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Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Citizen Stakeholder Voice

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**Collaborative Governance:**

**Emerging Practices and the Incomplete Legal Framework for Citizen and Stakeholder  
Voice**

by

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## **Abstract**

I argue here that we need a comprehensive model to understand emerging uses of collaboration across the policy continuum, and that we need to re-examine our legal framework for policy making, implementation, and enforcement to encompass this new collaborative governance. I take as my starting point the normative assumption that collaboration exists, and that it is useful and desirable in certain contexts if designed and implemented well. This article describes the broad range of processes through which citizens and stakeholders collaborate to make, implement, and enforce public policy, and then describes the incomplete legal framework for these processes. First, it will briefly review collaborative and new governance. Second, it will describe the emergence of deliberative democracy, collaborative public or network management, and appropriate dispute resolution in the policy process and argue that these three fields are related in their role in policy. These three separate fields have not previously been identified as part of a single phenomenon, namely the changing nature of citizen and stakeholder voice in governance. Third, it will describe the policy process and illustrations of how these new forms of participation operate across the policy continuum including legislative, executive, and judicial functions. Fourth, it will briefly review existing legal infrastructure as it authorizes collaboration, or provides constraints, obstacles, or barriers. Finally, I will argue that we need to revise our legal infrastructure needed to facilitate collaboration in a way that will strengthen our democracy.

## Introduction

In *A.L.A. Schechter Poultry Corp., et al. v. United States*,<sup>1</sup> the U.S. Supreme Court faced a challenge to a work product of collaboration. A New York poultry dealer was convicted of violating regulations adopted pursuant to the New Deal's National Industrial Recovery Act of 1934 (NIRA) by letting customers select individual chickens for kosher slaughter from a coop or lot. The Court observed that the national crisis of the Depression "demanded a broad and intensive cooperative effort by those engaged in trade and industry, and that this necessary cooperation was sought to be fostered by permitting them to initiate the adoption of codes."<sup>2</sup> However, the court noted that this cooperation

involves the coercive exercise of the law-making power. The codes of fair competition which the statute attempts to authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes.

The Constitution provides that "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Art I, § 1. And the Congress is authorized "To make all laws which shall be necessary and proper for carrying into execution" its general powers. Art. I, § 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.

\*\*\* [W]e said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained.<sup>3</sup>

The statute in question expressly purported to "provide for the general welfare by promoting the organization of industry *for the purpose of cooperative action among trade groups*."<sup>4</sup>

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<sup>1</sup> 295 U.S. 495 (1935, affectionately known at 'the Sick Chicken case').

<sup>2</sup> *Id.* at 529.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 531, note 9 (emphasis added).

The executive branch argued that the codes will "consist of rules of competition deemed fair for each industry by representative members of that industry -- by the persons most vitally concerned and most familiar with its problems."<sup>5</sup>

The Court, however, was unimpressed:

But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.<sup>6</sup>

The executive branch argued that there are constraints built into the statute that render it a fair process for developing the codes. The President could not approve codes as law unless he first found that the trade or industrial associations or groups were truly representative and did not unfairly restrict membership. The President also had to ensure that the code was not designed to promote monopolies or eliminate, oppress, or discriminate against small competitors. The Court rejected these protections as inadequate to address the delegation problem:

But these restrictions leave virtually untouched the field of policy envisaged by section one, and, in that wide field of legislative possibilities, the proponents of a code, refraining from monopolistic designs, may roam at will and the President may approve or disapprove their proposals as he may see fit.<sup>7</sup>

The Court concluded that the codes were a legislative undertaking, and that the NIRA was without precedent because it supplied no standards and prescribed no rules of conduct.

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<sup>5</sup> *Id.* at 537.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 538.

Instead, it authorized codes to do this, but set no standards for the codes.<sup>8</sup> The Court concluded: “[T]he code-making authority thus conferred is an unconstitutional delegation of legislative power.”<sup>9</sup> Justice Cardozo famously concurred, describing it as “delegation run riot.”<sup>10</sup> The Supreme Court never overruled *Schechter Poultry*. Most of its rulings on delegation do not return to the question of delegation to a non-governmental entity or collaborative network of private sector actors, but instead examine the scope of a statute’s delegated authority to the executive branch.<sup>11</sup>

Recently, the scholarship of administrative law has embraced self-regulation and the so-called “new governance,” including the use of policy tools that involve privatization of previously public work and devolution of responsibility from unitary bureaucracies to contractors.<sup>12</sup> Some have characterized the legal scholarship of the new governance as a new form of legal realism, one that looks pragmatically at law in context and in action; these legal scholars seek “to reinvent governance from the ‘bottom up’ by rejecting ancient

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<sup>8</sup> *Id.* at 541.

<sup>9</sup> *Id.* at 542.

<sup>10</sup> *Id.* at 553.

<sup>11</sup> See, e.g., *Panama Refining v. Ryan*, 293 U.S. 388 (1935); *National Broadcasting Co., Inc. v. U.S.*, 319 U.S. 190 (1943); *National Cable Television v. U.S.*, 415 U.S. 336 (1974); and *Clinton v. U.S.*, 524 U.S. 417 (1998).

<sup>12</sup> The seminal work in public affairs is Lester M. Salamon, ed., *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (2002); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 *FORDHAM URB. L.J.* 1611 (2001); see also, Daniel J. Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 *HARV. ENVTL. L. REV.* 441 (1999). A number of legal scholars have recently examined the new governance, which includes collaborative governance, in a variety of contexts. Examples include Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *U.C.L.A. L. REV.* 1, 22 (1997); Bradley C. Karkkainen, *Reply: “New Governance” in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 *MINN. L. REV.* 471 (2004); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *MINN. L. REV.* 342 (2004); Orly Lobel, *Surreply: Setting the Agenda for New Governance Research*, 89 *MINN. L. REV.* 498 (2004); Richard Stewart, *Administrative Law in the 21st Century*, 78 *N.Y.U. L. REV.* 437 (2003); Louise G. Trubek, *Lawyering for a New Democracy: Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 *WIS. L. REV.* 575 (2002); and Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 *IND. HEALTH L. REV.* 137 (2006).

administrative strategies of command and control and replacing them with a continuous dynamic process governed by the relevant stakeholders.”<sup>13</sup>

The specific processes through which stakeholders participate attract less attention among legal scholars. In practice, these include varieties of dialogue and deliberation with citizens and stakeholders, collaborative public management networks, and alternative or appropriate dispute resolution. These developments, taken together, raise anew questions of transparency, accountability, and the extent to which delegation adequately constrains administrative action within the rule of law. Of course, some seventy years later, the Supreme Court is probably not about to come down on our collective heads to punish collaboration.<sup>14</sup> However, public administrators have an ethical obligation to know and comply with the Constitution and public law,<sup>15</sup> and where collaboration is concerned, the law is either piecemeal or silent.

I argue here that we need a comprehensive model to understand emerging uses of collaboration across the policy continuum, and that we need to re-examine our legal framework for policy making, implementation, and enforcement to encompass this new collaborative governance. I take as my starting point the normative assumption that collaboration exists, and that it is useful and desirable in certain contexts if designed and

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<sup>13</sup> Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse, and David Wilkins, *Foreword: Is it Time for a New Legal Realism?* 2005 WIS. L. REV. 335, 357 (2005), citing Gregory C. Shaffer, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* (2003); Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EURO. L. J. 1 (2002); Louise G. Trubek & Maya Das, *Achieving Equality: Healthcare Governance in Transition*, 29 AM. J. LAW & MEDICINE 395 (2003).

<sup>14</sup> Professor Jody Freeman notes: “The arrangements that so disturbed the Supreme Court in the famous nondelegation cases are not repeated in current collaborative efforts. In those cases, policy-making authority was delegated to private interests that were not part of a balanced group, the government did not maintain an active role in the process, and there were few, if any, procedural checks on the groups’ conduct.” Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. REV. 1, 89-90 (1997).

<sup>15</sup> David H. Rosenbloom, *PUBLIC ADMINISTRATION: UNDERSTANDING MANAGEMENT, POLITICS, AND LAW IN THE PUBLIC SECTOR* (2008).

implemented well. This article describes the broad range of processes through which citizens and stakeholders collaborate to make, implement, and enforce public policy, and then describes the incomplete legal framework for these processes. First, it will briefly review collaborative and new governance. Second, it will describe the emergence of deliberative democracy, collaborative public or network management, and appropriate dispute resolution in the policy process and argue that these three fields are related in their role in policy. These three separate fields have not previously been identified as part of a single phenomenon, namely the changing nature of citizen and stakeholder voice in governance. Third, it will describe the policy process and illustrations of how these new forms of participation operate across the policy continuum including legislative, executive, and judicial functions. Fourth, it will briefly review existing legal infrastructure as it authorizes collaboration, or provides constraints, obstacles, or barriers. Finally, I will argue that we need to revise our legal infrastructure needed to facilitate collaboration in a way that will strengthen our democracy. As a disclaimer, here I can only survey selected developments, statutes, and issues; it is necessarily an incomplete sketch.

## **I. Collaboration in Governance and Management**

During the final third of the twentieth century, the way that we talk about both government and conflict evolved. So-called ‘wicked problems’ such as environmental degradation, urban economic development, and public health all challenged the capacity of a single governmental unit operating in hierarchy. Hierarchy’s command and control management strategies failed in the face of problems that could not be solved or solved easily



by one entity acting alone.<sup>16</sup> Moreover, hierarchy failed entirely as an approach to global and transnational problems, i.e., those that cross the jurisdictional boundaries of nation states.

This gave rise to the concept of governance, rather than government.<sup>17</sup> Governance suggests steering rather than top-down directing, and in its contemporary usage means a process involving resources and strategic, often collaborative relationships outside a single organization toward achieving a public policy goal. It may involve multiple organizations and stakeholders from public, private, and nonprofit sectors that combine in a network to address a common and shared problem. Certain manifestations of this phenomenon have come to be termed collaborative public management.<sup>18</sup> Collaborative public management generally relates to networks; it involves more than two parties in a bilateral contract.

Contracting out work is the subject of legal scholarship elsewhere;<sup>19</sup> however, the notion of contract as a metaphor for the blurring of public and private is relevant here.<sup>20</sup>

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<sup>16</sup> Robert Agranoff and Michael McGuire, *COLLABORATIVE PUBLIC MANAGEMENT: NEW STRATEGIES FOR LOCAL GOVERNMENTS* (2003).

<sup>17</sup> Donald F. Kettl, *THE TRANSFORMATION OF GOVERNANCE: PUBLIC ADMINISTRATION FOR TWENTY-FIRST CENTURY AMERICA* (2002). See also Scott Burris, Michael Kempa, and Clifford Shearing, *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 *AKRON L. REV.* 1, 3-4 (2008):

Once it was dogma that our collective world was divided into two fundamentally different spheres: the public sphere - which was the realm of governance, and the private sphere - the realm of the governed. This crucial distinction has eroded. States do not enjoy a monopoly on governance, and themselves are often governed by non-state actors.

<sup>18</sup> See Agranoff, *supra* note 12; Rosemary O'Leary, Catherine Gerard, Lisa Blomgren Bingham, (eds). *Symposium: Collaborative Public Management: Introduction*, 66 *PUBLIC ADMIN. REV.* 6 (2006). Collaborative public management is a concept that describes the process of facilitating and operating in multi-organizational arrangements to solve problems that cannot be solved or easily solved by single organizations. To collaborate means to co-labor to achieve common goals working across boundaries in multi-sector relationships. Collaboration is based on the value of reciprocity. Lisa Blomgren Bingham, Rosemary O'Leary, and Chris Carlson, *Frameshifting: Lateral Thinking for Collaborative Public Management*, 6, in Lisa Blomgren Bingham and Rosemary O'Leary, *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT* (2008).

<sup>19</sup> Ellen Dannin, *Ellen, Red Tape or Accountability: Privatization, Public-ization, and Public Values*. 15 *CORNELL JOURNAL OF LAW AND PUB. POL'Y* 111-163. (2006); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*. 84 *N.C.L. REV.* 397 (2006).

<sup>20</sup> Jody Freeman, *The Private Role in Public Governance*, 75 *N.Y.U.L. REV.* 543 (2000).

Governance may also involve citizens or those governed through institutionalized civic engagement and participatory decision-making; this is participatory governance, which is the active involvement of citizens in government decision-making<sup>21</sup> and may include deliberative democracy,<sup>22</sup> and/or collaborative governance.<sup>23</sup> A principle of collaborative, or shared, governance is that expert policy analysts do not have exclusive or even the necessary information about citizen values and knowledge.<sup>24</sup> Collaborative governance encompasses engagement in any stage of the policy process, including problem identification, identification of preferences, prioritizing among policy preferences, selecting a policy approach, adopting, implementing, and enforcing policy.<sup>25</sup>

The public administration literature distinguishes between collaborative public management and collaborative governance. The literature falls into two categories: one that focuses on collaboration among organizations, and a second that grows out of more traditional notions of civic engagement and ways for citizens to participate in governance. For the most part, neither of these literatures looks closely at the processes for collaboration. More specifically, they tend to ignore the emergence of dispute resolution and deliberative democracy as movements that relate to the evolution of governance.

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<sup>21</sup> Adapted from Douglas Henton, John Melville, Terry Amsler, and Malka Kopell, *COLLABORATIVE GOVERNANCE: A GUIDE FOR GRANTMAKERS* (2005).

<sup>22</sup> For a number of case studies and essays on deliberative democracy, see Archon Fung and Erik Olin Wright, eds., *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE* (2003) John Gastil and Peter Levine, eds., *THE DELIBERATIVE DEMOCRACY HANDBOOK* (2005).

<sup>23</sup> In addition, this article uses a definition for collaborative governance crafted by the Institute for Local Government, a nonprofit research organization affiliated with the League of California Cities:

*Collaborative governance* is a term used to describe the integration of reasoned discussions by the citizens and other residents into the decision-making of public representatives, especially when these approaches are embedded in the workings of local governance over time.

See [www.ca-ilg.org](http://www.ca-ilg.org).

<sup>24</sup> Matt Leighninger, *THE NEXT FORM OF DEMOCRACY: HOW EXPERT RULE IS GIVING WAY TO SHARED GOVERNANCE...AND WHY POLITICS WILL NEVER BE THE SAME* (2006).

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Administrative law scholars generally occupy themselves with challenges to the legitimacy of the administrative state.<sup>26</sup> The absence of any reference to administrative agencies in the Constitution, the combination of legislative, executive, and judicial functions in the agency potentially violating separation of powers, and the absence of direct accountability to the electorate taken together create a simmering source of concern.<sup>27</sup> As a result, most scholarship addresses how to constrain agency power and make it accountable, or conversely, to justify it.<sup>28</sup> Scholars have applied this approach to collaboration in governance, particularly regulation-by-negotiation.<sup>29</sup>

However, recently scholars have focused upon “the new governance” in recognition of the evolution away from command-and-control hierarchy to “a new model of collaborative, multi-party, multi-level, adaptive, problem-solving New Governance.”<sup>30</sup>

Professor Jody Freeman examines the private role in public governance across the policy continuum, finding that nongovernmental actors engage in legislative and adjudicative

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<sup>26</sup> Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. REV. 543 (2000).

<sup>27</sup> *Id.* at 545-546.

<sup>28</sup> Among legal scholars, there is literature on contracting out and privatization of government functions that identifies accountability as a concern. Professor Ellen Dannin explores new conceptions of accountability in privatization, arguing that it is more than just value of services for the public dollar, but should encompass civic values and participatory democracy. Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL’Y 111 (2006).

<sup>29</sup> E.g., William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351 (1997); Andrew P. Morriss and Bruce Yandle and Andrew Dorchak, *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179 (2005).

<sup>30</sup> Bradley C. Karkkainen, *Reply: New Governance in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 473 (2004). For the comprehensive review of the new governance literature which Professor Karkkainen critiques, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004). See also David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651 (2006); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247 (2006); David M. Trubek & Louise G. Trubek, *Narrowing the Gap? Law and New Approaches to Governance in the European Union: New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539 (2007); Louise G. Trubek, *Lawyering for a New Democracy: Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 WIS. L. REV. 575 (2002); Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 IND. HEALTH L. REV. 137 (2006); Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029 (2005).

roles.<sup>31</sup> She argues that public/private interdependence is a reality best understood as a set of negotiated relationships in which “public and private actors negotiate over policy making, implementation, and enforcement.”<sup>32</sup> She ultimately rejects the term governance in favor of “problems to confront and decisions to make,” observing “[t]here is nothing to govern.”<sup>33</sup> She argues that administrative law must reorient toward “facilitating the effectiveness of public/private regulatory regimes and away from the traditional project of constraining agency discretion.”<sup>34</sup> Importantly, she advocates institutional analysis and design, citing micro-institutional analysis as a promising marriage of critical legal studies and public choice approaches that can help us better approach the practical problems of governance.<sup>35</sup> She argues that institutional design should move away from the traditional legislative, executive, and judicial branches to an examination of alternative private institutions and stakeholders and the role they can effectively play in governance.<sup>36</sup>

Others have looked beyond the organized or institutional stakeholder to the potential for citizens to participate more meaningfully in governance. For example, Professor Lani Guinier argues for empowered third and fourth parties, proportional representation, and ways to promote participation independent from political structure and party system; in other words, she is advocating a new institutional design that promotes citizen self-organization and participation. She observes that “[d]emocratic practices are those that value power-sharing, invite broad participation, engage stakeholders in local decision-making about

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<sup>31</sup> Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U.L. REV. 543, 547 (2000). She includes among these corporations, public interest organizations, private standard setting bodies, professional associations, and nonprofit groups. She does not include citizens in their individual capacity.

