41library.tamu.edu/archives/public-papers/2512). Upon signing the act, George H.W. Bush emphasized, “[u]nder the Appointments Clause of the Constitution . . . governmental authority may be exercised only by officers of the United States.” Id.

[^343]: See [WARREN, supra note 203, at 223.]


[^345]: See [WARREN, supra note 203, at 207.]
democratic sphere, everybody is called upon to participate.\textsuperscript{346} 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.\textsuperscript{347} If the people want to decide on administrative issues, they have to concentrate their efforts at another level and vote for another government. The United States’ system fulfills this democratic ideal in administrative law.

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

The judiciary first and foremost serves the protection of the rule of law and allows for individual self-determination.\textsuperscript{348} 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.\textsuperscript{349} They are based on reason, not will, as Alexander Hamilton famously stated.\textsuperscript{350} The decisions of the legislature, on the other hand, are based on a collective (and thus democratic) will—and to a lesser extent, the decisions of the executive, when it acts as a rule maker.

The century-old dilemma that presents itself is how the judiciary can respect the democratic will and protect individual self-determination at the same time.\textsuperscript{351} Judicial protection in general is important in order to protect individual self-determination.\textsuperscript{352} 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.\textsuperscript{353} While reviewability and the scope of review, as well as the awarded remedy,

\textsuperscript{346} See id. at 207, 226.
\textsuperscript{348} See supra text accompanying note 71.
\textsuperscript{349} See \textit{Warren}, supra note 203, at 369–70, 406.
\textsuperscript{350} \textit{The Federalist} No. 78 (Alexander Hamilton).
\textsuperscript{351} See \textit{Bickel}, supra note 73, at 235; \textit{Ely}, supra note 73, at 103.
\textsuperscript{352} See supra text accompanying note 71.
determine how the State’s decision on participation in administrative proceedings is framed, “standing” determines who is allowed to participate in this decision.\footnote{Lubbers, supra note 223, at 410, 469.}

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.\footnote{See infra Part V.C.1.} While a judgment will usually vacate a rule, the possibility of remand without vaca
tion allows for the rule’s legal effect to continue.\footnote{See infra Part V.C.2.} Standing limits the participation of individuals in the courts’ proceedings and is equally controlled by the separation of powers.\footnote{See infra Part V.C.3.} Only a delicate balance between the scope of review, the judgment’s effect, and legal standing satisfies the separation of powers doctrine by balancing collective and individual self-determination.\footnote{See infra Part V.C.4.}

1. Separation of Powers and Judicial Review

The courts protect the rule of law and allow for individual self-
determination. Based on reason, judgments following the rule of law are “wholly retrospective”\footnote{See infra Part V.C.1.a.} and concern mainly the plaintiffs and the defendants.\footnote{See infra Part V.C.1.b.} The courts review the agencies’ rules.\footnote{See infra Part V.C.2.} 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.\footnote{See Strauss, supra note 114, at 766. From this, it follows that in general, judicial holdings must be applied retroactively. Reynolds v. Casket Co. v. Hyde, 514 U.S. 749, 752 (1995) (citing Harper v. Virginia Dep’t of Taxation, 509 U.S. 86, 90 (1993)).} This restriction plays out on different levels. First, judicial review can be excluded.\footnote{See supra note 353, at 63, 70, 72, 75.} Second, the scope of review might be restricted, inter alia, by deferring to the administration.\footnote{See infra Part V.C.1.a.}


The exclusion of judicial review usually guards a core area or
“‘special province’ of the Executive” against judicial review and is based on the separation of powers doctrine. The APA allows Congress to preclude judicial review via statutes. The Supreme Court tries to contain this wide exclusion with an assumption of the reviewability of the decision (or non-decision). But the courts have been reluctant to apply the presumption of reviewability. 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. 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 United States v. Wunderlich, stating that the exclusion of judicial review:

[M]akes 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.

