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Administrative Law and Culture for the U.S. Collaborative Governance State

David H. Rosenbloom* and Mei Jen Hung**

During the 1980s and 1990s, collaborative governance emerged as a potentially new global paradigm for public administration. It comes in many forms. However, its essence is governmental reliance on nongovernmental entities for the delivery of public services and constraints. Simply put, collaborative governance calls on government to focus on “steering” while relying on third parties to do the “rowing.” In the United States, collaborative government is not new in kind—the federal government relied on contractors to convey the mail from the early days of the republic. Rather it is new in scope, accounting for billions of dollars and millions of contract employees. As with any major shift in public administration, collaborative governance challenges extant legal regimes and organizational cultures. This article explains these challenges and considers some of the changes necessary to integrate collaborative government more fully into U.S. constitutional democracy.

I. ORIGINS

The movement toward collaborative governance as a new public administrative paradigm in the United States can be conveniently dated to publication of E.S. Savas’ book, *Privatization: The Key to Better Government* in 1987. Savas maintained that “the role of government is to steer, not to man the oars” and that using third parties to row “helps restore government to its fundamental purpose.”¹ He took a broad view of what government could rely on nongovernmental entities to provide. Among such functions, he lists adoption; airport operation; child protection; crime laboratory work; crime prevention and patrol; economic development; election administration; housing inspection and code enforcement; public housing management; criminal justice probation; property acquisition; public relations and information services; and records management.² Savas also identified several of the tools government can use in collaborative governance: contracts, franchises, grants, vouchers, volunteers, coproduction by the public, and regulatory measures.

It is a moot point whether Savas was ahead of the practice or placed it in a conceptual framework. By 1989, collaborative governance was firmly entrenched in some federal agencies. At the Environmental Protection Agency (EPA):

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1. EMANUEL S. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* 290 (1987).

2. *Id.* at 73.

Consultants were analyzing proposed legislation, drafting EPA's budget documents, overseeing the agency's field investigation teams, preparing work statements for other EPA contracts, writing draft preambles to formal rules, responding to public comments on those rules as part of the formal rulemaking process, developing guidelines for monitoring other contractors, organizing and conducting public hearings, and advising senior officials on legislative reorganizations. . . .³

Similarly, the Department of Energy:

relie[d] on a private workforce to perform virtually all basic governmental functions. It relie[d] on contractors in the preparation of its most important plans and policies, the development of budgets and budget documents, and the drafting of reports to Congress and congressional testimony. It relie[d] on contractors to monitor arms control negotiations, help prepare decisions on the export of nuclear technology, and conduct hearings and initial appeals in challenges to security clearance disputes. In addition, a contractor workforce is relied on by the Inspector General.⁴

Senator David Pryor (Democrat, Arkansas) denounced such arrangements creating "a very large, invisible, unelected bureaucracy of consultants who perform an enormous portion of the basic work of and set the policy for the Government."⁵

Building on Savas' work and further stamping collaborative government as among public administration's best practices, David Osborne and Ted Gaebler's phenomenally popular *Reinventing Government* laid the groundwork for the Clinton-Gore administration's effort to reinvent the federal government.⁶ Although the reinvention effort led by the Clinton-Gore National Performance Review went well beyond collaborative government by calling for massive deregulation of public administration, it repeated the "steering/rowing" metaphor and promoted massive outsourcing of governmental work.⁷ The National Performance Review developed the following decision tree for determining what the federal government should do:

3. PAUL LIGHT, *THE TRUE SIZE OF GOVERNMENT* 14 (1999). Light may be using "formal" in the sense of formalized or institutionalized and referring to notice-and-comment rulemaking perhaps as well as formal rulemaking.

4. Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 873 (2000) (quoting *Use of Consultants and Contractors by the Environmental Protection Agency and the Department of Energy: Hearing Before the Subcomm. on Fed. Servs., Post Office, and Civil Serv. of the Senate Comm. on Governmental Affairs*, 101st Cong. 63 (1989)).

5. LIGHT, *supra* note 3, at 13.

6. DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT* (1992). This book offered a new paradigm for public administration, known as "reinvention," and was among the most influential in field in the 1990s. Osborne was a senior advisor to Vice President Al Gore on the National Performance Review. Gaebler has been an appointed government official in several states, including California, Oregon, Ohio, Maryland, and Pennsylvania. Osborne and Gaebler are both members of the National Academy of Public Administration.

7. AL GORE, *CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS: THE REPORT OF THE NATIONAL PERFORMANCE REVIEW* 7 (1993).