<sup>32</sup> *Id.* at 548.

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

<sup>34</sup> *Id.* at 549.

<sup>35</sup> *Id.* at 674, citing Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1411 (1996).

<sup>36</sup> *Id.*

concrete problems, and yield creative solutions that are nevertheless subject to critical feedback.”<sup>37</sup>

However, administrative law scholars are largely ignoring the mismatch between the existing statutory framework for governance and private collaboration. Legislators drafted the key federal and state statutes as legal infrastructure contemplating unilateral, command-and-control, hierarchical, and individual agency action. The relevant statutes largely address only questions of process from the individual agency perspective. They are silent on the substantive work of agencies except with regard to judicial review for *ultra vires* agency action. They are silent on the structure of collaborative networks or other forms of collaborative public management. They may in places require public participation, for example notice and comment in rulemaking or public hearings,<sup>38</sup> but they are largely silent as to the wide variety of models for collaborative governance in agency policy-making.

This statutory framework represents part of the legal infrastructure for collaboration. The term legal infrastructure has been used to refer to a combined system of constitutional, statutory, decisional, and administrative law, taken together with the available institutional enforcement and support mechanisms. Its most common use is in reference to efforts to develop the rule of law and viable protection of private property and investment in emerging democracies. State and federal legal infrastructure currently addresses two main categories of administrative agency action: quasi-legislative processes for identifying policy problems, identifying possible solutions, and choosing among them in formulating policy; and quasi-judicial processes for implementing and enforcing policy.

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<sup>37</sup> Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 LOY. U. CHI. L.J. 23, 66 (2002).

<sup>38</sup> Jeffrey S. Lubbers, A GUIDE TO FEDERAL AGENCY RULEMAKING (4TH ED. 2006).

Statutory approaches that provide legal infrastructure can either help or hinder collaboration. While these statutes authorize individual agencies to use a wide variety of processes to engage citizens and stakeholders in the policy process,<sup>39</sup> including a broader range of processes with the advent of dispute resolution and negotiated rulemaking, they nevertheless do not explicitly address agencies acting in the context of a collaborative network in partnership with other organizations, citizens, and stakeholders.

We need is a more holistic view. The new governance is here to stay. Collaborative public management is growing; collaborative governance is a key way to respond to some criticisms of networked and privatized government action. Public law needs to provide a framework that authorizes collaborative management and collaborative governance, facilitates broader and more effective use of collaboration, and preserves accountability to the rule of law and transparency in government.

## **II. Citizen and Stakeholder Participation along the Policy Continuum**

While the public sector has grappled with the evolution from government to governance, civil society has experienced a parallel social phenomenon of groups seeking to empower citizen and stakeholder voice in governance. This phenomenon has taken three forms: deliberative and participatory democracy, collaborative public management, and conflict resolution (alternative or appropriate dispute resolution or ADR).

### **A. Deliberative and Participatory Democracy**

Deliberative democracy emerged during the past decade, and it is sufficiently new that there is no consensus about what to name it. Terms include participatory democracy, deliberation and dialogue, deliberative democracy, and more broadly, collaborative

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<sup>39</sup> Lisa B. Bingham, Tina Nabatchi, and Rosemary O'Leary, *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, 65 PUB. ADMIN. REV. 547 (2005).

governance. This movement emerged in response to perceived failings in representative democracy with respect to conflict over public policy. Various manifestations of civil society (the nonprofit and voluntary sector and citizen groups) have pressed for more public participation in the policy process.<sup>40</sup> This movement seeks more citizen deliberation, dialogue, and shared decision-making in governance.<sup>41</sup> This movement hopes to address conflict at the broader level of public policy. It takes advantage of new technologies for human communication and includes ‘e-democracy’ and ‘e-government.’ This movement has found some support in the institutions of civil society, to some degree from the same foundations that funded work on dispute resolution,<sup>42</sup> but usually under different funding programs more concerned with healing the damage of war and ethnic conflict and building democratic institutions.

Central to each of the many evolving forms of participatory governance are notions of dialogue and deliberation.<sup>43</sup> Dialogue is contrasted with the traditional adversarial processes of governance, which usually entail debate. In dialogue, participants engage in reasoned exchange of viewpoints, in an atmosphere of mutual respect and civility, in a neutral space or forum, with an effort to reach a better mutual understanding and sometimes even consensus. In debate, participants listen in an effort to identify weaknesses in the argument and score points in an effective counterargument; in deliberation and dialogue, participants listen in an effort to better understand the other’s viewpoint and identify questions or areas of confusion

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<sup>40</sup> John Forester, *THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES* (1999); John Gastil, *POLITICAL COMMUNICATION AND DELIBERATION* (2008).

<sup>41</sup> John Gastil and Peter Levine, *THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY* (2005); Nancy Roberts, *Public Deliberation in an Age of Direct Citizen Participation*, 33 *AMERICAN REV. OF PUB. ADMIN.* 1 (2003).

<sup>42</sup> These include the William and Flora Hewlett Foundation; see discussion in section II.C.

<sup>43</sup> Lars Hasselblad Torres, *DELIBERATIVE DEMOCRACY: A SURVEY OF THE FIELD, A REPORT PREPARED FOR THE WILLIAM AND FLORA HEWLETT FOUNDATION* (2003)(copy on file with author).

to probe for a deeper understanding. Deliberation is the thoughtful consideration of information, views, and ideas.

There has been a proliferation of and experimentation with a variety of models and techniques including, but not limited to, the 21st Century Town Meeting, Appreciative Inquiry, Bohmian Dialogue, Citizen ChoiceWork Dialogues, Citizens Juries, Compassionate Listening, Consensus Conferences, Conversation Café, Deliberative Polling, Dynamic Facilitation and the Wisdom Council, Future Search, Intergroup Dialogue, National Issues Forums, Nonviolent Communication, Online D&D, Open Space Technology, Public Conversations Project, Study Circles, Sustained Dialogue, Wisdom Circles, and World Café.<sup>44</sup>

### **B. Collaborative Public or Network Management**

The study of collaborative public management (CPM) is an outgrowth of work in intergovernmental relations, privatization, devolution, and nonprofit management.<sup>45</sup> It represents a shift in perspective; instead of viewing relations from the eyes of a single public manager engaged in a linear series of contractual and partnership arrangements, scholars of collaborative public management view the actors from a distance in relation to each other.

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<sup>44</sup> There are detailed definitions for dialogue and deliberation and a primer of models and techniques on the website of the National Coalition for Dialogue and Deliberation, [www.thataway.org](http://www.thataway.org). For an effort at mapping the growing field and more description, see also Abigail Williamson, *MAPPING PUBLIC DELIBERATION*, Cambridge, MA: John F. Kennedy School of Government (2004)(copy on file with author). It also lists mediation and dispute resolution, processes described above that can be adapted to larger scale participation.

<sup>45</sup> See generally, Eugene Bardach, *GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP*. (1999); Robert Agranoff, *MANAGING WITHIN NETWORKS: ADDING VALUE TO PUBLIC ORGANIZATIONS* (2007). Robert Agranoff and Michael McGuire, *COLLABORATIVE PUBLIC MANAGEMENT: NEW STRATEGIES FOR LOCAL GOVERNMENTS* (2003). See also Rosemary O'Leary and Lisa Blomgren Bingham (eds), *THE COLLABORATIVE PUBLIC MANAGER* (2008) and Lisa Blomgren Bingham and Rosemary O'Leary (eds), *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT* (2008).



Public administration scholars distinguish among cooperation, coordination, and collaboration.<sup>46</sup> Cooperation is the absence of conflict; it is less formal, involves sharing information, may be short term, and presents little risk.<sup>47</sup> Coordination is the orchestration of people toward a particular goal; it involves more formal and longer-term interaction, increased risk and shared rewards. Collaboration, however, suggests a closer relationship; it suggests that participants “co-labor.” It entails a new structure, shared resources, defined relationships and communication. Collaboration also involves creating, enhancing, and building on social and organizational capital in pursuit of shared purposes.

### **1. Varieties of Collaborative Public Management**

Collaboration varies along a number of dimensions. It occurs within and across organizations. A single organization may have multiple districts, units, or offices that need to collaborate (e.g., various extension offices of a university with multiple campuses). It occurs within and across sectors. There are networks of agencies, for example, federal agencies coordinating on environmental conflict resolution or across the government on ADR.<sup>48</sup> It also occurs with like-minded or homogeneous and diverse partners. Environmental groups may form a coalition among themselves; yet in a collaborative effort, they may work with putative private sector polluters, conflicting local, regional, state, and federal government agencies, and concerned citizen groups.

Collaboration occurs among those with shared and different goals. It does not nullify competition, and paradoxically may yield conflict. For example, higher education may band together to develop an alternative to the U.S. News Ranking formula. However, each

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<sup>46</sup> John M. Bryson and Barbara C. Crosby, *Failing into Cross-Sector Collaboration Successfully*, in Lisa Blomgren Bingham and Rosemary O’Leary (eds), *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT* (2008).

<sup>47</sup> Michael Winer and Karen Ray Winer, *COLLABORATION HANDBOOK: CREATING, SUSTAINING, AND ENJOYING THE JOURNEY*, 22 (1994).

<sup>48</sup> See the website of the Federal Interagency ADR Working Group, [www.adr.gov](http://www.adr.gov).

institution may seek to best the other in the quest for top applicants, and schools will still compete against each other for advances in reputation.

Collaboration occurs when it is mandatory as well as when it is emergent or voluntary. States vary in mandating collaboration regarding community efforts to serve children and families.<sup>49</sup> Some states mandate which agencies have to participate, while other states set goals with proportions of members representing certain categories. Still other states used an open-ended approach, allowing the networks to self-organize.

Collaboration has been occurring in planning and environmental settings for three decades. In land use, for example, fifty-nine different municipal authorities collaborated in Hamilton County, Ohio, to develop a plan for growth and development; they reached unanimous agreement on its outlines.<sup>50</sup> In the Florida Everglades, stakeholders collaborated to resolve a conflict over the science of restoring the watershed and how to foster and measure progress.<sup>51</sup> Collaboration occurs on highly contentious issues and on less controversial ones. The field of environmental conflict resolution is a testament to the use of collaboration on highly contentious issues such as natural resource allocation and development, cleanup of water, land, or air, and land use.<sup>52</sup> Collaboration occurs with large and small numbers of actors. RESOLVE, a mediation services nonprofit, documents mediated collaboration on a variety of policy issues with dozens of participants.<sup>53</sup>

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<sup>49</sup> Stephen Page, *Managing for Results Across Agencies: Building Collaborative Capacity in the Human Services*, in Lisa Blomgren Bingham and Rosemary O’Leary, eds., *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT* (2008).

<sup>50</sup> See the website of AmericaSpeaks, the nonprofit organization that operated as convener and facilitator, [www.americaspeaks.org](http://www.americaspeaks.org).

<sup>51</sup> See the website of the United States Institute for Environmental Conflict Resolution, [www.usiecr.gov](http://www.usiecr.gov).

<sup>52</sup> Rosemary O’Leary and Lisa B. Bingham, eds., *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* (2003).

<sup>53</sup> See the website of RESOLVE, a nonprofit organization that provides mediation and facilitation services in environmental and public policy conflict, [www.resolve.org](http://www.resolve.org).

Collaboration occurs with and without professional facilitators or mediators. Facilitated or mediated collaboration has occurred at highly polluted sites involving local, regional, state, and federal government, Native American tribes, nonprofit organizations, environmental advocacy groups, and groups of local residents since the 1970s.<sup>54</sup> It has also occurred in food safety, HIV/AIDS treatment, urban air quality, and dam decommissioning.<sup>55</sup> In watershed management, some groups use professionals and others have not, but instead designate one member to chair meetings.<sup>56</sup>

In lower conflict settings, regional voluntary service coordination and collaboration may emerge voluntarily among local governments.<sup>57</sup> Local neighborhood councils collaborate with city service agencies to enhance communication and responsiveness.<sup>58</sup> The Policy Consensus Initiative documents how the state of Maryland collaborated with Wicomico County to develop better ways to coordinate the delivery of human services.<sup>59</sup>

Collaboration also occurs with and without public participation. Emergency management planning in New Orleans prior to Hurricane Katrina involved representatives of local, state, and federal government and was largely limited to professionals.<sup>60</sup> This engendered substantial criticism. Planning for the recovery now involves collaboration of

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<sup>54</sup> *Id.*

<sup>55</sup> See the Gallery of Successes at [www.resolv.org](http://www.resolv.org) for a number of case descriptions.

<sup>56</sup> William Leach and Paul Sabatier, *Facilitators, Coordinators, and Outcomes*, in Rosemary O'Leary and Lisa B. Bingham, eds., *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION*, 148-171(2003).

<sup>57</sup> Richard C. Feiock, *Institutional Collective Action and Local Government Collaboration*, in Lisa Blomgren Bingham and Rosemary O'Leary, eds., *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT* (2008).

<sup>58</sup> Terry L. Cooper, Thomas A. Bryer, and Jack W. Meek, *Outcomes Achieved Through Citizen-Centered Collaborative Public Management*, in Lisa Blomgren Bingham and Rosemary O'Leary, eds., *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT* (2008); and Terry L. Cooper, Thomas A. Bryer, and Jack W. Meek, *Citizen-centered Collaborative Public Management*, 66 *PUB. ADMIN. REV.* 76 (2006).

<sup>59</sup> See the website of the Policy Consensus Initiative at [www.policyconsensus.org](http://www.policyconsensus.org) for numerous case studies.

<sup>60</sup> John J. Kiefer and Robert S. Montjoy, *Incrementalism before the Storm: Network Performance for the Evacuation of New Orleans*, 66 *PUB. ADMIN. REV.* 122 (2006).

local, state, and federal agencies and a series of large scale, high profile citizen forums and participation by elected officials.<sup>61</sup> These are just a few examples of the wide variation of collaborative networks in practice.

## **2. Authorities for and Constraints on Collaborative Public Management**

Law may operate to facilitate or constrain collaboration in networks. One study shows that networks with express legislative authorization or charters are more likely to take action rather than simply share information.<sup>62</sup> Statutes may lower the barriers to collaboration, for example, by authorizing public agencies to do anything together that they have power to do apart.<sup>63</sup> When experiments in collaboration are successful, states may then mandate collaboration as the preferred method to implement public policy.<sup>64</sup> States have enacted mandates for accountability and managing for results in collaboration.<sup>65</sup> Legal mandates may provide collaborative public management networks with legitimacy that facilitates their work implementing policy.<sup>66</sup>

Law is an independent variable that is cropping up, creating incentives, barriers, or obstacles to collaborative public management; yet, the nature of individual statutory provisions has not been systematically examined in legal or public administration scholarship. This article

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<sup>61</sup> This process, organized with the assistance of AmericaSpeaks, is described in more detail on its website, [www.unifiedneworleansplan.com](http://www.unifiedneworleansplan.com).

<sup>62</sup> Robert Agranoff, *MANAGING WITHIN NETWORKS: ADDING VALUE TO PUBLIC ORGANIZATIONS* (2007).

<sup>63</sup> Richard C. Feiock, *Institutional Collective Action and Local Government Collaboration*, in Lisa Blomgren Bingham and Rosemary O'Leary, eds., *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT* (2008).

<sup>64</sup> Jay Ryu and Hal Rainey, *Organizational Design and Program Performance: One-Stop Shopping Structures in Employment Training Programs*, paper presented at Maxwell School Program on the Analysis and Resolution of Conflict 2006 Collaborative Public Management Conference ([http://www.maxwell.syr.edu/parc/2006\\_Coll\\_Pub\\_Mgmt\\_Conf.htm](http://www.maxwell.syr.edu/parc/2006_Coll_Pub_Mgmt_Conf.htm))(discussing emergent public management networks that form around one-stop employment centers, which are later mandated by the state legislature).

<sup>65</sup> Stephen Page, *Managing for Results Across Agencies: Building Collaborative Capacity in the Human Services*, in Lisa Blomgren Bingham and Rosemary O'Leary, eds., *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT* (2008).

<sup>66</sup> Keith G. Provan, Patrick Kenis, Sherrie E. Human, *Legitimacy Building in Organizational Networks*, in Lisa Blomgren Bingham and Rosemary O'Leary, eds., *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT* (2008)(examining legal mandates and legitimacy or effectiveness).

is only a first step in identifying this issue; it remains for future work to canvas the relevant legal authority.

### **C. Conflict Resolution: The ADR Movement**

Government institutions and authority were not sufficient to cope with waves of domestic conflict after World War II. Various new institutions evolved outside government to meet this need, including a mature system for collective bargaining. The ADR movement emerged in large part from private justice systems in labor relations when philanthropies subsidized experiments applying these processes in new contexts such as community and neighborhood conflict.<sup>67</sup> These processes include negotiation (preferably interest-based and collaborative rather than positional and competitive bargaining),<sup>68</sup> mediation (negotiation with the help of a third party with no decision-making power),<sup>69</sup> and arbitration (private judging).<sup>70</sup> These processes are not new; they exist informally in every culture throughout recorded history, for example through the work of village elders and religious leaders. What evolved after 1960 was the notion of institutionalizing them either outside government or in relation to it as civil society's way of enhancing community, its problem-solving capacity, social capital, and justice. When used in response to an existing conflict involving specific

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<sup>67</sup> Jerome T. Barrett with Joseph Barrett, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, SOCIAL, AND CULTURAL MOVEMENT* (2004).

<sup>68</sup> Roger Fisher, William Ury, and Bruce Patton, *GETTING TO YES* (2d Ed.) (1991).

