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

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

*Lisa Blomgren Bingham**

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I. INTRODUCTION

In *A.L.A. Schechter Poultry Corp. v. United States*,¹ the U.S. Supreme Court faced a challenge to a work product of collaboration. A New York poultry dealer let customers select individual chickens for kosher slaughter from a coop or lot; he was convicted of violating regulations adopted pursuant to the New Deal’s National Industrial Recovery Act (NIRA).² The Court observed that the national crisis of the Depression “demanded a broad and intensive co-operative effort by those engaged in trade and industry, and that this necessary co-operation was sought to be fostered by permitting them to initiate the adoption of codes.”³ However, the Court noted that this cooperation:

involves the coercive exercise of the lawmaking 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 . . .

1. 295 U.S. 495 (1935) (affectionately known as the “Sick Chicken” case).

2. *Id.* at 521, 527-28.

3. *Id.* at 529.

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.⁴

The statute in question expressly purported to “provide for the general welfare by promoting the organization of industry *for the purpose of co-operative action among trade groups*.”⁵ 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.”⁶

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 1? 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.⁷

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.⁸ The President also had to ensure that the code was not designed to promote monopolies or eliminate, oppress, or discriminate against small competitors.⁹ 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 1 and, in that wide field of legislative possibilities, the

4. *Id.* at 529-30.

5. *Id.* at 531 n.9 (emphasis added).

6. *Id.* at 537 (internal quotations omitted).

7. *Id.*

8. *Id.* at 538.

9. *Id.*

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.¹⁰

The Court found 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.¹¹ Instead, it authorized codes but set no standards for them.¹² The Court concluded: “[T]he code-making authority thus conferred is an unconstitutional delegation of legislative power.”¹³ Justice Cardozo famously concurred, describing it as “delegation running riot.”¹⁴

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. Instead, they examine the scope of a statute’s delegated authority to the executive branch.¹⁵

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.¹⁶ 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 administrative strategies of command and control and replacing them with a continuous dynamic process governed by the relevant stakeholders.”¹⁷

10. *Id.*

11. *Id.* at 541.

12. *Id.*

13. *Id.* at 542.

14. *Id.* at 553 (Cardozo, J., concurring).

15. See, e.g., *Clinton v. City of New York*, 524 U.S. 417 (1998); *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336 (1974); *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

16. The seminal works in public affairs are Lester M. Salamon & Odus V. Elliott, *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (2002), and 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. See, e.g., Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1 (1997); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 *MINN. L. REV.* 342 (2004); 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, *Surreply, Setting the Agenda for New Governance Research*, 89 *MINN. L. REV.* 498 (2004); Richard Stewart, *Administrative Law in the Twenty-First Century*, 78 *N.Y.U. L. REV.* 437 (2003); Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 *WIS. L. REV.* 575 (2002) [hereinafter Trubek, *Public Interest Lawyers*]; Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 *IND. HEALTH L. REV.* 139 (2006) [hereinafter Trubek, *New Governance*].

17. Howard Erlanger et al., *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 *EUR. L.J.* 1 (2002); Louise G. Trubek & Maya Das, *Achieving Equality: Healthcare Governance in Transition*, 29 *AM. J. L. & MED.* 395 (2003)).

The specific processes through which stakeholders participate attract less attention among 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 once again 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.¹⁸ However, public administrators have an ethical obligation to know and comply with the Constitution and public law,¹⁹ and where collaboration is concerned, the law is either piecemeal or silent.

We need a comprehensive model to understand emerging uses of collaboration across the policy continuum. We also need to re-examine our legal framework for policy-making, implementation, and enforcement to encompass this new collaborative governance. My normative assumption is that collaborative governance is useful in appropriate 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. First, it briefly reviews collaborative and new governance. Second, it describes deliberative democracy; collaborative public or network management; and appropriate dispute resolution in the policy process. These three separate fields are part of a single phenomenon, namely the changing nature of citizen and stakeholder voice in governance. Third, it describes how these new forms of participation operate across the policy continuum. Fourth, it briefly reviews existing legal infrastructure for collaborative governance primarily from the perspective of federal administrative law.²⁰ I conclude that we need to revise our legal infrastructure to facilitate collaboration in a way that will strengthen our democracy.

II. COLLABORATION IN GOVERNANCE AND MANAGEMENT

During the final third of the twentieth century, the way that we talked 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.²¹ Moreover, hierarchy failed entirely as an approach to global and transnational problems, i.e., those that cross the jurisdictional boundaries of nation states.

18. 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.

Freeman, *supra* note 16, at 90.

19. DAVID H. ROSENBLUM, *ADMINISTRATIVE LAW FOR PUBLIC MANAGERS* 7 (2003).

20. This article can only survey selected developments, statutes, and issues; it is necessarily an incomplete sketch.

21. See ROBERT AGRANOFF & MICHAEL MCGUIRE, *COLLABORATIVE PUBLIC MANAGEMENT: NEW STRATEGIES FOR LOCAL GOVERNMENTS* 2, 24 (2003).

This gave rise to the concept of governance, rather than government.²² Governance suggests steering rather than top-down directing. In its contemporary usage, it means a process involving resources and strategic, often collaborative, relationships outside a single organization aimed 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.”²³ 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;²⁴ however, the notion of contract as a metaphor for the blurring of public and private is relevant here.²⁵

Governance may also involve the public through civic engagement and participatory decision-making; this is “participatory governance,” which is the active involvement of citizens in government decision-making²⁶ and may include deliberative democracy²⁷ and/or collaborative governance.²⁸ A principle of collaborative, or shared, governance is that expert policy analysts do not have exclusive or even the necessary information about public values and knowledge.²⁹ Collabora-

22. See DONALD F. KETTL, *THE TRANSFORMATION OF GOVERNANCE: PUBLIC ADMINISTRATION FOR TWENTY-FIRST CENTURY AMERICA* (2002); see also Scott Burris et al., *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.”).

23. See generally AGRANOFF & MCGUIRE, *supra* note 21; Rosemary O’Leary et al., *Introduction to the Symposium on Collaborative Public Management*, 66 PUB. ADMIN. REV. (SPECIAL ISSUE) 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 et al., *Frameshifting: Lateral Thinking for Collaborative Public Management*, in *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT* 3 (Lisa Blomgren Bingham & Rosemary O’Leary eds., 2008).

24. See, e.g., Ellen Dainin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL’Y 111 (2006); Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397 (2006).

25. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 571 (2000).

26. See generally DOUG HENTON ET AL., *THE WILLIAM AND FLORA HEWLETT FOUNDATION, COLLABORATIVE GOVERNANCE: A GUIDE FOR GRANTMAKERS* (2005), available at <http://www.hewlett.org/news/collaborative-governance-a-guide-for-grantmakers>.

27. For a number of case studies and essays on deliberative democracy, see *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE* (Archon Fung & Erik Olin Wright eds., 2003), and *THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY* (John Gastil & Peter Levine eds., 2005).

28. 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.” Interview with Terry Amsler, Program Director, Collaborative Governance Initiative, Inst. for Local Gov’t, Sacramento, Cal. (Nov. 28, 2009).

29. 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* 1-3 (2006).

tive governance may occur at any stage of the policy process, including identifying an issue; identifying approaches to addressing it; identifying preferences; prioritizing among preferences; selecting a policy approach; and adopting, implementing, and enforcing policy.³⁰

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 public participation. 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.

Administrative law scholars generally occupy themselves with challenges to the legitimacy of the administrative state.³¹ The absence of any reference to administrative agencies in the Constitution, the combination of quasi-legislative, executive, and quasi-judicial functions in the agency potentially violating separation of powers, and the absence of direct accountability to the electorate taken together raise concerns.³² As a result, most scholarship addresses how to constrain agency power and make it accountable, or conversely, to justify it.³³ Scholars have applied this approach to collaboration in governance, particularly regulation-by-negotiation.³⁴

However, scholars recently have recognized an evolution away from command-and-control hierarchy to “a new model of collaborative, multi-party, multi-level, adaptive, problem-solving New Governance.”³⁵ Professor Jody Freeman examines the private role in public governance across the policy continuum, finding that nongovernmental actors engage in legislative and adjudicative roles.³⁶ 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 poli-

30. See *infra* Part III.

31. See Freeman, *supra* note 25, at 543.

32. *Id.* at 545-46.

33. 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. Dannin, *supra* note 24.

34. See, 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 et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179 (2005).

35. Karkkainen, *supra* note 16, at 473. For a comprehensive review of the new governance literature that Professor Karkkainen critiques, see Orly Lobel, *The Renew Deal*, *supra* note 16. 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); Trubek, *Public Interest Lawyers*, *supra* note 16; 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); Trubek, *New Governance*, *supra* note 16; Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029 (2005).

36. Freeman, *supra* note 25, at 547. She includes among these corporations, public interest organizations, private standard setting bodies, professional associations, and nonprofit groups. *Id.* She does not include citizens in their individual capacity. *Id.*

cy making, implementation, and enforcement.”³⁷ She ultimately rejects the term governance in favor of “problems to confront and decisions to make,” observing “[t]here is nothing to govern.”³⁸ 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.”³⁹ 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.⁴⁰ 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.⁴¹

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.⁴² She observes that “[d]emocratic practices are those that value power-sharing, invite broad participation, engage stakeholders in local decision-making about concrete problems, and yield creative solutions that are nevertheless subject to critical feedback.”⁴³

However, administrative law scholars are largely ignoring the mismatch between the existing statutory framework for governance and 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.⁴⁴ 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 hearings⁴⁵—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

37. *Id.* at 548.

38. *Id.*

39. *Id.* at 549.

40. *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)).

41. *Id.*

42. See Lani Guinier, *Supreme Democracy: Bush v. Gore Redux*, 34 LOY. U. CHI. L.J. 23 (2002).

43. *Id.* at 66.

44. See *infra*, Part IV.

45. See, e.g., JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 6, 15 (4th ed. 2006).

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.

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,⁴⁶ 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, the public, or stakeholders.

We need 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.

III. PUBLIC 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 public and stakeholder voice in governance. This phenomenon has taken three forms: (1) deliberative and participatory democracy; (2) collaborative public management; and (3) 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 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.⁴⁷ This movement seeks more public deliberation, dialogue, and shared decision making in governance⁴⁸ 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.” It has found support in the institutions of civil

46. See Lisa B. Bingham et al., *The New Governance: Practices and Processes for Stakeholder and Citizen Participation in the Work of Government*, 65 PUB. ADMIN. REV. 547, 550-52 (2005).

47. See, e.g., JOHN FORESTER, *THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES* (1999); JOHN GASTIL, *POLITICAL COMMUNICATION AND DELIBERATION* (2008).

48. *THE DELIBERATIVE DEMOCRACY HANDBOOK*, *supra* note 27, at 3-4; Nancy Roberts, *Public Deliberation in an Age of Direct Citizen Participation*, 33 AM. REV. PUB. ADMIN. 1, 1 (2003).

society, to some degree from the same foundations that funded work on dispute resolution,⁴⁹ 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,⁵⁰ as contrasted with the traditional adversarial processes of governance, which usually entail debate. In dialogue, participants engage in a 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 to probe for a deeper understanding. Deliberation is the thoughtful consideration of information, views, and ideas.

There are 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.⁵¹

B. Collaborative Public or Network Management

The study of collaborative public management is an outgrowth of work in intergovernmental relations, privatization, devolution, and nonprofit management.⁵² 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.

49. These include the William and Flora Hewlett Foundation. See discussion *infra* Part II.C.

50. LARS HASSELBLAD TORRES, THE WILLIAM AND FLORA HEWLETT FOUNDATION, DELIBERATIVE DEMOCRACY: A SURVEY OF THE FIELD (2003) (on file with author).

51. The Web site for the National Coalition for Dialogue and Deliberation offers detailed definitions for dialogue and deliberation, National Coalition for Dialogue & Deliberation, http://www.thataway.org/?page_id=713 (last visited Dec. 15, 2009), and links to models and techniques, National Coalition for Dialogue & Deliberation, http://www.thataway.org/?page_id=1487 (last visited Dec. 15, 2009). For an effort at mapping the growing field and more description, see ABIGAIL WILLIAMSON & ARCHON FUNG, MAPPING PUBLIC DELIBERATION (Feb. 14, 2005) (unpublished report), available at <http://www.hewlett.org/download?guid=987261ed-49c2-102c-ab7e-0002b3e9a4de> (last visited Dec. 15, 2009).

52. See generally AGRANOFF & MCGUIRE, *supra* note 21; ROBERT AGRANOFF, MANAGING WITHIN NETWORKS: ADDING VALUE TO PUBLIC ORGANIZATIONS (2007); EUGENE BARDACH, GETTING AGENCIES TO WORK TOGETHER: THE PRACTICE AND THEORY OF MANAGERIAL CRAFTSMANSHIP (1999); BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT, *supra* note 23; THE COLLABORATIVE PUBLIC MANAGER (Rosemary O'Leary & Lisa Blomgren Bingham eds., 2008).

