
DELEGATION OF LEGISLATIVE POWER TO AGENCIES: A COMPARATIVE ANALYSIS OF UNITED STATES AND GERMAN LAW*

Uwe Kischel†

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† Dr. jur. (Marburg University), L.L.M. (Yale). The author is grateful to Professor Jerry L. Mashaw, of the Yale Law School, for his helpful comments on this article.

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I. Introduction

Delegation is a problem closely linked to the constitutional and political structure as well as the legal culture of a given country. Recognizing these links makes it easier to fully understand and evaluate the present state of a given delegation doctrine and to appreciate the possibilities and ramifications of alternative solutions. Trying to understand this background of delegation by looking exclusively at one's own country, however, is a difficult task. Too many institutions are intuitively taken for granted, and too many alternatives might never have been developed.

The following article, therefore, compares the German and the United States approaches to delegation. The comparison proceeds in three parts: description, comparative summary, and constitutional and political background. In the first part, the current state of the law and the scholarly discussions are described much in the way they would be described in their respective legal systems. This renders the account as accurate as possible. The alternative—describing one legal order from the point of view of the other—might tend to neglect the differences in legal styles¹ and the different weight attached to some sub-issues. The second part, consequently, shifts from this mostly national point of view to a comparative one, summarizing and contrasting the German and American doctrines. Finally, the third part develops the complex constitutional, political, and, to a limited degree, jurisprudential background in which the doctrines are embedded. In attempting to explain why the legal solutions are different, this part will highlight the problems and implications of doctrinal change.

As a preliminary matter, the limits of this article should be clarified. First, it is not the goal of this article to develop a new alternative to the existing delegation doctrine in one country by using an approach advocated in the other. On the contrary, it tries to warn against the all-too-easy assumption that one country's solutions are "better" and that they can or should be transferred to the other. Major adjustments in the political and constitutional systems would often be necessary to accommodate such a change. Second, this article consciously ignores four aspects of the delegation problem: delegation to private persons, sub-delegation, delegation of judicial power, and all issues of federalism. The last point implies, for the United States, that only the federal and not the states' law of delegation is mentioned. For Germany, it implies, *inter alia*, that the extent to which the federal delegation doctrine binds the Länder, the existence of the Bundesrat, and the relationship between the federal government and legislature, on the one hand, and the Länder administration, on the other, will be disregarded.

II. Approaches Toward the Problem of Delegation

A. UNITED STATES

The delegation doctrine in the United States is surrounded by a great deal of uncertainty. This uncertainty begins with the rather fragile textual and historical

1. On the notion of "style" with regard to different systems of law, see 1 KONRAD ZWIEGERT & HEIN KÖTZ, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 78-86 (2d ed. 1984).

underpinnings and continues with a judicial elaboration that is far from constant and consistent. Accordingly, scholarly opinions disagree not only on what the law of delegation should be, but also on what it presently is. The following section will describe the origin and development of the delegation doctrine as it is commonly perceived, examine its present existence and standards, and, finally, review what state of the law scholars consider desirable.

1. Origin and Development

A. TEXTUAL AND HISTORICAL BACKGROUND

The text of the United States Constitution contains no reference to delegation. Article I, Section 1 of the United States Constitution (the "Constitution") merely states: "All legislative Powers herein granted shall be vested in a Congress of the United States." The adjective "all" might be considered an argument against any delegation. The mere fact, however, that somebody is "vested" with a power does not imply that he is unable to let that power be executed in his name by somebody else.² On the other hand, one might also argue that Congress has only received its power from the people³ and that, accordingly, the common law maxim *delegata potestas non potest delegari* applies.⁴ In support of the view that the Constitution allows the powers vested in Congress to be executed by another person or body, one can refer to Article I, Section 8 of the Constitution which provides: "The Congress shall have Power. . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Although this text could be read to allow delegation,⁵ such interpretation is by no means conclusive.

This lack of direct constitutional regulation regarding delegation is somewhat surprising, since the problem was already known in England.⁶ The practical importance and scope of delegation as perceived today, however, bears upon the modern administrative state. Therefore, the silence of the Constitution might be explained by the fact that no such state was conceived of in late 18th century America; the Constitution itself does not contain any references to an administrative system. It only provides: "The executive Power shall be vested in a President of the United States of America"⁷ who "shall take Care that the Laws be faithfully executed."⁸ Furthermore, the Constitution mentions officers of the United States who are

2. Cf. *People v. Reynolds*, 10 Ill. (5 Gilm.) 1, 13, 17 (1848).

3. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1432-39 (1987).

4. On this maxim and its relation to legislative powers, see JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT 71 (J.W. Gough ed. 1946); see generally Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168 (1928-29); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 4-5 (1982-83); SOTIRIOS A. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 26-30 (1975).

5. 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 157 (2d ed. 1978) [hereinafter DAVIS, TREATISE]; *contra* *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

6. See Duff & Whiteside, *supra* note 4, at 168-73 (a historical survey); cf., e.g., LOCKE, *supra* note 4, at 71.

7. U.S. CONST. art. II, § 1.

8. *Id.* § 3.

commissioned by the president.⁹ The existence of an executive branch with the president and officers of the United States is thus presumed. One might even tend to think that the framers appreciated the necessity of a certain administrative body because Alexander Hamilton boldly stated that "the true test of a good government is its aptitude and tendency to produce a good administration."¹⁰ Hamilton, however, used the word "administration" in a much more limited sense than it is used today:

The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operations of war—these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government.¹¹

Hence, the Constitution does not contemplate a modern administrative state with its many agencies and their extensive rulemaking activity. It would, therefore, be a futile task to try to extract rules on delegation of legislative power to such agencies from the actual wording of the founding document.

Similarly, the history surrounding the framing and early application of the Constitution is not explicit. On a few occasions, however, it evinces a rather favorable view of delegation. A motion by James Madison at the Constitutional Convention to give the president the power "to execute such other powers as may from time to time be delegated by the national Legislature" was refused because it was regarded as superfluous in view of the power to carry the national laws into effect.¹² Furthermore, the first Congress, many of whose members had participated in the framing of the Constitution,¹³ enacted laws that granted rather sweeping powers to the president.¹⁴

Nonetheless, neither the constitutional text nor its history provide any firm guidance as to the existence or exact contents of a doctrine of delegation.

B. DEVELOPMENT OF CASE LAW

(1) Pre-New Deal

Until the New Deal era, the Supreme Court had never invalidated a statute on delegation grounds. Nevertheless, it often used clear nondelegation language, as in *Field v. Clark*: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."¹⁵ Yet it is also possible to find declarations of the exact opposite. For instance, Chief Justice John Marshall

9. *Id.*

10. THE FEDERALIST NO. 68 (Alexander Hamilton).

11. THE FEDERALIST NO. 72 (Alexander Hamilton).

12. 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 67 (1911).

13. For a list, see *Bowsher v. Synar*, 478 U.S. 714, 724 n.3 (1986).

14. *E.g.*, Act of July 22, 1790, ch. 23, 1 Stat. 137 (regulation of trade with Indian tribes); for further examples, see DAVIS, TREATISE, *supra* note 5, at 158-59.

15. 143 U.S. 649, 692 (1892); see also *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

once said, "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."¹⁶ A reconciliation of these very contradictory statements is nevertheless possible if one pays attention to their respective qualifications. Marshall goes on to say,

[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.¹⁷

This leaves little room for the idea of sweeping broad delegation power that his previous statement conveyed. Not only is delegation reduced to a mere filling-up of details, but even such limited delegation can be unconstitutional if the subject is one that must be entirely regulated by the legislature. Thus, what at first appears to be an account of law very much in favor of delegation is actually very stringent.

The pronounced antidelegation statement in *Field*, on the other hand, was later attenuated by an exception for the filling of details taken directly from Justice Marshall's opinion.¹⁸ However, instances where such a filling-up was to be entirely left to the legislature were no longer mentioned, and the filling-up became inclusive of, for instance, the power to declare conduct criminal.¹⁹ In short, the early prodelegation case contained qualifications that gave its central statement a rather rigorous nondelegation meaning; later, broad nondelegation language was used, that was, however, attenuated by selective use of the earlier statements to be more prodelegation than they had ever been.

Furthermore, the Court developed a method of circumventing its own nondelegation language by declaring complex administrative action to be a mere exercise in fact finding to "ascertain and declare the event upon which [the legislative] will was to take effect" which was "not, in any real sense, . . . the power of legislation."²⁰

With the beginning of the 20th Century, the Court drifted away from the language of "filling up details" toward a test that asked whether the relevant statute had provided sufficient standards to guide an agency in its decisionmaking process. After its possibly first appearance in 1904,²¹ this line of reasoning reached its most famous expression in 1928, when the Court demanded an "intelligible principle" in the statute that directed the administrator to conform.²² Nevertheless, such a principle was always found.

All these wide exceptions to the nondelegation rule and the Court's unwillingness to invalidate a statute on delegation grounds led to the widespread belief that nondelegation was dead.²³

16. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

17. *Id.* With respect to filling-up the details, see *Shreveport Grain & Elevator Co.*, 287 U.S. at 85.

18. *United States v. Grimaud*, 220 U.S. 506, 517 (1911).

19. *Id.* at 518, 521.

20. *Field*, 143 U.S. at 692, 693.

21. *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904). On the doubts about the meaning of this case, see LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 57 (1965).

22. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

23. JAFFE, *supra* note 21, at 51, 60.

(2) New Deal

This impression changed dramatically when the Court struck down parts of the National Industrial Recovery Act of 1933, in two 1935 cases.²⁴ The Act was an early attempt to solve the major problems of the Great Depression through administrative measures. Today, it is often regarded as not only hastily and poorly drafted but also ill-considered; soon after its enactment, it fell into disfavor among many in the Roosevelt constituency.²⁵

In the first of these two cases, *Panama Refining Co. v. Ryan*²⁶, the Court dealt with section 9(c) of the National Industrial Recovery Act. Section 9(c) permitted the president to prohibit the transportation of so-called *hot oil* in interstate and foreign commerce.²⁷ Hot oil was any oil that had been produced or withdrawn from storage in excess of any state law or regulation. The violation of any presidential order under this provision was a criminal offense punishable by fine or imprisonment.²⁸ Section 9(c) itself did not, however, provide the president with any standard for using the authority given to him. The Court examined whether the provisions of section 1 of the Act contained any standards. All the Court found, however, was a "declaration of policy" by Congress, in which a large number of partly conflicting goals were announced, such as removal of obstructions to commerce, promotion of productivity and cooperative organization of industry, elimination of unfair competitive practices, increase of consumption, reduction of unemployment, improvement of standards of labor, and conservation of natural resources.²⁹ Accordingly, the Court found that section 1 was merely a broad introductory outline which declared no definitive legislative policy, and thus in no way controlled or limited the authority conferred under section 9(c).³⁰ Since the Court could not find the legislative standard required for a statute to pass the delegation test, section 9(c) was considered invalid.³¹ The Court even went so far as to declare that "[i]f section 9(c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function."³²

In the second case, *A.L.A. Schechter Poultry Corp. v. United States*,³³ the Court confirmed its reasoning in *Panama Refining* that Congress may leave to the adminis-

24. See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). A third case, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), in which the Court also invalidated a congressional statute on delegation grounds, will not be addressed here because it involved delegation to private persons.

25. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 17 (1993); JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW* 53 (3d ed. 1992); ERNEST GELLHORN & RONALD M. LEVIN, *ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL* 15 (3d ed. 1990) (this source provides the only view of Gellhorn's and Levin's collective approach).

26. 293 U.S. 388 (1935).

27. *Id.* at 405-06.

28. *Id.* at 406.

29. *Id.* at 416 n.6.

30. *Id.* at 416-19.

31. *Id.* at 430.

32. *Id.*

33. 295 U.S. 495 (1935).

tration "the making of subordinate rules within prescribed limits and the determination of facts," but that Congress is constitutionally required to enact standards for the carrying out of these administrative tasks.³⁴ Using this test, the Court struck down section 3, the centerpiece of the entire National Industrial Recovery Act. Section 3 provided that the president was given authority to promulgate "codes of fair competition" that were presented to him by trade or industrial associations or groups.³⁵ The only limitations upon this power were that the presenting associations or groups had to be true representatives of their industries and trades, that codes could not permit or promote monopolies or operate against small enterprises, and that the code was required to tend to effectuate the policy of section 1.³⁶ As the Court indicated, section 3 thus did not simply authorize the promulgation of codes dealing with unfair competitive practices, but it enabled the president to enact anything that might help to achieve the very wide goals of section 1, or anything that he might take to be "wise and beneficent measures for the government of trades and industries."³⁷ In other words, Congress told the president: "Here is a problem, do something about it, we give you the power." In view of the virtually nonexistent limits to this power, the Court struck down section 3 as an unconstitutional delegation.³⁸

(3) Post-New Deal

(a) NULLIFICATION. Never again did the Court use the delegation doctrine to strike down any statute enacted by Congress.³⁹ This, however, was due neither to a substantial improvement in the precision of statutory delegations nor to a change in doctrine. For instance, in *National Broadcasting Co. v. United States (Networks)*,⁴⁰ the Court interpreted section 303 of the Communications Act of 1934 to be a general grant of power to the Federal Communications Commission (FCC) to supervise the broadcasting industry, conditioned only on the very broad, statutory formula "as public convenience, interest, or necessity requires."⁴¹ This was not held to be an unconstitutional delegation.⁴² In *Yakus v. United States*,⁴³ the Court upheld a wartime statute empowering an administrator to control prices.⁴⁴ The prices to be set by the Office of Price Administration were to stabilize commodity prices, be fair and equitable, and be fixed with due consideration to prevailing prices during a designated base period.⁴⁵ In the Court's opinion, this broad line

34. *Id.* at 530.

35. *Id.* at 521 n.4.

36. *Id.*

37. *Id.* at 535.

38. *Id.* at 541-42.

39. *Contra AMAN & MAYTON, supra* note 25, at 23-24 (discussing the interpretation that there was a finding of unconstitutionality and partial nullification of a statute in *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974)). A closer reading of the case reveals, however, that the Court used the delegation doctrine only as a means of interpretation. *Cf. infra* part II.A.1.b.(3)(b).

40. 319 U.S. 190 (1943).

41. *Id.* at 214, 216-26.

42. *Id.* at 225-26.

43. 321 U.S. 414 (1944).

44. *Id.* at 423.

45. *Id.* at 420-21.

"sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."⁴⁶

In two more recent cases, the Court reaffirmed the requirement of standards or intelligible principles for a delegation to be constitutional.⁴⁷ Both times, however, Congress was found to have given sufficient guidance to the administration. In one case, the policies had been outlined and Congress had explained "what the Commission should do and how it should do it, and set[] out specific directives to govern particular situations."⁴⁸ In the other case, involving the setting of user fees for pipelines, the agency was, *inter alia*, limited to the criteria of volume-miles, miles, or revenues, and had to stay beneath a certain overall amount of fees.⁴⁹

A different kind of argument to uphold a delegation was used in *Fahey v. Maloney*.⁵⁰ Here, the administration had been authorized to prescribe terms and conditions upon which a conservator would be appointed for a failing bank. The Court found, *inter alia*, that banking was "one of the longest regulated and most closely supervised" businesses in which there existed "accumulated experience of supervisors" and "well-defined practices," and in which the courts had developed "well-known and generally acceptable standards."⁵¹ These standards were "sufficiently explicit, against the background of custom, to be adequate for proper administration and for judicial review."⁵²

A revival of a stricter nondelegation doctrine can be found in two dissenting opinions by Justice Rehnquist, who would have preferred to invalidate congressional statutes on the grounds that quintessentially legislative choices underlying important legislation had been left to agencies.⁵³

Outside the decisions of the Supreme Court, a noteworthy, original approach to the delegation problem can be found in the judgement of the United States District Court for the District of Columbia in *Amalgamated Meat Cutters v. Connally*.⁵⁴ The case dealt with the constitutionality of the Economic Stabilization Act of 1970, section 1 of which allowed the president to stabilize "as he may deem appropriate . . . prices, rents, wages, and salaries" at levels no less than those on a specified date.⁵⁵ The decision to uphold the act was based less on the presence of intelligible principles, but rather upon a far-reaching analysis of substantial and procedural safeguards against administrative abuse of power. Judge Leventhal

46. *Id.* at 425.