<sup>69</sup> For a detailed description of the process and examples, see Christopher Moore, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (3D ED) (2003). For an alternative model of practice, transformative mediation, see Robert A. Baruch Bush and Joseph Folger, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (Rev. Ed. 2005). As to labor and employment uses, see John T. Dunlop and Arnold M. Zack, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* (1997).

<sup>70</sup> Arbitration has a long history of use for disputes in labor relations and business in the private sector. The classic treatise on labor arbitration is Alan Miles Ruben, Frank Elkouri, and Edna Asper Elkouri, *HOW ARBITRATION WORKS* (6th Ed. 2001). For a discussion of arbitration in dispute system designs involving employment disputes, see David B. Lipsky, Ronald L. Seeber, & Richard D. Fincher, *EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS* (2003). On commercial arbitration, see Thomas J. Stipanowich and Peter H. Kaskell, eds., *COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS* (2001).

disputants, this movement became known as alternative dispute resolution (ADR). It was later renamed as ‘appropriate’ dispute resolution, in response to criticism that ADR exists independently from the justice system and is thus not ‘alternative’ in all cases<sup>71</sup> and the traditional civil justice system is intended to resolve disputes.<sup>72</sup>

The ADR movement gave rise to community mediation centers funded in part by the US Department of Justice to address social unrest during the 1960s.<sup>73</sup> During the 1970s and 1980s, the business community adopted ADR to reduce transaction costs in addressing conflict in commercial dealings.<sup>74</sup> During the 1990s, ADR became institutionalized in many judicial systems, including both state<sup>75</sup> and federal courts<sup>76</sup> in the US and increasingly in Europe<sup>77</sup> and other developed economies such as Australia.<sup>78</sup> During past decade, it became institutionalized in US federal agencies.<sup>79</sup>

Civil society contributed to dissemination of these processes in a variety of ways. What follows are a few examples but by no means a complete account. In the United States,

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<sup>71</sup> Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2689 (1995)

<sup>72</sup> E.g., Janet Reno, U.S. Attorney General, a strong advocate of ADR, in her Address to the American Judicature Society (Feb. 5, 1998), available at [http://www.usdoj.gov/archive/ag/speeches/1998/0205\\_ag\\_cgo.htm](http://www.usdoj.gov/archive/ag/speeches/1998/0205_ag_cgo.htm):

At the Department of Justice, I took steps two years ago, to make the use of what I call, not alternative dispute resolution, but appropriate dispute resolution, a reality. I use appropriate dispute resolution, because sometimes a trial is by far and away the most appropriate method.

<sup>73</sup> See the website of the National Association for Community Mediation, [www.nafcm.org](http://www.nafcm.org).

<sup>74</sup> See the websites of the American Arbitration Association, [www.adr.org](http://www.adr.org), and the International Institute for Conflict Prevention and Dispute Resolution, [www.cpradr.org](http://www.cpradr.org) (formerly known as the CPR Institute).

<sup>75</sup> See the website of the National Center for State Courts, [www.ncsconline.org](http://www.ncsconline.org).

<sup>76</sup> See the website of the Federal Judicial Center, [www.fjc.gov](http://www.fjc.gov).

<sup>77</sup> Nadja Alexander (ed.), *GLOBAL TRENDS IN MEDIATION* (2003). See also website of the European Commission, [http://ec.europa.eu/civiljustice/adr/adr\\_gen\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_gen_en.htm).

<sup>78</sup> Nadja Alexander (ed.), *GLOBAL TRENDS IN MEDIATION* (2003).

<sup>79</sup> Lisa B. Bingham and Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate its Success?* 6 J. OF PUB. ADMINISTRATION, RESEARCH AND THEORY 383 (1996); Jeffrey M. Senger, *FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT* (2003); Lisa B. Bingham, *MEDIATION AT WORK: TRANSFORMING WORKPLACE CONFLICT AT THE UNITED STATES POSTAL SERVICE* (2003); see also website of the Federal Interagency ADR Working Group, [www.adr.gov](http://www.adr.gov).

beginning in the 1960's, philanthropic institutions such as the Ford, Carnegie, Rockefeller, and Hewlett Foundations, among others, funded the movement. Hewlett's contribution was central to the development of ADR in the US.<sup>80</sup> In Europe and the newly independent states following the end of the Cold War in the 1990's, these same philanthropies, together with the European Union,<sup>81</sup> the American Bar Association and its Foundation,<sup>82</sup> the Soros Foundation,<sup>83</sup> the World Bank,<sup>84</sup> and the USAID,<sup>85</sup> among others, funded various training and efforts at program development to strengthen the rule of law. Similar projects have recently been undertaken in China and other parts of Asia by the Asia Foundation.<sup>86</sup> In addition, there have been numerous independent initiatives and exchanges across national boundaries through institutions of higher education, primarily law schools, for example regarding the training of judges in South and Central America, Eastern Europe, the newly independent states, and Asia.<sup>87</sup>

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<sup>80</sup> For the history of this program see [www.hewlett.org/Publications/conflictresolutionbrief.htm](http://www.hewlett.org/Publications/conflictresolutionbrief.htm). For explanatory monographs on the full spectrum of its work, see Douglas Henton, John Melville, Terry Amsler, and Malka Kopell, *COLLABORATIVE GOVERNANCE: A GUIDE FOR GRANTMAKERS* (2005); Rosemary O'Leary, Malka Kopell, and Terry Amsler, *ENVIRONMENTAL CONFLICT RESOLUTION: A GUIDE FOR GRANTMAKERS* (2005)(see [www.hewlett.org/ECRguide.htm](http://www.hewlett.org/ECRguide.htm)). For a summary of research gaps Hewlett identified upon completion of its funding program, see Robert A. Baruch Bush and Lisa B. Bingham, *Knowledge Gaps: The Final Conference of the Hewlett ADR Theory Centers*, 23 *CONFLICT RESOL. Q.* 99-122 (2005).

<sup>81</sup> See website of the European Commission-sponsored Project *Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in MEDA Countries*, <http://www.adrmeda.org/>.

<sup>82</sup> See website of the American Bar Association, [http://www.abanet.org/rol/europe\\_and\\_eurasia/](http://www.abanet.org/rol/europe_and_eurasia/).

<sup>83</sup> See website of the Open Society Institute, a Soros Foundations Network, <http://www.soros.org/initiatives>.

<sup>84</sup> See website of the World Bank regarding dispute resolution, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20745989~menuPK:1990313~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> and related material regarding governance and anti-corruption initiatives, <http://go.worldbank.org/CMW4R42O70>.

<sup>85</sup> See website of US Agency of International Development, [http://www.usaid.gov/locations/europe\\_eurasia/press/success/2006-12-24.html](http://www.usaid.gov/locations/europe_eurasia/press/success/2006-12-24.html).

<sup>86</sup> See programs on law and governance on the website of the Asia Foundation, <http://asiafoundation.org/program/>.

<sup>87</sup> E.g., see website of the Institute for Legal Infrastructure at McGeorge School of Law, University of the Pacific, Sacramento, California, <http://www.mcgeorge.edu/x1129.xml>.

Common ADR processes for public conflict resolution<sup>88</sup> may include negotiation,<sup>89</sup> which is considered a form of ADR because it is different from traditional competitive bargaining and is the foundation for all the other processes except arbitration.<sup>90</sup> Conciliation is a term used when an agency attempts to negotiate a private settlement between two or more parties to a dispute subject to the agency's jurisdiction.<sup>91</sup> This term historically also referred to mediation in the context of labor relations and collective bargaining, as in the Federal Mediation and Conciliation Service.<sup>92</sup> Facilitation is widely used in environmental conflict resolution.<sup>93</sup> This process is more commonly used in multi-party issues or for large groups<sup>94</sup> and is considered less interventionist than mediation. Mediation is the most widely

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<sup>88</sup> For a basic overview, see Lisa B. Bingham, *Alternative Dispute Resolution in Public Administration*, in Phillip J. Cooper and Chester A. Newland (eds), *HANDBOOK OF PUBLIC LAW AND ADMINISTRATION*, 546-566 (1997).

<sup>89</sup> Principled or interest-based negotiation (also called collaborative problem-solving) is sometimes considered a form of dispute resolution. Disputants negotiate directly and attempt to untangle interpersonal and substantive issues, focus on interests not rights or positions, promote creative problem-solving, and use principles rather than power to reach agreement. Fisher, Ury, and Patton, *supra* note \_\_\_. For a comprehensive review of the negotiation literature, see Roy J. Lewicki, David M. Saunders, and Bruce Barry, *NEGOTIATION* (5TH ED. 2005). For a summary of principled negotiation applied to collaborative networks and a bibliography, see Rosemary O'Leary and Lisa Blomgren Bingham, *A MANAGER'S GUIDE TO RESOLVING CONFLICTS IN COLLABORATIVE NETWORKS* (2007).

<sup>90</sup> For an example of how the executive branch has encouraged the use of principled negotiation and collaborative problem-solving in governance, see the Office of Management and Budget and President's Council on Environmental Quality *MEMORANDUM ON ENVIRONMENTAL CONFLICT RESOLUTION* (2004), available on the web at <http://www.whitehouse.gov/ceq/joint-statement.html>.

<sup>91</sup> For example, The Civil Rights Act of 1964 (commonly known as Title VII) mandates conciliation for disputes regarding discrimination in employment. See 42 USC Sec. 2000e-4(g)(4)(2008), which provides that the EEOC may:

upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this subchapter, to assist in such effectuation by *conciliation* or such other remedial action as is provided by this subchapter....[emphasis added]

<sup>92</sup> 29 USC Sec. 172 (2008)(section creating the FMCS and empowering it to provide mediation and conciliation services).

<sup>93</sup> A facilitator structures group discussions toward a voluntary settlement, asking questions and using collaborative problem-solving techniques. For a detailed explanation of the process and examples, see Roger Schwarz, *THE SKILLED FACILITATOR: A COMPREHENSIVE RESOURCE FOR CONSULTANTS, FACILITATORS, MANAGERS, TRAINERS, AND COACHES*, 2ND EDITION (2002) and Roger Schwarz, Anne Davidson, Peg Carlson, Sue McKinney, *THE SKILLED FACILITATOR FIELDBOOK: TIPS, TOOLS, AND TESTED METHODS FOR CONSULTANTS, FACILITATORS, MANAGERS, TRAINERS, AND COACHES* (2005).

<sup>94</sup> Susan L. Carpenter and W. J. D. Kennedy, *MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR PROFESSIONALS IN GOVERNMENT, BUSINESS, AND CITIZEN'S GROUPS* (2001).



used process in the federal government.<sup>95</sup> This process is also widely used in environmental and public policy conflict resolution.<sup>96</sup> These processes all involve developing consensus-based solutions.

However, dispute resolution also includes decision-based processes. Fact-finding is a form of advisory arbitration where a neutral conducts an informal evidentiary hearing to narrow disputed facts. Mini-trials are a form of advisory arbitration where a neutral conducts a more formal but still abbreviated evidentiary hearing, and advises on disputed questions of law. Arbitration is private adjudication or private judging.<sup>97</sup> Dispute resolution includes not only processes, but also programs housing choices among a variety of processes. For example, ombuds use an in-house third party neutral to assist people in handling conflict.<sup>98</sup> Properly structured, these programs may contribute to systemic change.<sup>99</sup>

There is substantial research on these processes in the fields of social psychology, organizational behavior, political science, economics, planning, communications, education,

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<sup>95</sup> Mediation is assisted negotiation, in which a third party neutral attempts to help parties reach a mutual agreement. Sometimes the mediator uses shuttle diplomacy, in which the parties will separately and mostly in confidence communicate their interests, goals and concerns. The mediator identifies a range of possible settlements, but has no power to impose a solution or decide the case. See generally, Christopher W. Moore, *THE MEDIATION PROCESS* (3D ED) (2003) and Robert A. Baruch Bush and Joseph P. Folger, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2004).

<sup>96</sup> See Lawrence Susskind and Jeffrey Cruikshank, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987) and Lawrence Susskind, Sarah McKearnan, and Jennifer Thomas-Larmer, *THE CONSENSUS-BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (1999).

<sup>97</sup> Generally, a third party neutral conducts an informal hearing on disputed issues of fact and/or law and renders an award or decision. This process may be voluntary or mandatory, and may be advisory or binding. For discussions of adhesive arbitration that create arbitration agreements as a condition of employment or entering into a consumer transaction, see Thomas Metzloff, ed., *Symposium: Mandatory Arbitration*, 67 *LAW & CONTEMP. PROBS.* 1 (2004). Sometimes arbitration is imposed by law, as in the case of the Amateur Sports Act mandating arbitration for disputes regarding issues arising in Olympic sports competition. 36 USC § 220529 (2008).

<sup>98</sup> The ombuds can help refer employees or citizens to the appropriate dispute resolution process, can engage in conflict coaching, and can help manage the variety of agency processes. For a wealth of resources and standards of practice, see the website of the International Ombuds Association, <http://www.ombudsassociation.org>.

<sup>99</sup> Susan Sturm and Howard Gadlin, *Conflict Resolution and Systemic Change*, 1 *J. DISP. RESOL.* 1 (2007).

labor and industrial relations, among other fields.<sup>100</sup> One leading theory is that of procedural justice, which suggests that people will judge the outcome of a dispute process to be fair if they judge the process for reaching that outcome to be fair and if they are given opportunities for voice and respectful treatment.<sup>101</sup> Researchers have also identified interactional and interpersonal justice as frames for understanding disputant preferences for dispute resolution processes.<sup>102</sup>

### III. Governance and the Policy Process

Together, these developments have begun to change the policy process at every jurisdictional level, whether local, regional, state, national, transnational, or global. At its most general, the policy process consists of stages in a continuous and dynamic system. The following stages assume a division among legislative, executive, and judicial powers.<sup>103</sup> The stages include identifying approaches or tools for solving the policy problem,<sup>104</sup> setting priorities among these, selecting from among the priorities, drafting proposed legislation, enacting legislation, identifying policy problems left for the executive to resolve within the boundaries of the legislation, identifying approaches or tools for regulations, setting priorities for these, selecting from among them, drafting proposed regulations, enacting regulations,

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<sup>100</sup> Morton Deutsch, Peter T. Coleman, Eric C. Marcus (Eds), *THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE*, 2nd Edition (2006). For review articles on field studies and evaluation of the uses of mediation in the contexts of employment, education, criminal justice, the environmental, family disputes, civil litigation in courts, and community disputes, see Tricia S. Jones, ed., *Conflict Resolution in the Field: Special Symposium*, 22 *CONFLICT RESOL. Q.* 1-320 (2004).

<sup>101</sup> E. Allan Lind and Thomas R. Tyler, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988).

<sup>102</sup> For a review of recent literature, see Tina Nabatchi, Lisa Blomgren Bingham, and David H. Good *Organizational Justice and Workplace Mediation: A Six Factor Model*, 18 *INT'L J. CONFLICT MGMT* 148 (2007).

<sup>103</sup> I use the term power rather than 'branch' because in some nations, multiple powers are combined in a single branch of government. This discussion is framed largely in terms of the domestic context of the United States, but it could as easily map processes in other national contexts or transnationally.

<sup>104</sup> Lester Salamon, ed. *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (2002).

implementing regulations (through project or program management, permits), enforcing legislation and regulations through executive power adjudication, and enforcing these through litigation within the jurisdiction of the judicial power. It is arbitrary to begin at any one point because the system is continuous and dynamic. For example, a national court may decide a controversial case that prompts a wave of legislation. The legislature may adopt a law that ends up in court. However, it is conventional to begin with identifying a policy problem. Figure 1 summarizes this framework in a linear format.

INSERT FIGURE 1 ABOUT HERE

Conflict can and will occur at each of these stages. One helpful metaphor is the flowing stream.<sup>105</sup> There is no fixed boundary for each of these stages on the policy continuum. Upstream includes the earliest stages in the policy process up to the point of implementation; these are either legislative or quasi-legislative in nature.<sup>106</sup> After legislation is enacted, agencies engage in quasi-legislative action aimed at filling in the details and establishing general standards of behavior for prospective or future application. Traditionally, this upstream action entails limited public participation through, for example, committee testimony, written comment, or speaking briefly at public hearings.

However, I argue here that new forms of participatory governance are increasingly used upstream in the policy process and that we need to re-examine the legal framework within which public agencies do this work. These new forms include deliberative democracy, e-democracy, public conversations, participatory budgeting, citizen juries, study circles, collaborative policy-making, and other forms of deliberation and dialogue among groups of

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<sup>105</sup> Rosemary O'Leary and Lisa B. Bingham, eds., *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* (2003).

<sup>106</sup> Lisa B. Bingham, Tina Nabatchi, and Rosemary O'Leary, *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, 65 *PUB. ADMIN. REV.* 547 (2005).

stakeholders or citizens.<sup>107</sup> They also include focus groups, roundtables, deliberative town meeting forums, choice work dialogues, national issues forums, cooperative management bodies, and other partnership arrangements. The underlying theory is that these processes promote a more civil public discourse and more collaborative and deliberative policy-making among citizens.

Using the framework of the US Institute for Environmental Conflict Resolution,<sup>108</sup> midstream stages in the policy process include rulemaking, implementation, and program development. These are both quasi-legislative and quasi-judicial.<sup>109</sup> An agency may use negotiated rulemaking to draft proposed regulations.<sup>110</sup> The agency may need to craft a permit for a particular land use or development. In this case, implementation through permitting or licensing both sets future standards and also involves defined actors with a specific history of past behaviors (for example, organizations emitting pollutants).<sup>111</sup> However, we again see increasing use of new ways to engage the public in this stage of the policy process. For example, the agency might use consensus policy-making or mediation to reach consensus on the permit terms. There are also collaborative public management

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<sup>107</sup> David E. Booher, *Collaborative Governance Practices and Democracy*, 93 NATIONAL CIVIC REV. 32 (2004); Archon Fung and Erik Olin Wright (eds). DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE (2003); Lars Hasselblad Torres, DELIBERATIVE DEMOCRACY: A SURVEY OF THE FIELD, A REPORT PREPARED FOR THE WILLIAM AND FLORA HEWLETT FOUNDATION (2003)(copy on file with author); Abigail Williamson, MAPPING PUBLIC DELIBERATION (2004)(copy on file with author).