Public administration scholars distinguish among cooperation, coordination, and collaboration.⁵³ Cooperation is the absence of conflict; it is less formal, involves sharing information, may be short term, and presents little risk.⁵⁴ 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 “collabor.” 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 coordinate on environmental conflict resolution and across the government on ADR.⁵⁵ It also occurs between both 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 it may yield conflict. For example, higher education may band together to develop an alternative to the U.S. News & World Reports ranking formula.⁵⁶ However, each 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 also 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.⁵⁷ Some states mandate which agencies have to participate, while other states set goals with proportions of members representing certain categories. Still other states use an open-ended approach, allowing the networks to self-organize.⁵⁸

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 devel-

53. John M. Bryson & Barbara C. Crosby, *Failing into Cross-Sector Collaboration Successfully*, in *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT*, *supra* note 23, at 55-57.

54. MICHAEL WINER & KAREN RAY WINER, *COLLABORATION HANDBOOK: CREATING, SUSTAINING, AND ENJOYING THE JOURNEY 22* (1994).

55. See Interagency Alternative Dispute Resolution Working Group, <http://www.adr.gov/> (last visited Dec. 15, 2009).

56. For examples of the U.S. News rankings, see <http://www.usnews.com/sections/rankings/> (last visited Dec. 15, 2009).

57. Stephen Page, *Managing for Results Across Agencies: Building Collaborative Capacity in the Human Services*, in *BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT*, *supra* note 23, at 138-161.

58. *Id.* at 144.

opment; they reached unanimous agreement on its outlines.⁵⁹ In the Florida Everglades, stakeholders collaborated to resolve a conflict over the science of restoring the watershed and how to foster and measure progress.⁶⁰

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.⁶¹ Collaboration occurs with large and small numbers of actors. RESOLVE, a nonprofit mediation services organization, documents mediated collaboration on a variety of policy issues with dozens of participants.⁶²

Moreover, 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.⁶³ It has also occurred in food safety, HIV/AIDS treatment, urban air quality, and dam decommissioning.⁶⁴ In watershed management, some groups use professionals while others instead designate one member to chair meetings.⁶⁵

In lower conflict settings, regional voluntary service coordination and collaboration may emerge voluntarily among local governments.⁶⁶ Local neighborhood councils collaborate with city service agencies to enhance communication and responsiveness.⁶⁷ 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.⁶⁸

59. AmericaSpeaks, Hamilton County Community COMPASS, <http://www.americaspeaks.org/index.cfm?fuseaction=page.viewPage&PageID=568&d:\CFusionMX7\verity\Data\dummy.txt> (last visited Dec. 15, 2009).

60. See CARLOS ALVAREZ ET AL., U.S. INST. FOR ENVTL. CONFLICT RESOLUTION, ASSESSMENT OF OPPORTUNITIES FOR MULTI-STAKEHOLDER COLLABORATION 6 (2002), available at http://www.ecr.gov/pdf/everglades_final_report.pdf. See generally U.S. Institute for Environmental Conflict Resolution, <http://www.ecr.gov/Default.aspx> (last visited June 18, 2009).

61. See generally THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION (Rosemary O'Leary & Lisa B. Bingham eds., 2003).

62. See RESOLVE, Online Case Gallery, http://www.resolve.org/experience/cases/exhibit_all.html (last visited Dec. 15, 2009); RESOLVE is a nonprofit organization that provides mediation and facilitation services in environmental and public policy conflict. RESOLVE, Results Through Consensus, <http://www.resolve.org/index.html> (last visited Dec. 15, 2009).

63. See RESOLVE, Our Experience, <http://www.resolve.org/experience/index.html> (last visited Dec. 15, 2009); RESOLVE, Gallery of Case Studies, *supra* note 62.

64. See RESOLVE, Gallery of Case Studies, *supra* note 62.

65. William Leach & Paul Sabatier, *Facilitators, Coordinators, and Outcomes*, in THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 61, at 148, 148-71.

66. Richard C. Feiock, *Institutional Collective Action and Local Government Collaboration*, in BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT, *supra* note 23, at 195-210.

67. Terry L. Cooper et al., *Citizen-Centered Collaborative Public Management*, 66 PUB. ADMIN. REV. 76, 79 (2006) [hereinafter Cooper et al., *Citizen-Centered*]; Terry L. Cooper et al., *Outcomes Achieved Through Citizen-Centered Collaborative Public Management*, in BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT, *supra* note 23, at 211-229.

68. Policy Consensus Initiative & Nat'l Policy Consensus Ctr., Case Studies Database—Human Services Cases, <http://www.policyconsensus.org/casestudies/humanservices.html> (last visited Dec. 15, 2009); see also Consensus Initiative & Nat'l Policy Consensus Ctr., Human Services: Building Consensus on Human Services Reform in Maryland 3, http://www.policyconsensus.org/casestudies/docs/MD_reform.pdf (last visited Dec. 15, 2009).

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.⁶⁹ This engendered substantial criticism.⁷⁰ Planning for the recovery now involves collaboration of local, state, and federal agencies and a series of large scale, high-profile citizen forums and participation by elected officials.⁷¹ 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.⁷² Statutes may lower the barriers to collaboration, for example, by authorizing public agencies to do anything together that they have power to do apart.⁷³ When experiments in collaboration are successful, states may then mandate collaboration as the preferred method to implement public policy.⁷⁴ States have enacted mandates for accountability and managing for results in collaboration.⁷⁵ Legal mandates may provide collaborative public management networks with legitimacy that facilitates their work implementing policy.⁷⁶

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

69. John J. Kiefer & Robert S. Montjoy, *Incrementalism before the Storm: Network Performance for the Evacuation of New Orleans*, 66 PUB. ADMIN. REV. 122, 124-26 (2006) (describing how state and local officials formulated the plan and how exercises were confined to professionals).

70. For an analysis, see a case study by AmericaSpeaks, Unified New Orleans Plan, <http://www.americaspeaks.org> (follow "Projects" hyperlink; then follow "Case Studies" hyperlink; then follow "Unified New Orleans Plan" hyperlink) (last visited Dec. 15, 2009).

71. This process, organized with the assistance of AmericaSpeaks, is described in more detail at The Unified New Orleans Plan, The Plan Defined, <http://www.unifiedneworleansplan.com/home3/section/130/the-plan-defined> (last visited Dec. 15, 2009), and AmericaSpeaks, Unified New Orleans Plan, <http://www.americaspeaks.org> (follow "Projects" hyperlink; then follow "Case Studies" hyperlink; then follow "Unified New Orleans Plan" hyperlink) (last visited Dec. 15, 2009).

72. AGRANOFF, *supra* note 52, at 189-220.

73. Richard C. Feiock, *Institutional Collective Action and Local Government Collaboration*, in BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT, *supra* note 23, at 195-210.

74. Jay Ryu, Ohio Univ., & Hal Rainey, Univ. of Ga., Organizational Design and Program Performance: One-Stop Shopping Structures in Employment Training Programs, Presentation at the 2006 Collaborative Public Management Conference: Maxwell School Program on the Analysis and Resolution of Conflict (Sept. 29, 2006), available at <http://www.maxwell.syr.edu/parc/AAA%20-%20Powerpoints/Hal%20Rainey.ppt> (discussing emergent public management networks that form around one-stop employment centers, which are later mandated by the state legislature).

75. Stephen Page, *supra* note 57, at 138-61.

76. Keith G. Provan et al., *Legitimacy Building in Organizational Networks*, in BIG IDEAS IN COLLABORATIVE PUBLIC MANAGEMENT *supra* note 23, at 121-37 (examining legal mandates and legitimacy or effectiveness).

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.⁷⁷ These processes include negotiation (preferably interest-based and collaborative rather than positional and competitive bargaining),⁷⁸ mediation (negotiation with the help of a third party with no decision-making power),⁷⁹ and arbitration (private judging).⁸⁰

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 these processes 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 disputants, this movement became known as alternative dispute resolution. Some now call it "appropriate" dispute resolution, in response to criticism that: (1) ADR exists independently from the justice system and is thus not "alternative" in all cases,⁸¹ and (2) that the traditional civil justice system is intended to resolve disputes.⁸²

The ADR movement gave rise to community mediation centers funded in part by the U.S. Department of Justice to address social unrest during the 1960s.⁸³

77. JEROME T. BARRETT WITH JOSEPH BARRETT, *A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, SOCIAL, AND CULTURAL MOVEMENT* 148-157 (2004).

78. ROGER FISHER ET AL., *GETTING TO YES* (2d ed. 1991).

79. For a detailed description of the mediation 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 & JOSEPH FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (rev. ed. 2005). As to labor and employment uses, see JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* (1997).

80. 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 ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* (Alan Miles Ruben ed., 6th ed. 2003). For a discussion of arbitration in dispute-system designs involving employment disputes, see DAVID B. LIPSKY ET AL., *EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS* (2003). On commercial arbitration, see THOMAS J. STIPANOWICH & PETER H. KASKELL, *CPR COMM'N ON THE FUTURE OF ARBITRATION, COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS* (2000).

81. 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).

82. For example, Janet Reno, a strong advocate of ADR, explained: "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." Janet Reno, U.S. Att'y Gen., Address Before the American Judicature Society 8 (Feb. 5, 1998) (transcript available at http://www.usdoj.gov/archive/ag/speeches/1998/0205_ag_cgo.htm (last visited Dec. 15, 2009)).

83. See Timothy Hedeon, *The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Progress*, 22 CONFLICT RESOL. Q. 101, 102-04 (2004); Nat'l Ass'n for Cmty. Mediation, About Community Mediation, <http://www.nafcm.org/pg5.cfm> (last visited Dec. 15, 2009).

During the 1970s and 1980s, the business community adopted ADR to reduce transaction costs in addressing conflict in commercial dealings.⁸⁴ During the 1990s, ADR became institutionalized in many judicial systems, including both state⁸⁵ and federal courts⁸⁶ in the United States, and increasingly in Europe⁸⁷ and other developed economies such as Australia.⁸⁸ During the past decade, ADR became institutionalized in U.S. federal agencies.⁸⁹

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, beginning in the 1960s, 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 United States.⁹⁰ In Europe and the states made newly independent by the end of the Cold War in the 1990s, these same philanthropies, together with the European Union,⁹¹ the American Bar Association and its Foundation,⁹² the Soros Foundation,⁹³ the World Bank,⁹⁴ and the USAID,⁹⁵ among others, funded various training

84. See Am. Arbitration Assoc., www.adr.org (last visited Dec. 15, 2009); Int'l Inst. for Conflict Prevention and Disp. Resol., www.cpradr.org (last visited Dec. 15, 2009) (formerly known as the CPR Institute).

85. See Nat'l Ctr. for State Courts, Alternative Dispute Resolution InfoCenter, <http://www.ncsconline.org/wc/CourTopics/ResourceCenter.asp?id=2> (last visited Dec. 15, 2009).

86. See Fed. Judicial Ctr., Inside the Federal Courts, <http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/293> (last visited Dec. 15, 2009) (describing types of ADR procedures used in federal courts after the Alternative Dispute Resolution Act of 1998).

87. See, e.g., Nadja Alexander, *Global Trends in Mediation: Riding the Third Wave*, in GLOBAL TRENDS IN MEDIATION 1, 8 (Nadja Alexander ed., 2003); see also Eur. Comm'n, European Judicial Network: Alternative Dispute Resolutions—General Information, http://ec.europa.eu/civiljustice/adr/adr_gen_en.htm (last visited Dec. 15, 2009).

88. Tania Sourdin, *Mediation in Australia: The Decline of Litigation?*, in GLOBAL TRENDS IN MEDIATION, *supra* note 87, at 33, 34.

89. JEFFREY M. SENTER, FEDERAL DISPUTE RESOLUTION: USING ADR WITH THE UNITED STATES GOVERNMENT 14-16 (2003); Lisa B. Bingham & Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate its Success?*, 6 J. OF PUB. ADMIN. RES. & THEORY 383, 392-96 (1996); see also Interagency Alternative Dispute Resolution Working Group, <http://www.adr.gov> (last visited Dec. 15, 2009).

90. For the history of this program see DAVID KOVICK, THE HEWLETT FOUNDATION'S CONFLICT RESOLUTION PROGRAM: TWENTY YEARS OF FIELD-BUILDING 1984-2004 (2005), available at <http://www.hewlett.org/download?guid=674b602c-49ce-102c-ab7e-0002b3e9a4de> (last visited Dec. 15, 2009). For explanatory monographs on the full spectrum of its work, see HENTON ET AL., *supra* note 26; ROSEMARY O'LEARY ET AL., THE WILLIAM AND FLORA HEWLETT FOUNDATION, ENVIRONMENTAL CONFLICT RESOLUTION: STRATEGIES FOR ENVIRONMENTAL GRANTMAKERS (2005), available at <http://www.hewlett.org/download?guid=d4f60a08-49be-102c-ab7e-0002b3e9a4de> (last visited Dec. 15, 2009). For a summary of research gaps Hewlett identified upon completion of its funding program, see Robert A. Baruch Bush & Lisa B. Bingham, *Knowledge Gaps: The Final Conference of the Hewlett ADR Theory Centers*, 23 CONFLICT RESOL. Q. 99-122 (2005).

