

THE NEXT GENERATION OF ADMINISTRATIVE LAW: BUILDING THE LEGAL INFRASTRUCTURE FOR COLLABORATIVE GOVERNANCE

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This Article describes the map of statutory administrative law through those cross-cutting statutes that apply generally to all federal agencies. It argues that each major statute represents a balance among five fundamental values in the relationship between the government and the governed, a balance struck by Congress in a particular historical context and moment in time. These values are accountability, efficiency, transparency, participation, and collaboration. Second, it surveys the current law and practice of both in-person and technology-aided public participation, including recent developments through the Open Government Initiative, Open Government Dialogue, and Open Government Directive. Third, it argues that at this moment in history—in light of dramatic technology-driven changes in transparency—we need to reassess the balance among our five fundamental values to foster more participation and collaboration. In order to adjust those values to foster collaborative governance, it proposes to broaden agency authority to innovate through a Collaborative Governance Act (CGA) that defines public participation to include an increasingly rich variety of deliberative and participatory democratic practices. It proposes to model the CGA in structure on the Administrative Dispute Resolution Act by providing for an agency specialist, broad agency discretion to innovate in the use of participatory processes, and encouraging innovation by limiting judicial review.

Introduction	298
I. Collaborative Governance and Administrative Law: Flatland .	303
A. The APA: Rulemaking and Adjudication	305

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B. FOIA and the Sunshine Act	308
C. Federal Advisory Committees	308
D. Negotiated Rulemaking and Dispute Resolution	311
E. Paperwork Reduction Act	313
F. E-Government and E-Rulemaking	313
II. Collaborative Governance and Public Participation: Moving into Uncharted Territory	315
A. Public Participation in Administrative Law	316
B. Agency Regulations and Public Participation	322
C. Agency Practices and Public Participation	326
D. Technology-Driven Changes in Public Participation	331
E. A New Paradigm: The Open Government Initiative	334
F. The Open Government Dialogue	335
G. The Open Government Directive	337
H. The Future of the Open Government Initiative	339
III. A Collaborative Governance Act: A More Multi- Dimensional Map	342
Conclusion	348
Appendix A: Draft Collaborative Governance Executive Order	350

INTRODUCTION

On his first full day in office, President Barack Obama committed to create “an unprecedented level of openness in Government” and “a system of transparency, public participation, and collaboration” to strengthen democracy, ensure the public trust, and “promote efficiency and effectiveness in Government.”¹ President Obama’s memorandum directs federal agencies to work on policy together with the public and stakeholders from the public, private, and nonprofit sectors. This is a departure from top-down and expert-driven policy analysis. It starts with different assumptions: knowledge is widespread in society and agencies do not have a monopoly on it. A strong democracy needs many voices and values. The president’s memorandum represents a commitment to collaborative governance.

Collaborative governance can take many forms,² including many experiments in deliberative democracy, collaborative public or network management, and appropriate dispute resolution in the policy process; these processes all share a related role by providing ways for people to

1. Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 26, 2009).

2. For a review of the current theories and literature on governance, see Scott Burris et al., *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1 (2008).

exercise voice and to work together in governance.³ This Article defines collaborative governance broadly. First, it includes collaboration with the broadest definition of partners outside the federal government but within its national jurisdiction,⁴ meaning the general public, state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders.⁵ Second, it includes collaboration across the broadest scope of federal agency work in the policy process. For this purpose, the phrase “policy process” is defined as any action by the executive branch in developing, implementing, or enforcing public policy, including but not limited to: identifying and defining a public policy issue; defining the options for a new policy framework; expanding the range of options; identifying approaches for addressing an issue; setting priorities among approaches; selecting from among the priorities; implementing solutions; project management; developing and adopting regulations; enforcing regulations; and assessing the impacts of decisions. Third, it includes collaboration through any method, model, or process that is deliberative and consensual as distinguished from adversarial or adjudicative, including but not limited to: public involvement, civic engagement, dialogue, public deliberation, deliberative democracy, public consultation, multi-stakeholder collaboration, collaborative public management, dispute resolution, and negotiation. Fourth, it includes both in-person and online methods.

3. Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Citizen and Stakeholder Voice*, 2009 J. DISP. RESOL. 269 (2009) (describing the spectrum of collaborative governance processes and arguing they represent a single related phenomenon of non-adversarial voice that operates across the policy continuum, including legislative, executive, and judicial functions).

4. Collaborative governance occurs between and among national governments and these categories of participants, but transnational applications are outside the scope of this Article. For more on transnational applications, see, e.g., Gráinne de Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT'L L. 221 (2008); David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-Ordination*, 11 EUR. L.J. 343 (2005); David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539 (2007); Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union* (European Governance Papers, No. C-07-02, 2007), available at <http://www.connex-network.org/eurogov/pdf/egp-connex-C-07-02.pdf>.

5. The scope of this Article is limited to the policy process in the executive branch of the United States government. The term “collaborative governance” applies equally to any level of government, including local, regional, and state. Hence, these definitions could be reframed for different jurisdictions.

Collaborative governance represents an emerging alternative to traditional command-and-control approaches to making, implementing, and enforcing policy.⁶ It is related to the “new governance,” which includes the use of policy tools that involve privatization of previously public work and devolution of responsibility from unitary bureaucracies to networks and contractors.⁷ Some have characterized new governance legal scholarship 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

6. A recent review of empirical literature on collaborative governance defines stakeholders to include both individual participants and organizations or agencies. See Chris Ansell & Alison Gash, *Collaborative Governance in Theory and Practice*, 18 J. PUB. ADMIN. RES. & THEORY 543 (2007) (finding that face-to-face dialogue, trust-building, and the development of commitment and shared understanding are crucial factors for collaboration, and that small wins deepen trust, commitment, and shared understanding). For diverse practice resources, see Institute for Local Government, Collaborative Governance Initiative (Public Engagement), <http://www.ca-ilg.org/cgi> (last visited Mar. 4, 2010).

7. The seminal works in public affairs are THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester M. Salamon ed., 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); Bradley C. Karkkainen, Reply, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Orly Lobel, Surreply, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498 (2004); Richard Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003); David L. Markell, *The Role of Spotlighting Procedures in Promoting Citizen Participation, Transparency, and Accountability*, WAKE FOREST L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1553125>; Louise G. Trubek, *New Governance and Soft Law in Health Care Reform*, 3 IND. HEALTH L. REV. 139 (2006) [hereinafter Trubek, *New Governance*]; Louise G. Trubek, *Public Interest Lawyers and New Governance: Advocating for Healthcare*, 2002 WIS. L. REV. 575 [hereinafter Trubek, *Lawyering*].

stakeholders.”⁸ This Symposium issue represents a broad cross section of new governance thinking.⁹

This Article argues that we need to rethink federal administrative law to facilitate collaborative governance practices in the executive branch. It takes as its normative starting point that facilitating more deliberative public participation and collaboration is desirable.¹⁰ Theory justifying this viewpoint stems from the literature on deliberative democracy,¹¹ legal pragmatism,¹² democratic experimentalism,¹³ and

8. Howard Erlanger et al., Foreword, *Is it Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 357; 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).

9. See, e.g., Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons From Chicago's Public Housing Reform Experiment*, 16 GEO. J. POVERTY L. & POL'Y 117 (2009); Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239; Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357; Mark Dawson, *Transforming into What? New Governance in the EU and the "Managerial Sensibility" in Modern Law*, 2010 WIS. L. REV. 389; Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1 (2008); Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons from Financial Regulation*, 2010 WIS. L. REV. 441; Nan D. Hunter, *Risk Governance and Deliberative Democracy in Health Care*, 97 GEO. L.J. 1 (2008); Poul F. Kjaer, *The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law, and the Political in the Transnational Space*, 2010 WIS. L. REV. 489; Edward Rubin, *The Regulatizing Process and the Boundaries of New Public Governance*, 2010 WIS. L. REV. 535; Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591; Stephanie Tai, *Comparing Approaches Towards Governing Scientific Advisory Bodies on Food Safety in the United States and the European Union*, 2010 WIS. L. REV. 627; Michael Wilkinson, *Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism*, 2010 WIS. L. REV. 673. A comprehensive review of the new governance literature is outside the scope of this Article.