<sup>108</sup> See [www.ecr.gov](http://www.ecr.gov).

<sup>109</sup> Lisa B. Bingham, Tina Nabatchi, and Rosemary O'Leary, The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government, 65 PUB. ADMIN. REV. 547 (2005).

<sup>110</sup> Negotiated rulemaking has been in use since the 1980s and has support in law. Lawrence Susskind and Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133 (1985); Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986).

<sup>111</sup> Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. REV. 1 (1997)(describing cases of negotiated permits for industrial discharges into air and water).

networks that cooperate to implement policy.<sup>112</sup> Thus, I argue that we now find a mix of participatory governance and ADR processes used midstream.

Downstream stages in the policy process are quasi-judicial or judicial, although these are broad over-generalizations. Judicial and quasi-judicial action is aimed at determining rights and responsibilities among a defined set of actors based on past events. Traditionally, these processes include formal and informal adjudication and informal agency action resulting in an order. However, we now find wide spread agency uses of ADR, including mediation, facilitation, early neutral assessment, and arbitration. Generally, ADR, and not deliberative or participatory democracy, is associated with these stages of the policy process. Figure 2 summarizes this array of processes.

INSERT FIGURE 2 ABOUT HERE

The problem with the traditional account of the policy process is that it is usually understood to refer to a single sovereign actor with legal jurisdiction over certain substantive policy arenas pursuant to a defined delegation of authority. However, governance entails activity among multiple actors with potentially overlapping jurisdiction. ADR has a well-established history in which agencies have used it to address complex disputes involving multiple actors, sectors, and levels of government. This is also true to a lesser extent for collaborative public management, but not true of deliberative and participatory democracy.

In sum, we have arrived at a point in the relation between government and private, non-profit, or citizen actors where we have a multiplicity of new modes for interaction in the

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<sup>112</sup> Allyson Barker, Holly Chamberlain, Jeremy Eyre, Bernadette Gomez, Jess Hofberger, Jason Jones, Aaron Kingston, Mark McBride, Kirk Robinson, Dean Smith, Mark Smith, Megan Smith, Junior Staff Members, Robert Ressayre ed., Senior Staff Member, *The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis*, 23 J. LAND RESOURCES & ENVTL. L. 67 (2003)(observing that “collaborative groups’ are coalitions of interested parties affected by land-use policies, organized to develop and present a consensual resource management plan to the relevant federal agency”).

policy process. We have different names for many ways of engaging citizens and stakeholders across the policy continuum, but we have not arrived at a comprehensive understanding of how these relate to each other or to the existing legal framework for governance. In order to illustrate this development in more detail, the following section breaks the policy process up into fifteen steps with examples of how various processes are loosely arrayed from upstream to downstream along the policy process. The discussion combines illustrations from local, regional, state, and national government action. Table 1 summarizes these illustrations along the array.

INSERT TABLE I ABOUT HERE

#### **A. Upstream -- Legislative and Quasi-legislative Uses of Dialogue and Deliberation**

Processes for resolving conflict in the policy process vary along several dimensions, including the participants, their authority and power to influence policy decisions, and the process for communication and decision-making.<sup>113</sup> Fung suggests that categories of participants include the diffuse public sphere, open self-selection, open targeted recruiting, random selection, lay stakeholders, professional stakeholders, elected representatives, and expert administrators. He proposes that types of authority include personal benefits, communicative influence, advise and consult, co-governance and direct authority. Lastly, he identifies six modes of communication and decision-processes: participants listen as spectators, express preferences, develop preferences, aggregate and bargain, deliberate and negotiate, and deploy technique and expertise. Using these three dimensions, he creates a ‘democracy cube’, on which he maps different processes.

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<sup>113</sup> Archon Fung, *Varieties of Participation in Complex Governance*. 66 PUB. ADMIN. REV. 66 (2006).

Others have described different levels of public participation. Arnstein's ladder of participation ranges from manipulation of the public and therapy at the low end, through levels including informing, consultation, and placation in the middle, to partnership, delegated power, and citizen control on the upper steps of the ladder.<sup>114</sup> The International Association for Public Participation has a Spectrum of Participation in which agencies have the choice to inform, consult, involve, collaborate, or empower the public.<sup>115</sup> Each form of public participation has an implicit promise to the public, ranging from keeping the public informed to implementing what the public decides.

Other commentators have suggested that the quality of these processes depends upon how well they satisfy three criteria: inclusiveness, deliberativeness, and influence.<sup>116</sup> Inclusiveness is the quality of getting a broadly representative portion of the relevant community to participate. Deliberativeness has to do with the quality of dialogue, information exchanged, and civility of the conversation among participants and decision-makers. Influence has to do with the impact of deliberation on policy and decision-making.

The discussion below merely describes a selection of processes; it does not advocate for any particular model. Each model or process has advantages and disadvantages; each falls in a different space on Fung's democracy cube, Arnstein's ladder, or IAP2's spectrum. Moreover, a number of the processes are used at more than one stage of the policy process in varying ways. For example, a number of the same processes can be used both for policy-

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<sup>114</sup> Sherry Arnstein, *A Ladder of Citizen Participation*, 35 J. OF THE AMERICAN INSTITUTE OF PLANNERS 216 (1969).

<sup>115</sup> See <http://iap2.org/displayassociationlinks.cfm>.

<sup>116</sup> Lyn Carson and Janette Hartz-Karp, *Adapting and Combining Deliberative Designs*, in John Gastil and Peter Levine (eds.), *THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY*, 120 (2005).

making in legislation at the local, state, or national level, and also for rulemaking or adopting administrative agency regulations (see Table 1).

### **Step 1: Identifying a Policy Problem**

Citizens can identify a policy problem through direct democracy, which includes the referendum and initiative process. Government can invite citizens to a community visioning process, in which the public in small groups engages in structured brainstorming and dialogue with the help of a professional facilitator regarding issues facing the community, for example, how to use a reclaimed polluted site.<sup>117</sup> Where an existing policy controversy has polarized leaders in various community constituencies and organizations, the Public Conversations Project uses facilitated, face-to-face dialogue and communication to foster better mutual understanding and reduce stereotyping, defensiveness, or polarization.<sup>118</sup> Its process focuses on community leaders and involves repeated, private, facilitated, small group discussions over a period of months or longer. The goal is not agreement, but enhanced communication. This process was used for leaders in the abortion/right to life controversy in Boston, Massachusetts, USA.

### **Step 2: Identifying Approaches for Solving the Policy Problem**

Government can use a citizen jury for legislative purposes, that is, in a policy-making context, as distinguished from civil or criminal juries that do for fact-finding in a judicial or court setting. In Denmark, the citizens' jury lets a representative group participate in the legislative process:

“[T]hey are comprehensively informed about a technological issue, allowed to question leading experts in the field and finally answer certain preset questions. The

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<sup>117</sup> See [www.epa.gov/superfund/tools/pdfs/9comvis.pdf](http://www.epa.gov/superfund/tools/pdfs/9comvis.pdf).

<sup>118</sup> See [www.publicconversations.org](http://www.publicconversations.org).



jury is not required to achieve a consensus regarding the answers it gives and in closing, the jury can vote on different possible answers, which can be formulated by the jury itself. The purpose of a citizens' jury is to acquire an informed, well-conceived and constructive expression of citizens' opinions."<sup>119</sup>

The citizen jury in Denmark has addressed complex matters of technology policy, such as genetically manipulated plants. Planning cells and consensus conferences are closely related to the citizen's jury; in both processes citizens deliberate to reach consensus on a policy issue.<sup>120</sup>

Study Circles produce materials for citizens to engage in dialogue on issues such as civil rights, criminal justice, diversity, education, student success, growth and sprawl, immigration, and other topics.<sup>121</sup> They help organize a representative and diverse cross section of the city for community-wide dialogue. Study circle groups use facilitators. Groups meet across the community for a period of months. After these small groups work in parallel, they come together to share ideas for solving public problems in ways that will benefit the whole community.

What distinguishes these approaches is that citizens have the power to conduct a broad-ranging inquiry into the policy problem; they are not simply given pre-defined options to choose among.

### **Step 3: Setting Priorities Among Solutions to a Policy Problem**

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<sup>119</sup> See [www.tekno.dk](http://www.tekno.dk).

<sup>120</sup> Lyn Carson and Janette Hartz-Karp, *Adapting and Combining Deliberative Designs*, in John Gastil and Peter Levine (eds.), *THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY*, 120 (2005).

<sup>121</sup> Patrick I. Scully and Martha L McCoy, *Study Circles: Local Deliberation as the Cornerstone of Deliberative Democracy*, in John Gastil and Peter Levine (eds.), *THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY*, 199 (2005). See also [www.everyday-democracy.org/en/index.aspx](http://www.everyday-democracy.org/en/index.aspx).

One model increasingly in use is the AmericaSpeaks 21st Century Town Meeting,<sup>122</sup> which is also used under the name Global Voices in international settings, and as the Citizens Summit in Denmark<sup>123</sup> and in combination with other processes such as the citizens' jury, televote, and consensus conference in Australia.<sup>124</sup> These are high technology, large-scale meetings.

AmericaSpeaks convened "Listening to the City," a 4,800-person group that was a demographically representative sample of the electorate of New York City for a full day of dialogue and deliberation about how to redevelop Ground Zero, the site of the former World Trade Center. At tables of eight to ten people, each with a professional mediator or facilitator, citizens had a chance to talk about plans for Ground Zero. They exchanged ideas, discussed priorities, and created knowledge together, which was projected onto giant screens around the ballroom, so that everyone could see and share the ideas coming out from each small table's discussion. Citizens then expressed preferences about priorities for these ideas, using hand held keypad voting devices that recorded their preferences together with demographic information. By the end of the day, the AmericaSpeaks 'theme team,' a combination of staff and citizens, was able to analyze all this data, and to prepare a written report of what the people wanted. This report was submitted to decision-makers and shared with citizens at the end of the day. This model is used for large-scale citizen meetings.<sup>125</sup> A

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<sup>122</sup> Carolyn Lukensmeyer and Steven Brigham, *Taking Democracy to Scale: Large Scale Interventions -- For Citizens*, 41 JOURNAL OF APPLIED BEHAVIORAL SCIENCE 47 (2005); Carolyn J. Lukensmeyer, Joseph Goldman, and Steven Brigham, *A Town Meeting for the 21st Century*, in John Gastil and Peter Levine (eds.), THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY, 157 (2005). See also [www.americaspeaks.org](http://www.americaspeaks.org).

<sup>123</sup> See [www.tekno.dk](http://www.tekno.dk).

<sup>124</sup> Lyn Carson and Janette Hartz-Karp, *Adapting and Combining Deliberative Designs*, in John Gastil and Peter Levine (eds.), THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY, 120 (2005).

<sup>125</sup> Lukensmeyer and Brigham, *supra* note \_\_\_\_.

similar process was used in Davos at the World Economic Forum.<sup>126</sup> There is ongoing empirical research on the effectiveness of this process. Preliminary findings suggest that care needs to be taken in clarifying its relation to decision-making; interviews a year or two after the Town Meetings on regional land use plans in Chicago and Cincinnati, Ohio found that citizens did not know whether there had been specific policy recommendations, or whether any policy recommendations had been adopted and implemented by government decision-makers.<sup>127</sup> There is evidence that individual participants experience increased political and personal efficacy and enhanced trust in government.<sup>128</sup>

The Kettering Foundation organizes large-scale citizen meetings, called National Issues Forums, into small groups for structured discussions of a limited number of policy choices.<sup>129</sup> It provides a briefing booklet for each issue with non-partisan information allowing citizens to better understand the costs, benefits, impacts, and consequences of various policy approaches. Through discussion with one another, citizens may identify their own preferences in light of better information. The briefing booklet provides a limited number of specific policy options for citizens to compare and contrast. This model is most commonly used at the local government or municipal level for local ordinances and policy-choices, or problems such as racial or ethnic conflict within a city.

In both of these processes, participants deliberate from the ground up on a defined policy problem. They can have an open-ended discussion on their priorities. Neither process is designed to develop unanimity or consensus. Instead, both processes help citizens clarify

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<sup>126</sup> See <http://www.globalvoices.org/>.

<sup>127</sup> Lisa-Marie Napoli, Rebecca Nesbit, and Lisa Blomgren Bingham, *Assessing Deliberation: Agenda-Setting, Impacts, and Outcomes* (2006). Paper Presented at the conference of the National Coalition for Dialogue and Deliberation, San Francisco, CA (August 3-6). Manuscript available on request from authors.

<sup>128</sup> See doctoral dissertation of Tina Nabatchi (2007)(copy on file with author).

<sup>129</sup> See the website of the Kettering Foundation and National Issues Forums, [www.kettering.org](http://www.kettering.org).

their own policy preferences and better understand the preferences of others. In theory, this permits some moderation of extreme views.

Most recently, the European Union has undertaken a series of Citizens Forums for the purpose of dialogue and deliberation. Called the European Citizens' Consultations, initially it involved citizens from 25 Member States to deliberate "what Europe do we want" and select three topics for future forums in 25 Member States.<sup>130</sup> The intention is to create the first-ever pan-European dialogue and strengthen European democracy. In addition, Europe is developing a network of NGOs from civil society, including independent foundations, civic associations, and non-profit organizations to help support and implement large-scale policy dialogues. Sponsors include the German Robert Bosch Foundation, the Charles Léopold Mayer Foundation (France), the Compagnia di San Paolo (Italy), the European Cultural Foundation (Netherlands), and the Riksbankens Jubileumsfond (Sweden). In their planned use of technology and large scale dialogue, the planned summits bear some similarity to the AmericaSpeaks process.

#### **Step 4: Selecting from Among the Priorities**

Processes for selecting among priorities may either be for the purpose of informing decision-makers about citizens' preferences, as is the case with deliberative polling, or may be agreement-seeking processes aimed at a single final policy choice, such as policy dialogues or policy consensus processes. Daniel Yankelovich, a leading advocate of dialogue and deliberation, served as an influential pollster in the political arena for years.<sup>131</sup> He observed that polling results were unstable in that citizens' answers changed in light of new

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<sup>130</sup> See [www.european-citizens-consultations.eu/4.0.html](http://www.european-citizens-consultations.eu/4.0.html). Professor Aman suggests that the EU's democracy has certain deficits. Alfred C. Aman, *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* (2004).

<sup>131</sup> Daniel Yankelovich, *THE MAGIC OF DIALOGUE: TRANSFORMING CONFLICT INTO COOPERATION* (1999).

information; he advocates deliberation and dialogue to strengthen democracy by helping citizens “come to public judgment.”<sup>132</sup> He advocates a model called ChoiceWork Dialogues, which engages citizens in three-stages: consciousness-raising, working through a problem, and decision-making or resolution.<sup>133</sup> Key to this process is the distinction between dialogue and debate. Dialogue is about respectful exchanges of information and views in which people listen to find common ground and build consensus; debate is about winning and losing, in which people listen to find weaknesses and counterarguments.

Developed by Ackerman and Fishkin, deliberative polling is another process for getting better informed citizen preferences.<sup>134</sup> Participants have access to policy experts and an opportunity to deliberate with others.<sup>135</sup> Deliberative polls have been conducted in the US, Denmark, China, Australia, and other parts of Asia. An initial survey assesses participant views before deliberation. Participants then have an opportunity to examine non-partisan policy information and to ask a balanced panel of experts any questions they feel are relevant. They deliberate among themselves over the substance of the policy problem. At the end of the process, organizers again take an opinion survey to assess participant preferences. A critical feature to deliberative polls is that they involve a random sample of citizens; this means that the results of the process can provide decision-makers with a statistically significant, representative account of citizens’ preferences after dialogue. Empirical research over the past decade has documented that preferences change before and after deliberation,

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<sup>132</sup> Daniel Yankelovich, *COMING TO PUBLIC JUDGMENT: MAKING DEMOCRACY WORK IN A COMPLEX WORLD* (1991).

<sup>133</sup> He is affiliated with the organization Viewpoint Learning ([www.viewpointlearning.com](http://www.viewpointlearning.com)).

<sup>134</sup> Bruce Ackerman and James Fishkin, *DELIBERATION DAY* (2004).

<sup>135</sup> James Fishkin and Cynthia Farrar, *Deliberative Polling: From Experiment to Community Resource*, in John Gastil and Peter Levine (eds), *THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE 21ST CENTURY*, 68 (2005); see generally the website for the Center for Deliberative Democracy at Stanford University, <http://cdd.stanford.edu/research/>.

illustrating that point-in-time opinion polls in the absence of complete information are unreliable as measures of citizen preferences. Critics of deliberation suggest that opinions become more extreme;<sup>136</sup> however, this empirical study has been criticized as having a flawed research design because the participants were not diverse but rather started deliberation with a similar viewpoint and because they were only permitted to deliberate for fifteen minutes,<sup>137</sup> which is hardly sufficient time for a meaningful dialogue or exchange. It stands to reason that a group of like-minded citizens who have their views validated rather than challenged in a brief but large-scale meeting would become more committed to those views.