1. If a federal program is not “based on customer input,” it should be terminated or privatized.
2. If a federal program is “based on customer input,” the question is whether it “can . . . be done as well or better at the state or local level.”
3. If the answer is yes, then it should “devolve to other governments.”
4. If the answer is no, then the issue is whether there is “any way to cut cost or improve performance by introducing competition.”
5. If the answer is yes, then the program should be privatized or franchised.
6. If the answer is no, then it should be retained by the government and reinvented, which might also involve contracting out some of its aspects.⁸

The number of private employees under contract with the federal government at the close of the Clinton-Gore administration is unknown, but certainly large. Paul Light estimated the number at 5,635,000 in 1996.⁹ In some agencies, collaborative government was clearly the norm. For example, in 2001, the Department of Energy “reported that it had 14,700 employees (civil servants and officials), and over 100,000 contractor employees.”¹⁰

President George W. Bush’s administration was also firmly committed to collaborative governance. During the 2000 presidential election campaign, Bush echoed the National Performance Review: “My policies and my vision of government reform are guided by three principles: government should be citizen-centered, results-oriented, and wherever possible, market-based.”¹¹ Bush called for “competitive sourcing” in his President’s Management Agenda, issued in the summer of 2001.¹² Subsequently, the U.S. Office of Management and Budget (OMB) restructured outsourcing to enable federal employees to compete on paper with potential contractors for the performance of federal work. As outlined in OMB’s *Circular A-76*, competitive sourcing is complex, involving a

8. NATIONAL PERFORMANCE REVIEW, REINVENTION ROUNDTABLE: THE REPORT OF THE NATIONAL PERFORMANCE REVIEW (1995); see also Stephen Barr, *Gore Urges Rethinking for Reinvention*, WASH. POST, Jan. 4, 1995, at A23.

9. LIGHT, *supra* note 3, at 38.

10. Dan Guttman, *Inherently Governmental Functions and the New Millennium*, in MAKING GOVERNMENT MANAGEABLE 51 (Thomas Stanton & Benjamin Ginsberg, eds., 2004).

11. George W. Bush, *Building a Responsive, Innovative Government*, FED. TIMES, June 26, 2000, at 15.

12. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT’S MANAGEMENT AGENDA: FISCAL YEAR 2002, at 4, 5, 17-19 (2001), available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>.

variety of officials, teams, and boards.¹³ It potentially improves government efficiency as federal employees reengineer their work to be competitive. Ultimately, competitive sourcing decisions depend very heavily on cost-effectiveness, with pay, benefits, insurance, contract administration, overhead, retirement, and related considerations taken into account.¹⁴ As of 2003, OMB identified some 434,800 federal positions suitable for competitive outsourcing.¹⁵

The effectiveness and desirability of collaborative governance came under substantial questioning by the end of the Bush administration. As discussed, *infra*, a disquieting feature of collaboration is that the administrative law regime, largely based on the Administrative Procedure Act of 1946 (APA),¹⁶ that regulates federal agencies has very limited application to contractors and other nonfederal third parties.¹⁷ The Abu Ghraib scandal in 2004, which involved military and contract employees while highlighting the unclear relationship between the two, cast outsourcing in a highly unfavorable light.¹⁸ In Abu Ghraib as generally, it appeared that accountability had suffered and that the government was unable adequately to monitor contracting and contractors.

Over the years, the media have highlighted several instances of contractor corruption and inadequate performance. In February 2009, the U.S. Government Accountability Office (GAO) issued a report indicating that the federal "Excluded Parties List System," which requires prohibiting corrupt contractors from receiving additional contracts, was not working well.¹⁹ Having promised change and to fix government in his election campaign, in March 2009, President Barack Obama ordered OMB to undertake a thorough review of *Circular A-76* and related competitive sourcing matters.²⁰ Congress also had *A-76* on its agenda. The Omnibus Appropriations Act of 2009, signed by President Obama on March 11, suspended a great deal of federal competitive sourcing.²¹ However, whether the federal government can and will reverse or restrain collaborative governance in the long term is an open question.

13. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003), available at <http://oam.ocs.doc.gov/docs/OMB%20Circular%20A-76%20Revised%202003.pdf>.

14. For a more complete discussion, see David Rosenbloom & Suzanne Piotrowski, *Outsourcing the Constitution and Administrative Law Norms*, 35 AM. REV. OF PUB. ADMIN. 103 (2005).

15. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, COMPETITIVE SOURCING: REASONED AND RESPONSIBLE PUBLIC-PRIVATE COMPETITION 10, tbl.1 (2003), available at http://www.whitehouse.gov/omb/procurement/comp_sourc_addendum.pdf. One hundred thirty-five thousand and two hundred positions in the Department of Homeland Security were not included in this analysis. *Id.*

16. Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237.5 (codified as amended in scattered sections of 5 U.S.C.).

17. Rosenbloom & Piotrowski, *supra* note 14, at 103-121.

18. Vince Crawley & Bernard Adelsberger, *Abu Ghraib Reports Fault Contracting, Leadership*, FED. TIMES, Aug. 30, 2004, at 12.

19. U.S. GOV'T ACCOUNTABILITY OFFICE, EXCLUDED PARTIES LIST SYSTEM: SUSPENDED AND DEBARRED BUSINESSES AND INDIVIDUALS IMPROPERLY RECEIVE FEDERAL FUNDS, 2009, available at <http://www.gao.gov/new.items/d09174.pdf>; Robert Brodsky, *Government Continues To Provide Unethical Contractors with Work*, GAO SAYS, GOV'T EXECUTIVE, Feb. 26, 2009, available at http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0209/022609rb1.htm&oref=search.

20. Elizabeth Newell, *Obama Orders Contracting Overhaul*, GOV'T EXECUTIVE, March 4, 2009, available at <http://www.govexec.com/dailyfed/0309/030409e1.htm>.