The exclusion of judicial review, rather than the more specific limitation of its scope, might lead to too much discretion for the other

367 LUBBERS, supra note 223, at 405–06.
369 WARREN, supra note 203, at 381–82 (discussing various Court judgments regarding the reviewability of agency actions).
373 Id. at 101–02 (Douglas, J., dissenting).
branches, which often do not comply with the legal rules binding them without judicial oversight and thus leave individual self-determination unprotected. Because of this, courts indeed need to follow the presumption of reviewability.


The scope of judicial review is governed by 5 U.S.C. § 706. It has been said that the article’s different provisions are rather vague and wide open to interpretation. 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.” Equally rooted in the doctrine is the second principle, that under no circumstances may courts substitute the agency’s decision with their own. Both principles guard the collective decision-making process from the courts’ influence. Aside from that, dispute arises 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 and one that allows for close scrutiny of some other aspects. The former is said to be applied to substantive rights, the latter to procedural rights. Therefore, procedural rights will first be differentiated from substantive rights.

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

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376 WARREN, supra note 203, at 395; see ZIAMOU, supra note 17, at 172 (stating the provisions of APA § 706).
377 See WARREN, supra note 203, at 395–96.
378 Id.; see Douglas W. Kmiec, Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine, 2 ADMIN. L.J. 269, 269 (1988).
380 See infra Part V.C.1.b.ii.
381 See infra Part V.C.1.b.iii.
383 See infra Part V.C.1.b.i.
autonomy, but the assurance of fair representation for all affected interests in the exercise of the legislative power delegated to agencies.”

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 decisionmaking.”

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.

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 an administrative decision breaches a substantive law, it will be declared unlawful. This is old-fashioned, standard judicial review,

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384 Stewart, supra note 149, at 1712 (referring to the expansion of the traditional model).
385 Id.
387 Id.
389 See id.
391 See Garland, supra note 382, at 578.
392 See id. at 578, 579 (distinguishing procedural from quasi-procedural, and noting that participation as such is procedural, but the agency’s handling of the results of participation is quasi-procedural).
393 See id. at 525–26.
394 See id.
395 See infra note 403 and accompanying text.
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 the individual right to participate in an administrative proceeding—but extend their protection to the decision-making process.396 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.”397 This protection of collective self-determination can have two negative, mutually exclusive, consequences that render procedural rights far more complicated than substantive rights.398 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 action399—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.”400 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 and procedural rights.401

396 See supra notes 100–02 and accompanying text. Courts protect the process ex negativo and in cases involving substantive rights. The case here is different though, as the protection is not counter to individual rights but parallel to them. See, e.g., WARREN, supra note 203, at 377 (noting that when courts do not review individuals’ requests for review, the individuals just have to live with the agency decision).
398 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.
400 Id. at 1886.
401 See infra Part V.C.1.b.ii.
402 See infra Part V.C.1.b.iii.
ii. Substantive Laws and the *Chevron* Doctrine

According to 5 U.S.C. § 706(2)(C), a rule that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” must be held to be “unlawful and set aside” by the Court.403 The Supreme Court granted agencies wide discretion in interpreting whether a statutory right is indeed a statutory right in the landmark decision *Chevron, U.S.A., Inc. v. Natural Resources Defense Council (NRDC).*404 The Court applies a broad scope of review and allows for wide deference in rulemaking procedures in cases in which an agency interprets a statute.405 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.”406 But, “if the statute is silent or ambiguous with respect to the specific issue,” the courts can only decide on “whether the agency’s answer is based on a permissible construction of the statute,”407 or—in other words—whether it “has adopted a reasonable interpretation of the statute.”408 In the absence of clear congressional intent, the *Chevron* test gives the agencies a wide leeway in rulemaking by allowing them to interpret substantive laws as they see fit, as long as the interpretation is reasonable.409 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,*410 the second case on the legality of “Obamacare,” the decisive question was whether individuals are entitled to federal health care subsidies in states which have not established their own exchange yet.411 Although the statute uses the words “established by the state” in the particular