Agencies also use agreement-seeking processes in this stage of the policy continuum, such as a policy dialogue or the policy solutions model; these are described under implementation.

### **Step 5: Drafting Proposed Legislation**

The 21st Century Town Meeting model of AmericaSpeaks has been used with success to foster a national discussion on a major issue for legislation in Americans Discuss Social Security. In this dialogue, nearly 50,000 Americans in 50 states discussed Social Security reform and alternative legislative solutions to the problem of funding a national pension welfare system.<sup>138</sup> Organizers held two 10-city teleconferences, a five-city regional teleconference, five town meetings, and a seven-week online policy dialogue. This project was a break-through, because before this experiment in civic engagement, legislators found

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<sup>136</sup> David Schkade, Cass R. Sunstein, and Reid Hastie, *What Happened on Deliberation Day?*, Working Paper 06-19. AEI-Brookings Joint Center, [www.aei-brookings.org](http://www.aei-brookings.org) (2006); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71 (2000).

<sup>137</sup> Personal conversations with Terry Amsler, Institute for Local Government, Sacramento, CA ([www.ca-ilg.org](http://www.ca-ilg.org)).

<sup>138</sup> See [www.americaspeaks.org/projects/cases/adss/index.htm](http://www.americaspeaks.org/projects/cases/adss/index.htm).

the problem of reforming this pension system to be politically intractable. Participants provide legislators with direct evidence that reform was politically feasible.

A model that received substantial attention is the Citizens Assembly in British Columbia, Canada.<sup>139</sup> This consisted of one male and one female citizen randomly selected from each municipality or county in British Columbia, with a total membership of over 100 citizens. Their assignment was to draft a new structure for the electoral process in British Columbia. The Canadian national government agreed to submit their proposal to a referendum of the voters. The Citizens Assembly met and deliberated regularly for a year (2004-2005) and reached consensus on a proposal; that proposal narrowly failed -- it was approved by a 58% margin, but required a supermajority because it amended the provincial constitution. NGOs in California are currently proposing a citizens assembly model to address issues of state governance.

### **Step 6: Enacting Legislation**

The traditional forms for enacting legislation include direct democracy (the referendum and initiative processes) and representative democracy, in which elected representatives make policy choices for citizens. There have been efforts to reduce the adversarial nature of the legislative process through training of legislators in recent years. A leader in the US for this work is the Policy Consensus Initiative, which recently sponsored a two-day workshop entitled ‘Beyond Bickering’, at which more than 60 members of the Minnesota Legislature learned about dispute resolution and practical steps to finding consensus on contentious issues” in a legislative setting.<sup>140</sup>

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<sup>139</sup> See [www.citizensassembly.bc.ca](http://www.citizensassembly.bc.ca).

<sup>140</sup> See [www.policyconsensus.org/events/beyondbickering\\_MN.html](http://www.policyconsensus.org/events/beyondbickering_MN.html). This effort was also sponsored by the US National Council of State Legislators.

### **Step 7: Identifying Policy Problems for the Executive Power to Resolve within the Boundaries of the Legislation**

As with legislative action, so too conflict arises in the quasi-legislative process of developing rules and regulations to flesh out the details of legislation and carry its public policy choices into effect. The same processes are useful. At the local government level, community visioning is used for land use planning. The Twenty-first Century Town Meeting has been used for regional land use and economic development planning, for example in the region surrounding Chicago, Illinois, and currently for the Voices and Choices project in northeast Ohio,<sup>141</sup> a project funded by a 70-member collaborative of philanthropies to foster an unprecedented civic engagement initiative that will reach 39,000 people.

### **Step 8: Identifying Approaches or Tools for Regulations**

Again, deliberative polling, study circles, citizen juries, and various forms of policy dialogues can help administrators get a better understanding of citizen preferences for various policy tools or approaches. The US Department of Health and Human Services and Centers for Disease Control and Prevention is engaged in a national process combining collaborative public management in a network of stakeholders with civic engagement to address the regulatory problem of a possible flu pandemic and how to manage supplies of a theoretical vaccine.<sup>142</sup> The project used multiple methods to get citizens involved.<sup>143</sup>

## **B. Midstream in the Policy Process -- Deliberative or Participatory Governance, Collaborative Public or Network Management, and ADR**

In this part of the continuum, there is wide variation in process. All three categories of deliberative or participatory governance processes, collaborative public or network

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<sup>141</sup> See [www.voiceschoices.org/faq](http://www.voiceschoices.org/faq).

<sup>142</sup> For details, participant guides, and a complete report, see [www.keystone.org/spp/health-pandemic.html](http://www.keystone.org/spp/health-pandemic.html).

<sup>143</sup> See Everyday Democracy, formerly known as the Study Circles Resource Center, [www.everyday-democracy.org/en/index.aspx](http://www.everyday-democracy.org/en/index.aspx).



management, and ADR are used to resolve conflict.<sup>144</sup> There is no strict boundary between upstream and midstream. Somewhere between the legislative act of adopting policy and the quasi-legislative work of implementing it, there is a shift in the nature of processes related to governance from more deliberative processes that set priorities to agreement-seeking processes. In agreement-seeking processes, generally a mediator or facilitator works with a group of citizens or network of stakeholders to build consensus around the elements of a specific plan, permit, or policy proposal.<sup>145</sup> Typically, that neutral will engage in a conflict assessment process before convening the stakeholder group in order to assess the feasibility of reaching consensus. Mediation is particularly prevalent in environmental governance.<sup>146</sup>

The neutral generally uses principles of interest-based bargaining or principled negotiation.<sup>147</sup> This approach involves a focus on the interests of the parties rather than their adversarial positions. The mediator or facilitator may identify interests by asking problem-solving questions (who, what, where, why, how, why not) to get at the stakeholders' basic human and organizational needs. These will most often fall into one of five categories: needs relating to security, economic well-being, belonging to a community, organization, or social group, recognition, and autonomy.<sup>148</sup> Parties engage in brainstorming, a process through which they first generate a list of possible solutions. They next prioritize among these ideas, deliberate on them, and attempt to reach consensus. In the event of impasse, the stakeholders

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<sup>144</sup> For numerous case studies, see Lawrence Susskind, Sarah McKernan, and Jennifer Thomas-Larmer, *THE CONSENSUS-BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (1999).

<sup>145</sup> Christopher W. Moore, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* (3d Ed. 2003).

<sup>146</sup> Rosemary O'Leary and Lisa Blomgren Bingham, *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* (2003).

<sup>147</sup> Roger Fisher, William Ury, and Bruce Patton, *GETTING TO YES* (1991); see also Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, *LAW AND SOCIAL INQUIRY* (forthcoming 2008, available at SSRN: <http://ssrn.com/abstract=1114169>)(arguing that interest-based negotiation skills are essential for the new governance).

<sup>148</sup> *Id.*

are encouraged to use objective criteria, moral and professional standards, and other sources in a reasoned exchange rather than threaten to use leverage or bargaining power.

In mediation, the neutral can assist the parties with this negotiation process by meeting with sub-groups or individual stakeholders in caucus, a private confidential session.<sup>149</sup> The mediator can also help the parties by using active listening techniques such as paraphrasing and restating, by framing and reframing issues and suggestions, helping them identify their best alternative to a negotiated agreement (BATNA), and/or reality-testing about what might happen if parties fail to reach an agreement. Facilitators may use many of these techniques, but do not define their task as assisting the parties in reaching an agreement. Instead, they foster an organized discussion; nevertheless, this discussion may produce a consensus. Several examples are described under specific stages of the policy process.

When viewed on the policy continuum, collaborative public management is most frequently found midstream, during implementation and project management. Examples include such work as negotiated rulemaking to collaboratively develop rules to implement public law, or collaboration in managing a project, for example, watershed management. In the later case, a watershed will cross jurisdictional boundaries and implicate the legal authority of federal, state, regional, local, and tribal governments; concerned stakeholders will include various representatives from civil society such as nonprofit environmental organizations, citizen groups representing users of natural resources, and the private sector. Sometimes, a downstream enforcement process, such as a complex piece of multiparty environmental litigation, will be transformed through the mechanism of a negotiated consent decree into an

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<sup>149</sup> Moore, supra note \_\_.

ongoing collaborative public management network for supervising an environmental cleanup, for example. The military has also used collaborative public management in its procurement contract relationships.<sup>150</sup>

### **Step 9: Setting Priorities for Regulations**

Deliberative polls, policy and ChoiceWorks Dialogues and other deliberative forums can be used in this stage of the policy process in much the same way as earlier described. For example, in Canada, twelve ChoiceWork Dialogues were held across the country to discuss reform of the Canadian national health care system:

Participants were asked to accomplish two major tasks during the day: firstly, to create their own vision of the health care system they would like to see in 10 years' time; secondly, to work through the practical choices and trade offs required to realise that vision—working firstly in self facilitated groups to ensure that the conclusions reached would be their own. They then worked in a plenary session in which the facilitators prompted them to identify the key similarities and differences among the groups' reports, and to further define the areas of common ground.<sup>151</sup>

The kinds of regulatory priorities identified involved having a team of medical professionals (doctors, nurses, pharmacists, and others) provide primary care with a central information system, which would require participants to sign up with a provider team for one year instead of using solo practitioners, use a nurse for routine care, and have electronic medical records.

### **Step 10: Selecting from among Priorities for Regulations**

The budgeting process is a classic example of a situation in which citizens have been asked to select from among various priorities and allocate resources. The most lauded

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<sup>150</sup> Dymond reports that collaborations “among competing DOD contractors, whether called “teaming arrangements,” “joint ventures,” “strategic alliances,” “subcontracts,” “associations,” “licensing arrangements,” “partnering,” or “leader-follower agreements,” provide a variety of benefits to market participants in winning and keeping DOD contracts.” Major Francis Dymond, *DOD Contractor Collaborations: Proposed Procedures for Integrating Antitrust Law, Procurement Law, and Purchasing Decisions*, 172 MIL. L. REV. 96, 99 (2002)(observing that these collaborations also present antitrust issues).

<sup>151</sup> Judith Maxwell, Steven Rosell, and Pierre-Gerlier Forest, *Giving Citizens a Voice in Healthcare Policy in Canada*, 326 BRITISH MEDICAL J. 1031 (2003).

participatory budgeting process internationally is an institutionalized part of local governance in Porto Alegre, Brazil.<sup>152</sup> In this process, citizens in various neighborhoods select among priorities for infrastructure and other investment by municipal budget authorities.

Participatory budgeting in China is a new and experimental process, and involves dialogue and deliberation among a representative sample of citizens; one case included farmers, the commercial sector, and local government officials. Surveys, deliberation, and polls were recently used in Menlo Park, California to determine how to cut the city's budget.<sup>153</sup> The District of Columbia has used the AmericaSpeaks Twenty-First Century Town Meeting for participatory budgeting three times.<sup>154</sup>

### **Step 11: Drafting Proposed Regulations**

The US has experimented with and institutionalized a process referred to as negotiated rulemaking, regulatory negotiation, or rule by consensus under the Negotiated Rulemaking Act of 1996 (NRA -- for a description, see *infra*). The NRA was adopted to allow collaboration among a representative group of organizations and stakeholders to craft draft regulations; it is a top down, carefully structured statute that contains this form of collaborative public management within express limits. There are a number of examples in the literature at the federal<sup>155</sup> and state levels.<sup>156</sup> It has been used to reach a compromise

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<sup>152</sup> Archon Fung, *Varieties of Participation in Complex Governance*, 66 PUB. ADMIN. REV. 66 (2006).

<sup>153</sup> See [www.communityfocus.org](http://www.communityfocus.org).

<sup>154</sup> See <http://www.citizensummit.dc.gov/cs/site/default.asp>.

<sup>155</sup> For reviews, see Cary Coglianese, *Twenty-Eighth Annual Administrative Law Issue: Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997); Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000); Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386 (2001).

<sup>156</sup> E.g., Daniel P. Selmi, *The Promise and Limits of Negotiated Rulemaking: Evaluating the Negotiation of a Regional Air Quality Rule*, 35 ENVTL. L. 415 (2005)

between dog-walkers and birders in the Golden Gate Recreation Area,<sup>157</sup> fisheries management,<sup>158</sup> combined sewer overflows,<sup>159</sup> and air quality,<sup>160</sup> among many other topics.

### **Step 12: Enacting Regulations**

Enacting regulations is traditionally accompanied by forms of public participation such as notice and comment and/or a traditional public hearing. Notice and comment consists of publication of a notice of intent to adopt rules or regulations in a regular government publication or online. Comment consists simply of an opportunity for the public to submit written suggestions as to the substance of the proposed rules. A traditional public hearing consists of a brief opportunity for citizens to address the decision-making body or its representative. It is largely a passive activity during which citizens listen to a series of speakers but do not interact or deliberate on the policy problem.

More recently, new online technologies have made possible E-rulemaking, including threaded discussion forums<sup>161</sup> and electronic rulemaking dockets through which citizens may submit comments.<sup>162</sup> At present, there is modest experimentation.<sup>163</sup> Some observe that the process holds great potential to expand the participation of the general public in the rulemaking process,<sup>164</sup> but others find that the costs in terms of analyzing comments with

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<sup>157</sup> Robin McCall, *Dogs vs. Birds: Negotiated Rulemaking at Fort Funston*, 13 HASTINGS W.-N.W. J. ENV. L. & POL'Y 187 (2007).

<sup>158</sup> Shepherd R. Grimes, *The Federal Regional Fishery Management Councils: A Negotiated Rulemaking Approach to Fisheries Management*, 6 OCEAN & COASTAL L.J. 187 (2001).

<sup>159</sup> Siobhan Mee, *Negotiated Rulemaking and Combined Sewer Overflows (CSOs): Consensus Saves Ossification?* 25 B.C. ENVTL. AFF. L. REV. 213 (1997).

<sup>160</sup> Charles E. McChesney II, *The Interstate Ozone Pollution Negotiations: OTAG, EPA, and a Novel Approach to Negotiated Rulemaking*, 14 OHIO ST. J. ON DISP. RESOL. 615 (1999).

<sup>161</sup> Gregory S. Weber, *Needling the Thread: A Moderator's Guide to Freedom of Speech Limitations on Government Sponsored Web-Based Threaded Discussions*, 7 COMP. L. REV. & TECH. J. 323 (2004).

<sup>162</sup> Susskind, et al., *supra* note \_\_.

<sup>163</sup> Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006) (finding based on analysis of the available evidence that e-rulemaking's potential for a revolutionary change in public participation is limited).

<sup>164</sup> Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFFALO L. REV. 903 (2006).

sufficient care to withstand judicial review may outweigh the benefits.<sup>165</sup> One empirical study found that it has provided simply one more avenue for voice without imposing a substantial burden on the agency.<sup>166</sup>

### **Step 13: Implementing Regulations**

Conflict also arises when administrators seek to implement public policy through regulatory activity. Moreover, many policy problems cross jurisdictional and sectoral boundaries; solutions require the collaboration of multiple stakeholders, such as national, regional, and local government actors, nonprofit organizations, and the private sector. There are agreement-seeking models that are used at this stage of the policy process in order to get the work of government accomplished. Administrators have used consensus-building and alternative dispute resolution (ADR) processes, including facilitated policy consensus and mediation, to help stakeholders and affected public constituencies reach agreement. In mediation, an impartial third party and limited number of disputants often seek a resolution as their goal.<sup>167</sup> The term facilitation refers to a process in which an impartial third party helps organize and direct a discussion among a larger group of stakeholders.<sup>168</sup>

It is common to build a conciliation step into the dispute resolution mechanisms of international treaties and accords. These processes are also increasingly common for land use and permitting disputes in environmental governance.<sup>169</sup> In the US, Congress created a new

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<sup>165</sup> Stuart Minor Benjamin, *E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893 (2006).

<sup>166</sup> John M. de Figueiredo, *E-Rulemaking: Bringing Data to Theory at the Federal Communications Commission*, 55 DUKE L.J. 969 (2006).

<sup>167</sup> See Carpenter and Kennedy *supra*, note \_\_; Moore, *supra* note \_\_; Susskind and Cruikshank, *supra* note \_\_.

<sup>168</sup> Roger Schwarz, *THE SKILLED FACILITATOR: A COMPREHENSIVE RESOURCE FOR CONSULTANTS, FACILITATORS, MANAGERS, TRAINERS, AND COACHES* (2002).

<sup>169</sup> Rosemary O'Leary and Lisa B. Bingham, eds., *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* (2003).

federal agency, the US Institute for Environmental Conflict Resolution, to help with such efforts.<sup>170</sup>

One model is the policy consensus process. For example, “Public Solutions” is sponsored by the National Policy Consensus Center.<sup>171</sup> In Public Solutions, an elected official, public administrator, or leader from state or local government helps convene a stakeholder group in a neutral forum. With the help of an impartial facilitator, the group works to reach consensus on a solution to a policy problem. In this form of collaborative governance, sponsors identify an issue; there is a conflict assessment to determine if collaboration is feasible and who are the stakeholders; a leader convenes the group; the group frames the issue, and agrees upon the framework and conditions for deliberation; and the participants execute a written agreement to ensure accountability. The Public Solutions model’s key principles include transparency, equity, inclusiveness, effectiveness/efficiency, responsiveness, accountability, forum neutrality, and consensus-based decision making.

The implementation phase also encompasses collaborative public or network management.<sup>172</sup> For example, at the municipal level, Los Angeles has neighborhood councils that work with city agencies to prioritize service delivery for particular areas of the city.<sup>173</sup> These councils consist of elected representatives of local neighborhoods who negotiate memoranda of understanding with city departments.

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<sup>170</sup> The USIECR, see [www.ecr.gov](http://www.ecr.gov).