21. The Omnibus Appropriations Act, Pub. L. No. 111-8, 123 Stat. 691.

II. PURPOSES

Embracing Savas' claims, collaborative governance is typically presented as a means of making government "better" or in the reinventers' terms, "work better and cost less."²² "Better," of course, is subject to multiple meanings. One person's administrative efficiency may be the denial of another's due process.²³ Not surprisingly, therefore, the rationales for relying on third parties vary and can be at odds with one another:

- *Cost-effectiveness.* Cost-effectiveness is a prime reason for contracting out governmental work. Starting from the premise that it would be absurd for government to produce its own pencils, paperclips, and other products that are readily available in open, competitive markets, advocates of collaborative governance contend that government can cost-effectively provide a wide range of services by procuring their performance through competitive bidding among third parties. If private firms can pick up more trash per dollar than government, why not contract for their services? Similarly, if Correction Corporation of America can run prisons more cost-effectively than the Federal Bureau of Prisons, why not hire it to do so? If Blackwater and Halliburton can provide security to facilities and food service to troops in a war zone more cost-effectively than military personnel, why not rely on them?
- *Specialization, expertise, and capacity.* Government may also rely on third parties because they have greater capacity and expertise in performing an aspect of government work or tasks the government needs completed. Information technology (IT) is an example. Expense aside, it would be difficult for government to duplicate IT specialists' capacity and expertise because they gain a wide range of experience by working in a variety of settings with different hardware, software, applications, and organizational cultures.
- *Subsidies.* Collaborative governance can be a means of subsidizing third parties. Subsidies are a longstanding vehicle for promoting public policies. Federal procurement policies provide advantages that help subsidize small businesses and enterprises owned by disadvantaged persons. President George W. Bush's faith-based initiatives made it easier for religious organizations to compete for federal social service contracts—and funds.²⁴
- *Circumvention of legal requirements.* As discussed, *infra*, in the United States, private entities contracted to perform government

22. See GORE, *supra* note 7.

23. Stanley v. Illinois, 405 U.S. 645, 650 (1972); see generally HERBERT KAUFMAN, RED TAPE (1977).

24. Exec. Order No. 13,199, 66 Fed. Reg. 8499 (January 29, 2001).

work are typically free from the constitutional and administrative law provisions that apply to public agencies. Consequently, collaborative government can be deliberately used to circumvent constitutional protections of due process and other rights, as well as regulations providing for transparency, representation, and public participation. Perhaps most important in this context is that the broad panoply of constitutional rights that pertain to public-sector human resources management—and raise costs—do not apply to the private sector.²⁵ This may make relying on a contractor workforce more attractive than a governmental one. Collaboration may also enable public agencies to achieve indirectly what they may be legally forbidden to do directly. For example, in 2006, the U.S. Department of Defense (DOD) contracted with a private firm that subcontracted with BeNow, Inc., to create a database as an aid in military recruitment.²⁶ The information sought of high school and college students included “birth dates, Social Security numbers, ethnicity, grade-point averages” and the students’ curricula.²⁷ DOD apparently authorized the contractor to gain access to medical records, among other sources.²⁸ Any effort by DOD to create the database itself would have potentially violated the Privacy Act of 1974.²⁹

- *Politics.* Where there is governance, there is politics. In the United States, both the Republicans and Democrats purport to favor limiting or reducing the size of government. Reining in government was particularly important to the Clinton-Gore administration’s claim to be “New Democrats.”³⁰ New Democrats have to avoid the “tax and spend liberal” label applied to old Democrats. They also have to distinguish themselves from Republicans, which they do by contending that government can be a positive force in the economy and society.

25. YONG S. LEE & DAVID H. ROSENBLUM, *A REASONABLE PUBLIC SERVANT* 155-227 (2005) (discussing equal employment opportunity law as it pertains both to public and private employees). Though Constitutional concerns may not be as prevalent in the private sector as they are in the public sector, there may be statutory equivalents, such as civil rights laws.

26. *Pentagon Recruiting Program Attacked*, BOSTON BUSINESS JOURNAL, Oct. 18, 2005, <http://boston.bizjournals.com/boston/stories/2005/10/17/daily43.html>.

27. *Id.*

28. *Id.*

29. Privacy Act of 1974, 5 U.S.C. § 552A (2006). The act limits the types of information federal agencies may collect, provides individuals with a right to access to records on them, and requires agencies to publish notices in the *Federal Register* explaining their record keeping systems and access, storage, and disposal policies. See FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 813-825 (William Funk, et al., eds, 3d ed. 2000). In a letter to then-Secretary of Defense, Donald Rumsfeld, a coalition of more than 100 groups charged that the program conflicted with the Privacy Act. David Chu, Undersecretary of Defense for Personnel and Readiness, admitted that a privacy notice should have been issued before 2005, which was three years after the program began. See Jonathan Krim, *Recruitment Tool Targeted*, WASH. POST, Oct. 18, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/17/AR2005101701529.html>. Reliance on private entities to collect information for federal agencies also raises Fourth Amendment concerns. See Michael Isaac, *Privatizing Surveillance: The Use of Data Mining in Federal Law Enforcement*, 58 RUTGERS L. REV. 1057 (2006).