47. *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989); *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

48. *Mistretta*, 488 U.S. at 379 (quoting *United States v. Chambers*, 680 F. Supp. 793, 796 (E.D. La. 1988)).

49. *Skinner*, 490 U.S. at 219.

50. 332 U.S. 245 (1947).

51. *Id.* at 250.

52. *Id.* at 253.

53. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., dissenting); *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting).

54. 337 F. Supp. 737 (D.D.C. 1971).

55. *Id.* at 764.

especially emphasized judicial review, congressional oversight, the procedural requirements of the Administrative Procedure Act, and previous and expectable future administrative experience in administering price controls that would lead to the development of more precise standards.⁵⁶

The Court treated differently the delegation doctrine in the area of foreign affairs, in which Congress does not have *prima facie* exclusive authority, but rather shares competences with the president.⁵⁷ This shared authority and the better fact-finding opportunities of the president in foreign relations led the court to consider it unwise to require the imposition of narrow standards by Congress; instead, it held that a delegation that would be unconstitutional in internal affairs might still be sustained in foreign relations.⁵⁸

(b) INTERPRETATION. Even though, in modern jurisprudence, the delegation doctrine is never used in practice to nullify a statute, it is not without practical effect. As another line of cases shows, it plays an important role as a standard of statutory interpretation.

The question whether a delegation is so broad that its constitutionality becomes doubtful, depends first on an interpretation of the exact scope of the statutorily conferred powers. Here, it is of course possible for a court to accept a very broad interpretation, and to then declare even this maximum to be constitutional.⁵⁹ Today, however, the Court takes the opposite path. The Court circumvents possible delegation problems by making a narrow interpretation of statutory language, thus using the delegation doctrine as an *Ashwander*-like⁶⁰ principle. This approach can be illustrated by *National Cable Television v. United States*.⁶¹ Here, the Court refused to read literally the Independent Offices Appropriations Act of 1952 when it was applied to the FCC's imposing of fees on community antenna television (CATV). The Act prescribed that in imposing fees, among other things, "value to the recipient, public policy or interest served" should be taken into consideration. It was argued before the Court that the fixing of a fee that took into consideration public policy or interests served could be regarded as a levying of taxes. The power to tax, it was said, is one of those essential legislative functions that Congress is not allowed to delegate.⁶² The Court addressed this issue by stating that it was not necessary to reach the delegation question and that "the hurdles revealed . . . lead us to read the Act narrowly to avoid constitutional problems."⁶³ The Court then proceeded to read the challenged part of the Act as not relevant to the case.⁶⁴

56. *Id.* at 746-63.

57. *See* U.S. CONST. art. II, § 2.

58. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-28 (1936).

59. *See, e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 215-26 (1943).

60. *Cf. Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) (noting that the Court will try to avoid questions regarding a statute's constitutionality by narrowly construing the statute as inapplicable to the issues at hand).

61. 415 U.S. 336 (1974).

62. *Id.* at 341-42.

63. *Id.* at 342.

64. *Id.* at 343.

Similarly, in the Benzene case,⁶⁵ the Court dealt with the question whether the delegation, under section 3(8) of the Occupational Safety and Health Act of 1970, of the power to "assure[], to the extent feasible . . . that no employee will suffer material impairment of health or functional capacity"⁶⁶ required the agency to find a *significant* risk of harm before making a rule. The Court answered in the affirmative, stating that otherwise "the statute would make such a 'sweeping delegation of legislative power' that it might be unconstitutional."⁶⁷

The delegation doctrine can be modified under specific circumstances, as exemplified in *Kent v. Dulles*.⁶⁸ The Court held that the Department of State could not withhold a passport because of the political affiliation of the applicant. It did so because the constitutionally protected freedom to travel was at stake, and the delegation of power to regulate the exercise of such a freedom was to be construed narrowly, for otherwise important constitutional questions would arise.⁶⁹ It has been suggested that the delegation doctrine was not the Court's real concern in this case. Rather, the restriction on the freedom to travel alone would have been sufficient to trigger the same result.⁷⁰ Indeed, the possible infringement of a constitutional liberty is an indispensable element of the decision. This possible infringement, however, did not consist in any substantive decision reached by Congress, but in a mere delegation. Thus, one might argue that the treatment of the delegation issue here was not driven by the delegation doctrine as such, but directly by the right to travel itself. But this view implies that the presence of liberty interests is a relevant aspect in approaching a delegation problem, or, in other words, that the delegation doctrine has to take constitutional liberties into account because their presence leads to a stricter analysis than usual. It is therefore safe to conclude that the delegation doctrine can be used to protect a constitutional liberty from infringement by agencies without congressional standards.⁷¹

2. *The Present State of the Delegation Doctrine*

A. DEAD OR ALIVE?

Today, a commonplace observation is that the delegation doctrine is alternatively considered dead or alive.⁷² Accordingly, the answer to the question of which one of these propositions is true cannot be given in a simple, all-or-nothing fashion, but requires a number of distinctions.

(1) Nullification

The theory that there is no legal rule of nondelegation has its most staunch supporter in Professor Kenneth Davis, one of the leading experts in administrative

65. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 686 (1980).

66. *Id.* at 612.

67. *Id.* at 646.

68. 357 U.S. 116 (1958).

69. *Id.* at 129-30.

70. BARBER, *supra* note 4, at 97-98.

71. *Kent* is regarded as an aspect of the delegation doctrine in DAVIS, *TREATISE*, *supra* note 5, at 200-01; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 366, 366 n.14 (2d ed. 1988); AMAN & MAYTON, *supra* note 25, at 36.

72. *E.g.*, AMAN & MAYTON, *supra* note 25, at 7.

law in the United States.⁷³ His point of view has also been supported by Justice Thurgood Marshall.⁷⁴ Professor Davis argues that the Court's nondelegation doctrine is mere "verbiage" and belied by the reality of the holdings.⁷⁵ The law allows delegation even where major policy questions are involved.⁷⁶ Delegation is a question of congressional appraisal and of comparative qualifications of administrators and legislators.⁷⁷ Any other view would, according to Davis, be damaging to democracy and would make the operation of modern government impossible.⁷⁸ *Panama Refining* would be decided differently today, for it involved the delegation of only a very limited power.⁷⁹ *Schechter*, on the other hand, involved the most expansive congressional delegation ever; nevertheless, its language is misleadingly broad.⁸⁰ Thus, it seems that Professor Davis approves of the holding in *Schechter*, although his position is not entirely clear.

The difference between the Court's nondelegation language and its prodelegation holdings does, indeed, lie at the root of the problem of defining the current law of delegation. Several writers, however, point out that none of the cases following *Schechter* addressed a situation in which there was a complete lack of congressional standards to guide the agencies.⁸¹ Implicitly and in a limited way, even Professor Davis admits this fact when he characterizes *Schechter* as involving "the most sweeping congressional delegation of all time."⁸² Thus, it is safe to state that even though the principle of nondelegation has never been repudiated by the Court,⁸³ it has turned into a question of degree and has moved away from categorical questions such as legislation or fact-finding.⁸⁴ The possible observation, that even in *Schechter* a very limited amount of congressional guidelines existed, only underscores the appropriateness of an approach that analyzes delegation in terms of degree. When Professor Davis criticizes nondelegation proposals as incompatible with modern government, he neglects to discuss this aspect of degree and attacks only the most radical nondelegation doctrine that would tend to consider even interpretation of vague language and application of general rules to specific cases as a form of prohibited delegation.⁸⁵ The delegation doctrine, thus,

73. DAVIS, TREATISE, *supra* note 5, at 149-50; KENNETH C. DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES 66 (1989) [hereinafter DAVIS, EIGHTIES].

74. *Federal Power Comm'n v. New Eng. Power Co.*, 415 U.S. 345, 352-53, 353 n.1 (1974) (Marshall, J., dissenting).

75. DAVIS, TREATISE, *supra* note 5, at 150; see DAVIS, EIGHTIES, *supra* note 73, at 54-58, 66.

76. DAVIS, TREATISE, *supra* note 5, at 150-51.

77. *Id.* at 156; see also DAVIS, EIGHTIES, *supra* note 73, at 57-58, 66.

78. DAVIS, TREATISE, *supra* note 5, at 150; DAVIS, EIGHTIES, *supra* note 73, at 57.

79. DAVIS, TREATISE, *supra* note 5, at 175.

80. *Id.* at 176-77.

81. David P. Curtie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 29; cf. AMAN & MAYTON, *supra* note 25, at 22, 22 n.36; JAFFE, *supra* note 21, at 69; BARBER, *supra* note 4, at 95.

82. DAVIS, TREATISE, *supra* note 5, at 176.

83. Curtie, *supra* note 81, at 29; AMAN & MAYTON, *supra* note 25, at 22.

84. JAFFE, *supra* note 21, at 71; AMAN & MAYTON, *supra* note 25, at 31; Aranson et al., *supra* note 4, at 17; cf. GELLHORN & LEVIN, *supra* note 25, at 22-23.

85. Cf. DAVIS, TREATISE, *supra* note 5, at 156-57. On the impossibility of squeezing all discretion out of application, see KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 154-55 (3d ed. 1975).

remains valid, at least for extreme cases.⁸⁶ This limited validity is supported even by Professor Davis, who, apart from his position on *Schechter*, clearly says that "a delegation by Congress to the page boys and girls to legislate as they see fit would be unconstitutional."⁸⁷ If, now, the delegation doctrine is not entirely dead and has transformed into question of degree, it can unpredictably make a new appearance from its "fugitive existence at the edge of constitutional jurisprudence" at any time the Court considers a delegation of legislative power as going "too far."⁸⁸

(2) Interpretation

The preceding discussion only dealt with one aspect of the delegation doctrine, its possible use for purposes of nullification. The outline of cases, however, has already shown that the Court also employs the delegation doctrine as a means of interpretation. It is this aspect on which supporters of the continuing importance of the delegation doctrine heavily rely.⁸⁹ Here, the doctrine plays an important and vital role even today. Professor Davis can reject the existence of a nondelegation doctrine only by ignoring this aspect, as he himself admits.⁹⁰

B. THE DELEGATION TEST

Whether the delegation doctrine is used for nullification or for interpretive purposes, it must be given some substance in order to be applicable.

(1) Basic Requirements

First, Congress must provide the agencies with some just and reasonable standard or some intelligible principle to guide their exercise of discretion.⁹¹ To distinguish between these two terms, as some authors do, seems rather futile in such an insecure area of law, especially if it is not even clear which one of the two is narrower.⁹²

This requirement alone, however, is everything but strict and thus serves only limited purposes. It cannot be decided in advance for any specific statutory clause, when a standard is so vague that it cannot provide any guidance to either courts or agencies and must thus be seen as unconstitutional for nullification purposes or as posing constitutional problems for interpretive purposes. It is here that the inherent unpredictability of the delegation doctrine shows with the most force.

A second basic requirement of the delegation doctrine is that a primary or

86. GELLHORN & LEVIN, *supra* note 25, at 29.

87. DAVIS, TREATISE, *supra* note 5, at 151.

88. Aranson et al., *supra* note 4, at 17.

89. AMAN & MAYTON, *supra* note 25, at 15, 23-26, 28-29; cf. GELLHORN & LEVIN, *supra* note 25, at 23-25; Currie, *supra* note 81, at 29; JAFFE, *supra* note 21, at 72-73; Aranson et al., *supra* note 4, at 12-13; Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419, 419 n.2 (1987); cf. also *Synar v. United States*, 626 F. Supp. 1374, 1384 (D.D.C. 1986).

90. Davis states: "If scaling down a broad delegation is part of the nondelegation doctrine, then that part of the doctrine is still alive and may long live." DAVIS, TREATISE, *supra* note 5, at 201.

91. See *supra* part II.A.1.b.(3)(a), (b).

92. DAVIS, TREATISE, *supra* note 5, at 160 (distinguishing the terms and implying that the term "intelligible principle" is narrower); JAFFE, *supra* note 21, at 60 (not stressing the distinction, but noting that "standard" is perhaps a shade narrower than "intelligible principle").

major social choice be made by Congress, rather than by administrators.⁹³ Of course, opinion on what constitutes a "major" choice or a mere filling-up of details can differ widely.⁹⁴ Moreover, what is primary can be considered a question of quality or of quantity.⁹⁵ In the latter version, this requirement underlies the Benzene case,⁹⁶ for instance, and is even used by Professor Davis, who generally rejects it,⁹⁷ to distinguish *Schechter* from all other cases, especially from *Panama Refining*.⁹⁸ This requirement is also useful in reconciling Justice Cardozo's dissent in *Panama Refining* with his concurrence in *Schechter*. In *Panama Refining*, Justice Cardozo found sufficient delegation standards in section 1 of the National Industrial Recovery Act.⁹⁹ The same section 1, however, was referred to by the challenged delegation in *Schechter*.¹⁰⁰ Cardozo nevertheless distinguished the latter case on the grounds its delegation was not confined to any group of acts but covered the entire field of industrial regulation, thus being a "delegation running riot."¹⁰¹

(2) Filling-In of General Delegations by Agencies

Whenever agencies act upon a delegation, they apply it to specific situations in only one specific way, thus narrowing down a broad power that theoretically might have accommodated different solutions. Courts have used these self-made restrictions to uphold delegations in two ways. First, *Fahey v. Mallonee* demonstrates that the existence of standard administrative practices in a certain field may preserve a delegation that would otherwise be considered too broad.¹⁰² Second, *Meat Cutters* suggests that the mere expectation that the agency will develop standards in the future may be at least one argument among others for upholding the delegation.¹⁰³ Read even more broadly, *Meat Cutters* stands for an approach where the entire system of procedural and substantive controls that the agency is bound to apply can save a delegation.¹⁰⁴ Such a proceduralization of the delegation test is by some scholars regarded as *the* contemporary approach to delegation,¹⁰⁵ by some as a desirable future alteration,¹⁰⁶ and by still others as simply incorrect.¹⁰⁷

93. AMAN & MAYTON, *supra* note 25, at 15, 31, 32 n.21; Currie, *supra* note 81, at 30; *contra* DAVIS, TREATISE, *supra* note 5, at 155; DAVIS, EIGHTIES, *supra* note 73, at 54, 57.

94. *Cf.* DAVIS, TREATISE, *supra* note 5, at 154-55 (listing a multitude of very detailed and specific questions considered "major").

95. *Cf.* AMAN & MAYTON, *supra* note 25, at 31 (referring to quality), 32 n.21 (referring to quantity).

96. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980); *see supra* part II.A.1.b.(3)(b).

97. *See supra* part II.A.2.a.(1).

98. DAVIS, TREATISE, *supra* note 5, at 175-76.

99. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 440 (1935) (Cardozo, J., dissenting).

100. *See supra* part II.A.1.b.(2).

101. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

102. AMAN & MAYTON, *supra* note 25, at 32-33. Aman & Mayton are critical, however, of this theory. *Id.* at 37. *See also* DAVIS, TREATISE, *supra* note 5, at 203; *cf.* MASHAW, *supra* note 25, at 66; *see supra* part II.A.1.b.(3)(a).

103. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 758-60 (D.D.C. 1971).

104. *Id.* at 746-62; *see supra* part II.A.1.b.(3)(a). *See also* *Wichita R.R. v. Pub. Utils. Comm'n*, 260 U.S. 48, 59 (1922) (regarding procedural controls).

105. GELLHORN & LEVIN, *supra* note 25, at 22.

106. DAVIS, TREATISE, *supra* note 5, at 207-08; *cf.* JAFFE, *supra* note 21, at 85-86.

107. AMAN & MAYTON, *supra* note 25, at 37-39.

(3) Special Circumstances

The delegation doctrine varies from its usual form in certain categories of cases. It is broader in the field of foreign affairs and stricter when personal liberties are at stake.¹⁰⁸

Finally, there seem to be certain core functions which Congress can never delegate, such as the impeachment power and the power to approve or veto treaties, because the language of the Constitution makes clear that the purpose of these powers would not be served if they were delegated.¹⁰⁹ For analogous reasons, the power to legislate, as such, is nondelegable.¹¹⁰ It is debated whether this line of thought also applies to the taxing power.¹¹¹

3. *What the Law Should Be*

In spite of the specifications just attempted, the United States delegation doctrine remains an area of law that is far from clear. Many scholars, therefore, have not concentrated on describing the present state of the doctrine. Rather, they generally discuss the virtues and flaws of restrictions on delegation, and from their insights, try to develop a workable doctrine.

Thus, Theodore J. Lowi argues that the present, excessive delegation deranges virtually all constitutional relationships, constitutes a "legislide," and should be abandoned by reducing agency discretion, in order to put an end to what he calls "government by patronage."¹¹² According to Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson, broad delegation reduces public welfare by augmenting the amount of legislation, which collectively produces private goods.¹¹³ A reinvigorated delegation doctrine would reduce such legislation and increase public welfare.¹¹⁴ A later article by Gellhorn alone suggests that his demand for more limited delegation is more restricted than Lowi's order.¹¹⁵ David Schoenbrod also supports a stricter enforcement of the delegation doctrine, for which he proposes a new test.¹¹⁶ According to this test, Congress may not delegate any legislative power that Article I of the Constitution assigns to the legislative process, especially the power to make rules of private conduct.¹¹⁷ At the same time, Schoenbrod admits of the necessity for interpretation of broad statutory language by the executive

108. See *supra* part II.A.1.b.(3)(a)-(b); AMAN & MAYTON, *supra* note 25, at 33-34, 36.

109. TRIBE, *supra* note 71, at 362-63; see also DAVIS, TREATISE, *supra* note 5, at 198 (for the impeachment power). *But cf.* *Synar v. United States*, 626 F. Supp. 1374, 1385-86 (D.D.C. 1986) (without referencing these specific examples).

110. TRIBE, *supra* note 71, at 363; see also DAVIS, TREATISE, *supra* note 5, at 151, 198.

111. Compare TRIBE, *supra* note 71, at 366 n.15 (taxing power is not delegable) with *National Cable Television Ass'n*, 415 U.S. at 342 (discussing the delegation of taxing power as least problematic) and *Skinner*, 490 U.S. at 220-24 and AMAN & MAYTON, *supra* note 25, at 23 n.40 (taxing power is delegable).

112. Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 296, 299, 322 (1987).

113. Aranson et al., *supra* note 4, at 64.

114. *Id.* at 63-67.

115. Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 349-53 (1987).

116. David Schoenbrod, *Separation of Powers and the Powers that Be: The Constitutional Purpose of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 358-59 (1987).

117. *Id.*

and judiciary. He does not consider this unconstitutional, as long as the statute states a rule and not only a goal.¹¹⁸

On the other side of the doctrinal spectrum, Jerry L. Mashaw argues in favor of broad delegations. He does not believe that delegation either delegitimizes governance or reduces general welfare.¹¹⁹ On the contrary, he emphasizes that delegation has a major democratic virtue in that it allows the president, as head of the executive, who alone has a truly nationwide constituency, to put the political views for which he was elected into practice.¹²⁰ Truly specific statutes would not only be inadequate in view of temporal and regional differences that have to be accommodated, but would also turn presidential politics into a "mere beauty contest."¹²¹

Kenneth Culp Davis wants to change the purpose of the delegation doctrine and use it as a protection against unnecessary and uncontrolled discretionary power.¹²² Along this line, he prefers to shift focus from standards to safeguards.¹²³ He believes courts should not hold broad delegations unlawful but instead require that administrators rapidly develop administrative standards.¹²⁴

Richard B. Stewart, finally, wants to go beyond the entire debate on delegation.¹²⁵ To him, the delegation problem is rooted in the attempt to regulate extraordinarily complex social and economic structures through centralized command and control mechanisms.¹²⁶ As a remedy, he proposes a reconstructive strategy of regulation by transferring decisionmaking from the central government to markets, collective bargaining, or state and local governments. In short, he calls for decentralization and deregulation.¹²⁷

B. GERMANY

In German law, delegation is a firmly established principle. Not only is the administrative state, as such, reflected in the German constitution (Grundgesetz, GG), but delegation is even expressly dealt with in one of its articles. Moreover, the German Constitutional Court (Bundesverfassungsgericht, BVerfG) and German scholars have developed a sufficiently coherent body of doctrine that specifies the contents of this provision and solves several other issues which are not specifically dealt with in the Grundgesetz. The following section will first provide the textual and brief historical background, then lay out the doctrinal rules of delegation as

118. *Id.* at 358-59, 361, 389.

119. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. ECON. & ORG. 81, 91 (1985).

120. *Id.* at 95-96.

121. *Id.* at 96; see also DAVIS, EIGHTIES, *supra* note 73, at 67-70 (discussing *Chevron U.S.A. Inc. v. Natural Resource Defense Council*, 467 U.S. 837, 865-66 (1984)).

122. DAVIS, TREATISE, *supra* note 5, at 208.

123. *Id.* at 209.

124. *Id.* at 207.

125. See Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 328-29 (1987). See generally *id.* at 329-35.

126. *Id.* at 335.

127. *Id.* at 328-35.

developed by the Constitutional Court, and finally describe some of the doctrinal criticism that has been advanced.

1. Textual and Historical Basis

The Grundgesetz, promulgated on May 23, 1949, is a much more recent document than the United States Constitution of 1787. The Grundgesetz was framed against the background of a highly elaborated administrative state and, unlike the Constitution, contains a number of provisions that directly address questions of administration.¹²⁸ Hence, it was not surprising that the question of delegation would also be addressed. Furthermore, German legal scholars have long studied delegation.¹²⁹ During the second Reich, prior to 1919, even extreme delegation was considered legal.¹³⁰ During the Weimar Republic, some scholars voiced opposition against this total prodelegation standpoint.¹³¹ The German Supreme Court (Reichsgericht, RG) and many writers, however, disagreed.¹³² It was only admitted that delegation had to be somehow limited in duration, subject matter, or persons affected,¹³³ an exception that was so insignificant that it was rarely mentioned. In effect, the legislature passed a number of far-reaching, so-called *Ermächtigungsgesetze* with limited durations, which, for instance, authorized the government to take all measures that it deemed necessary and urgent in view of the distress of people and Reich.¹³⁴ The government was sometimes even authorized to promulgate regulations (Verordnungen) that would infringe upon the basic constitutional rights of individuals.¹³⁵ From a legal perspective, it was one of these *Ermächtigungsgesetze* which brought an end to the Weimar Republic and led into the Third Reich. The government, in effect Hitler, was generally authorized to promulgate *statutes* (and not only *Verordnungen*) which could even be at variance with the Weimar Constitution.¹³⁶ Later on, this authorization was extended even further, allowing the government to enact new constitutional law.¹³⁷

Against this historical background, it was inevitable for the framers of the Grundgesetz not only to deal with delegation but strictly to confine it. The framers

128. See art. 83-90 GG.

129. For a detailed discussion of the old law, see Paul Schoen, *Das Verordnungsrecht und die neuen Verfassungen*, 6 AöR 133 *passim* (1924). For an overview in English, see Sidney B. Jacoby, *Delegation of Powers and Judicial Review: A Study in Comparative Law*, 36 COLUM. L. REV. 871, 884-88 (1936).

130. E.g., ADOLF ARNDT, *DAS STAATSRECHT DES DEUTSCHEN REICHES* 200 (1901); 1 PAUL LABAND, *DAS STAATSRECHT DES DEUTSCHEN REICHES* 599-600 (2d ed. 1888).

131. E.g., Carl H. Triepel, *Die Ermächtigungsgesetze*, 29 DEUTSCHE JURISTENZEITUNG 2, 6 (1924).

132. RG, decision of Jan. 25, 1924, RGZ 107, 315, 317-18; FRIEDRICH GIESE ET AL., *DEUTSCHES VERWALTUNGSRECHT* 30 (1930); Schoen, *supra* note 129, at 148-57.

133. RG, decision of Feb. 1, 1921, RGSt 55, 246, 246-47.

134. "Die Reichsregierung wird ermächtigt, die Maßnahmen zu treffen, die sie im Hinblick auf die Not von Volk und Reich für erforderlich und dringend erachtet." *Ermächtigungsgesetz* of Dec. 8, 1923, RGBl. I 1923, 1179.

135. "Die Reichsregierung wird ermächtigt, die Maßnahmen zu treffen, welche sie auf finanziellem, wirtschaftlichem und sozialem Gebiete für erforderlich und dringend erachtet. Dabei kann von den Grundrechten der Reichsverfassung abgewichen werden." *Ermächtigungsgesetz* of Oct. 13, 1923, RGBl. I 1923, 943.

136. Gesetz zur Behebung der Not von Volk und Reich of Mar. 24, 1933, RGBl. I 1933, 141.

137. Gesetz über den Neuaufbau des Reichs of Jan. 30, 1934, RGBl. I 1934, 75.

consciously turned away from the practice of Weimar and tried to delimit a clear boundary between legislative and executive tasks in the area of legislation. The result was Article 80, Paragraph 1 of the Grundgesetz, which provides:

The federal government, a federal minister, or the governments of the Länder may be authorized by statute to issue regulations. Content, purpose, and scope of such authorization must be determined by the statute. The statutory basis must be specified in the regulation. If the statute provides that the authorization may be delegated further, such delegation may only be effected by regulation.¹³⁸

2. *The Delegation Test and the Theory of Essentialness*

The principle established by Article 1, Paragraph 1, Clause 2 of the Grundgesetz does not address all problems that might arise in the area of delegation. This is exemplified by a series of questions which the Constitutional Court asks.¹³⁹ First, the Constitutional Court asks whether a given issue must be resolved by any legal enactment (statute or *Verordnung*) or can be regulated by internal directives (*Verwaltungsvorschriften*).¹⁴⁰ By asking whether legislation is necessary *at all*, this inquiry goes beyond the question who may or must legislate and thus exceeds the scope of this article and will not be further discussed. Second, the Court asks whether the issue must be decided *entirely* by parliament or whether it may in part be left to administrative rulemaking. This problem is commonly referred to as parliamentary or total reservation (*Parlamentsvorbehalt*, *Totalvorbehalt*). The third question only arises if delegation is at all possible. It asks *how much* decisionmaking power may be given to the administration and how much decisionmaking be made by statute. It is only here, that the "content, purpose, and scope" formula of the Grundgesetz exerts its influence. The theory of essentialness (*Wesentlichkeitstheorie*), which the Constitutional Court has developed, influences the answers to all three questions.

A. PARLIAMENTARY RESERVATION

Parliament may not regulate anything it wishes by simply passing a more or less detailed delegation statute. On the contrary, there are certain issues which can only be regulated directly by parliamentary enactment. The Grundgesetz explicitly mentions several of these issues, such as the transfer of sovereign rights to international institutions (Article 24, Paragraph 1 of the Grundgesetz), the budget (Article 110), or a law that amends the Constitution (Article 79). None of these provisions, however, are of particular practical significance for the question of delegation.

The Constitutional Court, however, has developed a general principle to govern

138. "Durch Gesetz können die Bundesregierung, ein Bundesminister oder die Landesregierungen ermächtigt werden, Rechtsverordnungen zu erlassen. Dabei müssen Inhalt, Zweck und Ausmaß der erteilten Ermächtigung im Gesetze bestimmt werden. Die Rechtsgrundlage ist in der Verordnung anzugeben. Ist durch Gesetz vorgesehen, daß eine Ermächtigung weiter übertragen werden kann, so bedarf es zur Übertragung der Ermächtigung einer Rechtsverordnung" (translation by the author).

139. For an instructive overview, see GUNTHER SCHWERDTFEGER, *ÖFFENTLICHES RECHT IN DER FALLBEARBEITUNG* §§ 507-08 (1986).

140. *Id.* § 507; BVerfG, decision of Dec. 21, 1977, BVerfGE 47, 46, 79.

the question: Parliament is obliged to make all *essential* decisions itself.¹⁴¹ The notion of "essentialness" does not refer to the amount of controversial political debate which surrounds the issue.¹⁴² Rather, "essentialness" is generally a function of the intensity with which basic constitutional rights of those who are addressed by the legal rule are affected.¹⁴³ The relevant question, therefore, is whether the decision is essential for putting into effect the basic rights.¹⁴⁴

In one case, for example, the Constitutional Court considered sexual education in public schools. Sexual education was a matter that simultaneously affected the partly conflicting right of parents to educate their children (Article 6, Paragraph 2 of the Grundgesetz), the right of children to develop their personality and to have their intimate personal sphere protected (Article 2, Paragraph 1), and the duty of the state to educate (Article 7, Paragraph 1). The question whether sexual education should be taught in schools was of such importance for the exercise of all these conflicting basic rights, that it was considered essential and had to be decided by the legislature itself.¹⁴⁵

In another well-known case, the Court considered whether the legislature alone must determine under what circumstances a high-school student has to repeat a class and when a student can be expelled from his type of school for insufficient academic performance.¹⁴⁶ The Court distinguished between these two questions. Expulsion touches upon the right to choose one's job and job-related education freely (Article 12, Paragraph 1 of the Grundgesetz), because it bars the student from all schools of a certain type, influences his future path in life and education, and is likely to exclude him from certain jobs. The gravity of these effects made the question of expulsion essential.¹⁴⁷ Requiring a student to repeat his class, on the other hand, was held not to be essential, although it touches his right to freely develop his personality, which is protected by Article 2, Paragraph 1 of the Grundgesetz. The Court argued that repeating only prolongs education for one year, generally does not negatively influence the student's path in life, and can even exert a positive pedagogical influence.¹⁴⁸

B. CONTENT, PURPOSE, AND SCOPE

When no total reservation bars delegation, the delegating statute must still determine content, purpose, and scope (Article 80, Paragraph 1, Clause 2 of the

141. BVerfG, decision of July 18, 1972, BVerfGE 33, 303, 303; BVerfG, decision of Dec. 29, 1977, BVerfGE 47, 46, 78-79; BVerfG, decision of Aug. 8, 1978, BVerfGE 49, 89, 126. For a critical overview of this theory, see Dieter C. Umbach, *Das Wesentliche an der Wesentlichkeitstheorie*, in Festschrift HANS JOACHIM FALLER 111 *passim* (Wolfgang Zeidler et al. eds., 1984); see *infra* II.B.2.c.(2).