<sup>171</sup> The NPCC, see [www.policyconsensus.org/publicsolutions/ps\\_2.html](http://www.policyconsensus.org/publicsolutions/ps_2.html).

<sup>172</sup> See discussion *supra* Section III.B., at \_\_\_ to \_\_\_. Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U.L. REV. 437, 448-9 (2003):

Here are some examples: ... cooperative arrangements involving governmental and nongovernmental entities in delivering family services or administering Medicare; and negotiation, in the draconian shadow of the Endangered Species Act, of regional habitat conservation plans by federal natural resource management agencies, private landowners, developers, and state and local governments.

<sup>173</sup> Terry L. Cooper, Thomas A. Bryer and Jack W. Meek, *Citizen-Centered Collaborative Public Management*, 66 PUB. ADMIN. REV. 76 (2006).

## **C. Downstream in the Policy Process -- Using Appropriate Dispute Resolution to Resolve Conflict Among Identified Disputants**

Appropriate dispute resolution can be used for both executive agency action and disputes within the jurisdiction of the judiciary. Generally, these processes are quasi-judicial or judicial in that they assist specific identified disputants and are retrospective in nature; they examine the facts of past events that gave rise to a dispute. The processes may either seek a voluntary settlement agreement (mediation) or may provide disputants with a decision that ends their conflict more expeditiously than traditional agency or court adjudication (fact-finding, advisory arbitration, or binding arbitration).

### **Step 14: Enforcing Legislation and Regulations -- Executive Administrative Agencies**

The executive power uses ADR in enforcement activities, including again mediation, fact-finding, advisory arbitration, and binding arbitration. These processes first found their way into US executive agencies as means for resolving conflict in collective bargaining and labor relations; a famous US example was the War Labor Board created during World War II to address labor issues in a way that would not interfere with the production of war materiel. Over the past decade, ADR has become fully institutionalized as a set of tools for resolving conflict in governance processes enforcing legislation and regulations in the US government.<sup>174</sup> In addition, state governments in the US also use ADR.<sup>175</sup>

### **Step 15: Enforcing Legislation and Regulations through Judicial Power**

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<sup>174</sup> See Senger, supra note \_\_; Bingham and Wise, supra note \_\_. The website of the federal Interagency ADR Working Group ([www.adr.gov](http://www.adr.gov)) contains numerous resources, model practices, and guidelines developed for mediation and other ADR processes in civil enforcement, public policy, and environmental disputes. Federal agencies also use ADR for internal disputes in employment or with contractors in procurement matters.

<sup>175</sup> For links to state programs, see [www.policyconsensus.org](http://www.policyconsensus.org), the website of the Policy Consensus Initiative, an NGO that supports the use of ADR and collaborative governance at the level of state government.



Over the past century, courts have increasingly turned fact-finding and adjudication over to alternative forums such as administrative adjudication and arbitration.<sup>176</sup> ADR programs are increasingly common methods for resolving conflict involving specific identified parties arising out of past events. Forms of ADR include mediation, fact-finding, advisory arbitration, binding arbitration, mini-trials, and summary jury trials. Mediation is in increasingly widespread use in national judicial systems. A recent study reviewed programs in Australia, Austria, Belgium, Canada and Quebec, Denmark, England, Wales, Scotland, Germany, Italy, the Netherlands, Poland, South Africa, Switzerland, and Yugoslavia.<sup>177</sup> In the United States, every federal district court must establish an ADR program pursuant to the ADR Act of 1998.<sup>178</sup> In addition, there are mediation programs in the US federal Courts of Appeals<sup>179</sup> and throughout the 50 states.<sup>180</sup> In the US, a network of community mediation centers provides mediation services for small claims and neighborhood disputes either by contract with the courts, or independently as NGOs.<sup>181</sup>

In the European Union, there are both national and regional projects to build ADR practice both inside and independent from courts but in the shadow of the justice system for civil and commercial disputes.<sup>182</sup> The EU has adopted a code of conduct for mediators.<sup>183</sup> It

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<sup>176</sup> Judith Resnik, *The Role of the Judge in the Twenty-First Century: Whither and Whether Adjudication?*, 86 B.U.L. REV. 1101 (2006).

<sup>177</sup> Nadja Alexander (ed.), *GLOBAL TRENDS IN MEDIATION* (2003).

<sup>178</sup> See Senger, *supra* note \_\_.

<sup>179</sup> See the website of the Federal Judicial Center, [www.fjc.gov](http://www.fjc.gov).

<sup>180</sup> See the website of the National Center for State Courts, [www.ncsconline.org](http://www.ncsconline.org).

<sup>181</sup> Beth Gazley, Won Kyung Chang, and Lisa Blomgren Bingham, *Collaboration and Citizen Participation in Community Mediation Centers*. 23 *REVIEW OF POLICY RESEARCH* 843 (2006); see also the website of the National Association for Community Mediation, [www.nafcm.org](http://www.nafcm.org).

<sup>182</sup> See [http://ec.europa.eu/civiljustice/adr/adr\\_gen\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_gen_en.htm) for the European Commission's country-by-country status report.

<sup>183</sup> See [http://ec.europa.eu/civiljustice/adr/adr\\_ec\\_code\\_conduct\\_en.htm](http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm).

is also building a private dispute resolution infrastructure through the MEDA project to address business and commercial conflict.<sup>184</sup>

Moreover, ADR is perhaps the only form of governance for international disputes, since there is no single authoritative sovereign judiciary. All international tribunals are established through an agreement of nations to submit to their jurisdiction; hence, they are all forms of mediation and arbitration. Examples include the International Court of Arbitration for Sport established to resolve disputes related to international athletic competitions such as the Olympic Games,<sup>185</sup> arbitration boards established through trade agreements such as the North American Free Trade Agreement and the World Trade Organization,<sup>186</sup> and the International Court of Justice,<sup>187</sup> to name but a few.

In addition to these mechanisms, a network of private ADR service providers is serving the needs for commercial dispute resolution among the international business community through mediation and binding arbitration.<sup>188</sup> There are a number of nongovernmental organizations that provide access to arbitration services and model rules, including the International Chamber of Commerce, and arbitration centers in London, Stockholm, Hong Kong, and a number of other commercial centers worldwide.

#### **IV. Collaborative Governance and Public Law: The Limits of Current Legal**

##### **Infrastructure**

Collaboration in governance is not new; US history provides a dynamic and iterative pattern of innovation and legislation. For almost a century, there have been repeated attempts

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<sup>184</sup> See [www.adrmeda.org](http://www.adrmeda.org).

<sup>185</sup> See [www.tas-cas.org](http://www.tas-cas.org).

<sup>186</sup> See [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/disp1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm).

<sup>187</sup> See [www.icj-cij.org](http://www.icj-cij.org).

<sup>188</sup> See [www.adr.org](http://www.adr.org); [www.cpradr.org](http://www.cpradr.org).

to balance agencies' need to consult and gather information from stakeholders outside government with transparency and accountability. Richard Stewart describes the evolution of administrative law in five stages.<sup>189</sup> First, the US took from England the common law model in which citizens brought tort actions against regulatory officials to seek judicial review of their actions.<sup>190</sup> With industrialization in the late nineteenth century and the first commissions and regulatory agencies, this yielded to the 'traditional model of administrative law,' in which courts required agencies to use adjudication modeled on courtroom process before ratemaking or other action; the courts then engaged in judicial review of the agency's fact-finding based on the record and its statutory authority.<sup>191</sup> During the New Deal, Congress created agencies with open-ended statutory delegations of discretionary power, raising constitutional concerns about their accountability.<sup>192</sup> In response to the perceived democracy deficit, James Landis advocated regulatory management by experts "guided by experience and professional discipline."<sup>193</sup> This vision helped shape the Administrative Procedure Act, enacted in 1946.<sup>194</sup>

Stewart reports three developments that changed administrative law in the 1960s: 1) acceptance of Ralph Nader's critique that agencies were dominated by the industry they regulate; 2) the rise of public interest litigation through environmental, consumer, civil rights, and labor advocates; and 3) the adoption of new laws on the environment, health, safety, civil rights, welfare, and Medicare, sometimes termed the "rights revolution."<sup>195</sup> He argues that

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<sup>189</sup> Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U.L. REV. 437 (2003).

<sup>190</sup> *Id.* at 439.

<sup>191</sup> *Id.* at 439-440.

<sup>192</sup> *Id.* at 440.

<sup>193</sup> *Id.* at 441.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 441-442. This development has been chronicled in detail in Robert Kagan's *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2003)(describing the impact on policy of a lawyering model based on litigation).

this gave rise to the fourth stage of administrative law, which he terms the “interest representation model,”<sup>196</sup> during which agencies shifted from adjudication to quasi-legislative rulemaking. This included expanded judicial review, participation by public interest advocacy groups, and an examination of the rulemaking record under the “hard look” doctrine to determine if the agency had considered participants’ submissions and justified its exercise of discretion based on the record.<sup>197</sup> A key feature of this stage is the need for the agency to respond to the concerns of all affected interests.<sup>198</sup> Adversarial legalism continued in the form of citizen-suits to force agency action. Stewart describes the fifth stage as “analytic management of regulation,” imposed through executive order to control agency discretion and perceived excesses using cost benefit analysis and executive oversight.<sup>199</sup> He argues that the current structure of administrative law is still evolving, and has turned to two new regulatory methods: “government-stakeholder network structures and economic incentive systems.”<sup>200</sup> Stewart uses new governance examples from collaborative public management, negotiated rulemaking, and consensus policy-making. He argues that these new methods of regulation must confront issues of accountability and political legitimacy raised by networks’ blurring of the public-private distinction.<sup>201</sup>

We have reached a state of complexity in governance where collaboration is essential. I argue here that public voice, not only in the form of interest groups and stakeholders, but also through direct civic engagement of citizens and residents, can address emerging concerns about accountability and legitimacy in the new governance through enhanced

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<sup>196</sup> Stewart, *supra* note \_\_ at 441.

<sup>197</sup> *Id.* at 442.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 443.

<sup>200</sup> *Id.* at 448.

<sup>201</sup> *Id.* at 451.

transparency. In fact, transparency has been the remedy of choice for accountability concerns arising out of collaboration. Each of the evolutionary stages of administrative law has brought with it new legal infrastructure to open governance to public view following a period during which government officials attempted to work privately with stakeholders to address public policy problems. Within the executive branch, agencies must comply with the Administrative Procedure Act (APA),<sup>202</sup> Freedom of Information Act (FOIA),<sup>203</sup> Government in the Sunshine Act,<sup>204</sup> Federal Advisory Committee Act (FACA),<sup>205</sup> Negotiated Rulemaking Act (NRA),<sup>206</sup> and Administrative Dispute Resolution Act (ADRA).<sup>207</sup> The APA opened up adjudication and rulemaking to public participation following the New Deal and *Schechter Poultry*. The FOIA and Sunshine Act made possible public scrutiny of records and opened agency meetings during the ‘rights revolution’ of the 1960s. FACA drew back the curtain on groups of stakeholders that agencies convened to provide information for the governance process during the decades following World War II. The NRA and ADRA can be viewed as legal infrastructure intended to enhance public participation through new collaborative processes following good government reforms of the 1970s and experimentation with consensus-building in the 1980s. The NRA subjects negotiated rulemaking committees to FACA; the ADRA sets guidelines for the balance between confidentiality and public access in federal agency use of ADR.

However, our existing legal framework for administrative law was not framed to encompass the full extent of collaborative governance as it has now evolved in practice.

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<sup>202</sup> 5 U.S.C. §§551 *et seq.*, hereafter ‘APA.’

<sup>203</sup> 5 U.S.C. §552, hereafter ‘FOIA.’

<sup>204</sup> 5 U.S.C. §552b, hereafter Sunshine Act.

<sup>205</sup> 5 U.S.C. Appendix II, hereafter ‘FACA.’

<sup>206</sup> 5 U.S.C. §§561, *et seq.*, hereafter ‘NRA.’

<sup>207</sup> 5 U.S.C. §§571, *et seq.*, hereafter ‘ADRA.’

Professor Jody Freeman has articulated a theory of collaborative governance with five components: 1) a problem-solving orientation, 2) participation by interested and affected parties in all stages of the decision-making process, 3) provisional solutions subject to continuous monitoring, evaluation, and revision, 4) accountability that transcends traditional public and private roles in governance, and 5) a flexible, engaged agency.<sup>208</sup>

Our existing legal framework poses obstacles and barriers to collaborative governance and the kind of civic engagement and public participation that would provide the transparency necessary to address concerns collaboration. This section will survey salient examples of administrative laws affecting collaborative governance in US federal and state government. This is only a superficial survey; a more comprehensive analysis, including an empirical study of obstacles and barriers that practitioners experience in the field, is the subject of future work.

#### **A. Legal Infrastructure in the Federal Executive Branch**

In the United States, federal administrative agencies are sometimes thought of as a fourth branch of government in which judicial, legislative, and executive functions from the other three are collapsed.<sup>209</sup> They have substantial discretion to choose among different governance processes under the APA,<sup>210</sup> which provides for both quasi-legislative and quasi-judicial agency action. The term quasi-legislative refers to agency action that is synoptic, prospective, and general in application, and that sets standards, guidelines, expectations, or rules and regulations for behavior. Traditional rulemaking can meet these criteria, particularly

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<sup>208</sup> Jody Freeman, *Collaborative Governance in the Administrative State*, 45 U.C.L.A. L. REV. 1, 22 (1997). While she examines collaborative governance primarily in the context of federal agencies using negotiated rulemaking and consensus processes to develop permits, and my discussion is primarily framed in terms of the federal government, her criteria and my analysis apply equally to collaborative governance at the local, regional, state, federal, and transnational levels.

<sup>209</sup> Rosenbloom, *supra* note \_\_.

<sup>210</sup> Rosenbloom, *supra* note \_\_ at 6-7.

for substantive or legislative rules.<sup>211</sup> The term quasi-judicial usually refers to agency action that is retrospective, fact-based, and determines the rights or obligations of selected citizens or stakeholders rather than those of the general public. It encompasses formal and informal adjudication.

These statutes were not drafted expressly to authorize agencies to collaborate in networks with other actors, nor with a view toward joint agency action. Their unit of analysis, the obligations they impose and processes they authorize, all take as their starting place individual agency action and circumscribed public participation. The resulting disconnection between the goals and language of these statutes and emerging collaborative governance practices creates problems we need to address.

### **1. The Administrative Procedure Act: A Statute for Agencies Acting Alone**

The APA, enacted in response to the growth of the administrative state during the New Deal, was a substantial breakthrough in the public's right to know about, and participate in, processes of governance in federal administrative agencies.<sup>212</sup> It encompasses formal and informal agency action.<sup>213</sup> Formal agency action can take the forms of rulemaking or adjudication. In rulemaking, agencies create general rules of prospective application. Rulemaking generally involves published notice and an opportunity for members of the public to comment, although generally not through an oral evidentiary hearing.<sup>214</sup>

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<sup>211</sup> Rosenbloom, *supra* note \_\_, 59.

<sup>212</sup> 5 USC §§551, et seq. For a discussion of the history and purposes of the APA, see Gerald M. Pops, *Administrative Law as Public Policy*, 2 J. POL'Y HIST. 98 (1990)(describing the original tension between the organized bar's efforts to protect the property rights of private citizens and corporations and agencies' desire for efficient and expert action to solve the problems of society, and citing Richard Stewart's interest representation model explaining how the expansion of standing, public access and participation by underrepresented groups, and judicial review was seen as a way to protect people from government).

<sup>213</sup> David Rosenbloom, *ADMINISTRATIVE LAW FOR PUBLIC MANAGERS*, 57 (2003).

<sup>214</sup> Phillip J. Cooper, *PUBLIC LAW AND PUBLIC ADMINISTRATION* 3D ED., 132 (2000); Cornelius Kerwin, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 2D ED (1999); David Rosenbloom,

In adjudication, an agency determines individual rights through a retrospective examination of evidence and facts. Adjudication procedures range from informal ones (the kind a school principal engages in when she disciplines a student) to formal adjudication subject to the *Goldberg v. Kelly*'s full requirements.<sup>215</sup> Formal adjudication under the APA involves an adjudicatory hearing before an administrative law judge with many of the requisites of procedural due process.

Informal agency action, rulemaking, and adjudication together provide for agency action across the entire policy cycle, from policy-making and implementation to enforcement. The APA fundamentally altered the relation of citizens and stakeholders to the government. It made the work of government more transparent through public notice in rulemaking. It also created an explicit and legitimate voice for citizens through opportunities to comment on proposed rules. Formal and informal adjudication procedures gave citizens and stakeholders a voice and an opportunity to be heard before government substantially interfered with their interests in life, liberty, or property.

However, the APA contemplates action by a single agency, acting alone and not in collaboration with other agencies, whether federal, state, or local. Neither the word collaboration (in any form), nor the word network, appears in its text. Moreover, it does not have formal provision for collaborative management in networks with other organizations, whether private, nonprofit, or other stakeholders.<sup>216</sup> This silence creates ambiguities for collaborative public management networks.

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ADMINISTRATIVE LAW FOR PUBLIC MANAGERS, 57 (2003); David H. Rosenbloom and Rosemary O'Leary, PUBLIC ADMINISTRATION AND LAW, 2ND ED. (1997).

<sup>215</sup> 397 U.S. 254 (1970). This includes notice, the right to present evidence, confrontation and cross-examination of witnesses, oral argument, legal counsel, a written decision stating reasons enunciated in this landmark Supreme Court decision.

<sup>216</sup> The definition of 'agency' provides:



The APA provides for notice and comment in rulemaking, but it does not define the form that public participation in rulemaking should take;<sup>217</sup> instead, the courts have carved out

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5 U.S.C. §551. Definitions.