30. Jon F. Hale, *The Making of the New Democrats*, 110 POL. SCI. Q. 207, 207-32 (1995).

Putting these two considerations together requires that government be a finely honed tool or, as Gore might have put it, a well-integrated circuit. Reducing the size of the federal workforce was central to the National Performance Review. It initially called for a reduction of 252,000 positions.³¹ By 1996, the size of the non-postal federal civilian workforce was down by some 282,000 positions, or thirteen percent.³² The New Democrats' strategy undoubtedly helped Clinton and Gore parry Senator Bob Dole's tax-and-spend charge during the 1996 presidential election campaign. Of course, as is now well understood, while the number of federal employees was shrinking, the government's contractor workforce was growing.³³

III. GENERIC CONCERNS ABOUT COLLABORATIVE GOVERNMENT: INHERENTLY GOVERNMENTAL FUNCTIONS, LEGAL CONTROLS, AND CORRUPTION

A. *Inherently Governmental Functions*

There is disagreement over how to treat and define inherently governmental functions in collaborative governance. Savas contends that “. . . false alarms are raised about privatizing services that are said to be ‘inherently governmental’: the responsibility for providing the service can be retained by government, but the government does not have to continue producing it.”³⁴ Taking state and local government into account, he appears to be correct. As Paul Light observes, “But for a handful of functions dealing with national security and criminal justice, it is not clear that there is a pure and inherently governmental function left today.”³⁵ Others, including the Bush and Obama administrations, would limit competitive sourcing to commercial functions, that is, activities that are not inherently governmental. Under Bush, OMB defined “inherently governmental” as:

activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority or making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.³⁶

Examples include:

31. See GORE, *supra* note 7.

32. See LIGHT, *supra* note 3, at 38.

33. *Id.*

34. SAVAS, *supra* note 1, at 62.

35. LIGHT, *supra* note 3, at 9-10.

36. OMB CIRCULAR NO. A-76, *supra* note 13, at 5-6.

- “Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise”;
- “Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise”;
- “Significantly affecting the life, liberty, or property of private persons”;
- “Exerting ultimate control over the acquisition, use, or disposition of United States property. . . .”³⁷

Noting that the cost of federal contracts rose from \$71 billion in 2000 to \$135 billion in 2008, Obama finds this definition inadequate: “the line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions.”³⁸ He gave OMB the lead responsibility for the unenviable task of formulating a better definition of inherently governmental—one which presumably will require that the government retain more functions in-house.³⁹

B. Legal Controls

With limited exceptions, the panoply of constitutional and federal administrative law controls that regulate government do not apply to entities doing outsourced government work. The Constitution applies directly to private action only under two circumstances. First, the Thirteenth Amendment’s proscription of slavery and involuntary servitude applies to private parties as well as government.⁴⁰ Second, under the state-action doctrine, a private entity may be treated as governmental for constitutional purposes. The key is whether the private action “may be fairly treated as that of the State [i.e., government] itself.”⁴¹ But whether the key will fit “is a matter of normative judgment, and the criteria lack rigid simplicity” and “consistency.”⁴²

In general, to be a state actor, a private entity must be one or more of the following:

37. *Id.* at 6.

38. Memorandum for the Heads of Executive Departments and Agencies, *Government Contracting* (Mar. 4, 2009), available at <http://www.govexec.com/pdfs/030409e1.pdf>. It is not indicated whether the figures are for constant dollars.

39. *Id.*

40. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); see ALEXANDER TESIS, *THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY* (2004); George Rutherglen, *State Action and the Thirteenth Amendment*, 94 VA. L. REV. 1367 (2008).

41. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

42. *Id.*; *Lebron v. Nat’l. R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995).

- Engaged in a public function as defined by the judiciary;
- Controlled by a government;
- Engaged in joint participation with government;
- Entwined with government; or
- Empowered to use government's coercive power.⁴³

Being heavily funded and/or regulated by government will not alone turn a private party into a state actor. Although collaborative governance will probably transform an increasing number of private entities into state actors, the vast majority of government contractors are not likely to be subject to constitutional constraints. After all, the state-action doctrine is fashioned to protect private autonomy as well as individual constitutional rights.⁴⁴ Similarly, federal administrative law has little bearing on private entities engaged in collaborative governance. Its core provisions for making administrative processes comport more fully with U.S. democratic constitutionalism apply only to government. When it was enacted in 1946, there was nothing in the APA⁴⁵ that would make government contractors more representative, open to public participation, transparent, or procedurally fair in their treatment of individuals. Subsequent statutes and regulations do bring administrative law values into collaborative governance, but on an incremental rather than comprehensive basis.

For instance, the Openness Promotes Effectiveness in our National Government Act, known as the "OPEN Government Act of 2007," extends freedom of information to "any information" held by a private entity "that would be an agency record . . . when maintained by an agency" and to information kept by a contractor "for the purposes of records management."⁴⁶ The National Defense Authorization Act for Fiscal Year 2008 also contains provisions for increasing the transparency of collaborative governance.⁴⁷ Additionally, it mandates GAO reporting on the "ethics programs of major defense contractors," ethics training, and the protection of contractor-employees who report a "substantial violation of law related to a contract" through hotlines or other channels.⁴⁸ The Federal Acquisition Regulation contains provisions for whistle-blower protection and the protection of personal privacy.⁴⁹ As useful as such measures may be, the reality remains that when government outsources work, constitutional constraints and administrative law values are apt to be lost.