142. *Contra* Gunter Kisker, *Neue Aspekte im Streit um den Vorbehalt des Gesetzes*, 30 NJW 1313, 1318 (1977). For a rebuttal, see Carl-Eugen Eberle, *Gesetzesvorbehalt und Parlamentsvorbehalt*, 37 DÖV 485, 487 (1984); Michael Kloepfer, *Der Vorbehalt des Gesetzes im Wandel*, 39 JZ 685, 692 (1984); Umbach, *supra* note 141, at 126-27.

143. BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 274; BVerfG, decision of Aug. 8, 1978, BVerfGE 49, 89, 127.

144. BVerfG, decision of Dec. 21, 1977, BVerfGE 47, 79.

145. *Id.* at 81-82.

146. BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 257, 268-76.

147. *Id.* at 273, 275.

148. *Id.* at 273-76.

Grundgesetz).¹⁴⁹ These three terms do not need to be treated separately.¹⁵⁰ For instance, content and scope may be ascertained by the purpose.¹⁵¹

(1) Statutory Interpretation

Content, scope, and purpose need not be determined by explicit statutory language. It is sufficient that they are ascertainable by the application of general principles of statutory interpretation, in particular by considering the goal, sense, and history of the entire statute.¹⁵²

Furthermore, the Court will prefer an interpretation that conforms to the demands of Article 80, Paragraph 1, Clause 2 of the Grundgesetz over one that does not (doctrine of *verfassungskonforme Auslegung*).¹⁵³ A very generalized use of this method could, however, be the end of all attempts to make the legislature use sufficiently determined language when delegating authority. Many, if not all, overly broad delegations could be upheld if the Court narrowed their meaning until they conformed to the Grundgesetz. However, there are general doctrinal safeguards against such tendencies.¹⁵⁴ In the context of delegation, the Court has furthermore only referred to *verfassungskonforme Auslegung* in order to buttress an interpretation that it had already reached by other means.¹⁵⁵

(2) Formulas

The Constitutional Court uses different expressions to describe how detailed the determination of content, purpose, and scope in the statute must be in order to be sufficient. First, the affected citizen must be able to know ahead of time in which cases and with which tendency the administration will use the authorization and what content the Verordnungen could legally have.¹⁵⁶ Second, the legislature itself must make the decision that certain areas are to be regulated and must lay

149. For a summary of the decisions of the Constitutional Court, see BVerfG, decision of Jan. 11, 1966, BVerfGE 19, 354, 361-62; BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 277-78. For a more historical description that distinguishes different phases of development, compare Horst Hasskarl, *Die Rechtsprechung des Bundesverfassungsgerichts zu Art. 80 Abs. 1 Satz 2 GG*, 94 AÖR 85, 87-99, 103-06 (1969) with Ulrich Ramsauer, *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland*, art. 80, §§ 47-50, in REIHE ALTERNATIVKOMMENTARE (Rudolf Wassermann ed., 1984) [hereinafter AK].

150. Theodor Maunz, in GRUNDGESETZ KOMMENTAR, art. 80, § 29 (Theodor Maunz & Günter Dürig eds., looseleaf) [hereinafter MAUNZ/DÜRIG].

151. BVerfG, decision of Nov. 12, 1958, BVerfGE 8, 274, 315, 318.

152. BVerfG, decision of Nov. 12, 1958, BVerfGE 8, 274, 307; BVerfG, decision of July 14, 1959, BVerfGE 10, 20, 51; BVerfG, decision of Nov. 27, 1962, BVerfGE 15, 153, 161; BVerfG, decision of Jan. 11, 1966, BVerfGE 19, 354, 362; BVerfG, decision of Dec. 20, 1981, 257, 277; BVerfG, decision of Dec. 12, 1984, BVerfGE 68, 319, 332-33; BVerfG, decision of Mar. 14, 1989, BVerfGE 80, 1, 21. In its earlier jurisprudence, the Court was much stricter on the issue of interpretation. See BVerfG, decision of June 10, 1953, BVerfGE 2, 307, 334-35; BVerfG, decision of June 13, 1956, BVerfGE 5, 71, 77.

153. BVerfG, decision of Feb. 11, 1958, BVerfGE 7, 267, 273; BVerfG, decision of Nov. 12, 1958, BVerfGE 8, 274, 324.

154. If the wording of the statute or its purpose is clear or if another reading would give the statute a completely new normative content, the statute can only be held invalid. Cf. BVerfG, decision of Aug. 5, 1966, BVerfGE 20, 150, 160-61; BVerfG, decision of May 14, 1986, BVerfGE 72, 278, 295; THEODOR MAUNZ & REINHOLD ZIPPELIUS, *DEUTSCHES STAATSRECHT* 47 (28th ed. 1991).

155. Cf. BVerfG, decision of Feb. 11, 1958, BVerfGE 7, 267, 273; BVerfG, decision of Nov. 12, 1958, BVerfGE 8, 274, 315-18, 324.

156. BVerfG, decision of Oct. 23, 1951, BVerfGE 1, 14, 60; BVerfG, decision of Nov. 27, 1962, BVerfGE 15, 153, 160.

down the limits of such regulation as well as its goal.¹⁵⁷ Third, one has to be able to derive from the statute what program the legislature tries to achieve.¹⁵⁸ These formulas are not mutually exclusive and are frequently used in combination.¹⁵⁹ More recently, the Court has shown a tendency to consolidate these formulas into one sentence: in the statute, the legislature itself must make the decisions by defining tendency and program sufficiently so that it can be known ahead which content the *Verordnung* can have.¹⁶⁰

In one case,¹⁶¹ a truck carrier challenged an order to pay a transportation tax. This tax had been assessed on the basis of "ton-kilometers." Specifically, the gross weight of the transported goods had been multiplied by the standard railway distances.¹⁶² In part, the actual distances driven were significantly shorter. The agency had relied on a *Verordnung* which had been enacted pursuant to, *inter alia*, a statute that authorized the administration to determine the scope of the basis for assessing the transportation tax.¹⁶³ The statute itself used the expression "ton-kilometers." As the Court explained, however, neither "ton" nor "kilometers" had any specific meaning, which was evident from the diverse uses the agency made of the terms: For "ton," the agency's *Verordnung* in certain cases relied on average weight in some cases and half of the real weight in others, and sometimes the *Verordnung* rounded figures off or up. Similarly, kilometers were in some cases determined by actual distance driven, but in other cases, by diverse standardized methods. Thus, the statute was not specific enough to determine the future content of the *Verordnung*.¹⁶⁴ Furthermore, the transportation tax statute did not aid the administration by providing a program or a specific goal, but instead, tried to fulfill a number of quite disparate purposes.¹⁶⁵ Consequently, it was held to be unconstitutional.¹⁶⁶

In another case, the Court upheld a provision of the Federal Physician Act (*Bundesärzteordnung*) which provided in section 11:

The federal government is authorized, with the consent of the Bundesrat to set the fees for medical services by a fee regulation. This fee regulation must set minimum and maximum prices for medical services. In doing so, the legitimate interests of physicians and those who are obliged to pay the fees are to be taken into account.¹⁶⁷

157. BVerfG, decision of June 10, 1953, BVerfGE 2, 307, 334; BVerfG, decision of Jan. 11, 1966, BVerfGE 19, 354, 361-62; BVerfG, decision of Oct. 11, 1966, BVerfGE 20, 257, 269-70.

158. BVerfG, decision of June 2, 1964, BVerfGE 18, 52, 62; BVerfG, decision of Jan. 11, 1966, BVerfGE 19, 354, 362; BVerfG, decision of May 14, 1969, BVerfGE 26, 16, 30.

159. See the older, but still relevant analysis by Hasskarl, *supra* note 149 *passim*.

160. BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 277; BVerfG, decision of Dec. 12, 1984, BVerfGE 68, 319, 333; BVerfG, decision of Mar. 14, 1989, BVerfGE 80, 1, 20.

161. BVerfG, decision of June 2, 1964, BVerfGE 18, 52.

162. *Id.* at 53.

163. *Id.* at 53-54.

164. *Id.* at 63.

165. BVerfG, decision of June 2, 1964, BVerfGE 18, at 64.

166. *Id.* at 53, 64.

167. "Die Bundesregierung wird ermächtigt, durch Rechtsverordnung mit Zustimmung des Bundesrates die Entgelte für ärztliche Tätigkeit in einer Gebührenordnung zu regeln. In dieser Gebührenordnung sind Mindest- und Höchstsätze für die ärztlichen Leistungen festzusetzen. Dabei ist den berechtigten Interessen der Ärzte und der zur Zahlung Verpflichteten Rechnung zu tragen." BVerfG, decision of Dec. 12, 1984, BVerfGE 68, 319, 320-21 (translation by the author).

The Court reasoned that the content of future Verordnungen was the setting of fees for medical services. The tendency and program of the statute, which determined its purpose, were to balance the interests between physicians and patients, so that neither too high a fee had to be paid nor too low a fee could be demanded. Finally, the statute sufficiently determined the scope of the authorization by providing that minimum and maximum fees had to be set after consideration of the above mentioned interests. Thus, the Court concluded, the possible content of the Verordnung was foreseeable and the rulemaking administration was instructed as to its limits.¹⁶⁸

(3) Relativity of Formulas

As the difference between the rather strict holding of the transportation tax case and the permissive holding in the physicians' fee case suggests, the formulas that describe the degree of specificity required for statutory delegation are not absolute. Rather, these formulas depend on the special features of the regulated issue, particularly how far a specific description of the regulated facts is practically possible, and on the intensity of the specific action taken.¹⁶⁹ Moreover, the more complex the regulated area is, or the more it can be expected that facts are going to change quickly, the less specificity is required.¹⁷⁰ Additionally, the impact of the theory of essentialness¹⁷¹ is of particular importance: the more the regulation affects basic rights, the higher the standard of specificity.¹⁷²

In the field of criminal law, the requirements are particularly strict. The primary rules of conduct, as well as the penalty range, must be foreseeable from the statute itself.¹⁷³ In the area of taxation, an authorization to lower the tax load does not have to be as specific as one to raise taxes.¹⁷⁴

In the school case mentioned above,¹⁷⁵ the Court decided that the prerequisites for requiring a student to repeat a class could be left to regulation by Verordnung. The Court held that such a decision did not touch very heavily upon the student's basic rights, that the entire matter did not lend itself to easy regulation, that a certain amount of pedagogical flexibility was appropriate, and that longstanding practice had established that the issue of repeating depends on both academic achievement and the accomplishment of the goals that were set for the class.¹⁷⁶

In another case, the Court upheld section 21 of the Road-Traffic Act (Straßenverkehrs-gesetz, StVG), which imposed certain criminal sanctions on persons who

168. *Id.* at 333.

169. BVerfG, decision of Jan. 8, 1981, BVerfGE 56, 1, 13; BVerfG, decision of Apr. 19, 1978, BVerfGE 48, 210, 221-22; BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 277-78.

170. BVerfG, decision of Nov. 12, 1958, BVerfGE 8, 274, 326. See also *infra* part III.E. (regarding this decision); BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 278.

171. See *supra* part II.B.2.a.

172. BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 278; BVerfG, decision of Jan. 8, 1981, BVerfGE 56, 1, 13; BVerfG, decision of Apr. 19, 1978, BVerfGE 48, 210, 221-22; cf. BVerfG, decision of Mar. 5, 1958, BVerfGE 7, 282, 302.

173. BVerfG, decision of July 3, 1962, BVerfGE 14, 174, 185-86; BVerfG, decision of July 25, 1962, BVerfGE 14, 245, 252.

174. BVerfG, decision of Apr. 19, 1978, BVerfGE 48, 210, 222.

175. See *supra* part II.B.2.a.

176. BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 278-80.

violated the provisions of Verordnungen that regulated traffic on public roads and places "to uphold order and security."¹⁷⁷ The Court first reiterated the very strict standard of specificity for criminal sanctions. "Public order and security," however, is one of the most important terms of art in German administrative law. Over decades, the courts had clarified its meaning.¹⁷⁸ Thus, the Constitutional Court reasoned, it was foreseeable how the administration would use the term and what the content of future Verordnungen would be.¹⁷⁹ This finding of sufficient determination was further supported by Section 6, Paragraph 1, Number 3 of the StVG, which listed precise questions for which Verordnungen could be promulgated and thus further specified the general language of section 21 of the StVG.¹⁸⁰

C. SCHOLARLY CRITICISM

The opinion of German scholars about the delegation doctrine as outlined above differentiates between two aspects. On one hand, there is widespread agreement on the Court's general interpretation of Article 80, Paragraph 1, Clause 2 of the Grundgesetz. The theory of essentialness, on the other hand, is subject to heavy criticism.

(1) Interpretation

The application of general principles of statutory interpretation to ascertain how specific a delegation in fact is, and the formulas developed to give more substance to the "content, purpose, and scope" standard are frequently referred to without disapproval.¹⁸¹ Sometimes, a certain concern is voiced that the legislature may have too much leeway in its delegation authority.¹⁸² Contrary considerations were advanced in debates on possible amendments of the Grundgesetz during the 1970s; the legislature should not be forced to determine content and scope in addition to purpose, and it should be allowed to alleviate its workload and improve its working conditions by delegating more authority to the administration.¹⁸³

(2) Theory of Essentialness

This picture of basic acquiescence changes dramatically once the theory of essentialness is addressed.

(a) CRITICISM. First, on a general level, the critics point out that the theory of essentialness involves a deviation from one of the most basic notions of German constitutional law, namely the "infringement" (Eingriff) on basic rights.¹⁸⁴ One

177. The German phrase is, "zur Erhaltung der Ordnung und Sicherheit." BVerfG, decision of July 25, 1962, BVerfGE 14, 245-246 (translation by the author).

178. Cf. KARL H. FRIAUF, *BESONDERES VERWALTUNGSRECHT* 196-200 (Ingo von Münch ed., 7th ed. 1985).

179. See also BVerfG, decision of May 23, 1980, BVerfGE 54, 143, 144-45.

180. *Id.* at 252-54.

181. See Maunz, in MAUNZ/DÜRIG, *supra* note 150, art. 80, §§ 27-33; Dieter Wilke, *Anmerkung zu BVerfGE* 58, 257, 37 JZ 758, 759 (1982); PETER BADURA, *STAATSRECHT* 367-68 (1986); Ramsauer, in AK, *supra* note 149, art. 80 §§ 46-50.

182. KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* § 528 (14th ed. 1984); Hasskarl, *supra* note 149, at 107; Kisker, *supra* note 142, at 1314.