406 *Chevron,* 467 U.S. at 842–43.
408 Kagan, supra note 148, at 2373.
409 See Miles & Sunstein, supra note 404, at 824.
411 Id. at 2485.
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 understanding was the one supported by the IRS. This reading led to a substantive individual right to health care subsidies in all of the United States; the petitioners’ reading did not. The appeals court upheld the agency’s reading on grounds of step two of the Chevron test, as did the Supreme Court. Since the Court deferred, the agency’s decision—within some boundaries—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. 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. The courts, however, 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

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413 King, 135 S. Ct. at 2496 (Scalia, J., dissenting).
414 Id. at 2487 (majority opinion).
415 See id. at 2488, 2495–96.
417 See id. at 2496 (affirming the lower court’s decision and thus upholding the agency’s decision).
418 421 See Kagan, supra note 148, at 2368.
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 via deference to the agencies.\footnote{See \textit{Chevron}, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 865–66 (1984); Cass R. Sunstein, \textit{Constitutionalism After the New Deal}, 101 \textit{Harv. L. Rev.} 421, 465 (1987) ("The Court justified its decision in part by pointing to presidential supervision over agencies and to the fact that the President, unlike courts, is accountable to the electorate.").} This is because the agencies—acting in a democratic fashion as rulemakers because of the openness of the decision-making process and thus of the procedure\footnote{See Cass R. Sunstein, \textit{Law and Administration After Chevron}, 90 \textit{Columbia L. Rev.} 2071, 2086–87 (1990). The second step, it is argued, is about the decision-making process. See, e.g., Ronald M. Levin, \textit{The Anatomy of Chevron: Step Two Reconsidered}, 72 CHI.-KENT L. REV. 1253, 1260–63 (1997) (arguing against the second step in \textit{Chevron} and examining cases from the D.C. Circuit Court that have transformed the question of whether the agency’s decision was reasonable to whether it was “reasoned”); Matthew C. Stephenson & Adrian Vermeule, \textit{Chevron has Only One Step}, 95 VA. L. REV. 597, 604 (2009) ("We have the doctrinal equivalent of musical chairs, with three doctrines (Chevron Step One, Chevron Step Two, State Farm) and only two chairs (interpretive reasonableness and reasoned decisionmaking "). See generally Knies, supra note 378, at 287–90 (making the assumption that Chevron applies to policy); Richard J. Pierce, Jr., \textit{The Role of Constitutional and Political Theory in Administrative Law}, 64 TEX. L. REV. 469, 520–24 (1985) (making the assumption that Chevron applies to policy); Kenneth W. Starr, \textit{Judicial Review in the Post-Chevron Era}, 31 YALE J. ON REG. 283, 307 (1986) (making the assumption that Chevron applies to policy).}—are provided with discretion in making their policy decision. This different reading is due to the Supreme Court’s failure to “adequately distinguish between outcome review and process review.”\footnote{See supra \textit{note} 37. See also David J. Barron & Elena Kagan, \textit{Chevron’s Nondelegation Doctrine}, 2001 SUP. CT. REV. 201, 216–17 ("[W]hen Congress grants an agency the power to implement a statute in a way that has binding legal effect . . . Congress necessarily grants the agency the power to resolve ambiguities in the statute.").} According to the second reading, not only the interpretation of law falls within \textit{Chevron’s} purview but also matters of policy.\footnote{This is consistent with \textit{Chevron’s} two-step analytical framework, which “is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.” \textit{King v. Burwell}}, 135 S. Ct. 2480, 2488 (2015) (quoting \textit{FDA v. Brown & Williamson Tobacco Corp.}, 529 U.S. 120, 159 (2000); Barron & Kagan, \textit{supra} note 426, at 213.)