43. *Brentwood Acad.*, 531 U.S. at 296-298.

44. *Nat'l Collegiate Athletic Ass'n v. Jerry Tarkanian*, 488 U.S. 179, 191 (1988).

45. Administrative Procedure Act, *supra* note 16.

46. OPEN Government Act of 2007, 5 U.S.C. § 552(f)(2)(a).

47. *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 §§ 807-08, 844-46 (codified across various sections of 28 U.S.C.).

48. *Id.* § 848; 41 U.S.C. § 265(a).

49. 48 C.F.R. §§ 3.909, 24.102(c) (2004).

C. Corruption

Collaborative governance enhances the prospects for corruption for the simple reason that it is easier for government to keep tabs on money when it is in its own budgets as opposed to those of contractors. Indeed, the federal government seems unable to prevent outsourcing to some 70,000 individuals and organizations on the Excluded Parties List System who are debarred from legally receiving contracts. One listed company received a contract even after it tried to sell nuclear weapons material to North Korea.⁵⁰

Principal-agent theory points to endemic problems in collaborative arrangements. The interests of principals and agents are not necessarily identical. Agents may seek larger budgets and more slack than necessary to perform contracted activities. Information asymmetry usually gives agents an advantage over principals, who may make poor choices in partnering adverse selection.⁵¹ Inadequate monitoring by principals also can foster moral hazards among agents. As principals take measures to counter these potential problems, contracts become more complex and costly to implement and oversee. Matters become even more complex when contractors and subcontractors subcontract, thereby creating attenuated, nested principal-agent relationships.

The predictive power of principal-agent theory in the context of collaborative governance is uncertain. By its nature, the full extent of corruption that can be attributed either to principal-agent relationships or other aspects of collaboration is unknowable. However, enough cases have attracted governmental and media attention to indicate that outsourcing creates significant opportunities for corruption.⁵²

IV. AN ADMINISTRATIVE PROCEDURE ACT FOR THE COLLABORATIVE GOVERNANCE STATE?

In 1946, the APA was hailed as “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government.”⁵³ The Act was aimed at democratizing federal administrative processes.⁵⁴ Along with the Legislative Reorganization Act of 1946, the APA improved Congress’ ability to control and monitor federal agencies. After six decades and many amendments and augmentations, the Act is still the generic regulatory law of federal administrative practice. However, as government changes to governance, the APA becomes less relevant because, as noted

50. Robert Brodsky, *Government Continues To Provide Unethical Contractors with Work*, *GAO Says*, GOV’T EXECUTIVE, Feb. 26, 2009, available at http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0209/022609rb1.htm&oref=search; U.S. GOVERNMENT ACCOUNTABILITY OFFICE, EXCLUDED PARTIES LIST SYSTEM: SUSPENDED AND DEBARRED BUSINESSES AND INDIVIDUALS IMPROPERLY RECEIVE FEDERAL FUNDS (2009), available at <http://www.gao.gov/new.items/d09174.pdf>.

51. JEAN-JAQUES LAFFONT & DAVID MARTIMORT, *THE THEORY OF INCENTIVES: THE PRINCIPAL-AGENT MODEL* (2002).

52. A Google search of “corruption in federal contracting” yields 971,000 results.

53. 92 CONG. REC. 2140, 2149 (1946) (statement of Sen. McCarran).

54. DAVID ROSENBLOOM, *BUILDING A LEGISLATIVE-CENTERED PUBLIC ADMINISTRATION: THE CONGRESS AND THE ADMINISTRATIVE STATE, 1946-1999*, at 35-41 (2000).

earlier, it does not reach the vast majority of contractor activity. This creates an anomaly. Identical work paid for with taxpayer and deficit dollars is subordinated to administrative law when performed by government but not when contracted out to third parties. If freedom of information, extensive transparency and procedural due process are important in government, why aren't they important when contractors do government's work? The revenue sources and work are essentially indistinguishable. Sometimes contractors and government employees work side-by-side, performing the same functions under radically different legal regimes. If public employees have broad constitutional rights to freedom of speech,⁵⁵ association, privacy, and procedural due process, what is the rationale for not guaranteeing the same rights to individuals working for private entities when paid with federal contracting dollars?

The short answer, of course, is that subjecting contractors to administrative law and constitutional values will raise costs and defeat the purpose of outsourcing. However, as noted above, outsourcing has several purposes. Few would complain if the state-action doctrine defeated an administrative agency's effort to circumvent "the most solemn obligations imposed by the Constitution"⁵⁶—or, perhaps, if transparency regulations served as a check on outsourcing for political gain. If outsourcing is primarily aimed as subsidizing favored interests, perhaps imposing administrative law and constitutional values on collaborators would be a reasonable *quid pro quo*. For instance, as a condition of the contract, a religious organization paid by government to perform outsourced government work could be barred from firing the employees involved for reasons, such as sexual orientation, that would be unacceptable in public agencies.⁵⁷ Under some circumstances, imposing higher costs on contractors may make collaboration more politically and legally acceptable, as in prison administration where constitutional law and public values demand that prisoners have at least "the minimal civilized measure of life's necessities."⁵⁸

The immediate problem, of course, is that drafting an APA for collaborative governance would be no mean task. Such a law would have to balance the competing values between government and governance as well as among the multiple purposes for collaborating. There is a further complication: to be effective, it would also have to be based on a model of how public administration inside government should operate in the collaborative administrative state.