183. BADURA, *supra* note 181, at 368.

184. Wilke, *supra* note 181, at 759; Kloepfer, *supra* note 142, at 689, 692.

author suggests that such basic alterations should be left to the amendment procedure.¹⁸⁵

Second, it has often been noted no one has ever clearly explained "the essence of essentialness" and what exactly is and is not essential.¹⁸⁶ Some say that the theory of essentialness, does not even deserve to be called a theory¹⁸⁷ because it amounts only to a declaration of bankruptcy for legal doctrine.¹⁸⁸

Third, the connection between essentialness and Article 80, Paragraph 1, Clause 2 of the Grundgesetz is considered unclear.¹⁸⁹ The Constitutional Court has explained that the two concepts are closely related and that Article 80 is a necessary supplement and a specification of the principle of Vorbehalt des Gesetzes (reservation of law),¹⁹⁰ from which the theory of essentialness can be said to originate. Some authors, on the other hand, insist that both concepts are independent of each other.¹⁹¹ They say that, according to the Court, Article 80 *only* applies in nonessential matters which do not have to be solved by the legislature alone. Yet requiring that content, purpose, and scope be statutorily determined in nonessential matters is regarded as an overly broad and inconsistent mandate.¹⁹² Other critics, however, argue in a way that is incompatible with this position. They maintain that Article 80 applies *even when* the parliamentary reservation does not require the legislature to act itself. This application, they say, proves the independence of Article 80 from essentialness.¹⁹³ Furthermore, it is critically noted that essentialness is used within the parliamentary reservation to determine *whether* the legislature has to regulate itself as well as within Article 80 to specify *how much* it has to regulate.¹⁹⁴ This use seems possible only if a different standard of essentialness is applied each time as if there are different *levels* of essentialness.¹⁹⁵

(b) DEFENSE. The theory of essentialness also has its defenders. The three objections just raised will be sequentially addressed.

First, the notion of essentialness indeed constitutes a step beyond the notion of infringement. The infringement of a basic right is always essential.¹⁹⁶ The theory of essentialness, therefore, only enlarges the area of the legislature's domain to decide all questions of constitutional importance.¹⁹⁷ The argument that a consti-

185. Wilke, *supra* note 181, at 759.

186. Umbach, *supra* note 141, at 112, 122-23, 131; Kloepfer, *supra* note 142, at 692.

187. Fritz Ossenbühl, *Schule im Rechtsstaat*, 30 DÖV 801, 802 (1977); Umbach, *supra* note 141, at 124.

188. GUNTER KISKER, 2 VERHANDLUNGEN DES 51. DEUTSCHEN JURISTENTAGES, Sitzungsberichte M82 (1976).

189. *E.g.*, Jost Pietzcker, *Vorrang und Vorbehalt des Gesetzes*, 19 JuS 710, 715 (1979).

190. BVerfG, decision of Aug. 8, 1978, BVerfGE 49, 89, 127; BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 278.

191. Kloepfer, *supra* note 142, at 691, 693; Wilke, *supra* note 181, at 759-60.

192. Wilke, *supra* note 181, at 760.

193. Kloepfer, *supra* note 142, at 691, 693.

194. Wilke, *supra* note 181, at 760; Kloepfer, *supra* note 142, at 691-92.

195. Umbach, *supra* note 141, at 128.

196. HESSE, *supra* note 182, § 509.

197. Thomas Oppermann, *Nach welchen rechtlichen Grundsätzen sind das öffentliche Schulwesen und die Stellung der an ihm Beteiligten zu ordnen?*, 1 VERHANDLUNGEN DES 51. DEUTSCHEN JURISTENTAGES C53-54 (1976); Eberle, *supra* note 142, at 486.

tutional amendment is necessary seems to disregard the fact that the notion of Eingriff itself is a doctrinal construction that is much older than and not directly mentioned in the Grundgesetz. It is therefore not evident why courts and legal doctrine should not be able to change a concept which they have themselves developed, especially if they advance changed circumstances and basic principles of constitutional law as justification.¹⁹⁸ The Court itself regards the theory of essentialness as a mere question of changed constitutional interpretation.¹⁹⁹ But interpreting a constitution, such as the Grundgesetz, is exactly the task of a constitutional court.

Second, it is undeniable that the notion of essentialness is rather open-ended. However, it is one of the characteristics of law to work with many open-ended terms, such as democracy or Rechtsstaat. A possible remedy would be future doctrinal and judicial refinement that relies on underlying general principles or on analysis in a case law fashion.²⁰⁰

Third, the Court has never said that Article 80 of the Grundgesetz applies only outside the realm of essentialness. On the contrary, the Court found it necessary to point out that the theory of essentialness *also* applies outside of Article 80 of the Grundgesetz,²⁰¹ thus implying that the two spheres normally overlap. Moreover, even in the area of essential questions, the legislature does not itself have to regulate every single detail.²⁰² The Constitutional Court clearly said that it would depend on a case-by-case analysis of the impact on basic rights to determine what the parliamentary reservation covers.²⁰³ Thus, when the Court decided in the school case that dismissal was covered by parliamentary reservation, it did not imply that no regulation whatsoever could be left to the administration, but only that all essential decisions had to be reached by the legislature.²⁰⁴ These "essential decisions" then included the prerequisites for dismissal from a certain school and from all schools of the same kind, the designation of the competent authority, and the principles of the applicable procedure.²⁰⁵

These holdings imply that the division between the application of the theory of essentialness on the level of parliamentary reservation and on its application on the level of Article 80 of the Grundgesetz cannot be carried through completely.²⁰⁶ True, Article 80, Paragraph 1, Clause 2 of the Grundgesetz does not

198. For these two justifications, see BVerfG, decision of Dec. 21, 1977, BVerfGE 47, 46, 78-79.

199. BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 282.

200. Cf. HESSE, *supra* note 182, § 509; Umbach, *supra* note 141, at 127; Ossenbühl, *supra* note 187, at 803; Kisker, *supra* note 142, at 1318; Pietzcker, *supra* note 189, at 715; Oppermann, *supra* note 197, at C55-62.

201. BVerfG, decision of Oct. 28, 1975, BVerfGE 40, 237, 249-50.

202. Horst Sendler, *Gesetzesrecht und Richterrecht im Schulwesen*, 97 DVBl. 381, 385 (1982); Thomas Clemens, *Grenzen staatlicher Maßnahmen im Schulbereich*, 3 NVwZ 65, 67 (1984); FRANZ MAYER & FERDINAND KOPP, *ALLGEMEINES VERWALTUNGSRECHT* 138 (5th ed. 1987).

203. BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 274; BVerfG, decision of Aug. 8, 1978, BVerfGE 49, 89, 127, 129-30.

204. BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 275.

205. BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 275. See also *supra* part II.B.2.a.

206. Cf. Clemens, *supra* note 202, at 66.

say when the legislature alone must decide an issue.²⁰⁷ In this respect, therefore, there is a difference between Article 80 of the Grundgesetz and parliamentary reservation. Yet, under the theory of essentialness, this difference turns into one between "whether at all" and "how much"²⁰⁸, a difference that loses its appeal when applied to each and every sub-issue separately, instead of to a broad range of questions *in toto*. Suppose, for instance, that a question X includes sub-issues a through f; whether sub-issue f must be decided by parliament is a question of "how much" if regarded on the basis of X, but a question of "whether at all" if regarded on the basis of f.

Therefore, the relationship between the theory of essentialness and Article 80 of the Grundgesetz is that of two overlapping circles: If an issue is very essential, nearly everything has to be regulated by the legislature. This is much more than Article 80 of the Grundgesetz requires and, thus, the Article will not have to be referred to. This was the situation in the school case with respect to dismissal.

If the question is less essential, Article 80 will apply but will be filtered by the theory of essentialness. This application occurred in the school case with respect to repeating a class.²⁰⁹ With little or no essentialness involved, Article 80 will still apply, but its requirements will not be handled very strictly. This does not render Article 80 superfluous. In case of medium essentialness, Article 80 narrows the focus of the theory of essentialness to the "content, purpose, and scope" requirements. Moreover, when an issue is not essential, the theory of essentialness alone might lead to no requirement for the legislature at all. Article 80 prevents this outcome.²¹⁰

The last argument concedes that applying the theory of essentialness to Article 80 of the Grundgesetz implies the use of different degrees of essentialness.²¹¹ This implication is by no means surprising; what else does it mean when the Constitutional Court states again and again that the more a basic right is affected, the higher a standard of specificity is needed? Moreover, even the Court's critics propose a gradual approach to the requirements of Article 80, Paragraph 1, Clause 2 of the Grundgesetz; they would only like to do without the notion of essentialness.²¹²

III. Differences and Similarities: A Comparative Summary

The differences between the approaches toward the delegation problem in the United States and Germany are considerable. Both countries historically had

207. Umbach, *supra* note 141, at 128.

208. Clemens, *supra* note 202, at 66-67.

209. See *supra* parts II.B.2.a. and II.B.2.b.(3).

210. Kloepfer, *supra* note 142, at 693; Kisker, *supra* note 142, at 1318, 1320 (discussing the nonapplication of art. 80 of the Grundgesetz in these cases, but failing to explain how he circumvents an explicit clause of the constitution).

211. Cf. Kisker, *supra* note 142, at 1317; Clemens, *supra* note 202, at 67; with respect to another question, different degrees are also admitted by SCHWERDTFEGER, *supra* note 139, § 507.

212. See Wilke, *supra* note 181, at 760; Kloepfer, *supra* note 142, at 691; Umbach, *supra* note 141, at 128-29; similar Pietzcker, *supra* note 189, at 712 n.27.

opposite starting points, but each shifted so significantly toward the other's stance, that today positions are to a certain extent reversed. Moreover, the two systems have developed quite different underlying rationales.

A. HISTORICAL STARTING POINTS AND PRACTICE OF HOLDINGS

The German point of departure was found in the historically unlimited delegation possibilities and their abuse during the Weimar Republic; these abuses constituted one of the many factors leading to the Third Reich.²¹³ The United States, in contrast, started out with Locke's maxim *delegata potestas non potest delegari*.²¹⁴

The empirical facts about the respective Courts' behavior, however, reveal that positions have changed. In the United States, the Supreme Court basically struck down statutes on delegation grounds in only two cases.²¹⁵ If the Supreme Court reached a similar decision today, this would be considered a revolutionary step and would probably cause an outburst of doctrinal commentaries. In Germany, on the other hand, the striking down of statutes on delegation grounds is considered a normal event that frequently occurs.²¹⁶

B. GENERAL POINTS OF AGREEMENT

The general criteria used to identify an unacceptable delegation differ widely. There are, nevertheless, some common points. First, the legislature cannot delegate as it pleases. On the other hand, some form of delegation is necessary and legal. Considering the points of view historically held in Germany and the United States, this element of agreement is not as insignificant as it may seem at first. Second, the legislature must provide the administration with guidance on how to carry out their authorization to make rules. Third, the existence of such guidance will be the standard by which to determine the legality of the delegation. The question of delegation, therefore, is not a categorical question of whether an act may be described as legislative or as a mere factfinding or filling in of blanks. Rather, it is a question of degree.²¹⁷ Fourth, the standard is not immutable but may depend on the field of law to which the authorization pertains, as well as on the possible impact of the regulations.²¹⁸ In this sense, too, delegation is a question of degree. Lastly, certain core legislative functions, especially those specifically mentioned in the respective constitutions, cannot be delegated at all.²¹⁹

C. STANDARDS

United States law only requires that the legislature provide *some* standard or intelligible principle.²²⁰ German law, on the other hand, is more specific on what

213. See *supra* part II.B.1.

214. See *supra* part II.A.1.a.

215. See *supra* part II.A.1.b.(2).

216. In the first 18 years of its existence, for instance, the Constitutional Court invalidated delegation statutes in two-thirds of the relevant cases; Hasskarl, *supra* note 149, at 108.

217. See *supra* parts II.A.1.b.(1), II.A.2.b.(1), II.B.2.b.(3), II.B.3.b.(2).

218. See *supra* parts II.A.2.b.(3), II.B.2.b.(3).

219. See *supra* parts II.A.2.b.(3), II.B.2.a.

220. See *supra* parts II.A.1.b.(1)-(3), II.A.2.b.(1), II.B.1, II.B.2.b.(2).

this standard or principle must contain, namely content, purpose, and scope. In interpreting this requirement, the German Constitutional Court has used three formulas: a) the *Verordnung* must be foreseeable to citizens, b) the legislature itself must decide, and c) the statute must set up a discernible program.²²¹ All three formulas express the same idea in different words.²²² The formulas find a certain counterpart in Supreme Court decisions which, for instance, insist that the field in which the administrator is to act is sufficiently marked, or which require that Congress tell the agency what it should do and how it should do it. The main difference between these requirements is a mere theoretical one: The German formulas address citizens, legislatures, and agencies, respectively.²²³ The United States formulas are directed to the courts to give them guidance for judicial review.²²⁴ The primary preoccupation, with citizens and their substantive rights in Germany, and with judicial review in the United States, highlights a difference in constitutional law styles between the two countries.

On the whole, the difference between "some standard" and "content, purpose, and scope" has led to a significantly stricter judicial review in Germany. Obviously, Germany would not have upheld the *Schechter* and *Panama* delegations either.²²⁵ Furthermore, it is very unlikely that the statute in *Networks*²²⁶ would have passed muster in Germany. Conversely, the transportation tax that failed judicial review in Germany,²²⁷ would most likely have passed in the United States. Indeed, such a tax would have probably been regarded as exceptionally precise. Similarly, the Supreme Court would most likely have upheld the Federal Physician Act, which passed review even in Germany.²²⁸

D. PERSONAL LIBERTIES

In Germany, considerations of basic rights, which also form the core of the theory of "essentialness," intensely influence this standard and the entire law of delegation.²²⁹ In the United States, on the other hand, this kind of approach has been used infrequently and has received little attention. Furthermore, its use has been confined to the interpretation of statutes. Accordingly, whether a delegation in the area of personal liberties would be reviewed by a stricter standard is unknown; only the possibility has been raised.²³⁰ Thus, for example, the delegation of authority to decide upon sexual education and upon expulsion from school²³¹ is likely to have been upheld under United States law, even if one pretended these rights were constitutionally protected in the United States.²³² Conversely, the

221. See *supra* part II.B.2.b.2.

222. Maunz, in MAUNZ/DÜRIG, *supra* note 150, art. 80, § 29.

223. Hasskarl, *supra* note 149, at 111.

224. See *supra* part II.A.1.b.(3)(a).

225. See *supra* part II.A.1.b.(2).

226. See *supra* part II.A.1.b.(3)(a).

227. See *supra* part II.B.2.b.(2).

228. *Id.*

229. See *supra* part II.B.2.

230. See *supra* parts II.A.1.b.(3)(b), II.A.2.b.(3).

231. See *supra* part II.B.2.a.

232. See *infra* part IV.A.4 (discussing the protection of fundamental rights).

delegation of authority in *Kent v. Dulles*, to freely decide on the withholding of a passport,²³³ would, questions of interpretation apart, not have passed judicial review in the Constitutional Court.²³⁴

E. MAJOR SOCIAL CHOICE AND FLEXIBILITY OF STANDARDS

In the United States, the delegation of major social choices to Administrative agencies is likely to receive unfavorable reviews.²³⁵ One might think that primary social choices are those choices which are essential in a society and, consequently, analogize this concept to the theory of essentialness. The notion of primary social choice, as opposed to more trivial matters, however, concerns questions of major political significance, which are heavily debated. Yet this is not the meaning of essentialness in German law, where the focus is on individual basic rights.²³⁶

On the other hand, the concept of primary social choice indicates that the particular circumstances of the case, or the area affected by the regulation, influence the standard by which the statute is scrutinized. This aspect of the delegation doctrine has found widespread approval in Germany, either through the theory of essentialness or otherwise.²³⁷ No such point of view seems to have expressly developed in the United States. The example which will most swiftly present itself to the German scholar's mind—that of delegation in criminal law—also exemplifies the difference in approaches in this area. In both countries, the law is similar with respect to the determination of penalty ranges, which in Germany may not be²³⁸ and in the United States practically never has been left to the administration. Unlike Germany, however, the United States does not consider the definition of the primary rules of conduct, which are safeguarded by criminal sanctions, to be such a delicate and important matter.²³⁹ Furthermore, according to the German concept, the concrete area which is regulated, can have the reverse effect of relaxing the standard of review in particularly complex areas.²⁴⁰ Thus, in a German case involving price stabilizations for the early post-war era, an extremely broad delegation was upheld. The Constitutional Court relied on the practical necessity of flexibility in a field where quick changes were common and

233. See *supra* part II.A.1.b(3)(b).

234. See BVerfG, decision of Jan. 16, 1957, BVerfGE 6, 32 *passim* (discussing passports and the liberty to leave the country in general); see *infra* part III.G. (regarding the relevance of administrative practices).