10. For a discussion of the policy arguments for participation as informing government and improving public decisions, see David Markell, *"Slack" in the Administrative State and its Implications for Governance: The Issue of Accountability*, 84 OR. L. REV. 1 (2005). For an argument against more participation, see generally JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS' BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* (2002).

11. See, e.g., JAMES S. FISHKIN, *VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995); JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2009); ARCHON FUNG & ERIK OLIN WRIGHT, *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE* (2003); ARCHON FUNG, *EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY* (2004); JOHN GASTIL, *BY POPULAR DEMAND: REVITALIZING REPRESENTATIVE DEMOCRACY THROUGH DELIBERATIVE ELECTIONS* (2000); JOHN GASTIL, *POLITICAL COMMUNICATION AND DELIBERATION* (2008); JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980).

civic republicanism.¹⁴ First, the Article briefly describes the map of statutory administrative law through those cross-cutting statutes that apply generally to all federal agencies. It argues that each major statute represents a balance among five fundamental values in the relationship between the government and the governed, a balance struck by Congress in a particular historical context and moment in time. These values are accountability, efficiency, transparency, participation, and collaboration.¹⁵ Second, it surveys the current law and practice of both in-person and technology-aided public participation, including recent developments through the Open Government Initiative, Open Government Dialogue, and the Open Government Directive. Third, it argues that at this moment in history, in light of dramatic technology-driven changes in transparency, we need to reassess the balance among our five fundamental values to foster more participation and collaboration. In order to adjust those values to foster collaborative governance, it proposes to broaden agency authority to innovate through a CGA modeled in structure on the Administrative Dispute Resolution Act.¹⁶

A CGA would give agencies the latitude to experiment with creative approaches to participation and collaboration and, through systematic evaluation, learn much needed lessons in institutional design.

12. See generally William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004) (reconsidering Legal Liberalism “in the light of the Pragmatist approach and to offer a tentative appraisal”).

13. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

14. Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1541 (1992).

15. Achieving desired outcomes or results also might be characterized as a fundamental value. It conceivably could be subsumed in the idea of efficiency or warrant treatment as a sixth fundamental value in the typology I propose. There are significant literatures as to how outcomes or results should be evaluated or measured, and also as to the definition of desired outcomes in the context of different regulatory regimes. Personal Communication with Prof. David L. Markell (Apr. 28, 2010) (on file with author). Substantive effectiveness is reflected in administrative law through requirements for cost-benefit analysis. See generally John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395 (2008). It is also reflected in the Government Performance and Results Act, 31 U.S.C. §§ 1105–1119, 3515, 9703–9704 (2006), which requires agencies to develop strategic plans and establish metrics for the success of their work. Yet a third alternative is that all administrative laws seek to improve the quality of substantive decision-making by addressing the forms and sources of information upon which agencies act. Thus, the five values reflect the use of process: effectiveness examines outcome. This Article will focus on administrative law as process. An examination of these values and their relation to administrative outcomes will be a subject of future research.

16. 5 U.S.C. §§ 571–584 (2006).

The Article includes as an appendix a draft executive order reflecting ideas of experienced practitioners on how the administration can foster collaborative governance.

I. COLLABORATIVE GOVERNANCE AND ADMINISTRATIVE LAW:
FLATLAND

Federal agencies and independent organizations can dwarf Fortune 500 companies in size and complexity and present managerial challenges requiring expertise in human resource management, performance measurement, budgeting and finance, information technology, public relations, public law, and contracting and procurement.¹⁷ Sometimes called the fourth branch of government,¹⁸ federal administrative agencies act in ways that are similar to both legislative and judicial branches as they execute the law.¹⁹ They develop policy by filling in the details left to them by Congress in legislation.²⁰ They administer the legislative scheme delegated to them in their enabling statute by adopting and implementing these rules and regulations and managing projects and programs.²¹ They enforce rules and regulations through informal agency action and informal and formal adjudication resulting in orders. Through this, they affect the legal rights and obligations of the public and stakeholders.²²