V. AN ADMINISTRATIVE CULTURE CHANGE FOR THE COLLABORATIVE GOVERNANCE STATE?

Administrative culture refers to the values that inform administrative arrangements and administrators' behavior. Moving from one administrative state to another requires culture change. As the U.S. public administrative orthodoxy of the 1930s and 1940s gave way to more democratized administration beginning in the 1960s, administrative practices were continually reshaped to accept, if not

55. *Garcetti v. Ceballos*, 547 U.S. 410, 417-418 (2006).

56. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995).

57. *See Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

58. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

embrace, transparency, public participation, and procedural due process.⁵⁹ Administrators were required to work in more socially representative and culturally diverse workforces. These changes were often difficult and spurred considerable litigation.⁶⁰ For instance, every agency that testified on the federal Freedom of Information Act of 1966 apparently opposed it,⁶¹ and promoting equal opportunity employment in the civil service proved to be a long-term struggle.⁶² Nevertheless, by the mid-1970s, in terms of democratic-constitutional values, legislative oversight, and judicial involvement, U.S. public administration would have been almost unrecognizable to advocates of the orthodoxy of the 1930s.

What changes do we need in administrative culture today to facilitate the collaborative governance state?

- *Adjust Administrative Structures and Processes.* Centralized and hierarchical structures need to be adjusted in response to relationships and interactions with partners.⁶³ An increasing use of networks involving citizen groups and the non-profit and private sectors in a more parallel and horizontal structure would encourage more partners to participate in collaboration.⁶⁴ Quasi-legislative and quasi-judicial processes that encourage collaboration⁶⁵ should be considered for incorporation in administrative decision-making and implementation. In addition, procedural inflexibility and red tape usually frustrate partners and undermine the development of collaboration and, consequently, should be reduced. Allowing administrators more discretion can promote more creative and tailored solutions to the needs of partners in collaboration.⁶⁶
- *Improve Government-Citizen Trust.* Lack of trust between government agencies and other partners is one of the main impediments to collaboration. Trust-building is a starting point for collaboration.⁶⁷ To develop citizens' trust in government, administrators must listen

59. See ROSENBLUM, *supra* note 54; DAVID H. ROSENBLUM, ROBERT S. KRAVCHUK, & RICHARD M. CLERKIN, PUBLIC ADMINISTRATION: UNDERSTANDING MANAGEMENT, POLITICS, AND LAW IN THE PUBLIC SECTOR 466-506 (7th ed. 2008) (1986); DAVID H. ROSENBLUM & ROSEMARY O'LEARY, PUBLIC ADMINISTRATION AND LAW (2d ed. 1997) (1983).

60. See ROSENBLUM & O'LEARY, *supra* note 59.

61. See SUBCOMMITTEE ON ADMIN. PRACTICE & PROCEDURE OF THE SENATE COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES (1974).

62. See DAVID H. ROSENBLUM, FEDERAL EQUAL EMPLOYMENT OPPORTUNITY: POLITICS AND PUBLIC PERSONNEL ADMINISTRATION (1977).

63. Cheryl Simrell King et al., *The Question of Participation: Toward Authentic Participation in Public Administration*, 58 PUB. ADMIN. REV. 317, 320 (1998).

64. See STEPHEN GOLDSMITH & WILLIAM D. EGGERS, GOVERNING BY NETWORK: THE NEW SHAPE OF THE PUBLIC SECTOR (2004).

65. 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 (2005).

66. Julia M. Wondolleck & Steven L. Yaffee, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT 221 (2000).

67. David P. McCaffrey et al., *The Appeal and Difficulties of Participative Systems*, 6 ORGANIZATION SCIENCE 603, 612 (1995), available at <http://www.jstor.org/stable/2635025>.

and be responsive.⁶⁸ Communication between administrators with authority and expertise and citizens with local knowledge is essential in producing positive collaborative outcomes. Administrators' lack of trust in citizens and failure to consider local knowledge can result in government decisions that are inappropriate for the particular demands and situations of the other participants in a collaborative relationship.⁶⁹

- *Develop New Skills to Manage Collaboration.* The skills required to work in a hierarchical structure are not suitable for work in a more horizontal structure that emphasizes communication and negotiating with different collaborative partners. Administrators face the multiple and diverse interests, perspectives, and expectations of their partners⁷⁰ and have to learn how to manage and facilitate collaboration. Identifying opportunities and priorities for collaboration is essential because collaboration takes time and effort.⁷¹ Dr. Lester M. Salamon⁷² discusses activation skills, orchestration skills, and modulations skills.⁷³ Activation skills refer to the skills to identify, attract, and encourage entities to join collaborative efforts with government and other partners. Orchestration skills emphasize administrators' ability to develop visions and consensus, enhance coordination, and persuade partners to remain in collaborative arrangements. Modulation skills require administrators to design and implement a combination of rewards and penalties to guide and motivate partners to achieve desirable outcomes. Agranoff and McGuire discuss activating, framing, mobilizing, and synthesizing.⁷⁴ Increasing training in such skills is necessary to make collaborative governance more effective.
- *Adjust Personal Attitudes and Organizational Values.* Collaboration requires sharing resources and authority and changes in administrative routines, which usually clash with the principles and experiences

68. Camilla Stivers, *The Listening Bureaucrat: Responsiveness in Public Administration*, 54 PUB. ADMIN. REV. 364, 364 (1994).