235. See *supra* part II.A.2.b.(1).

236. See *supra* part II.B.2.a.

237. See *supra* part II.B.2.b.(3).

238. *Id.*

239. *Grimaud*, 220 U.S. at 522; *Yakus*, 321 U.S. at 424-27; Bruce L. Segal, Note, *Administrative Law—The Delegation Doctrine and the Imposition of Criminal Sanctions through Agency Regulation*, 29 WAYNE L.R. 1317, 1319-20 (1983). But see *United States v. Robel*, 389 U.S. 258, 272 (1967) (Brennan, J., concurring in result) (“congressional delegation of authority to designate ‘defense facilities’ creates the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of protected freedoms”). Note that bills of attainder are unconstitutional in both countries. U.S. CONST. art. I, § 9, cl. 3; art. 19 para. 1, cl. 1 GG.

240. See *supra* part II.B.2.b.(3).

had to be accommodated with equal swiftness.²⁴¹ Interestingly, the holding of this case is reminiscent of *Yakus* and *Meat Cutters*.²⁴² It may be that the German Constitutional Court has expressly stated a consideration that merely underlies some decisions of the Supreme Court without ever being made explicit.

F. INTERPRETATION

Both in Germany and in the United States, the delegation doctrine is also used in the area of statutory interpretation.²⁴³ In both countries, this approach is an application of the respective general doctrine on the influence of constitutional law on statutory interpretation. Correspondingly, existing differences are traceable to these general doctrines. Thus, in the United States, a certain interpretation is preferred over another, if the other one would *raise* a serious constitutional question. In Germany, one interpretation is preferred, if the other would actually *violate* the constitution. The German rule, therefore, is much narrower. That the interpretive function of the delegation doctrine is given much less attention in Germany may, *inter alia*, be due to this narrower application, to the greater readiness to overturn a statute, or to the lack of a need to affirm the very existence of a delegation doctrine.

G. ADDITIONAL METHODS TO UPHOLD A STATUTE

Courts in the United States have taken into account current or expected administrative practices and the entire spectrum of procedural and substantial safeguards, in order to save a statute that might otherwise be considered unconstitutional.²⁴⁴ Of these methods, only the "current administrative practices" are acceptable in Germany, and even this is true only in a very limited way. For German courts do not accept administrative practices as such and are only willing to rely on past *judicial* narrowing of overly broad language.²⁴⁵ Thus, on this narrower ground, *Fahey v. Mallonee*²⁴⁶ might have been decided the same way under German law. *Meat Cutters*,²⁴⁷ on the other hand, would not have been upheld in German law on the same grounds as in the United States, even though the holding might still have been the same in light of the price stabilization case just mentioned. In *Kent v. Dulles*, finally, the administrative practices could not have been used to narrow the statutory authorization, which would consequently not have passed muster.²⁴⁸

H. CLARITY AND PREDICTABILITY

Finally, the frequent complaint in the United States that the Supreme Court's standard for delegation is mere verbiage, that has little or no reality in the holdings

241. BVerfG, decision of Nov. 12, 1958, BVerfGE 8, 274, 311.

242. See *supra* part II.B.1.b.(3)(a).

243. See *supra* parts II.A.1.b.(3)(b), II.B.2.b.(1).

244. See *supra* part II.A.2.b.(2).

245. See *supra* part II.B.2.b.(3).

246. See *supra* part II.A.1.b.(3)(a).

247. *Id.*

248. See *supra* parts II.A.1.b.(3)(b), III.D.

and therefore lacks predictability in that it might suddenly be reinvigorated one day,²⁴⁹ finds no equivalent in Germany. This is not to say that all decisions of the Constitutional Court are foreseeable and that they form a perfect whole.²⁵⁰ The basic doctrinal concepts involved, however, are comparatively clear and, with the exception of the theory of "essentialness," largely accepted. Although the notion of "essentialness" is under attack because of its open-ended character,²⁵¹ even the critics do not allege that the theory of "essentialness" is only applied at the Constitutional Court's unpredictable discretion, that it is mere verbiage, and that it has no reality in the holdings. And even these critics would largely reach the same results as the Constitutional Court by using other concepts.²⁵² This difference in theoretical clarity and predictability is not a singular phenomenon but probably but one example of a fundamental, underlying difference in the perception of law and legal order, of a different legal "style," in the United States and Germany.²⁵³

IV. Why Different?—Constitution, Politics, and Legal Culture

The differences in approach to the delegation problem are not simply due to the fact that different countries sometimes find different solutions to the same problem. Rather, the diversities can be traced to different constitutional and political systems as well as to different legal cultures. Sketching out this background of the delegation doctrine will serve several goals. It will explain the actual function of the delegation doctrine in the two countries under consideration, thus fulfilling an important goal of comparative law. Moreover, it will provide a deeper understanding of the respective solutions. Finally, it is likely to prevent a simplistic evaluation of the merits and problems of each solution that might tempt the lawyer to engage in a sort of cultural imperialism, i.e., to consider his approach to be the "better" one that should "obviously" be adopted by the other country.

Thus, the following section will attempt to put *both* the present state of the delegation doctrine and the pertinent doctrinal positions and discussions in the United States and Germany in perspective. To this end, the basic principles of the legal and political background will only be discussed to the extent necessary to establish a plausible relationship with the delegation doctrine. For clarity, the multitude of exceptions and provisos, which could be made, are purposely excluded.

A. LEGAL FRAMEWORK

1. Clear Constitutional Basis

One of the most obvious differences in background has already been suggested:²⁵⁴ Compared to the United States, the constitutional basis of the delega-

249. See *supra* part II.A.2.a.(1).

250. See Hasskarl, *supra* note 149, at 103 for critical remarks.

251. See *supra* part II.B.2.c.(2)(a).

252. See *supra* part II.B.2.c.(2)(b).

253. See *infra* part IV.A.3.b.

254. See *supra* parts II.A.1.a, II.B.1.

tion doctrine in Germany is remarkably clear. This is true in two respects. First, delegation, as such, is mentioned and a standard for delegation is provided in the Grundgesetz itself (Article 80, Paragraph 1). This inclusion rules out two otherwise possible positions on delegation, namely the maximalist one, according to which all delegation is illegal, and the minimalist one, according to which all delegation is permissible. Second, the existence of a large administrative structure is recognized, as such, in the Grundgesetz, but poses problems in United States constitutional law.

Against this background, it is not surprising that the fundamental discrepancies in legal discourse about the existence and scope of the delegation doctrine, which characterize decisions and literature in the United States, find no equivalent in the more securely based German environment. This relationship between firmness of textual basis and intensity of legal disagreement is further evidenced by the fact that the most disputed area of the German doctrine, the theory of "essentialness," is exactly the area in which a clear textual foundation is lacking.

2. *The Place of the Administration Among Constitutional Powers*

A related issue, which makes the question of delegation fundamentally more complicated for a lawyer in the United States, is the exact classification of the administration among the three classical branches of government.²⁵⁵ To the United States lawyer, the administration does not fit neatly into the system; an agency is neither a Court in the sense of Article III of the Constitution, nor a part of Congress, nor is it identical with the president, who, according to Article II of the Constitution, represents the executive branch. The lack of identity with the executive is particularly pronounced with respect to the so-called *independent agencies*, which are created with the purpose of shielding their activities from direct presidential oversight.²⁵⁶ Nevertheless, agencies engage in rulemaking and thus in a (quasi-)legislative activity. Through administrative courts, they exercise (quasi-)judicial power. In carrying out laws, they perform (quasi-)executive functions. This leads courts in the United States and legal scholars to consider the agencies as a fourth branch of government which combines functions of all three classical branches.²⁵⁷ It is not surprising that the delegation of legislative power, to institutions whose constitutional legitimacy is considered so doubtful, poses major problems. Again, the thin constitutional basis of the administration must be reconciled with its necessity and its factual existence.

In Germany, the concept of separation of powers has a different meaning. Here, the administration is considered an integral part of the executive branch.²⁵⁸

255. See generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 *passim* (1984) (describing the confusion over the proper place of administrative agencies in the federal government).

256. See, e.g., AMAN & MAYTON, *supra* note 25, at 582-601 (on independent agencies).

257. *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting); Strauss, *supra* note 255, at 575-76, 578; GELLHORN & LEVIN, *supra* note 25, at 10; AMAN & MAYTON, *supra* note 25, at 3-4.

258. Roman Herzog, in MAUNZ/DÜRIG, *supra* note 150, art. 20, §§ V 22, V 48.

Sometimes the two terms are even used interchangeably.²⁵⁹ Nevertheless, there is a recognition that the administration does more than execute the laws. German administrative courts cannot serve as an example, because they are clearly not part of the executive branch. Still, some of the administration's activities are judicial in nature, and administrative rulemaking is readily considered the performance of legislative functions.²⁶⁰

The solution to this apparent contradiction between a clear classification as executive and an equally clear recognition of non-executive functions is quite simple. First, the Grundgesetz does not contain a definition for the executive branch. According to legal doctrine, it is simply that branch which is neither part of the legislature nor of the courts,²⁶¹ thus including the administration. Additionally, this administration in the institutional sense is differentiated from administration in the substantive sense.²⁶² That the administration, as an institution, performs acts, which are not substantively administrative in nature, is implicit in this distinction. Second, separation of power concerns do not pose major theoretical or practical problems to the German lawyer. To him, mutual influence, limitation, and control, which transgress the boundaries of the different branches, is built into the system.²⁶³ The principle of separation of powers only requires that no branch predominate over another in a way that the Constitution does not prescribe, and that no branch may be deprived of the competences necessary to fulfill its constitutional duties.²⁶⁴ Thus, the concept of separation of powers takes on a less stringent meaning than in the United States.²⁶⁵ In short, the delegation of legislative power to the administration does not, as such, involve fundamental structural and constitutional problems in Germany.

Apart from its fundamental aspects, this different conception of separation of powers might also have influenced the importance attached to delegation issues. In *Bowsher v. Synar*,²⁶⁶ for instance, the Supreme Court did not address the delegation question upon which the District Court focused,²⁶⁷ because it could decide the case solely on the basis of a strict conception of separation of powers.²⁶⁸ In other words, it is possible that the United States did not need to develop a more restrictive view of delegation because the policy behind delegation could, at least in some

259. MAYER & KOPP, *supra* note 202, at 39; *contra* Ingo von Münch, in ALLGEMEINES VERWALTUNGSRECHT 3 (Hans-Uwe Erichsen & Wolfgang Martens eds., 8th ed. 1988) [hereinafter ERICHSEN & MARTENS]. Cf. Herzog, in MAUNZ/DÜRIG, *supra* note 150, at 5; HARTMUT MAURER, ALLGEMEINES VERWALTUNGSRECHT 3 (8th ed. 1992).

260. Cf. MAYER & KOPP, *supra* note 202, at 32.

261. Herzog, in MAUNZ/DÜRIG, *supra* note 150, art. 20, § V 98.

262. MAYER & KOPP, *supra* note 202, at 31; von Münch, in ERICHSEN & MARTENS, *supra* note 259, at 2; MAURER, *supra* note 259, at 1-2.

263. MAUNZ & ZIPPELIUS, *supra* note 154, at 90-1; REINHOLD ZIPPELIUS, ALLGEMEINE STAATSLAHRE 304-5 (11th ed. 1991); von Münch, in ERICHSEN & MARTENS, *supra* note 259, at 3-4.

264. BVerfG, decision of Apr. 27, 1959, BVerfGE 9, 268, 279-80.

265. Cf. ZIPPELIUS, *supra* note 263, at 304. But for a less stringent United States view, see *Morrison v. Olson*, 487 U.S. 654, 695-96 (1988).

266. 478 U.S. 714 (1986).

267. *Synar v. United States*, 626 F. Supp. 1374, 1382-91 (D.D.C. 1986).

268. *Bowsher*, 478 U.S. at 736 n.10, 721-34.

cases, be effectively furthered by separation of powers.²⁶⁹ On the other hand, separation of powers is also a concern underlying nondelegation.²⁷⁰ Therefore, it is impossible to say whether a less pronounced version of separation of powers in the United States would have led to a stricter (delegation must be revived) or more permissive (the rationale of nondelegation is weakened) application of the delegation doctrine.

3. *The Structural Background of Delegation*

A. RECHTSSTAAT AND DEMOCRACY IN THE GERMAN APPROACH

The German delegation doctrine is inextricably linked to the notions of Rechtsstaat and democracy.²⁷¹

The notion of Rechtsstaat goes far beyond "rule of law" in its American understanding. The latter "holds that power should be seen to be restrained by legal norms announced, in particular by the legislature, as much as possible in advance."²⁷² This idea, however, is but one of the many aspects of Rechtsstaat. Rechtsstaat is not only a formal (procedural), but also a material (substantive) concept.²⁷³ It includes, *inter alia*, substantive justice, especially the existence of personal basic rights, separation of powers, supremacy of the constitution, supremacy of law (*Vorrang des Gesetzes*), and *Vorbehalt des Gesetzes*, a certain concreteness of statutes so that infringements are foreseeable and reviewable, a general prohibition of retroactive laws, the principle of proportionality, judicial review, and the requirement that the government give reasons for its decisions.²⁷⁴ The elements of Rechtsstaat are closely interconnected and influence each other, just as the concept of Rechtsstaat pervades and influences the whole body of German law. The "content, scope, and purpose" standard of Article 80, Paragraph 1, Clause 2 of the Grundgesetz is a direct expression of Rechtsstaat and its elements.²⁷⁵ First, the principle of *Vorbehalt des Gesetzes* requires the legislature itself to determine and limit authorizations that allow the administration to burden the people. Second, separation of powers demands that the administration act according to legislative guidelines and not replace legislative decisionmaking. Third, judicial review of administrative infringements is only possible if there are limits to administrative action.

But Article 80 of the Grundgesetz is also an expression of the democratic principle. Democracy is the second constitutive element of *Vorbehalt des Gesetzes* that underlies Article 80.²⁷⁶ The legislature democratically represents the people; therefore it

269. Cf. *Synar*, 626 F. Supp. at 1404.

270. *Id.* at 1383; see *infra* part IV.A.3.b.

271. For a critical view, see Eberle, *supra* note 142 *passim*.

272. Sargentich, *supra* note 89, at 423.

273. MAUNZ & ZIPPELIUS, *supra* note 154, at 85; Herzog, in MAUNZ/DÜRIG, *supra* note 150, art. 20, §§ VII 15-16; cf. BVerfG, decision of Oct. 25, 1966, BVerfGE 20, 323, 331.