However, the basic provisions of administrative law do not map perfectly onto what federal agencies do.²³ The three branches each have tools for supervising agency action. The executive branch can manage agencies through executive orders and the Office of Management and Budget (OMB). The judicial branch exercises review using constitutional and statutory standards to ensure agencies operate within the law and the scope of their delegated authority. This discussion,

17. See generally Colin Campbell, *The Complex Organization of the Executive Branch: The Legacies of Competing Approaches to Administration*, in *THE EXECUTIVE BRANCH* 243 (Joel D. Aberbach & Mark A. Peterson eds., 2005). Table 1 reflects the great variation across departments in employees (from several thousand to millions) and budget (in billions). *Id.* at 254.

18. See, e.g., Seidenfeld, *supra* note 14, at 1541.

19. BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 1.5 (3d ed. 1991).

20. See *id.* at §§ 1.7–1.9.

21. See generally Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 *COLUM. L. REV.* 369, 387–97 (1989) (describing the relation of due process jurisprudence to the administrative agency context).

22. See Edward L. Rubin, *Due Process and The Administrative State*, 72 *CAL. L. REV.* 1044 (1984).

23. The additional complexities of federalism and intergovernmental relations are not addressed in detail here. For a discussion in the context of environmental governance, see Markell, *supra* note 10, at 19–40.

however, will focus on the legislative branch. Congress has a variety of ways to control administrative agencies, including budgetary controls, specific instructions and structural constraints in legislation, reacting to agency action with legislation, and oversight through committees, hearings, and investigations.²⁴ In addition, it can adopt procedural limitations either in an agency's individual legislative authorization or through cross-cutting statutes that apply to agencies generally, providing for public information, public participation, due process, and judicial review.²⁵

Administrative law reflects five key values related to the legitimacy of agency authority and the relationship between government and the governed: accountability, efficiency, transparency, participation, and collaboration.²⁶ At different points in history, events prompted Congress to modify how it controls administrative agencies. Executive branch agencies must comply with the Administrative

24. Charles R. Shipan, *Congress and the Bureaucracy*, in THE LEGISLATIVE BRANCH 432–58 (Paul J. Quirk & Sarah A. Binder eds., 2005).

25. *Id.* at 442–44.

26. A comprehensive survey of the literature regarding these values is beyond the scope of this Article. For thoughtful discussions of one or more of these values in administrative law and process, see, e.g., Markell, *supra* note 10 (examining the relationship between transparency and accountability); David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 U. KAN. L. REV. 1 (2008) (examining empirical evidence regarding claims that citizen participation leads to inefficient decision-making); Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173 (1997) (arguing that mass participation in agency decision-making is economically inefficient and comes at the expense of deliberative democratic practice); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073 (2005) (providing an in-depth analysis of theories of administrative accountability and debunking many of them); Seidenfeld, *supra* note 14 (advocating deliberative public participation early in the policy development process in administrative agencies as a means of ensuring accountability and legitimacy); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411 (2000) (critiquing arguments in favor of collaboration as a means to make the regulatory system more efficient, and arguing for participation by a community of individuals with common interests who represent and are accountable to stakeholders); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059 (2001) (examining and critiquing Office of Management and Budget scrutiny of cost-benefit analyses, congressional committee oversight of rulemaking, and congressional fast-track review as means of accountability); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 63 (examining how U.S. administrative law might provide a model for making global regulatory regimes more accountable through participation, transparency, and judicial review).

Procedure Act (APA),²⁷ Freedom of Information Act (FOIA),²⁸ Government in the Sunshine Act,²⁹ Federal Advisory Committee Act (FACA),³⁰ Negotiated Rulemaking Act (NRA),³¹ Administrative Dispute Resolution Act (ADRA),³² the Paperwork Reduction Act (PRA), the E-Government Act (E-Gov),³³ and others.³⁴

The following Sections briefly review these major statutes and the balance they strike among sometimes competing values. Together, these statutes comprise a legal framework for agency action. This legal framework is two-dimensional: it sees the agency's world primarily as rulemaking and adjudication or, at best, negotiation and dispute resolution in the shadow of rulemaking and adjudication. This map of flatland does not adequately envision the new world of collaborative governance.