For the purpose of this subchapter -

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include -

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia; or except as to the requirements of section 552 of this title

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix....

<sup>217</sup> The provisions for notice and comment do not mandate an oral hearing:

5 U.S.C. §553. Rule making.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved -

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply -

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except -

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

an area of agency discretion with the rejection of hybrid rulemaking or imposition of adversary legalism on the rulemaking process.<sup>218</sup>

On the other hand, this very silence creates problems when agencies would like to innovate. For example, large-scale public dialogues, with many people talking together in small groups, raise questions for judicial review. How do we reconcile this many simultaneous oral comments with requirements for creating a rulemaking record? How does the agency prove that it responded to significant comments in the record?<sup>219</sup>

Moreover, the vast majority of agency action is informal. This would encompass most work implementing and managing public policy. The APA is largely silent on this aspect of agency authority, except as regards allowing the public to petition the agency for a response that can in turn be submitted for judicial review.<sup>220</sup> Thus, there is no express legal authority for engaging the public in this sphere of agency action. If an agency chooses to do so, it may be accused of waste and mismanagement by expending funds on activities that are neither required nor expressly authorized.

## **2. The Freedom of Information and Sunshine Acts**

The reform movement for more transparency in government gave rise to legal infrastructure creating a right to access to government records, and also, a right to notice regarding the public meetings at which agencies make decisions and take action. These provisions often create issues for agencies using processes for negotiation and collaboration.

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<sup>218</sup> The Supreme Court famously rejected mandates for cross examination in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

<sup>219</sup> Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893 (2006)(raising this issue in the context of e-rulemaking).

<sup>220</sup> See 5 U.S.C. §555 Ancillary matters:

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

At what point must the collaborative network disclose documents? What is the public's right to attend meetings of a collaborative network? Some commentators have suggested that these laws inhibit the use of consensus-building processes among groups of stakeholders in public policy issues.<sup>221</sup> Federal dispute resolution laws have provided for confidentiality in certain circumstances.<sup>222</sup> However, the sunshine laws contemplate traditional action by a single agency, not joint action among several. This can create inefficiencies and barriers.

### **3. The Federal Advisory Committees Act (FACA)**

In an effort to make government more responsive, agencies began to create and rely on advisory committees, the use of which within the Beltway grew dramatically after World War II and outside the Beltway grew during the 1980s.<sup>223</sup> However, concern arose about potential waste, their perceived excessive influence, and the problem of delegating effective decisional

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<sup>221</sup> David Faure, *The Federal Advisory Committee Act: Balanced Representation and Open Meetings Conflict with Dispute Resolution*, 11 OHIO ST. J. ON DISP. RESOL. 489 (1996)(arguing that FACA, which subjects advisory committees to open meetings and public records requirements under 5 U.S.C. §552, interferes with the function of negotiated rulemaking and consensus-building processes); see also Lauri D. Boxer-Macomber, TOO MUCH SUN? EMERGING CHALLENGES PRESENTED BY CALIFORNIA AND FEDERAL OPEN MEETING LEGISLATION TO PUBLIC POLICY CONSENSUS BUILDING PROCESSES (2003) available at the website of the Center for Collaborative Policy, [www.csus.edu/ccp](http://www.csus.edu/ccp).

<sup>222</sup> See Federal Interagency ADR Working Group Steering Committee, PROTECTING THE CONFIDENTIALITY OF DISPUTE RESOLUTION PROCEEDINGS: A GUIDE FOR FEDERAL WORKPLACE ADR PROGRAM ADMINISTRATORS (April 2006), available at the Federal IADRWG website, [www.adr.gov](http://www.adr.gov).

<sup>223</sup> For a comprehensive review of FACA that includes its history, case law to that date, and a survey of agency administrators, see Steven P. Croley and William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451 (1997). Those authors observe:

This is not to suggest, however, that agencies began to receive advice from nongovernmental entities only in 1972. Much to the contrary, the FACA was designed to formalize and routinize what was already an age-old institution, in part out of concern that some interests had come to enjoy unchecked and perhaps illicit access to federal executive decisionmakers. As a House report outlining the need for some kind of governance structure for advisory committees explained, for example, the Antitrust Division in the early 1950s expressed concerns about the proximity of some industry advisory committee members to the issues about which they were rendering advice, concerns which led the Justice Department to issue a set of standards for agencies' use of advisory groups. Meanwhile, the possibility of legislative standards for the organization and operation of advisory committees had been considered by Congress intermittently in the two decades preceding the Act, with the earliest efforts of congressional control over "outsiders'" advice dating to 1842. [Citations omitted]

*Id.* at 453.

authority to unelected, non-accountable private parties.<sup>224</sup> The committees often met in private and they were not always balanced among competing points of view. As a result, FACA was adopted to force agencies to give notice of the creation of new advisory committees, and to define the scope of their authority. It imposes on Congressional committees the responsibility for supervising the formation of new committees in legislation and requiring that the membership of the proposed advisory committee is fair and balanced in terms of the points of view represented.”<sup>225</sup> It required that a federal official convene and attend each meeting, that meetings be open to the public, and that there be an element of public participation.<sup>226</sup> This is an instance of federal legal infrastructure that anticipates a collaborative network, namely the committee, but again ties it to a single agency as defined in the APA<sup>227</sup> to preserve accountability, and requires public records<sup>228</sup> and the availability of public participation in

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<sup>224</sup> 5 U.S.C. APP. §2 provides:

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that --

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with the law, by the official, agency, or officer involved.

See generally Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE, 297-300 (2006).

<sup>225</sup> 5 U.S.C. APP. §5(b)(2).

<sup>226</sup> Boxer-Macomber, supra note \_\_ at 14.

<sup>227</sup> 5 U.S.C. APP. §3(3) provides “The term “agency” has the same meaning as in section 551(1) of Title 5, United States Code.”

<sup>228</sup> 5 U.S.C. APP. §9(b) (2) and (3) provides that agency heads must designate an advisory committee management officer who is responsible for assembling and maintaining “the reports, records, and other papers of any such committee during its existence” and also for carrying out “on behalf of that agency, the provisions of section 552 of Title 5, United States Code, with respect to such reports, records, and other papers.”

committee meetings<sup>229</sup> to ensure both transparency and accountability. The Act specifically excludes local civic groups and bodies created to advise state and local government.<sup>230</sup>

The primary purpose of FACA was to reduce the use of advisory committees, and it succeeded in this goal.<sup>231</sup> However, it may have succeeded at the expense of effective policy-making, according to some commentators, who observe the inherent tension between policies favoring negotiation and consensus-building and FACA's goals of restricting the use of advisory committees.<sup>232</sup>

#### **4. The APA and Processes for Collaboration**

In the 1980s, some federal agencies engaged in dispute resolution, negotiated rulemaking, and policy consensus processes without explicit authorization. The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers among others experimented with ADR for a decade or more.<sup>233</sup> Other agencies declined to use these new techniques, asserting they were outside their delegated authority. In its original form, the APA had no explicit provision for the processes used in collaboration, for example alternative dispute resolution (mediation, facilitation, interest-based negotiation, and other processes, or "ADR"). It had no provision for negotiating or building consensus on

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<sup>229</sup> *Id.* Section 552b of Title 5 of the United States Code contains provisions for open meetings.

<sup>230</sup> 5 U.S.C. APP. §4(c) provides that "Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies."

<sup>231</sup> President William J. Clinton reported to Congress in 1998 in the 27th and final such mandated report on the reduction of advisory committees and their attendant costs during his administration in keeping with his goal. TWENTY-SEVENTH ANNUAL REPORT OF THE PRESIDENT ON ADVISORY COMMITTEES FISCAL YEAR 1998.

<sup>232</sup> Steven P. Croley and William F. Funk, *supra* note \_\_ at 456 (describing President Clinton's efforts to encourage negotiation and consensus-building and how these are in tension with his goal of reducing by a third the number of advisory committees).

<sup>233</sup> See, e.g., Lawrence Susskind, PARTNERING, CONSENSUS BUILDING, AND ALTERNATIVE DISPUTE RESOLUTION: CURRENT USES AND OPPORTUNITIES IN THE U. S. ARMY CORPS OF ENGINEERS. Consensus Building Institute, Fort Belvoir, VA: Office of Counsel and the Institute for Water Resources, U. S. Army Corps of Engineers (1995).

regulations with networks of private, nonprofit, or public organizations (negotiated rulemaking or policy consensus processes). In the 1980s, agency lawyers had concerns that their clients had no authority under the APA to use alternative dispute resolution or negotiated rulemaking, and that agencies doing so might be acting *ultra vires* or outside the scope of their delegation. However, concerns about making government more efficient and responsive to the public led to legislative reform.

Congress passed two separate amendments to the APA in 1990 (made permanent in 1996) to clear up the confusion. These were the NRA of 1996<sup>234</sup> and the ADRA of 1996.<sup>235</sup> These federal laws have no application to state government; they apply only to agencies of the federal government as defined in the APA. These two statutes substantially expanded the forms and opportunities for participation by citizens and stakeholders in federal government decision-making. Since Congress passed these statutes, there has been dramatic growth in the use of new governance processes in the federal government.<sup>236</sup>

### **5. The Negotiated Rulemaking Act**

The NRA was adopted to allow collaboration among a representative group of organizations and stakeholders to craft draft regulations; it is a top down, carefully structured statute that contains this form of collaborative public management within express limits. An agency convenes a group of 25 or fewer stakeholders to negotiate the text for subsequent

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<sup>234</sup> 5 U.S.C. §§561, *et seq.*

<sup>235</sup> 5 U.S.C. §§571, *et seq.*

<sup>236</sup> See generally the website of the Federal Interagency ADR Working Group, [www.adr.gov](http://www.adr.gov); Senger, *supra* note \_\_; for an early empirical study of agency ADR use, see Lisa B. Bingham and Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate its Success?* 6 J. OF PUB. ADMIN. RES. & THEORY 383 (1996); for a follow up study with data collected in 2001, see Tina Nabatchi, *The Institutionalization of Alternative Dispute Resolution in the Federal Government*, 67 PUB. ADMIN. REV. 646 (2007).

public notice and comment.<sup>237</sup> Congress intended to enhance informal rulemaking and encourage innovation. The NRA defines “consensus” as unanimous concurrence among represented interests, unless the committee agrees otherwise. A “negotiated rulemaking committee” is “an advisory committee established by an agency ... to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.” It incorporates APA definitions for agency, party, person, rule, and rulemaking.

A single agency has sole authority to determine the need for a negotiated rulemaking committee. It may see assistance from a ‘convener.’ It must consider the need for a rule, whether there is a limited number of identifiable interests, whether there is a reasonable likelihood of balanced committee (one that can represent interests affected and is willing to negotiate), the likelihood of consensus within a reasonable time, agency resources, and agency willingness to use consensus for proposed rule. The agency must publish notice so people can apply for membership on the committee. After 30 days, the agency may establish the committee. It may also decide not to go forward with negotiated rulemaking, but instead to use the conventional formal and informal rulemaking process. Membership on the negotiated rulemaking committee is limited to 25 persons, unless the agency determines it needs more for balanced representation. The committee must include at least one agency representative. The decision not to have a negotiated rulemaking committee is committed to agency discretion and not subject to judicial review.

Once established, the committee must meet and try to reach consensus and may use an impartial facilitator to assist, chair meetings, and manage record-keeping. Records are

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<sup>237</sup> Cornelius M. Kerwin, *Negotiated Rulemaking*, in THE HANDBOOK OF PUBLIC LAW AND PUBLIC ADMINISTRATION, edited by Phillip J. Cooper and Chester A. Newland, 225-236 (1997).

exempt from disclosure under the Freedom of Information Act. Moreover, the committee itself is exempt from those sections of APA on rulemaking procedures.

The NRA requires a public report if there is consensus, and permits a limited report if there is no consensus, or a consensus on some but not all issues. The committee terminates upon final rule, unless there is some early agency directive or committee agreement on a different termination date. There is judicial review only of a final rule, and then in the same manner and by the same standards as any other rulemaking. The courts do not accord any greater deference to the product of negotiated rulemaking than rules made by the traditional process.

There is an active debate over whether negotiated rulemaking saves agencies time and money. While some claim that negotiated rulemakings are no shorter than traditional ones,<sup>238</sup> others argue that only rules likely to spur litigation and controversy are submitted to negotiated rulemaking, and thus, many administrators view it as an achievement that these rules take *no longer* than traditional rulemaking.<sup>239</sup> Others have concerns about the accountability of public agencies using negotiated rulemaking.<sup>240</sup>

Whatever its effectiveness, from the standpoint of collaborative public management, the statute presents problems. First, it contemplates action within the scope of delegated authority to a single, lead agency. Although it permits that agency to create the working group, it does not contemplate joint action by multiple agencies. Second, it sets up a tightly

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<sup>238</sup> Cary Coglianese, *The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L. J. 1255 (1997).

<sup>239</sup> Philip Harter, *Assessing the Assessors: The Actual Experience of Negotiated Rulemaking*, 9 N.Y.U. ENVIRONMENTAL L. J. 32 (2000).

<sup>240</sup> "Both negotiation theory and real-world experience point toward an insoluble tension between the agency's traditional role as a sovereign entity entrusted with using its expertise to further the public interest, and its role as negotiator seeking to attain a consensus with private parties. Therefore, regardless of whether or not reg neg "works" in a practical sense, it raises serious questions of the rule's legitimacy - questions which, if not rising to the level of unconstitutionality under the nondelegation doctrine, certainly cast doubt on the wisdom and propriety of granting judicial deference to negotiated interpretations of law." Robert Choo, *Judicial Review of Negotiated Rulemaking: Should Chevron Deference Apply?* 52 RUTGERS L. REV. 1069, 1119 (2000).



prescribed procedure for collaboration. This is a top down authorization that does not allow for much experimentation. Third, it requires that a negotiated rulemaking committee terminate upon completion of a draft rule; thus it does not contemplate the participation of the committee in implementation of the regulation. Fourth, it does not give the committee express authority for civic engagement during the conduct of its work. Finally, since committees are subject to FACA,<sup>241</sup> all the concerns expressed regarding that statute apply with equal force to the NRA.

## **6. The Administrative Dispute Resolution Act of 1996**

The ADRA contemplates both quasi-legislative and quasi-judicial processes when it authorizes agencies to use alternative dispute resolution.<sup>242</sup> Quasi-legislative new governance processes include uses of mediation, facilitation, consensus building, and collaborative policy making to make, implement, and enforce policy.<sup>243</sup> Under the ADRA, agencies have made quasi-judicial uses of new governance processes (including mediation, facilitation, mini-trials, summary jury trials, fact-finding, and binding and non-binding arbitration) for disputes arising out of employment, procurement contracts, or civil enforcement of an agency's public law mandate.<sup>244</sup>

The ADRA contains four key structural components: authorization to use ADR, a mandate that each agency appoint a dispute resolution specialist, required statements of

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<sup>241</sup> 5 U.S.C. §562(7) defines negotiated rulemaking committee as “means an advisory committee established by an agency in accordance with this subchapter and the Federal Advisory Committee Act to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule.”

<sup>242</sup> Marshall J. Breger, Gerald S. Schatz and Deborah Schick Laufer, eds. *FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK*. (2001).

<sup>243</sup> For example, environmental policy, see Robert F. Durant, Daniel J. Fiorino, and Rosemary O’Leary, eds. *ENVIRONMENTAL GOVERNANCE RECONSIDERED: CHALLENGES, CHOICES, AND OPPORTUNITIES* (2004); Rosemary O’Leary and Lisa Blomgren Bingham, *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* (2003).

<sup>244</sup> Lisa B. Bingham and Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate its Success?* 6 J. PUB. ADMIN. RES. AND THEORY 383 (1996).

agency ADR policy for the public, and easing bureaucratic barriers to ADR use.<sup>245</sup> These four elements have combined to increase the use of ADR by federal agencies. Surprisingly, the ADRA accomplished this without a federal monetary appropriation to support agency efforts to implement programs.

The ADRA authorizes use of ‘alternative means of dispute resolution’ defined as any procedure that is used to resolve issues in controversy, *including but not limited to*, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombudsman or any combination thereof. In other words, the statute creates an inclusive, not an exclusive, list of processes. This allows for continuous innovation. The act does not define the terms for processes, which in turn opens them up for innovation. The express authorization to use ADR eliminated any bar imposed by conservative and risk-averse agency legal counsel.

The ADRA expressly addressed concerns over the delegation of public authority to a private person in the provision for binding arbitration.<sup>246</sup> The USDOJ raised concerns about excessive delegation in the first draft of the bill, resulting in a watered down arbitration clause; the agency had the power to reject the award.<sup>247</sup> However, the 1996 version of the ADRA contains explicit authorization for arbitration that is binding on both parties. It incorporates provisions of federal Arbitration Act on enforcing arbitration awards. It gives

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<sup>245</sup> Margaret Ward, *Public Fuss in a Private Forum*, 2 HARV. NEGOTIATION L. REV. 217 (1997)(ADRA required each federal agency to adopt an ADR policy, appoint an ADR specialist, develop an ADR training program, and review existing agency agreements for possible incorporation of ADR clauses, examine the potential for alternatives in relation to formal and informal adjudications, rulemakings, enforcement actions, license and permit issuance and revocation, contract administration, and enforcement and defense of litigation.

<sup>246</sup> Jonathan D. Mester, *The Administrative Dispute Resolution Act of 1996: Will the New Era of ADR in Federal Administrative Agencies Occur at the Expense of Public Accountability?* 13 OHIO ST. J. ON DISP. RESOL. 167 (1997)(arguing this change renders agencies less publicly accountable).