69. MICHELLE W. SIMMONS, PARTICIPATION AND POWER: CIVIC DISCOURSE IN ENVIRONMENTAL POLICY DECISIONS 91-93 (2007).

70. Edward P. Weber & Anne M. Khademian, *Wicked Problems, Knowledge Challenges and Collaborative Capacity Builders in Network Settings*, 68 PUB. ADMIN. REV. 334, 341 (2008).

71. Mary Belefski, *Collaboration at the U.S. Environmental Protection Agency: An Interview with Two Senior Managers*, 66 PUB. ADMIN. REV. 143, 144 (2006) (Special Issue on Collaborative Public Management).

72. Dr. Salamon is Director of the Johns Hopkins University Center for the Study of Civil Society, a member of the U.S. National Academy of Public Administration, and a leading scholar on collaborative governance involving nonprofit organizations.

73. See Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in THE TOOLS OF GOVERNMENT: A GUIDE TO GOVERNANCE (Lester M. Salamon & O.V. Elliot eds., 2002).

74. Robert Agranoff & Michael McGuire, *Big Questions in Public Network Management Research*, 11 J. PUB. ADMIN. RESEARCH & THEORY 295, 298-300 (2001).

of administrators.⁷⁵ Collaboration may pose a threat to individual administrators and agencies, making them uncomfortable with or even resistant to collaborative efforts.⁷⁶ The administrative stereotypes of citizens as lacking ability and expertise and the fear that collaboration will reduce efficiency and damage agencies' reputations discourage administrators from investing fully in collaboration. Administrators need a better understanding of the possibilities and benefits of collaboration and to develop a passion and commitment for it.⁷⁷ Organizational cultures should trust and encourage administrators to share power with their partners and invest time and resources in collaboration.

- *Enhance Accountability through Assessment of Collaborative Outcomes.* Administrators face a dilemma in collaboration: they do not have control over the actions of their partners but are nevertheless responsible for the collective outcomes. Evaluating new collaborative efforts based on traditional standards and procedures frustrates and discourages future collaborative efforts. From a network perspective, new standards used to assess collaboration should focus on the capacity to create conditions favorable to collaboration, to cooperate with partners, and develop solutions using networks.⁷⁸ Thomas Beierle and Jerry Cayford suggest evaluation based on five social goals: incorporating public values into decisions; improving the substantive quality of decisions; resolving conflicts among competing interests; building trust in institutions; and educating and informing the public.⁷⁹
- *Enhance Accountability through Assessment of Collaborative Process.* Administrators are held accountable for the ways in which they implement their functions and achieve outcomes. Methods for assessing collaborative processes are necessary. William D. Leach emphasizes inclusiveness; representativeness; impartiality; transparency; deliberativeness; lawfulness; and empowerment.⁸⁰ Daniel Fiorino suggests four democratic criteria: direct participation of amateurs; collective decision-making; face-to-face discussion/deliberation; and equality.⁸¹

75. King, et. al, *supra* note 63, at 323.

76. Richard Gardner & Ron Shaffer, *The National Rural Development Partnership in the United States: A Case Study in Collaboration*, in PARTICIPATORY GOVERNANCE: PLANNING, CONFLICT MEDIATION AND PUBLIC DECISION-MAKING IN CIVIL SOCIETY 61, 77 (W. Robert Lovan, Michael Murray, & Ron Shaffer, eds. 2004).

77. Weber & Khademan, *supra* note 70, at 343-44.

78. Paul L. Posner, *Accountability Challenges of Third Party Government*, in THE TOOLS OF GOVERNMENT 523, 546 (Lester Salamon ed., 2002).

79. THOMAS BEIRLE & JERRY CAYFORD, DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS 6 (2002).

80. William D. Leach, *Collaborative Public Management and Democracy: Evidence from Western Watershed Partnerships*, 66 PUB. ADMIN. REV. 100, 100 (2006).

81. Daniel J. Fiorino, *Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms*, 15 SCI. TECH. & HUM. VALUES 226, 229-230 (1990), available at <http://www.jstor.org/>

- *Increase Bureaucratic Representativeness.* In collaboration, administrators must work with people from diverse parts of society and with different values, cultures, and perspectives. Partners care about with whom they work, just as they care about who delivers services.⁸² Making administrators more socially representative may not directly result in more positive outcomes in collaborative efforts, but it will help to increase administrative legitimacy as well as citizens' trust in government and their perception of its accessibility.⁸³ Representativeness can also increase administrators' understanding, sensibility, and ability to work with people with different needs and values.
- *Increase Institutional Support for Collaboration.* Top-level agency commitment is necessary if collaboration is to succeed.⁸⁴ Collaboration requires repeated communication, negotiation, and network-building over time. It takes time and effort and requires top-level officials' consistent support to secure funding and personnel for collaborative efforts. The discontinuation of funding and changes in personnel hurt the development and sustainability of collaborative efforts.⁸⁵ Transitions in administration or changes in political appointees challenge administrators who have to develop relationships with new appointees and convince them of the value of collaboration.⁸⁶
- *Be Aware of the Dark Side of Collaboration.* Imbalance of power and resources among partners is common.⁸⁷ Administrators need to be aware that this potentially affects the interaction between partners and collaborative outcomes.⁸⁸ As noted earlier, collaborative efforts can be used to suppress the demands and interest of less powerful

stable/689860?seq=1 (Mr. Fiorino is Director, National Environmental Performance Track Program, U.S. Environmental Protection Agency and Executive in Residence in the Department of Public Administration and Policy, American University—Washington, D.C.).