Then, “[j]udicial deference to agency ‘interpretation’ of law is simply one way of recognizing a delegation of law-making authority [and thus policy] to an agency.”\footnote{\textit{See also} \textit{Monaghan, Marbury and the Administrative State}, 83 COLUM. L. REV. 1, 26 (1983). See also David J. Barron & Elena Kagan, \textit{Chevron’s Nondelegation Doctrine}, 2001 SUP. CT. REV. 201, 216–17 ("[W]hen Congress grants an agency the power to implement a statute in a way that has binding legal effect . . . Congress necessarily grants the agency the power to resolve ambiguities in the statute.").} 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.\footnote{\textit{See} \textit{supra} \textit{note} 424.} 

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.\textsuperscript{428} 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.\textsuperscript{429} The subdivision 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 5 U.S.C. § 706(2)(A) and (D).\textsuperscript{430}

According to 5 U.S.C. § 706(2)(A) and (D), the reviewing court must “hold unlawful and set aside agency action, findings, and conclusions found to be [not in] observance of procedure required by law.”\textsuperscript{431} This latter norm encompasses the requirements of 5 U.S.C. §553: 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.\textsuperscript{432} This protection is of considerable importance, as it protects the right to participate.\textsuperscript{433} From this norm, it follows that in case no participation took place where required by law, the rule must be held unnecessary and set aside.\textsuperscript{434} 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.”\textsuperscript{435} It thus depends on whether the same result could be

\textsuperscript{428} See Kagan, supra note 148, at 2373.


\textsuperscript{431} Id.

\textsuperscript{432} See 5 U.S.C. § 553 (2014). One author differentiates between procedures and process of decision-making. Lawson, supra note 424, at 316. As most authors refer to the decision-making process as procedural this term will be used in a broad sense.


\textsuperscript{434} See, e.g., Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946, 948–49 (D.C. Cir. 1987) (differentiating interpretative rules for which no notice-and-comment procedure is necessary and legislative rules); see 5 U.S.C § 533(b).

\textsuperscript{435} United States Steel Corp. v. EPA, 595 F.2d 207, 215 (5th Cir. 1979) (quoting Braniff
expected in a new proceeding.436 However, a right to participate is depleted of meaning if the agency does not consider the results of the participation and then take those results into account.437 This is where 5 U.S.C. § 706(2)(A) 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.”438 The ensuing test is best understood as a procedural standard,439 as it is about reasoned decision-making,440 and it is essentially about the policy decision the agency makes and not its legal interpretation of the statute.441 The courts apply the so-called hard-look doctrine.442 The doctrine is understood by the Supreme Court as a very strict standard which needs to be thorough, “searching[,] and careful.”443 It first and foremost demands that the agency develops a rulemaking record, in order to allow the courts to review the decision-making process.444 Because of this, the hard-look doctrine has been blamed for inflating the rulemaking records to hundreds of pages.445 The procedural requirements demand that the record supports the conclusions which led to the rule; tests the basis

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436 See Lubbers, supra note 223, at 524 n.211; Craig Smith, Taking “Due Account” of the APA’s Prejudicial-Error Rule, 96 VA. L. REV. 1727, 1740 (2010). It has been held that “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 Coop. of Fla. v. Veneman, 289 F.3d 89, 96 (D.C. Cir. 2002) (citing McLouth Steel Products Corp. v. Thomas, 838 F.2d 1317, 1324 (D.C. Cir. 1988)).

437 See Ely et al., supra note 433, at 11.


440 See Bressman, supra note 397, at 1761, 1777; McFeeley, supra note 324, at 525–53; Lawson, supra note 424, at 318. But cf. Stephenson & Vermeule, supra note 425, at 598, 603 (proposing that the courts should move to a single-step test that examines the reasonableness of an agency’s interpretation).