<sup>247</sup> Cynthia B. Dauber, *The Ties that Do Not Bind: Nonbinding Arbitration in Federal Administrative Agencies*, 9 ADMIN. L.J. AM. U. 165 (1995).

arbitrators the usual powers to conduct a hearing, administer oaths, subpoena witnesses, and issue awards. It also gives arbitrators the power to interpret and apply “relevant statutory and regulatory requirements, legal precedents, and policy directives.” Arbitrators must issue award within 30 days, unless the parties agree to some other time limit. The Act specifies content of arbitration award, specifically “a brief informal discussion of the factual and legal basis for the award,” but does not require that it be formal. Final awards are binding, and may be enforced under federal Arbitration Act.

The way in which Congress addressed the concern about delegation to private decision-makers was by providing that an arbitration award, unlike agency adjudications, cannot be used as precedent. Since they are not precedent, unlike agency adjudications, arbitration awards may not be reviewed under the Administrative Procedure Act. Instead, there is judicial review only under the standards of the Federal Arbitration Act. This means that a court will only overturn a binding award upon proof of fraud, collusion, undue influence, exceeding the scope of the submission, or using unlawful procedure. In contrast, the APA standards authorize a reviewing court to overturn an agency’s adjudication if it is arbitrary and capricious, affected by an error of law, lacking substantial evidence on the record as a whole, or unconstitutional. It is harder to overturn an arbitration award through judicial review than an agency’s adjudication. A federal agency has complete discretion, not subject to judicial review, in deciding whether to use ADR.

The ADRA provided new legal infrastructure to ease the bureaucratic barriers to using neutrals. The ADRA authorizes agencies to use neutrals from a variety of sources, including the FMCS roster, American Arbitration Association (see [www.adr.org](http://www.adr.org)) roster, or any individual. It authorizes agencies to enter into contracts, and establish compensation

through agreement with other parties to the dispute. The statute also provides confidentiality for the parties for dispute resolution communications between a neutral and a party, with certain statutorily enumerated exceptions. All of these had previously been barriers that served agency inertia.

Thus, the ADRA authorizes individual agencies to use the processes of collaboration. Impliedly, it authorizes them to participate in multi-stakeholder dispute resolution processes with other agencies. However, it is not expressly directed at action by a network nor does it address issues of civic engagement. It contemplates a convener agency and action in relation to specific and identified stakeholders. This, it does not serve as the necessary legal infrastructure for collaborative governance.

However, the ADRA is increasingly viewed as a success. It may serve as a model for legislation on collaborative public management and collaborative governance, including broader institutionalization of civic engagement and deliberative democracy processes.

### **7. Specific Authorizations to Individual Agencies**

Congress may authorize individual agencies to use new governance processes or collaborate in service delivery in specific policy arenas. Individual federal agencies may be authorized, or sometimes required, to use ADR processes for certain kinds of disputes or within certain programs for enforcing public law. Special purpose authorizations in labor relations have existed for most of the past century. Labor-management cooperation programs are more recent. However, in the past two decades, Congress has built express authority to use ADR into a wide variety of public law programs, including US Department of Agriculture mediation of disputes between the government and farmers over federal

agricultural loans;<sup>248</sup> Environmental Protection Agency mediation and arbitration for certain disputes;<sup>249</sup> mediation of special education disputes;<sup>250</sup> and Department of Defense procurement disputes in a variety of forms, including mediation and a form of advisory arbitration known as dispute panels.<sup>251</sup> These are but a few such special purpose authorizations. By definition, special purpose authorizations generally run to a single agency; they do not contemplate a network of agencies.

More commonly, mandates for public involvement or public participation programs exist in most agencies' enabling legislation and are too numerous to catalogue. However, these typically do not define public involvement or public participation or authorize the more innovative processes of dialogue, deliberation, or large scale experiments in deliberative democracy.

## **8. The U.S. Institute for Environmental Conflict Resolution**

Another model for legal infrastructure is the creation of the U.S. Institute for Environmental Conflict Resolution.<sup>252</sup> This relatively young federal agency, established within the Morris Udall Foundation, has as its express mission “to assist the Federal

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<sup>248</sup> See generally, Stephen Carpenter, *Farm Service Agency Credit Programs and USDA National Appeals Division*, 3 DRAKE J. AGRIC. L. 35 (1998); Contemporary Studies Project, *The Iowa Mediation Service: An Empirical Study of Iowa Attorneys' Views on Mandatory Farm Mediation*, 79 IOWA L. REV. 653 (1994); L. Roger Johnson, *The North Dakota Agricultural Mediation Service*, 70 N. DAK. L. REV. 295 (1994).

<sup>249</sup> See generally, Sarah B. Belter *The Use of Arbitration by Federal Agencies to Solve Environmental Disputes: All Wrapped Up in Red Tape*, 56 U. MIAMI L. REV. 1033 (2002)(observing that the Environmental Protection Agency (EPA) has used mediation and arbitration to solve environmental disputes since the 1980s under the Superfund Amendments and Reauthorization Act of 1986, and the Comprehensive Environmental Compensation, Response, and Liability Act of 1980).

<sup>250</sup> See generally Grace E. D'Alo, *Accountability In Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOTIATION L. REV. 201 (2003); Nancy A. Welsh, *Stepping Back Through the Looking Glass: Real Conversations with Real Disputants About Institutionalized Mediation and Its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573 (2004).

<sup>251</sup> See generally, Eldon H. Crowell and Charles Pou, Jr., *Appealing Government Contract Decisions: Reducing the Cost and Delay of Procurement Litigation with Alternative Dispute Resolution Techniques*, 49 MD. L. REV. 183 (1990).

<sup>252</sup> USIECR, [www.ecr.gov](http://www.ecr.gov).

Government in implementing section 101 of the National Environmental Policy Act of 1969 ... by providing assessment, mediation, and other related services to resolve environmental disputes involving agencies and instrumentalities of the United States.”<sup>253</sup> Its mission is to provide a process and mechanism for collaboration across federal, state, local, and Native American sovereign entities for environmental disputes. This work of necessity involves a broader array of non-governmental stakeholders from both private and non-profit sectors as well as the broader public through direct citizen participation. By authorizing the USIECR to serve a convening function, the statute indirectly authorizes agencies to participate, and thus to collaborate.

## **B. State Legal Infrastructure**

Consistent with our federalism, the federal APA and its amendments have no application to state or local agencies. Each state adopts its own framework for state administrative procedure and for public conflict resolution. However, many states look to both the federal government and other states for guidance.

### **1. The Model State Administrative Procedures Act**

In a model similar to federal law, state administrative procedures acts generally contemplate action by a single agency, not an agency engaged in a collaborative public management network. The United States is blessed with the public service of the National Conference of Commissioners on Uniform State Laws.<sup>254</sup> The Model State Administrative Procedure Act is itself silent on alternative dispute resolution and negotiated rulemaking.<sup>255</sup> However, in states that have adopted it, administrators usually have implicit authority to use

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<sup>253</sup> 20 U.S.C. Section 5604 (2008) citing 42 U.S.C. 4331.

<sup>254</sup> These scholars and elite practitioners craft model statutes on a wide variety of subjects for states to consider enacting. See NCCUSL’s website for examples, [www.nccusl.org](http://www.nccusl.org).

<sup>255</sup> ‘MSAPA’ [1981], available on the web at [www.law.upenn.edu/bll/ulc/ulc.htm](http://www.law.upenn.edu/bll/ulc/ulc.htm).

these processes through their power to enter into contracts. Moreover, most states adopt the MSAPA's general provisions authorizing informal disposition or settlement of cases (§1-106), allowing agencies to establish advisory committees (§3-101), and requiring agencies to adopt rules for informal procedures available to the public (§2-104). All of these provisions provide authority for the kinds of informal, consensus-oriented processes that characterize the new governance.

In the absence of express statutory authorization, binding arbitration, a form of private judging, may raise concerns about unconstitutional delegation of agency regulatory power to private decision-makers.<sup>256</sup> However, generally none of the other new governance processes pose this problem, because they are all predicated upon agency agreement to the process and to any binding outcome. Moreover, as long as agencies subsequently follow other, more formal procedures for notice and comment to adopt negotiated draft regulations, there is no inherent conflict between traditional rulemaking and negotiated rulemaking even in the absence of express statutory authority.

However, this legal infrastructure presumes that the final agency action will be taken by one agency acting alone, not as part of a network. The drafters simply did not envision the emergence of networked governance.

## **2. State Legal Infrastructure for Negotiation and Dispute Resolution**

As is the case in the federal sector, there is legal infrastructure in many states that authorizes public agencies to use the processes of collaboration, for example, mediation. The National Conference of Commissioners on Uniform State Laws recently completed work on

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<sup>256</sup> Jeffrey M. Senger, *FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT* (2003).

the new Uniform Mediation Act.<sup>257</sup> This is another model statute for state legislatures to consider adopting. It provides express authority for government use of mediation in Section 2(6). A number of states have already adopted this uniform act, for example, Illinois.

Many states expressly authorize all state agencies to use new governance processes, either through amendments to their state APAs or executive order (e.g., Massachusetts). As of this writing, there are six comprehensive state offices of dispute resolution, 38 offices focusing on courts, and 34 in universities and non-profits.<sup>258</sup> State legislation on alternative dispute resolution and negotiated rulemaking ranges from the short and broad, to the long and specific. For example, New Mexico simply authorizes agencies to use alternative dispute resolution. In contrast, Texas<sup>259</sup> and Florida<sup>260</sup> have legislation analogous to the federal ADRA and NRA. More common is a general authorization as part of a state administrative procedure act. Indiana authorizes state agencies to use mediation, provided mediators have the same training as mediators for state courts.<sup>261</sup> New Jersey adopted dispute resolution and negotiated rulemaking through the Attorney General's power to adopt additional administrative procedures, and these provisions appear in the state administrative code.<sup>262</sup> Again, all of these statutes authorize the processes for collaboration (mediation, facilitation, and negotiation), but they are drafted from the perspective of unitary agency action. A single agency can enter into a process, but the ultimate action is its responsibility, not that of the collaborative.

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<sup>257</sup> The 'UMA' is available at [www.mediate.com/articles/umafinalstyled.cfm](http://www.mediate.com/articles/umafinalstyled.cfm).

<sup>258</sup> See [www.policyconsensus.org](http://www.policyconsensus.org).

<sup>259</sup> Texas statutes are modeled on the federal statutes. For negotiated rulemaking, see TEX. GOV'T CODE § 2008.001, et seq. (2007); as to government dispute resolution, see TEX. GOV'T CODE § 2009.001, et seq. (2007).

<sup>260</sup> FLA. STAT. § 120.573 (2008) authorizes mediation and FLA. STAT. § 120.54 (2008) authorizes negotiated rulemaking.

<sup>261</sup> See BURNS IND. CODE ANN. § 4-21.5-3.5-1, et seq. (2008).

<sup>262</sup> See N.J.A.C. 1:30-1.2 (2008) and N.J.A.C. 1:30-5.7 (2008).



In addition to these general authorizations, there are myriad specific legislative authorizations for certain state agencies to use particular processes for certain substantive policy work. For example, mediation is a common method for addressing conflicts arising out of special education placements and programs at the state level. State environmental agencies may have the power to use mediation for particular land use disputes, like deciding upon the sites for landfills.<sup>263</sup> In environmental governance, a group of agencies and stakeholders may reach an agreement through a consensus-building process, but sometimes problems can arise with enforcing and implementing the agreement. This too reflects a weakness in legal infrastructure for collaboration.

### **C. Legal Infrastructure for Local Government**

Although the legal framework for local government is in the first instance a matter of state law, local government charters and ordinances can provide an important source of support and legal infrastructure for collaborative governance and particularly civic engagement at the level of government that people find most relevant to their daily lives.<sup>264</sup> The Los Angeles Neighborhood Councils are incorporated into the city charter.<sup>265</sup>

For example, the National Civic League has developed an appendix to its Model City Charter that is entitled “Citizen-Based Government: A Process to Engage Citizens in Charter

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<sup>263</sup> E. Franklin Dukes, Marina A. Pisolish, and John B. Stephens, *REACHING FOR HIGHER GROUND IN CONFLICT RESOLUTION: TOOLS FOR POWERFUL GROUPS AND COMMUNITIES* (2000); Institute for Environmental Negotiation, University of Virginia, *A STREAM CORRIDOR PROTECTION STRATEGY FOR LOCAL GOVERNMENT* (2002); and Policy Consensus Initiative, *STATES MEDIATING CHANGE: IMPROVING GOVERNANCE THROUGH COLLABORATION* (2001).

<sup>264</sup> See Matt Leighninger, *THE NEXT FORM OF DEMOCRACY: HOW EXPERT RULE IS GIVING WAY TO SHARED GOVERNANCE -- AND WHY POLITICS WILL NEVER BE THE SAME* (2006). For resources and publications regarding collaborative governance at the local government level, see the website of the Institute for Local Government, [www.ca-ilg.org](http://www.ca-ilg.org) (follow civic engagement link for the Collaborative Governance Initiative); and see the website of the National League of Cities Democratic Governance Panel, [www.nlc.org](http://www.nlc.org) (follow link for Governance & Structure to find civic engagement resources).

<sup>265</sup> See [www.lacityneighborhoods.com](http://www.lacityneighborhoods.com) and [www.lacity.org/lacity102.htm](http://www.lacity.org/lacity102.htm).

Revision.”<sup>266</sup> It emphasizes the needs for citizen education and buy-in to lay the groundwork for successful charter revision. One could envision a charter provision that creates an office of collaborative governance and authorizes departments, boards, and commissions to make broad and innovative use of civic engagement processes for dialogue and deliberation.

## **V. Conclusion New Legal Infrastructure for Encouraging Collaborative Public Management and Collaborative Governance**

While the existing legal framework authorizes some of the processes for collaboration, these statutes were all drafted from the perspective of unitary agency decision-making. Moreover, they were not drafted with broad civic engagement and collaborative governance in mind. The inherent caution of lawyers may require more explicit language enabling agencies to do this work. There is much experimentation in forms of networked governance; similarly, we are in the ‘let the thousand flowers bloom’ stage of collaborative governance, in which new processes for citizen dialogue and deliberation in the policy process are emerging daily. Legal infrastructure should not inhibit this experimentation. Instead, it should authorize and legitimize it.

There are five key questions that the field of administrative law must consider as it develops new legal infrastructure for collaborative governance:

1. How can we empower agencies to participate in networks that can take action consistent with notions of delegated authority constrained by legislative standards that courts can use in judicial review?
2. How do we facilitate collaborative public management in a way that is consistent with transparency in government?

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<sup>266</sup> National Civic League, MODEL CITY CHARTER: DEFINING GOOD GOVERNMENT IN A NEW MILLENNIUM (8TH ED 2003).

3. How do we foster effective participation in collaborative governance by citizens and stakeholders to provide greater transparency?
4. How do we foster broader civic engagement in public management networks?
5. What forms and methods of accountability are appropriate in collaboration?

There are a variety of approaches we can begin to consider to address the legal infrastructure problem. One can envision a model analogous to a hybrid of the ADRA and NRA. In the area of collaborative public management, like the ADRA, it could provide the broad bottom up authorization for agencies to develop many different collaboration public management structures. It could clarify that agencies are empowered to act collectively, without violating the scope of their respective delegations. It could clarify that they have broad authority to innovate and experiment with ways to engage the public, without becoming subject to charges of waste or abuse. At the same time, like the NRA it could provide guidance on what criteria an agency might consider when deciding to use such a collaborative public management structure, much like the NRA criteria to assist an agency in deciding to use negotiated rulemaking. An agency's decision on whether or not to collaborate could, like the decision to use ADR or negotiated rulemaking, be committed to agency discretion. An essential element to foster both transparency and accountability would be to expand public participation and make it effective.

In the area of upstream collaborative governance processes, it could authorize broader agency use and innovation with civic engagement processes for dialogue and deliberation. Involving the public through more collaborative governance would make the work of collaborative public networks visible and directly accountable in a way that is far more immediate than judicial review. In order to foster continued growth in new processes for

dialogue and deliberation, the statute could contain a broad authorization for agencies to use a nonexclusive list of existing models including those catalogued here, much like the list in the ADRA of forms of dispute resolution. Similar to the ADRA, it could require that agencies develop capacity in this area by designating a specialist in collaborative governance. The ADRA did not cost money, but an appropriation would have made diffusion of this innovation move faster through government.

These models do not represent mandates or provisions that would require a specific collaborative public management structure or collaborative governance process; history suggests that administrative law has evolved incrementally through delegations of authority to administrative agencies to adapt process to their specific culture and substantive mandate.<sup>267</sup> Instead, these suggestions take the form of discretionary authority, incentives, and ideally financial support for the many experiments that are already under way.

This is only an initial foray into an analysis of the legal framework for collaborative governance, and one that has focused primarily on these issues as they apply to executive branch agencies in federal and by analogy state government. There are also concerns about collaborative governance in the legislative<sup>268</sup> and judicial<sup>269</sup> branches. Agency counsel will be taking much closer looks at the laws pertaining to their specific area of jurisdiction, and there are many, far more precise legal problems they will no doubt articulate. The business of identifying all of these specific issues can be costly for agencies. A more holistic approach may be in the public interest, one that authorizes collaboration and preserves accountability

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<sup>267</sup> Sidney Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89 (1996).

<sup>268</sup> Tom Melling, *Dispute Resolution Within Legislative Institutions*, 46 STAN. L. REV. 167 (1994).

<sup>269</sup> William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1 (1990).

through the enhanced transparency that broader civic engagement and public participation afford.