82. See Gregory S. Thielman & Joseph Stewart, Jr., *A Demand-Side Perspective on the Importance of Representative Bureaucracy: Aids, Ethnicity, Gender, and Sexual Orientation*, 56 PUB. ADMIN. REV. 168 (1996).

83. Nicholas O. Alozie & Cherise G. Moore, *Blacks and Latinos in City Management: Prospects and Challenges in Council Governments*, 30 INT'L J. PUB. ADMIN. 47, 50 (2007).

84. W. Robert Lovan, *Regional Transportation Strategies in the Washington, D.C. Area: When Will They Be Ready to Collaborate?*, in PARTICIPATORY GOVERNANCE: PLANNING, CONFLICT MEDIATION AND PUBLIC DECISION-MAKING IN CIVIL SOCIETY 115, 115-128 (W. Robert Lovan, Michael Murray, & Ron Shaffer, eds. 2004).

85. WONDOLLECK & YAFFEE, *supra* note 66, at 57.

86. U.S. ENVTL. PROT. AGENCY, TOWARDS AN ENVIRONMENTAL JUSTICE COLLABORATIVE MODEL: AN EVALUATION OF THE USE OF PARTNERSHIPS TO ADDRESS ENVIRONMENTAL ISSUES IN COMMUNITIES 16 (2003), available at <http://www.epa.gov/evaluate/ejevalrpt.pdf>.

87. Sheila Foster, *Environmental Justice in An Era of Devolved Collaboration*, 26 HARV. ENVTL. L. REV. 459, 494 (2002).

88. See Laurence J. O'Toole & K.J. Meier, *Desperately Seeking Selznick: Cooptation and the Dark Side of Public Management in Networks*, 64 PUB. ADMIN. REV. 681 (2004).

groups,⁸⁹ to conduct illegal or unethical activities,⁹⁰ or lead to government corruption.⁹¹

VI. CONCLUSION: INTEGRATING THE COLLABORATIVE GOVERNANCE STATE INTO U.S. CONSTITUTIONAL DEMOCRACY

If the collaborative governance state continues to progress, substantial changes in administrative law and culture are inevitable. In the past, each time U.S. public administration underwent a paradigm shift, the values embedded in administration changed dramatically. Beginning in the 1880s, so did the statutory law governing administrative structure and behavior.⁹² Since the 1960s, a great deal of legislative and judicial effort has been devoted to retrofitting the administrative state into the U.S. constitutional regime.⁹³ In the process, Congress and the federal courts gained substantial leverage over administrative processes, values, and outcomes. Collaborative governance presents new challenges for integrating public administration and constitutional democracy.

Currently, those challenges are being met—if at all—incrementally. Incrementalism has many virtues.⁹⁴ However, guiding principles help avoid missteps. The APA and contemporary constitutional law supply many of those principles. If transparency, public participation and representation, and procedural due process and a broad array of other constitutional rights for individuals in their encounters with public administration are important for democratizing the received administrative state, their significance for the collaborative governance state cannot be gainsaid. OMB's *Circular A-76* places *no* value on freedom of information, constitutional rights, and other democratic-constitutional concerns in structuring competitive sourcing.⁹⁵ That may be reasonable if transparency, rights, and such concerns have no value, but it is irrational to cede such considerations by default. Consequently, the daunting nature of the task notwithstanding, serious deliberation should be given to developing an administrative law regime and culture that are mutually supportive and effective in preserving the democratic-constitutional values and process that have been forced into public administration over the past six decades.

89. See DOUGLAS J. AMY, *THE POLITICS OF ENVIRONMENTAL MEDIATION* (1987).

90. Jörg Raab & Briton Milward, *Dark Networks as Problems*, 13 J. PUB. ADMIN. RES. & THEORY 413, 414-415 (2003).

91. Jin-Wook Choi, *Governance Structure and Administrative Corruption in Japan: An Organizational Network Approach*, 67 PUB. ADMIN. REV. 930 (2007).

92. See DAVID H. ROSENBLUM, *FEDERAL SERVICE AND THE CONSTITUTION* 70-118 (1971); David H. Rosenbloom, *Administrative Law and Regulation*, in *HANDBOOK OF PUBLIC ADMINISTRATION* 635, 654-661 (Jack Rabin, W. Bartley Hidreth, & Gerald Miller, eds., Taylor & Francis 3d ed. 2007).

93. See ROSENBLUM & O'LEARY, *supra* note 59.

94. Charles Lindblom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79, 86 (1959), available at <http://www.emerginghealthleaders.ca/resources/Lindblom-Muddling.pdf>.

95. OMB CIRCULAR NO. A-76, *supra* note 13.