442 Stephenson, supra note 441, at 754.

443 Id. at 758, 771–72; Breyer, supra note 420, at 387.

444 Stephenson, supra note 441, at 758.

445 See Strauss, supra note 114, at 760 (explaining in the subsequent pages how this led agencies to circumvent participation).
of the agencies’ conclusions; and reviews whether the policy choices are rationally connected with the facts and have been adequately articulated, defended, and adhered to.

Alternatives must have been taken into account. “[C]ourts 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.” 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. The courts closely guard the collective process of decision-making. 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 participation process also protects individual self-determination. Thus, the hard-look doctrine indeed protects individual self-determination—even if it might over-scrutinize

448 Sunstein, supra note 173, at 344.
450 Stewart, supra note 288, at 442.
451 See Garland, supra note 382, at 526–27 (citing Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 (D.C. Cir. 1979)).
452 See Garry, supra note 441, at 77.
453 See Garland, supra note 382, at 526–27; Garry, supra note 441, at 79; Scott A. Keller, Depoliticizing Judicial Review of Agency Rulemaking, 84 WASH. L. REV. 419, 481 (2009) (“[W]hen judges are given significant discretion to invalidate agency action, their policy preferences affect their decisions.”); Stephenson, supra note 441, at 765; Sunstein, supra note 449, at 188 (“There is, moreover, the familiar risks that judicial remedies will be based on a skewed understanding of a complex regulatory scheme or serve the preferences of the judges rather than promote genuine public interest.”).
454 Cf. Sunstein, supra note 449, at 188 (“It is important to be realistic about the limitations of judicial remedies, and one may find it highly implausible to think that such remedies will by themselves be able to transform the regulatory process into a forum for collective self-determination.”).
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.\(^{455}\) In FCC v. Fox Television Stations,\(^{456}\) 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 deference in the essentially political and democratic process of rulemaking:

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\text{[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.}^{457}
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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


\(^{457}\) Id. at 515. See Donnelly, supra note 307, at 361 (“The case involved a change in a 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.”).
process, and thus leaves leeway for the process of collective self-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 right to participate and the collective process. Justice Breyer’s verdict that “current doctrine is anomalous [because it] urges courts to defer to administrative interpretations of regulatory statutes, while also urging them to review agency decisions of regulatory policy strictly”\textsuperscript{458} is not entirely true anymore, thanks to the 2009 Supreme Court decision FCC v. Fox Television Stations. Still, the right balance has not yet been found 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.

2. 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.\textsuperscript{459} But the courts, in order to protect the agencies’ collective decision-making process, have taken to remanding without vacating, especially when procedural rights have been breached.\textsuperscript{460} This might well be the right approach from a collective self-determination perspective,\textsuperscript{461} at least as long as the administrative process can be repeated, or 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).

\textsuperscript{458} Breyer, supra note 420, at 364–65; see also Dolehide, supra note 405, at 1381 (noting the anomaly that though judges are experts at statute interpretation, they defer to an agency’s interpretation of a statute).

\textsuperscript{459} See generally Garland, supra note 382, at 568–70 (listing remedies available to courts, including requiring agencies to promulgate alternate rules).

\textsuperscript{460} See id. at 570; Levin, supra note 86, at 305–310.

\textsuperscript{461} See generally id. (discussing the remedies available to courts and the impact those remedies have on the agency decision making process).
3. 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 whether to act: they are obliged to pick up and decide on what an individual or a group brings to them, and they are confined by the bounds 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 and was based on the “Case or Controversy” requirement of Article III, Section 2 of the U.S. 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.” Standing was understood to be very narrow and allowed only those whose rights were infringed upon to participate on the judicial level. This so called legal interests test was developed especially by Justices Frankfurter and Brandeis in order “to limit the occasions for judicial intervention into democratic processes.” In other words, standing flows from the separation of powers doctrine:

The idea of 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, [respondents’] approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; such a role is appropriate for the Congress acting through its committees.