274. See MAUNZ & ZIPPELIUS, *supra* note 154, at 87-97; BADURA, *supra* note 181, at 203-18.

275. BVerfG, decision of Nov. 12, 1958, BVerfGE 8, 274, 325-26; see BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 278; BADURA, *supra* note 181, at 215; Maunz, in MAUNZ/DÜRIG, *supra* note 150, art. 80, § 1.

276. BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 278; BVerfG, decision of Aug. 8, 1978, BVerfGE 49, 89, 126-27; Herzog, in MAUNZ/DÜRIG, *supra* note 150, art. 20, §§ II 85-87.

must take the primary responsibility for laws that invade their basic rights. Thus, the *Vorbehalt des Gesetzes* takes on the form of parliamentary reservation.

The same principles lie at the root of the second element of the German delegation doctrine, namely the theory of "essentialness." Separation of powers ascribes the function of lawmaking to the legislature. Yet the Grundgesetz also makes clear that rulemaking is one of the functions of the administration. Therefore, not all legislative activities may be performed by the legislature alone. In balancing the constitutional roles of the legislature and administration against each other, the democratic principle requires that the legislature decide all important, essential questions.²⁷⁷ Furthermore, this "essentialness" must, under the Grundgesetz, at least refer to the activation of basic rights.²⁷⁸

From this very short explanation, it should be clear why the Constitutional Court has described Article 80 of the Grundgesetz and the theory of essentialness as closely related.²⁷⁹ It should be noted that the terms "Vorbehalt des Gesetzes," "parliamentary reservation," and "theory of essentialness" are not always clearly distinguished in judicial decisions and legal writing. This might be due, to a large extent, to the very close connection that exists among them. For example, it is possible to say that the *Vorbehalt des Gesetzes* has been enlarged and modified through the theory of essentialness towards parliamentary reservation.²⁸⁰ On the other hand, parliamentary reservation can be explained without reference to the theory of essentialness,²⁸¹ or as identical to it.²⁸² The theory of essentialness can, however, also be explained as the modern description of *Vorbehalt des Gesetzes* without reference to parliamentary reservation.²⁸³

Without going into further detail, one can summarize that the entire German delegation doctrine is linked to certain fundamental principles of German constitutional law.

B. THE MISSING UNITED STATES EQUIVALENT:

LEGAL AND JURISPRUDENTIAL REASONS

These principles and their complex interplay have no adequate equivalent in United States constitutional law. Of course, democracy, separation of powers, and rule of law are recognized principles in United States constitutional law. In their American meaning, however, all of them rally for radical nondelegation. First, like in Germany, democracy requires Congress to decide. If democracy in the United States is additionally considered to support the role of the president who needs broad delegations to fulfill his mission,²⁸⁴ this only exacerbates the overall lack of equivalence in legal background between the two nations. Second, separation of powers has different effects in both countries. In Germany, as just

277. BVerfG, decision of Aug. 8, 1978, BVerfGE 58, 89, 124-26.

278. *Id.* at 126; see *supra* part II.B.2.a.

279. See *supra* part II.B.2.c.(2)(a).

280. Cf. MAUNZ & ZIPPELIUS, *supra* note 154, at 92.

281. Cf. MAUNZ, in MAUNZ/DÜRIG, *supra* note 150, art. 80, § 5.

282. BVerfG, decision of Oct. 20, 1981, BVerfGE 58, 257, 268.

283. BVerfG, decision of Aug. 8, 1978, BVerfGE 49, 89, 126.

284. See *supra* part II.A.3 and *infra* part IV.B.1.

described, it provides a legitimate role for the administrative branch and its rule-making activities. In the United States, by contrast, separation of powers casts doubt upon the constitutional role and legitimacy of the administration.²⁸⁵ In the United States, the concept is often regarded as supporting nondelegation.²⁸⁶ In any event, critics of nondelegation have to argue against separation of powers and cannot, like in Germany, use it as an argument for their own position. Rule of law, finally, requires agency action to be based on and limited by prior legislative enactments, thus also opposing at least broad delegations.²⁸⁷

Apart from these established principles, the scholarly concept of "structural due process" or "due process of lawmaking" is not an equivalent of Rechtsstaat, either. Under a narrow conception, "due process of lawmaking" is an attempt to revive the original, procedural meaning of the due process clauses of the Fifth and Fourteenth Amendment of the United States Constitution. In order for a law to be validly enacted, the legislature must abide by the essential institutional rules prescribed for it.²⁸⁸ This is one of the many ideas included in the concept of Rechtsstaat, but no more.

Under a wider conception, due process of lawmaking involves questions of who promulgates, to what ends, and in what manner. It is part of an attempt to combine procedural and substantive approaches in order to best promote freedom.²⁸⁹ Phrased so broadly, the idea is indeed close to the basic rationale of Rechtsstaat as a formal and procedural concept; in this rudimentary stage, however, one could hardly call it an equivalent of that highly complex legal institution. Moreover, in an attempt to develop further this idea of structural due process, some have described it as a third way between the protection of substantive values against legislative incursion and purely formal judicial review; as the imposition of an ongoing dialogue between the legislature and society in the area of moral and social flux, thus enjoining the former from codifying norms in binding and determinate rules; as a loosely structured conception, an "anti-doctrine."²⁹⁰ In this sense, it has little, if anything, to do with Rechtsstaat.

A third conception of due process of lawmaking distinguishes among structural, deliberative, and procedural aspects.²⁹¹ Structurally, it ascribes the authority to reach certain decisions to particular entities and denies it to others.²⁹² This is similar to the German formula that the legislature must make the deci-

285. See *supra* part II.A.1.a.

286. See *Synar v. United States*, 626 F. Supp. 1374, 1383 (D.D.C. 1986); Sargentich, *supra* note 89, at 425. *Contra* BARBER, *supra* note 4, at 24-26 (discussing the connection between separation of powers and delegation doctrine).

287. Sargentich, *supra* note 89, at 423; cf. Mashaw, *supra* note 119, at 86.

288. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 235-55 (1976). It may be noteworthy that the problem Linde perceives, the invalidation of improperly enacted law, *id.* at 242-43, 247-50, is not regarded as a problem in Germany, where invalidation on such grounds is taken for granted. See, e.g., SCHWERTFEGGER, *supra* note 139, §§ 495-503.

289. TRIBE, *supra* note 71, at 1673-87 (with particular emphasis on discussion at 1673-75, 1682).

290. Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 *passim* (1975) (with particular emphasis on discussion at 301, 304, 310, 321).

291. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 118-31 (1991).

292. *Id.* at 122.

sion,²⁹³ and to the effect of the theory of "essentialness," even though the close link between "essentialness" and basic rights is not matched. The deliberative aspect, which is seen as the most doubtful, requires the legislature to act with sufficient deliberation.²⁹⁴ Similar requirements have been cautiously set up in Germany.²⁹⁵ The procedural aspects are those described by the aforementioned narrow conception.²⁹⁶ In sum, this theory of due process of lawmaking expresses some views that find more or less limited counterparts in German constitutional law, but it does not correspond to Rechtsstaat.

All this is not to say that structural due process, if it gained judicial acceptance, might not heavily influence the United States delegation doctrine,²⁹⁷ but this influence is unlikely to resemble the impact of Rechtsstaat on delegation in Germany.

Arguments in the area of jurisprudence amplify the differences in legal principles. The proponents in the United States of a rule of law approach such as Lowi²⁹⁸ are not infrequently described pejoratively as formalists.²⁹⁹ If this adjective is used to characterize any approach that inherently relies on a division between law and politics,³⁰⁰ then the entire German approach, like most of German administrative and constitutional law in general, could be called formalistic. Many United States scholars, on the other hand, prefer a functionalist approach, that is, they insist much less on a need for formal legal reasoning and much more on the real constraints of governmental institutions like administration, Congress, and courts. Thus, they prefer agencies to be rational and efficient pursuers of public values as provided by Congress, or they regard agencies as a framework in which different social groups can meet and bargain to find a compromise among their differing interests.³⁰¹ Consequently, these authors favor broad delegation.

In sum, the delegation doctrine and its surrounding debates in the United States and Germany take place within remarkably different frameworks of legal principles and legal philosophy. Many of the German constitutional doctrines that surround the question of delegation do not exist or have a different meaning in the United States. The legal philosophy underlying much of the German arguments would be considered formalistic in the United States.³⁰² Conversely, the very lenient

293. See *supra* part II.B.2.b.(2).

294. FARBER & FRICKEY, *supra* note 291, at 122, 124-25, 129. *Contra* Linde, *supra* note 288, at 227.

295. See BVerfG, decision of Nov. 27, 1978, BVerfGE 50, 51, 51; BVerfG, decision of Mar. 1, 1979, BVerfGE 50, 290, 333-34; SCHWERDTFEGGER, *supra* note 139, § 498.

296. See FARBER & FRICKEY, *supra* note 291, at 125.

297. Cf. TRIBE, *supra* note 71, at 1677-81 (referencing delegation and delegation cases; FARBER & FRICKEY, *supra* note 291, at 119-21, 128-29).

298. Lowi, *supra* note 112, at 296; THEODORE J. LOWI, *THE END OF LIBERALISM, THE SECOND REPUBLIC OF THE UNITED STATES* 92 (2d ed. 1979).

299. See Sargentich, *supra* note 89, at 424-31.

300. This division is described as the key formalist conviction by Sargentich, *supra* note 89, at 424-25. See ROBERT S. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 137-59 (1982) for a more complex analysis of formalism. Note that German lawyers would generally associate "formalism" with "Begriffsjurisprudenz," a largely outdated concept of the 19th century. Cf. LARENZ, *supra* note 85, at 20-38.

301. See the analyses by Sargentich, *supra* note 89, at 428-36.

302. On the pejorative meaning of "formalistic" in much of United States legal doctrine, compare SUMMERS, *supra* note 300, at 137.

United States delegation doctrine runs counter to firmly established principles of German law. Moreover, much of the academic discussion in the United States on the topic would probably not appeal to German scholars, whose "formal" legal training is hardly influenced by functionalism, or, more generally, legal realism and critical legal studies.³⁰³

4. *Procedural v. Substantive Approach*

Another fundamental difference in approach between the United States and Germany is the importance attached to the protection of substantive and procedural rights, respectively. Since any deeper analysis of this aspect would go far beyond the scope of this article, a few remarks must suffice. Both the focus of the theory of essentialness on basic rights as well as the important role of basic rights in the concept of *Vorbehalt des Gesetzes*³⁰⁴ exemplify the great preoccupation of German constitutional and administrative law with the protection of substantive basic rights. This is all the more important since virtually any action or nonaction by any person is *prima facie* protected as a basic right under the Grundgesetz, which contains not only provisions to protect special liberties but also the sweeping general clause of Article 2, Paragraph 1.

In United States constitutional law, by contrast, only certain fundamental civil rights trigger any heightened level of scrutiny; the notion of "substantive due process" has fallen into disfavor since 1937.³⁰⁵ On the other hand, United States administrative and constitutional law is much more preoccupied with the protection of procedural rights³⁰⁶ than its German counterpart.³⁰⁷ As a single example, one might refer to the extensive importance attached to hearing rights, which finds no equivalent in Germany.³⁰⁸ With respect to the delegation doctrine, this different United States attitude finds its expression in cases like *Meat Cutters*,³⁰⁹ where procedural safeguards legitimized broad delegations, and in doctrinal opinions like that of Stewart,³¹⁰ who want to go beyond the delegation problem in a procedural way, i.e., by transferring the power of decisionmaking to less centralized levels.

303. Compare the marginal to nonexistent treatment of legal realism and critical legal studies even in basic German treatises on philosophy of law. *E.g.*, HELMUT COING, *GRUNDZÜGE DER RECHTSPHILOSOPHIE passim* (4th ed. 1985) (with particular emphasis on discussion at 63-64); *EINFÜHRUNG IN DIE RECHTSPHILOSOPHIE UND RECHTSTHEORIE DER GEGENWART passim* (Arthur Kaufmann & Winfried Hassemer eds., 5th ed. 1989) (with particular emphasis on discussion at 103-22).

304. A special aspect of *Vorbehalt des Gesetzes* are the reservations for statutes (*Gesetzesvorbehalte*) in the list of basic rights contained in art. 1-20 GG, cf. SCHWERDTFEGGER, *supra* note 139, § 68.

305. On this development, see TRIBE, *supra* note 71, at 560-86, 769-84.

306. *E.g.*, Linde, *supra* note 288, at 255.

307. On the developing German concept of protection of basic rights through process requirements, compare BVerfG, decision of Dec. 20, 1979, BVerfGE 53, 30, 62-66. *See also id.* at 69-82 (Simon, J., and Heußner, J., dissenting); DIETER DÖRR, *FAIRES VERFAHREN passim* (1984); MAUNZ & ZIPPÉLIUS, *supra* note 154, at 344-45; ROBERT ALEXY, *THEORIE DER GRUNDRECHTE* 428-54 (1986).

308. *See, e.g.*, AMAN & MAYTON, *supra* note 25, at 56-66, 172-91 (hearing rights in the United States); Herbert Mandelartz, *Anhörung, Absehen von der Anhörung, Nachholen der unterbliebenen Anhörung - Zur Relativierung eines Verfahrensrechts*, 98 DVBL. 112 *passim* (1983); BVerfG, decision of Oct. 25, 1979, BVerfGE 59, 48, 50-56 (hearing rights in Germany).

309. *See supra* part II.A.1.b.(3)(a).

310. *See supra* part II.A.3.

As this difference in approach influences the way lawyers think about delegation, it also influences the outcome of delegation cases in practice. Thus, the much wider array of constitutionally protected basic rights in Germany lends more bite to a delegation doctrine whose standards are a function of the infringement of such rights. In other words, even if the German doctrine were to be applied in the United States, the scarcity of fundamental rights under the United States Constitution would make it a much duller instrument. Such speculations, however, are not very helpful since the extent of basic rights protection, the importance attached to it, and the decisive influence it has on the delegation doctrine cannot be separated. To transfer the delegation doctrine into another legal environment would change the doctrine itself.

B. POLITICAL FRAMEWORK

1. *Presidential v. Parliamentary and Party System*

A further factor that explains the differences in approach are the different governmental structures in Germany and the United States.³¹¹ Under the presidential system of the United States, the president is elected by and responsible to the people, not Congress. Now, in spite of the theoretical difficulties in assigning administrative agencies to one of the three branches of government, the president exerts considerable influence over the administration through official channels, such as his appointment power, semi-official channels like the Office of Management and Budget, or unofficial channels like simple phone calls.³¹² Through the president, therefore, the administration has an indirect democratic legitimation that is independent of Congress. In order to put into practice the political program for which he was elected, the president and "his" administration need broad delegations.³¹³ In other words, the delegation doctrine is situated in a constitutional power struggle between Congress and the President, with both actors having independent democratic legitimation and not infrequently conflicting goals.