91. See ADR MEDA, MEDA Programme, http://www.adrmeda.org/meda_programme.html (last visited Dec. 15, 2009) (Web site of the European Commission-sponsored project "Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in MEDA Countries").

92. See ABA, Rule of Law Initiative, http://www.abanet.org/rol/europe_and_eurasia/ (last visited Dec. 15, 2009) (describing the Europe and Eurasia Program).

93. See Open Society Institute & Soros Foundations Network, <http://www.soros.org/initiatives> (last visited Dec. 15, 2009).

94. See The World Bank, Law & Justice Initiatives—Alternative Dispute Resolution, <http://go.worldbank.org/FIDHSHUEJO> (last visited Dec. 15, 2009); The World Bank, WBI Gover-

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.⁹⁶ 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.⁹⁷

Common ADR processes for public conflict resolution⁹⁸ may include negotiation,⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ This term historically also referred to mediation in the context of labor relations and collective bargaining, as in the Federal Mediation and Conciliation Service (FMCS).¹⁰² Facilitation is widely used in environmental conflict resolution.¹⁰³ This process is more commonly used in multi-party issues or for

nance & Anti-Corruption-Programs, <http://go.worldbank.org/CMW4R42O70> (last visited Dec. 15, 2009).

95. See U.S. Agency for Int'l Dev., *USAID Europe and Eurasia: USAID, ABA/CEELI Provides Legal Aid to Thousands*, http://www.usaid.gov/locations/europe_eurasia/press/success/2006-12-24.html (last visited Dec. 15, 2009).

96. See The Asia Foundation: Programs, <http://asiafoundation.org/program/> (last visited Dec. 15, 2009).

97. See, e.g., Univ. of the Pacific, McGeorge School of Law, Institute for Development of Legal Infrastructure <http://www.mcgeorge.edu/x1129.xml> (last visited Dec. 15, 2009).

98. For a basic overview, see Lisa B. Bingham, *Alternative Dispute Resolution in Public Administration*, in HANDBOOK OF PUBLIC LAW AND ADMINISTRATION 546, 546-66 (Phillip J. Cooper & Chester A. Newland eds., 1997).

99. 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 rather than rights or positions, promote creative problem solving, and use principles rather than power to reach agreement. FISHER ET AL., supra note 78, at 10-11. For a comprehensive review of the negotiation literature, see ROY J. LEWICKI ET AL., NEGOTIATION (5th ed. 2005). For a summary of principled negotiation applied to collaborative networks and a bibliography, see ROSEMARY O'LEARY & LISA BLOMGREN BINGHAM, IBM CTR. FOR THE BUS. OF GOV'T, A MANAGER'S GUIDE TO RESOLVING CONFLICTS IN COLLABORATIVE NETWORKS (2007), available at <http://www.businessofgovernment.org/pdfs/OlearyBinghamReport.pdf>.

100. For an example of how the executive branch has encouraged the use of principled negotiation and collaborative problem solving in governance, see OFFICE OF MGMT. AND BUDGET AND PRESIDENT'S COUNCIL ON ENVTL. QUALITY, MEMORANDUM ON ENVIRONMENTAL CONFLICT RESOLUTION (2005), available at <http://www.usdoj.gov/adr/pdf/ombceqjointstmt.pdf>.

101. For example, The Civil Rights Act of 1964 (commonly known as Title VII) mandates conciliation for disputes regarding discrimination in employment. See 42 U.S.C. § 2000e-4(g)(4) (2006) (providing 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, . . . assist in such effectuation by conciliation or such other remedial action as is provided by this subchapter" (emphasis added)).

102. 29 U.S.C. § 172 (2006) (creating the FMCS and empowering it to provide mediation and conciliation services).

103. See, e.g., William Leach & Paul Sabatier, *Facilitators, Coordinators, and Outcomes*, in THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION, 148-71 (Rosemary O'Leary & Lisa Blomgren Bingham eds., 2003) (reporting on the use of facilitators in a study evaluating their effectiveness in watershed management, a form of environmental conflict resolution). 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,

large groups¹⁰⁴ and is considered less interventionist than mediation. Mediation is the most widely used process in the federal government.¹⁰⁵ This process is also widely used in environmental and public policy conflict resolution.¹⁰⁶ 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 third-party neutral conducts an informal evidentiary hearing to narrow disputed facts. Mini-trials are a form of advisory arbitration where a neutral party conducts a more formal but still abbreviated evidentiary hearing and advises on disputed questions of law. Arbitration is private adjudication or private judging.¹⁰⁷ Dispute resolution includes not only processes but also programs that give participants choices among a variety of processes. For example, ombudsperson programs use an in-house third-party neutral to assist people in handling conflict.¹⁰⁸ Properly structured, these programs may contribute to systemic change.¹⁰⁹

There is substantial research on these processes in the fields of social psychology, organizational behavior, political science, economics, planning, communications, education, labor, and industrial relations, among other fields.¹¹⁰ 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

FACILITATORS, MANAGERS, TRAINERS, AND COACHES (2d ed. 2002) [hereinafter SCHWARZ, THE SKILLED FACILITATOR] and ROGER SCHWARZ ET AL., THE SKILLED FACILITATOR FIELDBOOK: TIPS, TOOLS, AND TESTED METHODS FOR CONSULTANTS, FACILITATORS, MANAGERS, TRAINERS, AND COACHES (2005).

104. SUSAN L. CARPENTER & W.J.D. KENNEDY, MANAGING PUBLIC DISPUTES: A PRACTICAL GUIDE FOR PROFESSIONALS IN GOVERNMENT, BUSINESS, AND CITIZENS' GROUPS 107 (2d ed. 2001).

105. See Bingham & Wise, *supra* note 89. 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, BUSH & FOLGER, *supra* note 79; MOORE, *supra* note 79.

106. See LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 136-84 (1987); Michèle Firenz, *Introduction to the Cases and Commentaries, in THE CONSENSUS-BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* 679, 679-82 (Lawrence Susskind et al. eds., 1999).

107. 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. See generally, ELKOURI & ELKOURI, *supra* note 80. For discussions of adhesive arbitration that create arbitration agreements as a condition of employment or entering into a consumer transaction, see Symposium, *Mandatory Arbitration*, 67 LAW & CONTEMP. PROBS., Spring 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. See 36 U.S.C. § 220529 (2006).

108. 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 International Ombudsman Association, <http://www.ombudsassociation.org> (last visited June 18, 2009).

109. See Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1.

110. See generally, THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE (Morton Deutsch et al. eds., 2d ed. 2006). For review articles on field studies and evaluation of the uses of mediation in the contexts of employment, education, criminal justice, the environment, family disputes, civil litigation in courts, and community disputes, see *Conflict Resolution in the Field: Assessing the Past, Charting the Future*, 22 CONFLICT RESOL. Q. (SPECIAL ISSUE) 1 (2004).

that outcome to be fair and if they are given opportunities for voice and respectful treatment.¹¹¹ Researchers have also identified interactional and interpersonal justice as frames for understanding disputant preferences for dispute resolution processes.¹¹²

IV. 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.¹¹³ The stages include identifying approaches or tools for solving the policy problem,¹¹⁴ 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, 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.

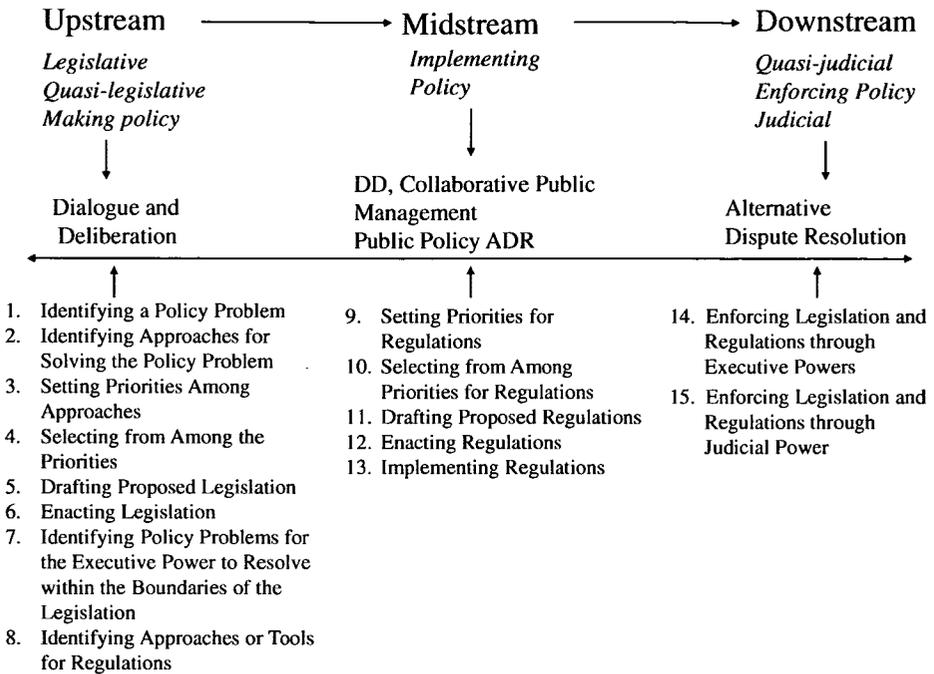
111. See E. ALLAN LIND & THOMAS R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 64 (1988).

112. For a review of recent literature, see Tina Nabatchi et al., *Organizational Justice and Workplace Mediation: A Six-Factor Model*, 18 INT'L J. CONFLICT MGMT. 148 (2007).

113. 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.

114. See generally, *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (Lester Salamon ed., 2002). For a discussion of the analysis and selection of policy instruments, see B. Guy Peters, *The Politics of Tool Choice*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNMENT* 552-64.

Figure 1. The Policy Continuum



Conflict can and will occur at each of these stages. One helpful metaphor is the flowing stream.¹¹⁵ 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.¹¹⁶ 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, new forms of participatory governance are increasingly used upstream in the policy process; 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 stakeholders or citizens.¹¹⁷ They also include focus groups, roundtables, deliberative town meeting forums, choice work dialogues,

115. THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 61, at 23.

116. Bingham et al., *supra* note 46, at 551-54.

117. DEEPENING DEMOCRACY, *supra* note 27, at 3-42; David E. Booher, *Collaborative Governance Practices and Democracy*, 93 NAT'L CIVIC REV. 32, 34-41 (2004); TORRES, *supra* note 50; Abby Williamson and Archon Fung, *Public Deliberation: Where are We and Where Can We Go?*, 93 NAT'L CIVIC REV. 3, 12 (2004)

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 U.S. Institute for Environmental Conflict Resolution (USIECR),¹¹⁸ midstream stages in the policy process include rulemaking, implementation, and program development. These are both quasi-legislative and quasi-judicial.¹¹⁹ An agency may use negotiated rulemaking to draft proposed regulations.¹²⁰ 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 involves defined actors with a specific history of past behaviors (for example, organizations emitting pollutants).¹²¹ 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 networks that cooperate to implement policy.¹²² 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 overgeneralizations. Judicial and quasi-judicial action are 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 widespread 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.

118. See U.S. Inst. for Env'tl. Conflict Resol., Types of ECR Processes, <http://www.ecr.gov/Basics/SampleProcessOutline.aspx> (last visited Dec. 15, 2009).

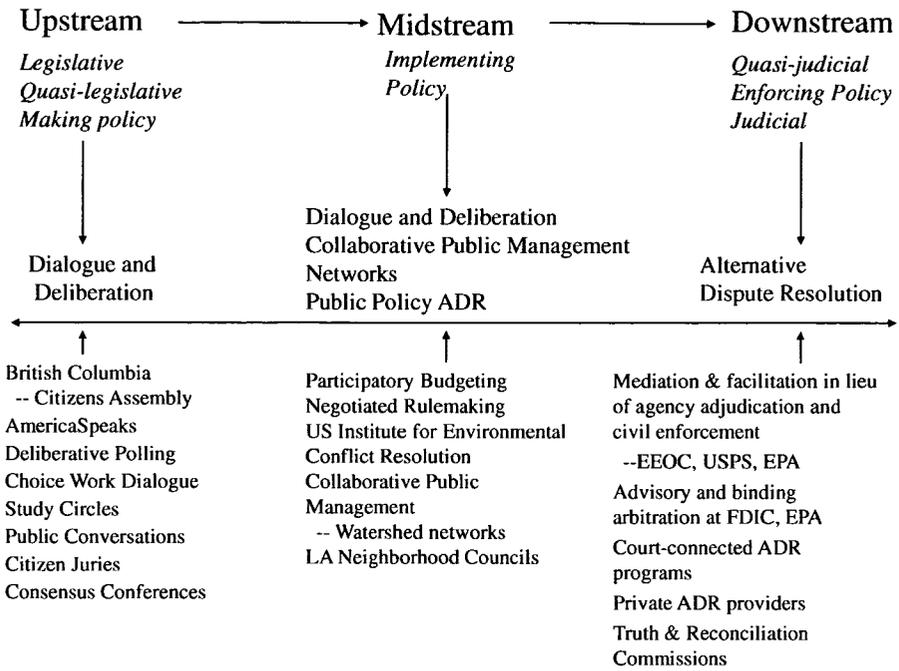
119. Lisa B. Bingham et al., *supra* note 46, at 552-54.