462 See generally Joan Leary Matthews, Unlocking the Courthouse Doors: Removal of the “Special Harm” Standing Requirement Under SEQRA, 65 ALB. L. REV. 421, 435–36 (2001) (discussing the issue of standing and its requirements, including that courts are limited to hearing cases or controversies as requested by the parties).

463 See Sunstein, supra note 371, at 170.

464 See id. at 168, 168 n.18.


467 Sunstein, supra note 371, at 179.
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."  

The Supreme Court abandoned the legal interests test in favor of the injury-in-fact test in 1970, and thus opened the door to a wide array of cases. The Supreme Court decided 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.” Within this zone of interest, nearly any interest can be named, such as an “aesthetic, conservational and/or recreational” interest. 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. 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


470 Id. at 152, 153. See also Air Courier Conf. of Am. v. Am. Postal Workers Union, 498 U.S. 517, 523, 530–31 (1991) (denying standing because the zone of interest test was not passed).


472 Sunstein, supra note 371, at 183–84.

473 See generally id. (noting that agencies were subject to political pressure from regulated industries, leading to changes to the concept of standing).

474 See, e.g., id. at 203–04 (describing the application of the relaxed standing principle in the Regents of the Univ. of Cal. v. Bakke case, which granted the plaintiff standing based on ostensibly collective rather than individual injury).
which the Supreme Court held, in short, that “beneficiaries of government regulation, not merely those trying to fend off government action, can have standing to sue.”

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 stated:

We 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.

While the judgment accepted the “injury in fact” requirement, the Court 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 particularized, . . . and (b) ‘actual or imminent, not “conjectural” or “hypothetical.”’”

A plaintiff must show more than a mere “general interest [in the alleged procedural violation] common to all members of the public.” The judgment then turned to the citizen suit provision of the Endangered Species Act (ESA), which provides that anybody may enjoin the government where it is alleged in breach of the ESA. By this, standing has been expressly ordained by Congress onto anybody as “part of a complex system in which Congress . . . enlists courts and citizens in order to produce compliance.” 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, noninstrumental ‘right’ to have the Executive observe

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475 Stone et al., supra note 57, at 108.
477 Id. at 573–74.
479 Ex parte Lévitt, 302 U.S. 633, 634 (1937) (per curiam).
480 Sunstein, supra note 371, at 200.
481 Id. at 221.
the procedures required by law. We reject this view.\footnote{Lujan, 504 U.S. at 573. This understanding was later upheld in \textit{Utah v. Evans}, 536 U.S. 452, 459 (2002) and \textit{Horne v. Flores}, 557 U.S. 433, 445 (2009).} While accepting standing on the basis of a concrete interest, the Court declared the citizen’s suit to be unconstitutional.\footnote{Lujan, 504 U.S. at 562–63, 578.}

Some have voiced the fear that from this judgment, it follows that procedural rights cannot confer standing anymore.\footnote{See \textit{id. at 601} (Blackmun, J., dissenting).} 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 [the individual] that is the ultimate basis of his standing.”\footnote{\textit{Id.} at 573 n.8 (majority opinion).} This view is reinforced by Justices Blackmun’s 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.”\footnote{\textit{Id.} at 605.} 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 demonstrate a sufficient likelihood of injury just through the breach of that procedural duty.”\footnote{See \textit{id. at 572}, 573 n.8 (majority opinion).}

Thus, all agree procedural breaches can lead to standing as long as the procedural norm protects a “concrete interest”\footnote{Id. at 605 (Blackmun, J., dissenting).} or if there is “an inextricable link between procedural and substantive harm”\footnote{See \textit{id. at 576–77} (majority opinion) (quoting \textit{Stark v. Wickard}, 321 U.S. 288, 309–10 (1944)).}—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.\footnote{\textit{Id.} at 572, 601–02.}