Under the parliamentary system in Germany, on the contrary, the chancellor is elected by and responsible to parliament (Article 63 of the Grundgesetz). Parliament theoretically can elect a new chancellor at any time (Article 67). The chancellor independently chooses the ministers, who are the heads of their respective governmental departments (Articles 64 & 65). At the same time, the system of political parties, which is constitutionally recognized (Article 21), further blurs the differences between the executive and the legislative branch. The chancellor will be elected by the party, or the coalition of parties in parliament (called a "fraction"), which holds the majority of votes. He will himself be a member of the majoritarian party. The members of a fraction are, moreover, in nearly all cases held to vote along with the rest of their fraction.³¹⁴

311. See generally ZIPPELIUS, *supra* note 263, at 388-413.

312. See GELLHORN & LEVIN, *supra* note 25, at 49-69.

313. Mashaw, *supra* note 119, at 95-99.

314. See Maunz, in MAUNZ/DÜRIG, *supra* note 150, art. 21, §§ 95-96. On party pressures in the United States, see CONGRESSIONAL QUARTERLY, INC., HOW CONGRESS WORKS 132-33 (2d ed. 1991).

Consequently, the real separation of power does not follow the traditional lines of legislature/executive but rather those of majority fraction/opposition.³¹⁵ Like in the United States, the administration therefore has a democratic legitimation.³¹⁶ Unlike in the United States, however, this legitimation is not different from but identical to that of the majority in the legislative branch. The delegation question, thus, is not situated in a power struggle between competing, democratically legitimated groups. A delegation that provides the agencies with very detailed guidance as to the contents of their future regulations will not be regarded so much as an effort of the legislature to extend its power into the realm of the executive; both are tightly connected anyway. The legislative and executive power are, to a certain degree, in the hands of the same group, which is monitored by the opposition parties, the courts, the press, and interest groups.³¹⁷ Even though this concentration of power might seem dangerous to American eyes, it has proven to work remarkably well. Nevertheless, this power structure might be one of the explanations for the German preoccupation with the infringement of basic rights.

2. Parliamentary Elections

Connected to the presence or absence of a party system, the system of parliamentary elections may be a factor which influences the degree of specificity for statutory delegation that is politically desirable in parliament. Writers in the United States often note that highly specific legislation can be undesirable for members of the House of Representatives,³¹⁸ who face elections every two years and are in a constant reelection campaign. Therefore, it is said, members of the House of Representatives will try to cast their vote for as few unpopular projects as possible.³¹⁹ Consequently, a statute that only states very broad goals which most members of the constituency can agree to, such as clean air or better automobile safety, might be favored over a statute which specifies how to implement these goals and will thus prefer the interests of certain groups over those of others.

This view, however, is not shared by everyone. There is doubt whether enhanced specificity of statutory language for purely constitutional reasons would really help voters decide. Furthermore, it is argued that the voters' decisions are predictions about future behavior of candidates. For this purpose, however, the general ideological tendencies of these candidates are more important than their past vote on the specific language of a bill, especially since it is known that no single Congressman controls the entire wording of a bill.³²⁰ Finally, the democratic role of the president and his need for broad delegations is stressed.³²¹

315. *E.g.*, MAUNZ & ZIPPELIUS, *supra* note 154, at 72; Herzog, *in* MAUNZ/DÜRIG, *supra* note 150, art. 20, § II 55; Norbert Gehrig, *Gewaltenteilung zwischen Regierung und parlamentarischer Opposition*, 86 DVBt. 633 *passim* (1971).

316. BVerfG, decision of Aug. 8, 1978, BVerfGE 49, 89, 125.

317. *See* Gehrig, *supra* note 315, at 634; EKKEHARDT STEIN, *STAATSRRECHT*, 152-53 (12th ed. 1990).

318. Aranson et al., *supra* note 4, at 30-41, 57. *See* Mashaw, *supra* note 119, at 87 (for a summary); Schoenbrod, *supra* note 116, at 375-76.

319. On constituent pressures on Congressmen, *see* HOW CONGRESS WORKS, *supra* note 314, at 127-29.

320. Mashaw, *supra* note 119, at 87-88.

321. *See supra* part IV.B.1.

Without resolving this debate, the situation in Germany can be contrasted with that in the United States. In Germany, a mixed system of representative and proportionality voting enables many members of parliament to be reelected without having the favor of any particular constituency, if only their party receives a sufficient amount of votes.³²² Even those legislators who are directly elected in their precinct will be held much less *personally* responsible for their voting patterns than in the United States, because it is generally known that their vote is determined by their fraction. In addition, legislators face reelection only every four years. For all these reasons, pork barrel politics on the *local* level are less likely to occur in Germany than in the United States. For the delegation problem, this implies that if very broad delegations were to be considered politically more expedient, this would be more so in the United States than in Germany.

3. Process and Technical Quality of Legislation

Closely connected to these differences in the political system are differences in the way statutes are made. In the United States, statutes are introduced into the legislative process by members of Congress. They have been drafted by these Congressmen with the help of their legislative staff. The president can introduce bills only through a Congressman who is willing to support his proposal. Once a bill is introduced, its contents and fate are greatly influenced by the committees and sub-committees which, again, rely on their own staff.³²³ Scholarly statements note that, within this process, agencies may sometimes draft a bill, or aid in its drafting,³²⁴ or that they may have a voice in the legislative hearings.³²⁵ In practice, however, the extent to which agencies are involved in the drafting of a bill depends on who promotes it. If the executive, i.e., the president, and his party are the driving force behind the legislative project, the bill will normally be discussed in detail with and prepared by the relevant agency. For proposals or counter-proposals from Congressmen of the other party, though, the agencies provide only limited technical assistance; the bill will normally have been shown to the agency and its comments will have been invited. Depending on the congressional and presidential power structure at the given time, the final statute will be the product of either one or both of these two proposals.³²⁶

In Germany, on the other hand, statutes can be brought before parliament by members of parliament or by the government (chancellor plus ministers) itself (Article 76, Paragraph 1 of the Grundgesetz). If the statute has a chance to pass,

322. See MAUNZ & ZIPPÉLIUS, *supra* note 154, at 277-78.

323. On the size of personal and committee staff, see HAROLD STANLEY & RICHARD G. NIEMI, *VITAL STATISTICS ON AMERICAN POLITICS* 215 (3d ed. 1992); HOW CONGRESS WORKS, *supra* note 314, at 106. On the introduction of a bill, see HOW FEDERAL LAWS ARE MADE 4-5, 9-12 (West 1982); ROBERT GOEHLERT & MARTIN S. FENTON, *CONGRESS AND LAW-MAKING* 12-18 (2d ed. 1988); HOW CONGRESS WORKS, *supra* note 314, at 44-46. On the role of the congressional staff in the legislative process, see HOW CONGRESS WORKS, *supra* note 314, at 101-24, esp. 109-10, 113, 114.

324. JACK DAVIES, *LEGISLATIVE LAW AND PROCESS IN A NUTSHELL* 143-44 (1986).

325. Cf. GOEHLERT & FENTON, *supra* note 323, at 14; HOW FEDERAL LAWS ARE MADE, *supra* note 323, at 9.

326. Interview with Donald Elliot, General Counsel of the Environmental Protection Agency, 1989-91, in New Haven, Conn. (Apr. 15, 1993).

that is, if it has the support of the majority fraction, there is no practical difference between these two possibilities since parliamentary majority and government form one political unit; nevertheless, governmental bills prevail by far.³²⁷ Whenever bills are introduced by the government, and frequently when they are introduced by the legislature, they have been drafted within the administrative bureaucracy.³²⁸ In most cases, the legislature only controls the bureaucratic output, but does not itself play any major role in the final wording of a statute.³²⁹

In short, the practical involvement of agencies in the drafting of statutes in Germany is more pronounced than in the United States. Since agencies are primary experts in their respective fields, one might conclude that German statutes generally are of higher technical quality. On the other hand, Congress can rely on its vast and expert staff of, for instance, 14,405 in 1989.³³⁰ It can, however, be doubted whether even such an enormous staff can match the expertise of agencies that deal with the topic on a daily basis, thus gaining knowledge and insight into all relevant facts, problems, and developments.³³¹ Given the lack of empirical data, the question of technical quality is, therefore, almost impossible to answer.

There is, however, another decisive factor to be taken into account. Within the United States, the reason given for the assumption that administrative heads and staffs are not more expert than congressional ones is the frequent quadrennial turnovers which occur within the administration.³³² Indeed, it seems safe to presume that the development of superior expertise depends on the stability and permanence of exposure to a certain field. Frequent administrative turnovers, however, are largely unknown in Germany. German jurists—unlike their American colleagues—tend to consider the administration as a perfectly acceptable career alternative to law firms and courts. Legal counsels in German agencies thus frequently have years and decades of experience in their respective fields and do not try to leave the administration after a few years of service to seek a more profitable and reputed occupation, as is frequently the case in the United States. Hence, the vast majority of German statutes in the administrative field are drafted by experts who have intimate knowledge of the current state of law and its practical application.³³³ Statutes, therefore, are often of high technical quality.

These differences have two effects. First, for a parliament like the German one, which has most of its statutes drafted by agency experts with much practical

327. Excluding the present Bundestag that was elected in the first unified election on Dec. 2, 1990, of the 4,389 bills that were passed since the founding of the Federal Republic, 3,387 were initiated by the government. EMIL HÜBNER & HORST-HENNEK ROHLFS, *JAHRBUCH DER BUNDESREPUBLIK DEUTSCHLAND 1992/93* 251 (1992). On the political reasons to have the majority fraction and not the government introduce a bill, see HANS SCHNEIDER, *GESETZGEBUNG* 55-56 (1982).

328. SCHNEIDER, *supra* note 327, at 55, 58-61; cf. *Gemeinsame Geschäftsordnung der Bundesministerien* §§ 22-62, reprinted in SCHNEIDER, *supra* note 327, at 347-64; ULRICH KARPEN, *GESETZGEBUNGS-, VERWALTUNGS- UND RECHTSPRECHUNGSLEHRE* 38 (1989).

329. SCHNEIDER, *supra* note 327, at 80; KARPEN, *supra* note 328, at 39.

330. HOW CONGRESS WORKS, *supra* note 314, at 106.

331. A comparison of the German agencies with the so-called *scientific service* of the German Bundestag and with the draftsman under the English system is found in SCHNEIDER, *supra* note 327, at 55, 58-59.

332. Aranson et al., *supra* note 4, at 23-24.

333. See SCHNEIDER, *supra* note 327, at 58-61.

experience within the relevant field, and which does not regularly introduce major changes to a bill outside this agency process, it will be easier to go beyond general statements and towards more detailed statutes. Not only will the overburdening of the legislature be less significant, but detailed statutes will also be less likely to be incompatible with the demands and limits of administrative process. Second, in a parliamentary system of the German kind, the difference in efficiency between specific statutory and regulatory action will be less pronounced. The parliamentary process will still be more burdensome, slower, and less likely to adapt readily to quickly changing circumstances.³³⁴ But the advantage in technical knowledge and expertise that the bureaucracy has over parliament will be diminished by the intensity of the support that the former lends to the latter.

4. Cultural Perceptions of Administration

Lastly, one should consider the different ways in which Americans and Germans tend to think about their administration in general. Anything that can be said here is, of course, highly subjective and impossible to substantiate without years of empirical research. Nevertheless, some informed guesses in this area may enable the reader to see more clearly some of the often unspoken premises from which American and German lawyers start in their thought processes. The following descriptions are highly generalized. To a degree, they could also be applied in the respective other country. Nevertheless, these statements correctly highlight the broad, general tendencies in thinking about public administration.

Bureaucratic administration in the United States is often viewed as an oversized institution which makes important policy decisions without being democratically elected. Agencies are regarded as heavily influenced by special-interest pressure groups and as not infrequently arriving at decisions that are not beneficial to the population as a whole. Although Germans also like to complain about their administration,³³⁵ much of the criticism is addressed at the poor performance of specific administrators or specific kinds of administrators. The administration, in general, is more frequently viewed as a rather successful method of efficiently carrying out statutes and guidelines provided by government and parliament. It will serve the best interest of the people if, and in so far as, these parliamentary decisions do. Administrators may be accused of party politics³³⁶ but less frequently of favoring special interest groups. The very fact that both are considered highly negative features and are often attached to specific administrators shows that the administration, as such, is generally considered to be a neutral, non-partisan institution.³³⁷ The fora in which interests groups are to carry out their struggles are parliament and parties, not the administration.

With respect to the delegation problem, one might be tempted to think that the greater German trust in the neutrality and competence of administrative agencies

334. See MAURER, *supra* note 259, at 54.

335. On complaining about the government as a U.S. "national pastime," see Mashaw, *supra* note 119, at 81.

336. E.g., *Landtagspräsident rügt Parteienfilz in Behörden*, FRANKFURTER RUNDSCHAU, Mar. 11, 1993, at 1.

337. Cf. von Münch, in ERICHSEN & MARTENS, *supra* note 259 at 57-59.

should lead to broader delegations. Indeed, as noted, proposals in this direction have been made.³³⁸ Yet the German perception of administration is also generally opposed to the idea—quite common to lawyers in the United States—that even below the level of ministers, agencies make *important* policy decisions.³³⁹ This severely limits the amount of leeway for agencies that is practically perceivable to German as compared to United States lawyers. Of course, not everyone in the United States regards policy-making at the administrative level favorably. The very absence of a major discussion on this topic in Germany, however, buttresses the difference in perception that is important here. One might object that the close connection between the parliamentary majority and the executive branch in Germany suggests that policy making must be considered much more a matter of the administration than in the United States, where the concept of separation of powers is carried out much more strictly.³⁴⁰ However, this inference is true only at the ministerial level, which can be differentiated from the rest of the administration.³⁴¹ Apart from that, this objection forcefully demonstrates the difficulties of comparing two systems that are so different in structure.

The different perception of the role of administrative agencies finally implies that the efforts of some American writers to describe administrative decisionmaking as a process of interest group interaction are rather unacceptable in the German legal environment.

V. Conclusion

The delegation doctrines in Germany and in the United States are quite different. The differences lie not only in the strictness of standards, but also in the emphasis accorded to certain sub-issues and in the way of thinking about delegation in general. In other words, the differences are not simply due to coincidence or the fact that in law there often is no best solution. Rather, the doctrines are part of a larger background which draws on aspects of constitutional law, political reality, and legal culture. In this sense, the delegation doctrines are inseparable parts of their respective jurisdictions, so that, at times, it can even be difficult to tell whether the delegation doctrine as such or other concepts are doing the work, and it becomes questionable where the delegation doctrine ends and where other doctrines begin.³⁴² The uncovering of these differences and some of these links will hopefully contribute to a better understanding of the issue of delegation, provide an opportunity to learn from experience in the other country, and point to some implications that need to be taken into account in critical assessments or reform proposals.³⁴³

338. See *supra* part IV.B.2.c.(1).

339. Cf., e.g., von Münch, in ERICHSEN & MARTENS, *supra* note 259, at 58; NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN 206-18 (2d ed. 1975) (with particular emphasis on discussion at 216) (sociological analysis).

340. See *supra* part IV.A.2.

341. On this differentiation, see von Münch, in ERICHSEN & MARTENS, *supra* note 259, at 3.

342. See *supra* parts II.A.1.b.(3)(b), IV.A.2, IV.A.4.

343. Cf. AMAN & MAYTON, *supra* note 25, at 8 n.2; CURRIE, *supra* note 81, at 26 n.36, 27 n.42. Note, subsequent to the final editing of this article, a comparative study on the U.S. and German delegation doctrines was published, emphasizing their possible influence on reforms in Eastern Europe. See Georg Nolte, *Ermächtigung der Exekutive zur Rechtsetzung*, 118 AöR 378 (1993).