120. Negotiated rulemaking has been in use since the 1980s and has support in law. See 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, 1627-29 (1986); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 140-44 (1985).

121. Freeman, *supra* note 16, at 55-66 (describing cases of negotiated permits for industrial discharges into air and water).

122. Allyson Barker et al., *The Role of Collaborative Groups in Federal Land and Resource Management: A Legal Analysis*, 23 J. LAND RESOURCES & ENVTL. L. 67, 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").

Figure 2. Process on the Policy Continuum



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 it is not true of deliberative and participatory democracy.

In sum, we have arrived at a point in the relationship between government and private, nonprofit, or citizen actors where we have a multitude of new modes for interaction in the 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 up the policy process 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.

Table 1. Abbreviated Taxonomy of Participation Processes in Governance

Flow	Policy Stage: From Inception of Legislation through Agency Action to Judicial Branch Enforcement	Participation Process: Deliberation and Dialogue Upstream Conflict Resolution Downstream	Inclusiveness: Broader Upstream, Narrower Downstream	Existing U.S. Legal Infrastructure for Participation: Less Upstream, More Downstream	Collaborative Public Management: Mostly Up- and Mid-Stream
Upstream in the Policy Process	1. Identifying a Policy Problem	Direct Democracy Initiative Process Community Visioning Public Conversations Project	All citizens eligible to vote Open invitation Targeted sample	State legislation Municipal ordinance	
	2. Identifying Approaches for Solving the Policy Problem	Citizen Juries, Denmark Study Circles	Targeted sample Targeted sample		
	3. Setting Priorities Among Approaches	AmericaSpeaks 21st Century Town Meetings Deliberative Polling National Issues Forum	Open invitation and representative sample Random sample Open invitation	State sunshine laws Federal FOIA	Municipal uses among local agencies and nonprofits
	4. Selecting from Among the Priorities	Policy Dialogues Policy Consensus ChoiceWorks Dialogues AmericaSpeaks 21st Century Town Meetings Deliberative Polling National Issues Forum	Targeted sample Targeted sample Open invitation Open invitation and representative sample Random sample Open invitation	State sunshine laws Federal FOIA	Municipal uses
	5. Drafting Proposed Legislation: Local, state, or federal	AmericaSpeaks: Americans Discuss Social Security	Open invitation and representative sample	State and federal constitutions Municipal charters State home rule laws	
	6. Enacting Legislation	Direct and Representative Democracy	All citizens eligible to vote	State and federal constitutions Municipal charters State home rule laws	
	7. Identifying Policy Problems for the Executive Power to Resolve within the Boundaries of the Legislation	Community visioning AmericaSpeaks Regional Planning	Open invitation Open invitation and representative sample	State and federal sunshine laws	Local, state, and regional uses

	8. Identifying Approaches or Tools for Regulations	Policy dialogues Policy consensus Study Circles Citizen Juries Planning Cells	Selected stakeholders Selected stakeholders Representative sample of citizens	State and federal sunshine laws Federal Advisory Committee Act State equivalents	Local, state, and regional uses
	9. Setting Priorities for Regulations	Policy dialogues Policy consensus ChoiceWorks Dialogues Deliberative Polling National Issues Forum Negotiated Rulemaking	Targeted sample Targeted sample Open invitation Random sample Open invitation Selected stakeholders	State and federal sunshine laws Federal Advisory Committee Act and state equivalents Federal Negotiated Rulemaking Act and state equivalents	Local, state, and regional uses Federal uses through Negotiated Rulemaking

A. Upstream in the Policy Process—Legislative and Quasi-legislative Uses of Dialogue and Deliberation

Processes for resolving conflict in policy-making vary along several dimensions, including the participants, their authority and power to influence policy decisions, and the process for communication and decision-making.¹²³ Professor Archon 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.¹²⁴ He proposes that types of authority include personal benefits, communicative influence, advise and consult, co-governance, and direct authority.¹²⁵ Lastly, he identifies six modes of communication and decision-making processes: participants listen as spectators, express preferences, develop preferences, aggregate and bargain, deliberate and negotiate, and deploy technique and expertise.¹²⁶ Using these three dimensions, he creates a “democracy cube,” on which he maps different processes.¹²⁷

Others have described different levels of public participation. Sherry 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.¹²⁸ The International Association for Public Participation (IAP2) has a “spectrum of participation” in which agencies have the choice to inform, consult, involve, collaborate, or empower the public.¹²⁹ Each form of

123. Archon Fung, *Varieties of Participation in Complex Governance*, 66 PUB. ADMIN. REV. 66, 66 (2006).

124. *Id.* at 67-68.

125. *Id.* at 69.

126. *Id.*

127. *Id.* at 70-72.

128. Sherry Arnstein, *A Ladder of Citizen Participation*, 35 J. OF THE AMERICAN INSTITUTE OF PLANNERS 216, 217-218 (1969).

129. See INT’L ASS’N FOR PUB. PARTICIPATION, IAP2 SPECTRUM OF PARTICIPATION (2007), available at http://iap2.org/associations/4748/files/IAP2%20Spectrum_vertical.pdf.

public participation has an implicit promise to the public, ranging from keeping the public informed to implementing what the public decides.¹³⁰

Other commentators have suggested that the quality of these processes depends upon how well they satisfy three criteria: inclusiveness, deliberativeness, and influence.¹³¹ 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; and influence has to do with the impact of deliberation on policy- and decision-making.¹³²

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 policymaking in legislation at the local, state, or national level, and also for rulemaking or adopting administrative agency regulations.¹³³

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, e.g., how to use a reclaimed polluted site.¹³⁴ 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.¹³⁵ 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.¹³⁶ This process was used for leaders in the abortion/right-to-life controversy in Boston, Massachusetts.¹³⁷

130. *Id.*

131. Lyn Carson & Janette Hartz-Karp, *Adapting and Combining Deliberative Designs*, in THE DELIBERATIVE DEMOCRACY HANDBOOK, *supra* note 27, at 120, 122.

132. *Id.* at 123.

133. *See supra* tbl.1.

134. *See* U.S. ENVTL. PROT. AGENCY, THE COMMUNITY VISIONING PROCESS 1-2 (SEPT. 2002), available at <http://www.epa.gov/superfund/community/pdfs/9comvis.pdf>.

135. *See* Public Conversations Project, FAQ, <http://www.publicconversations.org/project/?q=node/4> (last visited Dec. 15, 2009).

136. *See* Public Conversations Project, PCP's Approach, <http://www.publicconversations.org/what/methodology> (last visited Dec. 15, 2009).

137. Public Conversations Project, Talking with the Enemy, <http://www.publicconversations.org/dialogue/policy/abortion> (last visited Dec. 15, 2009).

Step 2: Identifying Approaches for Solving the Policy Problem

Government can use a citizens' jury for legislative purposes in a policy-making context, as distinguished from civil or criminal juries that do fact finding in a judicial or courtroom 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 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.¹³⁸

The citizens' jury in Denmark has addressed complex matters of technology policy, such as genetically manipulated plants.¹³⁹ Planning cells and consensus conferences are closely related to the citizens' jury; in both processes, citizens deliberate to reach consensus on a policy issue.¹⁴⁰

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.¹⁴¹ They help organize a representative and diverse cross section of the city for community-wide dialogue. Study Circles 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.¹⁴²

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 from which to choose.

138. See Teknologi-rådet, The Danish Bd. of Tech., Citizens' Jury, <http://www.tekno.dk> (follow "Methods" hyperlink; then follow "Citizens' Jury" hyperlink) (last visited Dec. 15, 2009).

139. See Teknologi-rådet, The Danish Bd. of Tech., *New GM Crops—New Debate*, <http://www.tekno.dk> (follow "Activities" hyperlink; then follow "Show All Activities" hyperlink; then follow "New GM Crops – New Debate" hyperlink) (last visited Dec. 15, 2009).

140. Carolyn M. Hendriks, *Consensus Conferences and Planning Cells: Lay Citizen Deliberations*, in THE DELIBERATIVE DEMOCRACY HANDBOOK, *supra* note 27, at 80, 87-90 (2005).

141. Patrick L. Scully & Martha L. McCoy, *Study Circles: Local Deliberation as the Cornerstone of Deliberative Democracy*, in THE DELIBERATIVE DEMOCRACY HANDBOOK, *supra* note 27, at 199, 206-209; see also Everyday-Democracy.org, <http://www.everyday-democracy.org/en/index.aspx> (last visited Dec. 15, 2009) (formerly the Study Circles Resource Center).

142. See Everyday-Democracy.org, The Basics of Dialogue to Change, <http://www.everyday-democracy.org/en/Page.Organizing.aspx> (last visited Dec. 15, 2009).

Step 3: Setting Priorities among Solutions to a Policy Problem

One model increasingly in use is the AmericaSpeaks 21st Century Town Meeting,¹⁴³ which is also used under the name Global Voices in international settings, as the Citizens Summit in Denmark,¹⁴⁴ and in combination with other processes such as the citizens' jury, televote, and consensus conference in Australia.¹⁴⁵ These are high-technology, large-scale meetings.

AmericaSpeaks convened "Listening to the City," a 4,500-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.¹⁴⁶ At tables of ten to twelve people, each with a professional mediator or facilitator, citizens had a chance to talk about plans for Ground Zero.¹⁴⁷ 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.¹⁴⁸ Citizens then expressed preferences about priorities for these ideas, using handheld, keypad voting devices that recorded their preferences together with their demographic information.¹⁴⁹ By the end of the day, the AmericaSpeaks "theme team," a combination of staff and citizens, was able to analyze all of 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.¹⁵⁰ This model is used for large-scale citizen meetings.¹⁵¹ A similar process was used in Davos, Switzerland, at the World Economic Forum.¹⁵²

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, Illinois, and Cincinnati, Ohio, found that citizens did

143. See Carolyn J. Lukensmeyer, Joe Goldman & Steven Brigham., *A Town Meeting for the 21st Century*, in THE DELIBERATIVE DEMOCRACY HANDBOOK, *supra* note 27, at 157, 157-60; Carolyn Lukensmeyer & Steven Brigham, *Taking Democracy to Scale: Large Scale Interventions—For Citizens*, 41 J. APPLIED BEHAV. SCI. 47, 48, 53-56 (2005); see also, AmericaSpeaks, <http://www.americaspeaks.org> (last visited June 19, 2009).

144. See Teknologi-rådet, The Danish Bd. of Tech., Citizens' Summit, <http://www.tekno.dk> (follow "Methods" hyperlink; then follow "Citizens' Summit" hyperlink) (last visited Dec. 15, 2009).

145. Carson & Hartz-Karp, *supra* note 131, at 132-34. see also AmericaSpeaks, Case Studies—Listening to the City, <http://www.americaspeaks.org/> (follow "Projects" hyperlink; then follow "Case Studies" hyperlink; then follow "listening to the City" hyperlink) (last visited Dec. 15, 2009).

146. Lukensmeyer et al., *supra* note 143, at 53; see also AmericaSpeaks, Case Studies—Listening to the City, *supra* note 145.

147. Lukensmeyer et al., *supra* note 143, at 52; see also CIVIC ALLIANCE TO REBUILD DOWNTOWN NEW YORK, LISTENING TO THE CITY: REPORT OF PROCEEDINGS 5 (2002), available at <http://www.americaspeaks.org/document/docWindow.cfm?fuseaction=document.viewDocument&documentid=65&documentFormatId=131> [hereinafter LISTENING TO THE CITY].

148. Lukensmeyer et al., *supra* note 143, at 52-53.

149. *Id.*

150. *See id.*

151. *See id.* at 47-48.

152. See AmericaSpeaks, Projects—World Economic Forum, <http://www.americaspeaks.org/index.cfm?fuseaction=page.viewPage&PageID=582&d:CFusionMX7vertiy\date\dummytxt> (last visited Dec. 15, 2009); see also AmericaSpeaks—Global Voices, <http://www.globalvoices.org/> (follow "Our Clients" drop down menu; follow "Past Projects" drop down menu) (last visited Dec. 15, 2009).

not know whether there had been specific policy recommendations or whether any policy recommendations had been adopted and implemented by government decision-makers.¹⁵³ There is evidence that individual participants experience increased political and personal efficacy and enhanced trust in government.¹⁵⁴

In National Issues Forums, people who attend large-scale citizen meetings are organized into small groups for structured discussions of a limited number of policy choices.¹⁵⁵ It provides a briefing booklet for each issue with non-partisan information, which allows 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.¹⁵⁶ 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 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, the project initially involved citizens from twenty-five member states to deliberate on "what Europe do we want?" and select three topics for future forums in the twenty-five member states.¹⁵⁷ The intention is to create the first pan-European dialogue and strengthen European democracy.¹⁵⁸ In addition, Europe is developing a network of non-governmental organizations (NGOs) from civil society, including independent foundations, civic associations, and nonprofit organizations to help support and implement large-scale policy dialogues. Sponsors include the Robert Bosch Foundation (Germany), the Charles Léopold Mayer Foundation (France), the Compagnia di San Paolo (Italy), the European Cultural Foundation (Netherlands), and the Riksbankens Jubileumsfond (Sweden).¹⁵⁹ In their planned use of technology and large-scale dialogue, the planned summits bear some similarity to the AmericaSpeaks process.