There is no disagreement on whether procedural administrative rights can confer standing.\footnote{See, \textit{e.g.}, \textit{Ctr. for Biological Diversity v. United States Dept of the Interior}, 563 F.3d 466,} \textit{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.\footnote{\textit{Id.} at 572, 601–02.}
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.”\textsuperscript{493} 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.”\textsuperscript{494} Nearly any interest can be named, for example, “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”\textsuperscript{495}

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 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.”\textsuperscript{496} If one accepts this argument as put forward, 5 U.S.C. § 706(2)(D), which extends the scope of review to procedural laws, would be “effectively eliminate[d],”\textsuperscript{497} as no plaintiff would be able to prove causation. The same would be true for 5 U.S.C. § 706(2)(A), as the arbitrary and capricious standard is understood as (quasi-)procedural.\textsuperscript{498} 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.\textsuperscript{499}

This approach can also find some basis in the \textit{Lujan} decision, where the Supreme Court held that “[t]here is this much truth to the

\textsuperscript{479} (2009).
\textsuperscript{494} \textit{Ctr. for Biological Diversity}, 563 F.3d at 479 (quoting \textit{Bentsen}, 94 F.3d at 664–65).
\textsuperscript{495} \textit{Id.} at 479 (quoting \textit{Lujan}, 504 U.S. at 562–63).
\textsuperscript{496} \textit{Bentsen}, 94 F.3d at 664–65; see \textit{supra} note 437 and accompanying text.
\textsuperscript{497} Cynthia R. Farina, \textit{Standing, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES, supra} note 368, at 46.
\textsuperscript{498} Garland, \textit{supra} note 382, at 525.
\textsuperscript{499} Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 94–95 (D.C. Cir. 2002).
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.  

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.

4. 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 a rather balanced result. On the one hand, by deferring to the agencies the competence to interpret statutes, 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 possesses 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

500 Lujan, 504 U.S. at 572 n.7.
501 Farina, supra note 497, at 35.
502 Id. at 35, 36 (citing Portland Audubon Soc’y v. Endangered Species Comm., 984 F.2d 1534, 1537 (9th Cir. 1993) (“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.”). But cf. Lujan, 504 U.S. at 573–74 (“[The Court] ha[s] consistently held that a plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy.”).
503 See supra text accompanying notes 457–58.
504 See discussion supra Parts V.C.1–2 and text accompanying notes 399–402.
505 See supra text accompanying notes 396–402.
506 See supra text accompanying notes 488–93.
507 See supra text accompanying notes 484–88.
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.\textsuperscript{508} It also protects individual self-determination through scrutinizing procedural rights.\textsuperscript{509} Thus, in the end, the judiciary finds the right balance of ensuring individual self-determination while respecting collective self-determination.

To conclude, participation in the judicial process involves only the plaintiff who is injured in his rights and interests. He is not allowed to decide for himself, but only to make himself heard and have his case considered and decided by the court. Participation on the judicial level thus works according to the constitutional theory of imperative participation laid out above. Direct judicial review by individuals on the grounds of the infringement of participatory rights is well known, legal standing is relatively broad, and the scope of review allows for protection of 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 United States Constitution’s implicit rules on participation explicit. It shows who must be able to participate and how much influence this participation must possess in order to add to the legitimacy of the exercise of public authority. The litmus test of delegated rulemaking proves that theory right.

Participation according to the United States Constitution needs to be spelled out as follows: First, everybody is able to participate on the legislative level, either indirectly via elections or directly via forms of direct democracy. Direct democracy does not exist on the United States federal level, but only on the state level; here is room for improvement. Second, rules will be made by the executive. However, the public—and not only those individuals who are directly affected—can give comments on the issue, which need to be taken into consideration. Third, with regard to judicial review, those whose participatory rights have been infringed possess standing to challenge the executive proceedings. These criteria are 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

\textsuperscript{508} See supra notes 450–52, 455–57 and accompanying text.

\textsuperscript{509} See supra text accompanying notes 453–54.
the separation of powers doctrine.