153. Lisa-Marie Napoli et al., *Assessing Deliberation: Agenda-Setting, Impacts, and Outcomes* 28-30 (2006) (on file with author).

154. See Tina Nabatchi, *Deliberative Democracy: The Effects of Participation on Perceptions of Political Efficacy* (July 2007) (Ph.D. dissertation, Indiana University) (on file with author).

155. See National Issues Forums: About Us, <http://www.nifi.org/about/index.aspx> (last visited Dec. 15, 2009).

156. See *id.*

157. See EUROPEAN CITIZENS' CONSULTATIONS, PROJECT SUMMARY 1-2 (2006), available at http://www.zsi.at/attach/1/About_the_project_ECC_A.pdf. See generally ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 4 (2004) (Professor Aman suggests that the European Union's democracy has certain deficits.).

158. See European Citizens' Consultations, Who Are We, <http://www.european-citizens-consultations.eu/contenu/who-are-we-0> (last visited Dec. 15, 2009).

159. See *id.*

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.¹⁶⁰ He observed that polling results were unstable in that citizens' answers changed in light of new information; he advocates deliberation and dialogue to strengthen democracy by helping citizens "come to public judgment."¹⁶¹ He advocates a model called ChoiceDialogues,¹⁶² which engages citizens in three-stages: consciousness-raising, working through a problem, and decision-making or resolution.¹⁶³ 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 Bruce Ackerman and James Fishkin, deliberative polling is another process for obtaining better-informed citizen preferences.¹⁶⁴ Participants have access to policy experts and an opportunity to deliberate with others.¹⁶⁵ Deliberative polls have been conducted in the United States, Denmark, China, Australia, and parts of Asia.¹⁶⁶ 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 amongst 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 after deliberation, illustrating that point-in-time opinion polls in the absence of complete information are unreliable as measures of citizen preferences.

160. See Daniel Yankelovich, *Biography Information 2006*, <http://www.danyankelovich.com> (last visited Dec. 15, 2009).

161. DANIEL YANKELOVICH, *COMING TO PUBLIC JUDGMENT: MAKING DEMOCRACY WORK IN A COMPLEX WORLD* (1991).

162. See Viewpoint Learning, Inc., *Who We Are: Daniel Yankelovich*, <http://www.viewpointlearning.com/about/yankelovich.shtml> (last visited Dec. 15, 2009); see also Viewpoint Learning, Inc., *ChoiceDialogueMethodology*, <http://www.viewpointlearning.com/offer/methodology.shtml> (last visited Dec. 15, 2009).

163. Viewpoint Learning, Inc., *Viewpoint Learning Model*, <http://www.viewpointlearning.com/about/model.shtml> (last visited Dec. 15, 2009).

164. See generally Bruce Ackerman & James S. Fishkin, *DELIBERATION DAY* (2004).

165. James Fishkin & Cynthia Farrar, *Deliberative Polling: From Experiment to Community Resource*, in *THE DELIBERATIVE DEMOCRACY HANDBOOK*, *supra* note 27, at 68, 72-74 (2005). See generally Ctr. for Deliberative Democracy, *Research Papers*, <http://cdd.stanford.edu/research> (last visited June 19, 2009).

166. See Ctr. for Deliberative Democracy, *Deliberative Polling*, <http://cdd.stanford.edu/polls/> (last visited Dec. 15, 2009).

Critics of deliberation suggest that opinions become more extreme;¹⁶⁷ however, the Schkade *et al.* empirical study¹⁶⁸ 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,¹⁶⁹ 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.¹⁷⁰

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.¹⁷¹ In this dialogue, nearly 50,000 Americans in fifty states discussed Social Security reform and alternative legislative solutions to the problem of funding a national pension welfare system.¹⁷² Organizers held two ten-city teleconferences, a five-city regional teleconference, five town meetings, and a seven-week online policy dialogue.¹⁷³ This project was a breakthrough because before this experiment in civic engagement, legislators found the problem of reforming this pension system to be politically intractable. Participants provided legislators with direct evidence that reform was politically feasible.¹⁷⁴

A model that received substantial scholarly attention is the Citizens' Assembly in British Columbia, Canada.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷ The Citizens Assembly met and deliberated regularly between 2004 and 2005 and

167. See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74-75 (2000); David Schkade *et al.*, *What Happened on Deliberation Day?* 1 (Univ. of Chi. Law & Econ., Olin Working Paper No. 298, AEI-Brookings Joint Ctr., Working Paper No. 06-19, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=911646 (last visited Dec. 15, 2009).

168. See Schkade *et al.*, *supra* note 167.

169. Interview with Terry Amsler, Program Director, Collaborative Governance Initiative, Inst. for Local Gov't, Sacramento, Cal. (2008). See generally Inst. for Local Gov't, www.ca-ilg.org (last visited June 19, 2009).

170. See discussion *infra* Part III.B.

171. See AmericaSpeaks, Case Studies—Americans Discuss Social Security, <http://www.americaspeaks.org/> (follow "Projects" hyperlink; then follow "Case Studies" hyperlink; then follow "Social Security" hyperlink) (last visited Dec. 15, 2009).

172. See *id.*

173. *Id.*

174. See *id.*

175. See Citizens' Assembly on Electoral Reform, *Improving Democracy in B.C.*, <http://www.citizensassembly.bc.ca/public> (last visited Dec. 15, 2009).

176. See B.C. CITIZENS' ASSEMBLY ON ELECTORAL REFORM, MAKING EVERY VOTE COUNT 10 (2004), available at http://www.citizensassembly.bc.ca/resources/final_report.pdf.

177. See *id.* at 10-14.

reached consensus on a proposal; while this proposal was approved by 58 percent of the voters, it narrowly failed because an amendment to the provincial constitution required a supermajority.¹⁷⁸ NGOs in California are currently proposing a citizens' assembly model to address issues of state governance.¹⁷⁹

Step 6: Enacting Legislation

The traditional forms for enacting legislation include direct democracy (the referendum and initiative processes) and representative democracy (where 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 United States for this work is the Policy Consensus Initiative, which recently sponsored a two-day workshop entitled "Beyond Bickering," at which more than sixty members of the Minnesota Legislature learned about dispute resolution and "practical steps to finding consensus on contentious issues" in a legislative setting.¹⁸⁰

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

As with legislative action, conflict also 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 21st Century Town Meeting has been used for regional land use and economic development planning—for example, in the region surrounding Chicago, Illinois¹⁸¹—and currently for the Voices and Choices project in northeast Ohio, a project funded through collaboration of over eighty philanthropies to foster an unprecedented civic engagement initiative that will reach 39,000 people.¹⁸²

Step 8: Identifying Approaches or Tools for Regulations

Again, deliberative polling, study circles, citizens' juries, and various forms of policy dialogues can help administrators gain a better understanding of citizen

178. See ELECTIONS BC, STATEMENT OF VOTES: REFERENDUM ON ELECTORAL REFORM 9 (2005), available at <http://www.elections.bc.ca/docs/rpt/SOV-2005-ReferendumOnElectoralReform.pdf>.

179. See, e.g., NEW AMERICA FOUNDATION, CITIZENS' ASSEMBLY: AN EFFECTIVE VEHICLE FOR POLITICAL REFORM, available at <http://www.newamerica.net/files/Citizens%20Assembly.pdf> (last visited Dec. 15, 2009).

180. Policy Consensus Initiative & Nat'l Policy Consensus Ctr., "Beyond Bickering," Minnesota Legislators Attend Two-Day Consensus Building Workshop, http://www.policyconsensus.org/events/beyondbickering_MN.html, (last visited June 19, 2009). This effort was also sponsored by the National Council of State Legislators. *Id.*

181. See AmericaSpeaks, Project—Common Ground Chicago Regional Forum, <http://www.americaspeaks.org/index.cfm?fuseaction=page.viewPage&PageID=567&d:\CFusionMX7\verity\Data\dummy.txt> (last visited Dec. 15, 2009).

182. See Advance Northeast Ohio, Our Action Plan, <http://www.advancenortheastohio.org/actionplan> (last visited Dec. 15, 2009); see also Advance Northeast Ohio, Voices and Choices, <http://www.advancenortheastohio.org/search/node/Voices+and+Choices> (last visited Dec. 15, 2009).

preferences for various policy tools or approaches. The Centers for Disease Control and Prevention are 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.¹⁸³ The project has used multiple methods to get citizens involved.¹⁸⁴

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 processes. All three categories of deliberative or participatory governance processes, collaborative public or network management, and ADR are used to resolve conflict.¹⁸⁵ 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.¹⁸⁶ Typically, that neutral will engage in a conflict-assessment process before convening the stakeholder group in order to assess the feasibility of reaching consensus.¹⁸⁷ Mediation is particularly prevalent in environmental governance.¹⁸⁸

The neutral generally uses principles of interest-based bargaining or principled negotiation.¹⁸⁹ 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.¹⁹⁰ These will, most often, fall into one of five categories: (1) needs relating to security; (2) economic well-being; (3) belonging to a community, organization, or social group; (4) recognition; and (5) autonomy.¹⁹¹ Parties engage in brainstorming, a process through which they first generate a list of possible solutions.¹⁹² They next

183. For details, participant guides, and a complete report, see The Keystone Center, Health Policy—Pandemic Flu, <http://www.keystone.org/spp/health-and-social-policy/infectious-disease> (last visited Dec. 15, 2009).

184. See Julie Fanselow, *CDC Honored for Public Engagement on Pandemic Flu*, EVERYDAY DEMOCRACY, Dec. 3, 2007, <http://www.everyday-democracy.org/en/Article.647.aspx> (last visited Dec. 15, 2009).

185. For numerous case studies, see THE CONSENSUS-BUILDING HANDBOOK, *supra* note 106

186. MOORE, *supra* note 79, at 8, 15-17.

187. *Id.* at 61-65.

188. Rosemary O'Leary and Susan Summers Raines, *Dispute Resolution at the U.S. Environmental Protection Agency*, in THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 61, at 253-76 (2003).

189. FISHER ET AL., *supra* note 78, at 10-11; see also Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 503 (2008) (arguing that interest-based negotiation skills are essential for the new governance).

190. See FISHER ET AL., *supra* note 78, at 47.

191. *Id.* at 48-49.

192. See *id.* at 60-62.

prioritize among these ideas, deliberate on them, and attempt to reach consensus. In the event of impasse, the stakeholders 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.¹⁹³

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.¹⁹⁴ 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 reality-testing about what might happen if parties fail to reach an agreement.¹⁹⁵ 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.¹⁹⁶

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, e.g., watershed management. In the latter 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 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.¹⁹⁷

Step 9: Setting Priorities for Regulations

Deliberative polls, policy and ChoiceDialogues, 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: first, to create their own vision of the health care system they would like to see in ten years' time; and second, to work through the practical choices and tradeoffs re-

193. See *id.* at 85.

194. MOORE, *supra* note 79, at 368-69.

195. See *id.* at 228, 235-44, 306, 330.

196. See generally, Leach & Sabatier, *supra* note 103.

197. 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, 97-98 (2002) (observing that these collaborations also present antitrust issues).

quired to realize that vision. They first worked 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.¹⁹⁸

The kinds of regulatory priorities identified involved "having a team of medical professionals (doctors, nurses, pharmacists, and others) . . . provide primary care . . . supported by 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.¹⁹⁹

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 participatory budgeting process internationally is an institutionalized part of local governance in Porto Alegre, Brazil.²⁰⁰ In this process, citizens in various neighborhoods select among priorities for infrastructure and other investment by municipal budget authorities.²⁰¹ Participatory budgeting in China is a new and experimental process, and it involves dialogue and deliberation among a representative sample of citizens; one case included farmers, the commercial sector, and local government officials.²⁰² Surveys, deliberation, and polls were recently used in Menlo Park, California, to determine how to cut the city's budget.²⁰³ The District of Columbia has used the AmericaSpeaks 21st Century Town Meeting for participatory budgeting four times.²⁰⁴

Step 11: Drafting Proposed Regulations

The United States 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).²⁰⁵ 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.

198. Judith Maxwell et al., *Giving Citizens a Voice in Healthcare Policy in Canada*, 326 BRIT. MED. J. 1031, 1031 (2003).

199. *Id.* at 1032.

200. See Fung, *supra* note 123, at 71-72 (2006).

201. See *id.* at 71.

202. James Fishkin, et al., *Public Consultation Through Deliberation in China: The First Chinese Deliberative Poll 4-6*, tbl.1 (2005) (unpublished manuscript, on file with author), available at <http://cdd.stanford.edu/research/papers/2005/deliberation-china.pdf>.

203. See Community Focus, Clients, <http://www.communityfocus.org/clients.html> (last visited Dec. 15, 2009).

204. See AmericaSpeaks, Case Studies—Neighborhood Action DC Citizen Summit, <http://www.americaspeaks.org/> (follow "Projects" hyperlink; then follow "Case Studies" hyperlink; then follow "D.C. Citizens' Summit" hyperlink) (last visited Dec. 15, 2009); District of Columbia, Neighborhood Action—Citizen Summit, <http://cs.ona.dc.gov/cs/site/default.asp?csNav=f329901> (last visited Dec. 15, 2009).

205. For a description of the NRA, see *infra* part IV.A.5.

There are a number of examples in the literature at the federal²⁰⁶ and state levels.²⁰⁷ It has been used to reach a compromise between dog-walkers and birders in the Golden Gate Recreation Area²⁰⁸ and has been applied to fisheries management,²⁰⁹ combined sewer overflows,²¹⁰ and air quality,²¹¹ among many other topics.²¹²

Step 12: Enacting Regulations

Enacting regulations is traditionally accompanied by forms of public participation such as notice and comment and a traditional public hearing. Notice 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 forums²¹³ and electronic rulemaking dockets through which citizens may submit comments.²¹⁴ At present, there is modest experimentation.²¹⁵ Some observe that the process holds great potential to expand the participation of the general public in the rulemaking process,²¹⁶ but others find that the costs in terms of analyzing comments with sufficient care to withstand

206. See generally Cary Coglianese, *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).

207. See, 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).

208. Robin McCall, *Dogs vs. Birds: Negotiated Rulemaking at Fort Funston*, 13 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 187, 188, 203-04 (2007).

209. Shepherd R. Grimes, *The Federal Regional Fishery Management Councils: A Negotiated Rule-making Approach to Fisheries Management*, 6 OCEAN & COASTAL L.J. 187-88 (2001).

210. Siobhan Mee, *Negotiated Rulemaking and Combined Sewer Overflows (CSOs): Consensus Saves Ossification?*, 25 B.C. ENVTL. AFF. L. REV. 213-14 (1997).

211. 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, 661 (1999).

212. For a discussion on the limits of stakeholder collaboration in rulemaking, see Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 413 (2000) (arguing that interest group dynamics impede a truly collaborative regulatory process).

213. Gregory S. Weber, *Needling the Thread: A Moderator's Guide to Freedom of Speech Limitations on Government Sponsored Web-Based Threaded Discussions*, 8 COMP. L. REV. & TECH J. 323, 323 (2004).

214. Michéle Ferenz & Colin Rule with Commentator William Moomaw, *RuleNet: an Experiment in Online Consensus-Building*, in THE CONSENSUS-BUILDING HANDBOOK, *supra* note 106, at 879-901.

215. See Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 943-45, 968 (2006) (finding based on analysis of the available evidence that e-rulemaking's potential for a revolutionary change in public participation is limited).

216. See Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903, 923, 923 n.77 (2006).

judicial review may outweigh the benefits.²¹⁷ One empirical study found that it has provided simply one more avenue for voice without imposing a substantial burden on the agency.²¹⁸

Step 13: Implementing Regulations

Conflict also arises when administrators seek to implement public policy through regulatory activity. Moreover, many policy problems cross jurisdictional and boundaries of public, private, and nonprofit sectors; 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 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.²¹⁹ 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.²²⁰

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.²²¹ In the United States, Congress created a new federal agency, the U.S. Institute for Environmental Conflict Resolution, to help with such efforts.²²²

One model is the policy consensus process. For example, Public Solutions is sponsored by the National Policy Consensus Center.²²³ In Public Solutions, an elected official, public administrator, or leader from state or local government helps convene a stakeholder group in a neutral forum.²²⁴ 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 the stakeholders are; 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.²²⁵ The Public Solutions model's key principles include transparency, equity, inclusiveness, effective-

217. See, e.g., Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 893, 939-40 (2006).

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

219. See CARPENTER & KENNEDY, *supra* note 104, at 187, 191-92; MOORE, *supra* note 79, at 8; SUSSKIND & CRUIKSHANK, *supra* note 106, at 162.

220. See SCHWARZ, *THE SKILLED FACILITATOR*, *supra* note 103, at 5.

221. See THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 61, at 8-9.

222. See U.S. Inst. for Envtl. Conflict Resol., <http://www.ecr.gov/> (last visited June 19, 2009).

223. See Policy Consensus Initiative & Nat'l Policy Consensus Ctr., Public Solutions, <http://www.policyconsensus.org/publicsolutions/index.html> (last visited Dec. 15, 2009).

224. See Policy Consensus Initiative & Nat'l Policy Consensus Ctr., Public Solutions Operating Center, http://www.policyconsensus.org/publicsolutions/ps_3.html (last visited Dec. 15, 2009).

225. *Id.*

ness/efficiency, responsiveness, accountability, forum neutrality, and consensus-based decision-making.²²⁶

The implementation phase also encompasses collaborative public or network management.²²⁷ 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.²²⁸ These councils consist of elected representatives of local neighborhoods who negotiate memoranda of understanding with city departments.²²⁹

C. Downstream in the Policy Process—Using ADR to Resolve Conflict among Identified Disputants

ADR 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 U.S. executive agencies as means for resolving conflict in collective bargaining and labor relations; a famous U.S. 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 material. Over the past decade, ADR has become well-, if unevenly, institutionalized as a set of tools for resolving conflict in governance processes enforcing legislation and regulations in the U.S. government.²³⁰ In addition, state governments in the United States also use ADR.²³¹

226. Policy Consensus Initiative & Nat'l Policy Consensus Ctr., Public Solutions System Principles, http://www.policyconsensus.org/publicsolutions/ps_4.html (last visited Dec. 15, 2009).

227. "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." Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 448-49 (2003); see also discussion *supra* Part II.B.

228. Cooper et al., *Citizen-Centered*, *supra* note 67, at 79, 82.

229. See Pradeep Chandra Kathi & Terry L. Cooper, *Democratizing the Administrative State: Connecting Neighborhood Councils and City Agencies*, 65 PUB. ADMIN. REV. 559, 563-64 (2005).

230. See SINGER, *supra* note 89, at 18-32, 74-77; Tina Nabatchi, *The Institutionalization of Alternative Dispute Resolution in the Federal Government*, 67 PUB. ADMIN. REV. 646, 647 (2007). The Web site of the federal Interagency ADR Working Group contains numerous resources, model practices, and guidelines developed for mediation and other ADR processes in civil enforcement, public policy,

Step 15: Enforcing Legislation and Regulations through Judicial Power

Over the past century, courts have increasingly turned fact-finding and adjudication over to alternative forums such as administrative adjudication and arbitration.²³² 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, Denmark, England, Wales, Scotland, Germany, Italy, the Netherlands, Poland, South Africa, Switzerland, and Yugoslavia.²³³ In the United States, every federal district court must establish an ADR program pursuant to the Alternative Dispute Resolution Act of 1998.²³⁴ In addition, there are mediation programs in the U.S. federal courts of appeals²³⁵ and throughout the fifty states.²³⁶ In the United States, 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.²³⁷

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.²³⁸ The European Union has adopted a code of conduct for mediators.²³⁹ It is also building a private dispute resolution infrastructure through the “MEDA Programme” to address business and commercial conflict.²⁴⁰

and environmental disputes. See Interagency Alternative Dispute Resolution Working Group, <http://www.adr.gov/index.html> (last visited Dec. 15, 2009). Federal agencies also use ADR for internal disputes in employment or with contractors in procurement matters. *Id.*

231. For links to state programs, see <http://www.policyconsensus.org>, the Web site of the Policy Consensus Initiative, an NGO that supports the use of ADR and collaborative governance at the level of state government (last visited Dec. 15, 2009). See also Policy Consensus Initiative & Nat’l Policy Consensus Ctr., Directory of State Programs, <http://www.policyconsensus.org/directory/index.html> (last visited Dec. 15, 2009).

232. See Judith Resnik, *The Role of the Judge in the Twenty-First Century: Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1103 (2006).

233. GLOBAL TRENDS IN MEDIATION, *supra* note 87.

234. See SINGER, *supra* note 89, at 14.

235. See Fed. Jud. Ctr., Inside the Federal Courts, How Cases Move Through Federal Courts: Alternative Dispute Resolution, <http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/290> (last visited Dec. 15, 2009).

236. See Nat’l Ctr. for State Courts, Knowledge and Information Services, Alternative Dispute Resolution, <http://www.ncsconline.org/WC/Publications/ADR/default.htm> (last visited Dec. 15, 2009).

237. Beth Gazley et al., *Collaboration and Citizen Participation in Community Mediation Centers*, 23 REV. POL’Y RES. 843, 843 (2006); see also Nat’l Ass’n for Cmty. Mediation, <http://www.nafcm.org> (last visited Dec. 15, 2009).

238. See Eur. Comm’n, European Jud. Network: Alternative Dispute Resolution—General Information, http://ec.europa.eu/civiljustice/adr/adr_gen_en.htm (last visited Dec. 15, 2009) (providing a country-by-country status report).

239. See Eur. Comm’n, European Jud. Network: Alternative Dispute Resolution—Community Law, http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.htm (last visited Dec. 15, 2009).

240. See ADR MEDA, Outline, <http://www.adrmeda.org/outline.html> (last visited Dec. 15, 2009). The acronym MEDA is not defined on the Web site; however, the entity consists of ten countries bordering the Mediterranean.

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 Court of Arbitration for Sport established to resolve disputes related to international athletic competitions such as the Olympic Games,²⁴¹ arbitration boards established through trade agreements such as the North American Free Trade Agreement and the World Trade Organization,²⁴² and the International Court of Justice,²⁴³ 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.²⁴⁴ There are a number of NGOs that provide access to arbitration services and model rules, including the International Chamber of Commerce,²⁴⁵ and arbitration centers in London, Stockholm, Hong Kong, and a number of other commercial centers worldwide.

V. COLLABORATIVE GOVERNANCE AND PUBLIC LAW: THE LIMITS OF CURRENT LEGAL INFRASTRUCTURE

Collaboration in governance is not new; U.S. history provides a dynamic and iterative pattern of innovation and legislation. For almost a century, there have been repeated attempts to balance agencies' need to consult and gather information from stakeholders outside government with transparency and accountability. Professor Richard Stewart describes the evolution of administrative law in five stages.²⁴⁶ First, the United States took from England the common law model in which citizens brought tort actions against regulatory officials to seek judicial review of their actions.²⁴⁷ Second, with industrialization in the late nineteenth century and the first commissions and regulatory agencies, the common law model yielded to the "traditional model of administrative law," in which courts required agencies to use adjudication modeled on courtroom process before rate-making or other action; the courts then engaged in judicial review of the agency's fact-finding based on the record and its statutory authority.²⁴⁸ Third, during the New Deal, Congress created agencies with open-ended statutory delegations of discretionary power, raising constitutional concerns about their accountability.²⁴⁹

241. See Court of Arbitration for Sport, History of the CAS, <http://www.tas-cas.org/history> (last visited Dec. 15, 2009).

242. See World Trade Org., Understanding the WTO: Settling Disputes, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Dec. 15, 2009).

243. See Int'l Court of Justice, The Court, <http://www.icj-cij.org/court/index.php?p1=1&PHPSESSID=c5ee614bcda79a1ee468790595cd350b> (last visited Dec. 15, 2009).

244. See, e.g., Am. Arbitration Ass'n, Arbitration, Mediation, and Other Forms of Alternative Dispute Resolution (ADR), <http://www.adr.org/> (last visited Dec. 15, 2009); Int'l Inst. for Conflict Prevention & Resolution, CPR: Home, <http://www.cpradr.org/> (last visited Dec. 15, 2009).

245. See Int'l Chamber of Commerce, ICC Dispute Resolution Services, <http://www.iccwbo.org/court/> (last visited Dec. 15, 2009).

246. Stewart, *supra* note 227, at 439.

247. *Id.*

248. *Id.* at 439-40.

249. *Id.* at 440.

In response to the perceived democracy deficit, James Landis advocated regulatory management by experts “[g]uided by experience and professional discipline.”²⁵⁰ This vision helped shape the Administrative Procedure Act (APA), enacted in 1946.²⁵¹

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.”²⁵² He argues that this gave rise to the fourth stage of administrative law, which he terms the “interest representation model,”²⁵³ 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.²⁵⁴ A key feature of this stage is the need for the agency to respond to the concerns of all affected interests.²⁵⁵ Adversarial legalism continued in the form of citizen-suits to force agency action. The fifth stage as “analytic management of regulation,” was imposed, through executive order, to control agency discretion and perceived excesses using cost-benefit analysis and executive oversight.²⁵⁶

Stewart argues that the current structure of administrative law is still evolving and has turned to two new regulatory methods: (1) “government-stakeholder network structures and (2) economic incentive systems.”²⁵⁷ 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.²⁵⁸

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 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 execu-

250. *Id.* at 441.

251. *Id.*

252. *Id.* at 441-42. This development has been chronicled in detail in ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2003) (describing the impact of a litigation-based lawyering model on policy).

253. Stewart, *supra* note 227, at 442.

254. *Id.*

255. *Id.*

256. *Id.* at 443-44.

257. *Id.* at 448.

258. *Id.* at 451.

tive branch, agencies must comply with the APA,²⁵⁹ Freedom of Information Act (FOIA),²⁶⁰ Government in the Sunshine Act,²⁶¹ Federal Advisory Committee Act (FACA),²⁶² NRA,²⁶³ and Administrative Dispute Resolution Act (ADRA).²⁶⁴

The APA opened up adjudication and rulemaking to public participation following the New Deal and *Schechter Poultry*.²⁶⁵ FOIA and the Sunshine Act made possible public scrutiny of records and opened agency meetings during the “rights revolution” of the 1960s.²⁶⁶ 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.²⁶⁷ 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.²⁶⁸ The NRA subjects negotiated rulemaking committees to FACA;²⁶⁹ the ADRA sets guidelines for the balance between confidentiality and public access in federal agency use of ADR.²⁷⁰

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. 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.²⁷¹

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 about collaboration. This section will survey salient examples of administrative laws affecting collaborative governance in U.S. federal and state government. This is only a preliminary 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.

259. 5 U.S.C. §§ 551-559, 701-706 (2006).

260. *Id.* § 552.

261. *Id.* § 552b.

262. *Id.* app. 2 §§ 1-6.

263. *Id.* §§ 561-570.

264. *Id.* §§ 571-584.

265. FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, 42-46 (William F. Funk et al. eds., American Bar Association 4th ed. 2008).

266. *Id.* at 676-690, 725-732.

267. *Id.* at 549-553.

268. *Id.* at 397-410, 941-947.

269. 5 U.S.C. § 565 (2006).

270. FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 265, at 403-405.

271. Freeman, *supra* note 16, at 22. 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.

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 the judicial, legislative, and executive functions from the other three are collapsed.²⁷² They have substantial discretion to choose among different governance processes under the APA,²⁷³ 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 for substantive or legislative rules.²⁷⁴ 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,²⁷⁵ 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.²⁷⁶ It encompasses formal and informal agency action.²⁷⁷ Formal agency action can take the forms of rulemaking or adjudication. In rulemaking, agencies create general rules of prospective application. Rulemaking generally involves

272. ROSENBLUM, *supra* note 19 at 11-12.

273. *Id.* at 6-7.

274. *Id.* at 59.

275. 5 U.S.C. §§ 551-559, 701-706 (2006).

276. 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).

277. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 97 (2003) (observing that the APA addresses rulemaking and adjudication, but fails to recognize priority setting, resource allocation, research, planning, targeting, guidance, and strategic enforcement, among other modes of agency action). Professor Rubin argues for a revision of the APA that would conceive of "administrative governance as an instrumentally rational process carried out by institutions with defined jurisdiction, a hierarchical structure, expert staff, and continuous operation." *Id.* at 189.

published notice and an opportunity for members of the public to comment, although generally not through an oral evidentiary hearing.²⁷⁸

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 *Goldberg v. Kelly's*²⁷⁹ full requirements.²⁸⁰ 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 policymaking 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 provisions for collaborative management in networks with other organizations, whether private, nonprofit, or other stakeholders.²⁸¹ This silence creates ambiguities for collaborative public management networks.

278. See PUBLIC LAW AND PUBLIC ADMINISTRATION 31-33 (Phillip J. Cooper & Chester A. Newland eds., Peacock Publishers 3d ed. 2000); CORNELIUS KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 83-84 (2d ed. 1999); ROSENBLUM, *supra* note 19, at 65-68; DAVID H. ROSENBLUM & ROSEMARY O'LEARY, PUBLIC ADMINISTRATION AND LAW 60, 139-43 (2d ed. 1997).

279. 397 U.S. 254 (1970).

280. This includes notice, the right to present evidence, confrontation and cross-examination of witnesses, oral argument, legal counsel, and a written decision stating reasons enunciated in this landmark Supreme Court decision. See *id.* at 267-71.

281. The definition of "agency" provides:

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. . . .

5 U.S.C. § 551 (2006).

The APA provides for notice and comment in rulemaking, but it does not define the form that public participation in rulemaking should take;²⁸² instead, the courts have carved out an area of agency discretion with the rejection of hybrid rulemaking or imposition of adversary legalism on the rulemaking process.²⁸³

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?²⁸⁴

Moreover, the vast majority of agency action is informal. This includes 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.²⁸⁵ Thus,

282. The provisions for notice and comment do not mandate an oral hearing:

(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 [sic] 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.

5 U.S.C. § 553.

283. 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).

284. See Benjamin, *supra* note 217, at 916 (raising this issue in the context of e-rulemaking).

285. See 5 U.S.C. § 555 (2006). 5 U.S.C. § 555(e) provides:

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.

there is no express legal authority for engaging the public in this sphere of agency action. If an agency chooses to engage the public, 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 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. 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.²⁸⁶ Federal dispute resolution laws have provided for confidentiality in certain circumstances.²⁸⁷ 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*

In an effort to make government more responsive, agencies began to create and rely on advisory committees, the use of which grew dramatically within the Beltway after World War II and outside the Beltway during the 1980s.²⁸⁸ Howev-

286. See David Faure, Note, *The Federal Advisory Committee Act: Balanced Representation and Open Meetings Conflict with Dispute Resolution*, 11 OHIO ST. J. ON DISP. RESOL. 489, 490, 518 (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, CTR. FOR COLLABORATIVE POLICY, TOO MUCH SUN? EMERGING CHALLENGES PRESENTED BY CALIFORNIA AND FEDERAL OPEN MEETING LEGISLATION TO PUBLIC POLICY CONSENSUS BUILDING PROCESSES (2003), available at http://www.csus.edu/ccp/publications/Too_Much_Sun.pdf.

287. See INTERAGENCY ADR WORKING GROUP STEERING COMM., PROTECTING THE CONFIDENTIALITY OF DISPUTE RESOLUTION PROCEEDINGS: A GUIDE FOR FEDERAL WORKPLACE ADR PROGRAM ADMINISTRATORS (2006), available at http://www.usdoj.gov/adr/pdf/final_confid.pdf.

288. 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 & 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.

Id. at 453 (footnotes omitted).

er, concerns arose about potential waste, their perceived excessive influence, and the problem of delegating effective decisional authority to unelected, non-accountable private parties.²⁸⁹ 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.”²⁹⁰ It requires 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.²⁹¹ 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 APA²⁹² to preserve accountability. It also requires public records²⁹³ and the availability of public participation in committee meetings²⁹⁴ to ensure both transparency and accountability. FACA specifically excludes local civic groups and bodies created to advise state and local government.²⁹⁵

289. For example, FACA 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.

5 U.S.C. app. 2 § 2. See generally RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, 297-300 (Supp. 2006).

290. 5 U.S.C. app. 2 § 5(b)(2).

291. BOXER-MACOMBER, *supra* note 286, at 14.

292. 5 U.S.C. app. 2 § 3(3) provides: “The term ‘agency’ has the same meaning as in section 551(1) of title 5, United States Code.”

293. 5 U.S.C. app. 2 § 8(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.”

294. *Id.* Section 552(a) of Title 5 of the United States Code contains provisions for open meetings.

295. 5 U.S.C. app. 2 § 4(c) provides: “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.”

The primary purpose of FACA was to reduce the use of advisory committees, and it succeeded in this goal.²⁹⁶ 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.²⁹⁷

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 longer.²⁹⁸ Other agencies declined to use these new techniques, asserting they were outside their delegated authority.²⁹⁹ In its original form, the APA had no explicit provision for the processes to be used in collaboration, e.g., ADR. It had no provision for negotiating or building consensus on 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 ADR or negotiated rulemaking and that agencies doing so might be acting *ultra vires* or outside the scope of their delegation.³⁰⁰ 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 1990³⁰¹ (made permanent in 1996) to clear up the confusion. These were the NRA of 1996 and the ADRA of 1996.³⁰² 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

296. President William J. Clinton reported to Congress in 1998, in the twenty-seventh and final such mandated report, on the reduction of advisory committees and their attendant costs during his administration in keeping with this goal. TWENTY-SEVENTH ANNUAL REPORT OF THE PRESIDENT ON ADVISORY COMMITTEES, FISCAL YEAR 1998, at I (1999).

297. Croley & Funk, *supra* note 288, 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).

298. See, e.g., THE CONSENSUS BUILDING INST., OFFICE OF COUNSEL AND THE INST. FOR WATER RES., U.S. ARMY CORPS OF ENGINEERS, PARTNERING, CONSENSUS BUILDING, AND ALTERNATIVE DISPUTE RESOLUTION: CURRENT USES AND OPPORTUNITIES IN THE U. S. ARMY CORPS OF ENGINEERS, ALTERNATIVE DISPUTE RESOLUTION SERIES, WORKING PAPER NO. 8, at 1 (IWR Working Paper No. 96-ADR-WP-8, 1996), available at <http://www.iwr.usace.army.mil/inside/products/pub/iwrreports/96-ADR-WP-8.pdf>.

299. Tina Nabatchi, *supra* note 230, at 647.

300. FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 9 (Marshall J. Breger, et al. eds., 2001) (citing an opinion of the U.S. Department of Justice Office of Legal Counsel).

301. The Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 561-570 (2006)); The Administrative Dispute Resolution Act of 1990, Pub. L. No. 101-552, 104 Stat. 2736 (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (2006)).

302. See Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat. 3870 (codified as amended in scattered sections of 5 U.S.C.).

Congress passed these statutes, there has been dramatic growth in the use of new governance processes in the federal government.³⁰³

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 twenty-five or fewer stakeholders to negotiate the text for subsequent public notice and comment.³⁰⁴ Congress intended to enhance informal rulemaking and encourage innovation. The NRA defines “consensus” as unanimous concurrence among represented interests, unless the committee agrees otherwise.³⁰⁵ 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.”³⁰⁶ It incorporates APA definitions for agency, party, person, rule, and rule-making.³⁰⁷

A single agency has sole authority to determine the need for a negotiated rulemaking committee.³⁰⁸ It may seek assistance from a “convener.”³⁰⁹ It must consider the need for a rule, whether there is a limited number of identifiable interests, whether there is a reasonable likelihood of a 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.³¹⁰ The agency must publish notice so people can apply for membership on the committee. After thirty days, the agency may establish the committee.³¹¹ 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 twenty-five persons unless the agency determines it needs more for balanced representation, and the committee must include at least one agency representative.³¹² The decision not to have a negotiated rulemaking committee is left to agency discretion and not subject to judicial review.³¹³

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

303. See generally Interagency Alternative Dispute Resolution Working Group, <http://www.adr.gov/index.html> (last visited Dec. 15, 2009); SINGER, *supra* note 89. For an early empirical study of agency ADR use, see Bingham & Wise, *supra* note 89. 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) (finding widespread use but uneven diffusion across agencies).

304. Cornelius M. Kerwin, *Negotiated Rulemaking*, in THE HANDBOOK OF PUBLIC LAW AND PUBLIC ADMINISTRATION 225, 225-36 (Phillip J. Cooper & Chester A. Newland eds., 1997).

305. 5 U.S.C. § 562(2) (2006).

306. *Id.* § 562(7).

307. *Id.* §§ 562(1), (8)-(11).

308. See *id.* § 563(a).

309. *Id.* § 563(b).

310. *Id.* § 563(a).

311. See *id.* § 564.

312. *Id.* § 565(b).

313. *Id.* § 570.

keeping.³¹⁴ Records are exempt from disclosure under FOIA. Moreover, the committee itself is exempt from those sections of the APA on rulemaking procedures.³¹⁵

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.³¹⁶ The committee terminates upon final rule unless there is some early agency directive or committee agreement on a different termination date.³¹⁷ 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.³¹⁸

There is an active debate over whether negotiated rulemaking saves agencies time and money. While some claim that negotiated rulemaking takes no less time than traditional ones,³¹⁹ 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* to draft than traditional rulemaking.³²⁰ Others have concerns about the accountability of public agencies using negotiated rulemaking.³²¹

Whatever its effectiveness, from the standpoint of collaborative public management, the NRA 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 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,³²² all the concerns expressed regarding that statute apply with equal force to the NRA.³²³

314. *Id.* § 566.

315. *Id.*

316. *Id.* § 566(f).

317. *Id.* § 567.

318. *Id.* § 570.

319. See Coglianesi, *supra* note 206.

320. Harter, *supra* note 206, at 45-49.

321. Robert Choo notes:

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, 1119-1120 (2000).

322. 5 U.S.C. § 562(7) ("negotiated rulemaking committee" as "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.").

323. See discussion *supra* Part IV.A.3.

6. *The Administrative Dispute Resolution Act*

The ADRA contemplates both quasi-legislative and quasi-judicial processes when it authorizes agencies to use ADR.³²⁴ Quasi-legislative new governance processes include uses of mediation, facilitation, consensus building, and collaborative policy-making to make, implement, and enforce policy.³²⁵ 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.³²⁶

The ADRA contains four key structural components: (1) authorization to use ADR; (2) a mandate that each agency appoint a dispute resolution specialist; (3) required statements of agency ADR policy for the public; and (4) easing bureaucratic barriers to ADR use.³²⁷ 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, factfinding, minitrials, arbitration, and use of ombuds, or any combination thereof."³²⁸ In other words, the statute creates an open-ended, 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.³²⁹ The U.S. Department of Justice raised concerns about excessive delegation in the first draft of the bill, resulting in a watered down arbitration clause; the agency had the pow-

324. FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK, *supra* note 300, at 36-37 (observing that it authorizes federal agencies to use any ADR procedure for a controversy related to an administrative program, which includes all federal agencies involving protection of the public interest and the determination of rights, privileges and obligations of private parties).

325. For example, environmental policy. See ENVIRONMENTAL GOVERNANCE RECONSIDERED: CHALLENGES, CHOICES, AND OPPORTUNITIES 177-182 (Robert F. Durant et al. eds., 2004); Thomas C. Beierle and Jerry Cayford, *Dispute Resolution as a Method of Public Participation*, in THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 61, at 53-68.

326. Bingham & Wise, *supra* note 89, at 392-401.

327. Margaret Ward, *Public Fuss in a Private Forum*, 2 HARV. NEGOT. L. REV. 217, 217-18 (1997) ("[The ADRA] required each federal agency to adopt an ADR policy, appoint an ADR specialist, develop an ADR training program, . . . 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.").

328. 5 U.S.C. § 571(3) (2006) (emphasis added).

329. See Jonathan D. Mester, Note, *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, 168 (1997) (arguing this change renders agencies less publicly accountable).

er to reject the award.³³⁰ However, the 1996 version of the ADRA contains explicit authorization for arbitration that is binding on both parties. It incorporates provisions of The Federal Arbitration Act (FAA) on enforcing arbitration awards.³³¹ The ADRA gives 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.”³³² Arbitrators must issue awards within thirty days unless the parties agree to some other time limit. The ADRA specifies the content of an arbitration award—specifically “a brief, informal discussion of the factual and legal basis for the award”—but does not require that it be formal.³³³ Final awards are binding and may be enforced under the FAA.³³⁴

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.³³⁵ Since they are not precedent, arbitration awards may not be reviewed under the APA. Instead, there is judicial review only under the standards of the FAA.³³⁶ 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.³³⁷ 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.³³⁸ 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.³³⁹

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 Federal Mediation and Conciliation Service roster, American Arbitration Association roster, or any individual.³⁴⁰ It authorizes agencies to enter into contracts and establish compensation through agreement with other parties to the dispute.³⁴¹ The statute also provides confidentiality for the parties for dispute resolution communications between a neutral and a party, with certain statutorily enumerated exceptions.³⁴² All of these had previously been barriers that served agency inertia.

330. See Cynthia B. Dauber, *The Ties That Do Not Bind: Nonbinding Arbitration in Federal Administrative Agencies*, 9 ADMIN. L.J. AM. U. 165, 172-73 (1995).

331. 5 U.S.C. § 580.

332. *Id.* § 579(5).

333. *Id.* § 580(a).

334. See *id.* § 580(c).

335. *Id.* § 580(d).

336. See *id.* § 581(a).

337. 9 U.S.C. § 10 (2006).

338. 5 U.S.C. § 706.

339. See *id.* § 581(b).

340. See *id.* § 573(a) (“Neutrals”); Am. Arbitration Ass’n, <http://www.adr.org/> (last visited Dec. 15, 2009); Fed. Mediation & Conciliation Serv., FMCS: Who We Are, <http://www.fmcs.gov/internet/categoryList.asp?categoryID=13> (last visited Dec. 15, 2009).

341. *Id.* § 573(e).

342. *Id.* § 574.

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. Thus, 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. *E-Government Act*

The E-Government Act of 2002³⁴³ brought the federal government into the Internet age by requiring use of new technologies to make government more accessible and transparent to the public.³⁴⁴ Unlike many other administrative laws, it makes express reference to collaboration and dialogue “among Federal, State, local, and tribal government leaders on electronic Government in the executive, legislative, and judicial branches, as well as leaders in the private and nonprofit sectors, to encourage collaboration. . . .”³⁴⁵ There is growing scholarship on the potential for expanded participation and collaboration in governance through the use of online tools.³⁴⁶ However, the E-Government Act is framed largely in terms of information transparency and access, not public participation.

8. *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 U.S. Department of Agriculture media-

343. 44 U.S.C. § 3601 (2006).

344. FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 265, at 469-472.

345. 44 U.S.C. § 3602(f)(9)(A).

346. Stephen J. Balla, *Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking*, J.L. POL'Y FOR INFO. SOC'Y 59 (2005) (reporting on empirical study of all forms of participation through an analysis of online documents of the U.S. Department of Transportation); A. Michael Froomkin, *Building the Bottom Up from the Top Down*, 5 *US: J. L. & POL'Y FOR INFO. SOC'Y* 141 (2009) (arguing that government can foster self-organization through legal reform to make communication technologies inexpensive, reliable, and widely available); Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber Lawyer*, 9 *B.U.J. SCI. & TECH. L.* 1 (2003) (arguing for broader use of technology in participatory democracy); Beth Simone Noveck, *The Electronic Revolution in Rulemaking*, 53 *EMORY L.J.* 433 (2004) (arguing for strengthening technology to foster citizen participation). *But see* Cary Coglianese, *supra* note 215 (arguing that empirical evidence does not support expanded public participation through e-rulemaking).

tion of disputes between the government and farmers over federal agricultural loans;³⁴⁷ Environmental Protection Agency mediation and arbitration for certain disputes;³⁴⁸ mediation of special education disputes;³⁴⁹ and Department of Defense procurement disputes in a variety of forms, including mediation and a form of advisory arbitration known as dispute panels.³⁵⁰ 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.

9. *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 (USIECR).³⁵¹ This relatively young federal agency, established within the Morris Udall Foundation, has as its express mission "to assist the Federal Government in implementing section 4331 of Title 42 [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."³⁵² 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 nonprofit 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.

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

348. 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, 1041-42 (2002) (observing that the Environmental Protection Agency 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).

349. See generally Grace E. D'Alo, *Accountability In Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOT. 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).

350. 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).

351. See U.S. Inst. for Envtl. Conflict Resolution, <http://www.ecr.gov/> (last visited Dec. 15, 2009).

352. 20 U.S.C. § 5604 (2006).

B. State Legal Infrastructure

Consistent with our federalism, the 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.³⁵³ The Model State Administrative Procedure Act (MSAPA) is itself silent on ADR and negotiated rulemaking.³⁵⁴ However, in states that have adopted it, administrators usually have implicit authority to use 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 (section 1-106), allowing agencies to establish advisory committees (section 3-101), and requiring agencies to adopt rules for informal procedures available to the public (section 2-104).³⁵⁵ 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 may raise concerns about unconstitutional delegation of agency regulatory power to private decision-makers.³⁵⁶ 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

353. These scholars and elite practitioners craft model statutes on a wide variety of subjects for states to consider enacting. See The Nat'l Conference of Comm'rs on Uniform State Laws, <http://www.nccusl.org> (last visited June 19, 2009).

354. 1981 Model State Admin. Procedure Act, available at <http://www.nmcpr.state.nm.us/acr/presentations/1981MSAPA.htm>.

355. *Id.*

356. SINGER, *supra* note 89, at 41-43.

recently completed work on the new Uniform Mediation Act.³⁵⁷ 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, such as Illinois.

Many states expressly authorize all state agencies to use new governance processes, either through amendments to their state APAs or executive order.³⁵⁸ As of this writing, there are six comprehensive state offices of dispute resolution, thirty-eight offices focusing on courts, and thirty-four in universities and non-profits.³⁵⁹ State legislation on ADR and negotiated rulemaking ranges from the short and broad to the long and specific. For example, New Mexico simply authorizes agencies to use ADR.³⁶⁰ In contrast, Texas³⁶¹ and Florida³⁶² 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.³⁶³ 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.³⁶⁴ 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.

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.³⁶⁵ State environmental agencies may have the power to use mediation for particular land use disputes, like deciding upon the sites for landfills.³⁶⁶ In

357. See NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIF. MEDIATION ACT (amended 2003), available at <http://www.law.upenn.edu/bl/archives/ulc/mediat/2003finaldraft.pdf>.

358. See Policy Consensus Initiative & Nat'l Policy Consensus Ctr <http://www.policyconsensus.org/tools/executiveorders/index.html> (last visited Nov. 28, 2009) (describing executive orders in Alabama, Florida, Massachusetts, Minnesota, Montana, New Mexico, Oregon, Pennsylvania, and Utah).

359. See Policy Consensus Initiative & Nat'l Policy Consensus Ctr., Directory of Programs, <http://www.policyconsensus.org/directory/alldirectory.php> (last visited June 19, 2009).

360. N.M. Stat. §§ 12-8A-1-12-8A-8 (West, Westlaw current through 2009 2d. Sess.). The New Mexico Governmental Dispute Prevention and Resolution Act authorizes state agencies to use a broad range of processes in rulemaking and adjudication.

361. Texas statutes are modeled on the federal statutes. See TEX. GOV'T CODE §§ 2008.001-2008.058 (West, Westlaw current 2009 Reg. and 1st Called Sess. of the 81st Leg.) (negotiated rulemaking); TEX. GOV'T CODE §§ 2009.001-2009.055 (West, Westlaw current 2009 Reg. and 1st Called Sess. of the 81st Leg.) (government dispute resolution).

362. FLA. STAT. § 120.573 (West, Westlaw current through Ch. 2009-270) (authorizing mediation); FLA. STAT. § 120.54 (authorizing negotiated rulemaking).

363. See IND. CODE ANN. § 4-21.5-3.5-1 (West, Westlaw current through end of 2009 1st Spec. Sess.).

364. See N.J. ADMIN. CODE §§ 1:30-1.2, 1:30-5.7 (West, Westlaw current through Jan. 4, 2010).

365. See Center for Appropriate Dispute Resolution in Special Education, <http://www.directionservice.org/cadre/> (last visited Dec. 15 2009).

366. See, e.g., MASS. GEN. LAWS Ch. 40A, § 6 (West, Westlaw current through Ch. 202 of the 2009 1st Annual Sess.); see generally, INST. FOR ENVTL. NEGOTIATION, UNIV. OF VA., A STREAM CORRIDOR PROTECTION STRATEGY FOR LOCAL GOVERNMENT (2002), available at http://www.virginia.edu/ien/docs/stream%20guide_final.pdf%202; see generally, POLICY CONSENSUS

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.³⁶⁷ For example, the Los Angeles Neighborhood Councils are incorporated into the city charter.³⁶⁸

The National Civic League has developed an appendix to its Model City Charter that is titled “Citizen-Based Government: A Process to Engage Citizens in Charter Revision.”³⁶⁹ 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.

VI. 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:

INITIATIVE, STATES MEDIATING CHANGE: IMPROVING GOVERNANCE THROUGH COLLABORATION (2001), available at <http://www.policyconsensus.org/publications/reports/docs/MediatingChangeCollaboration.pdf>.

367. See LEIGHNINGER, *supra* note 29, at 233-236 (2006). For resources and publications regarding collaborative governance at the local government level, see the Institute for Local Government, <http://www.ca-ilg.org> (follow “civic engagement” link for the Collaborative Governance Initiative), and the National League of Cities Democratic Governance Panel, <http://www.nlc.org> (follow “governance & structure” link to find civic engagement resources).

368. See, e.g., Division 22 of the Los Angeles Administrative Code. Chapter 28 establishes the Department of Neighborhood Empowerment to supervise a system of neighborhood councils. *Id.*, available at <http://www.lacityneighborhoods.com/Documents/CharterOrdinance.pdf> (last accessed Dec. 15, 2009).

369. NAT’L CIVIC LEAGUE, MODEL CITY CHARTER: DEFINING GOOD GOVERNMENT IN A NEW MILLENNIUM (8th ed. 2003).

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?
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.³⁷⁰ 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 legislative³⁷¹ and judicial³⁷² 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 through the enhanced transparency that broader civic engagement and public participation afford.

370. See Sidney Shapiro, *A Delegation Theory of the APA*, 10 ADMIN. L.J. AM. U. 89 (1996).

371. See Tom Melling, *Dispute Resolution Within Legislative Institutions*, 46 STAN. L. REV. 1677 (1994).

372. See William G. Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 VAND. L. REV. 1 (1990).