A. The APA: Rulemaking and Adjudication

The APA³⁵ framed agency action as adjudication and rulemaking following the New Deal.³⁶ The APA gives the public the right to know about and, to a limited extent, participate in certain federal administrative agency action.³⁷ It encompasses formal and informal

27. 5 U.S.C. §§ 551–559, 701–706 (2006).

28. *Id.* § 552.

29. *Id.* § 552b.

30. *Id.* app. §§ 1–16.

31. *Id.* §§ 561–570.

32. *Id.* §§ 571–584 (2006).

33. 44 U.S.C. § 3601 (2006)

34. *Id.* § 3501 (2006).

35. 5 U.S.C. §§ 551–559, 701–706 (2006).

36. FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK 42–46 (William F. Funk et al. eds., 4th ed. 2008).

37. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 97–100 (2003) (arguing that the APA does not address the reality of the modern administrative state by conceiving of agencies as similar to courts). Professor Rubin argues for a new APA based on a conception 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. He proposes that accountability would require a definition of an agency's goal, specification of the means, and, if rulemaking, input from the president, Congress, and the public. *Id.* However, he also advocates that in the case of informal adjudication and interpretive rules, “participation would be limited to the hierarchical superior of the agency or subagency . . .” *Id.* I respectfully disagree with this last point; agencies already seek more extensive public engagement upstream in the policy process and outside notice and comment rulemaking. They do so because an ounce of good public involvement is worth a pound of litigation after the fact. The iconic administrative law case example of informal adjudication gone wrong

agency action.³⁸ Primarily, it expressly addresses quasi-legislative action in the form of rulemaking and quasi-judicial action in the form of adjudication.³⁹ Professor Rubin observes that these two dimensions form a two-by-two table with four cells: formal rulemaking, informal rulemaking, formal adjudication, and informal adjudication.⁴⁰

In rulemaking, agencies adopt general rules of prospective application within the scope of their statutorily delegated authority. For informal rulemaking, the APA generally requires that an agency publish notice in the Federal Register and provide the public opportunity to comment, although generally not through an oral evidentiary hearing. Historically, the public could only view other comments by physically visiting the agency viewing room.⁴¹ Agencies also have statutory authority to do formal rulemaking using adjudicatory procedures.⁴² Formal rulemaking, however, is so rarely used as to be nonexistent.⁴³ Professor Rubin characterizes the APA as providing for review of agency action through private participation;⁴⁴ however, the only required participation involves notice and comment in rulemaking and due process protections in formal adjudication.

The APA also provides for adjudication⁴⁵ to determine individual rights through a retrospective examination of evidence and facts. The APA speaks directly only to formal adjudication, which involves an adjudicatory hearing before an administrative law judge with many of the requisites of procedural due process, including notice, confrontation and cross examination of witnesses, and a written decision.⁴⁶ Federal agencies do much adjudication that is informal although still subject to due process requirements.⁴⁷ The APA is largely silent on this aspect of agency authority, except that it expressly allows the public to petition

for lack of appropriately designed public involvement is *Citizens to Preserve Overton Park, Indiana v. Volpe*, 401 U.S. 402 (1971), one of many examples of conflict over how the national interstate highway system did damage to American urban communities.

38. Rubin, *supra* note 37, at 106.

39. *Id.*

40. *Id.*

41. *Id.* at 102 (observing that “few people other than professional lobbyists or lawyers . . . read the Federal Register, send comments to agencies regarding proposed rules, or challenge the legality of such rules in federal court”).

42. 5 U.S.C. § 553 (2006).

43. Rubin, *supra* note 37, at 107.

44. *Id.* at 100.

45. 5 U.S.C. § 554 (2006).

46. *Id.*

47. Rubin, *supra* note 37, at 107.

the agency for a response that can in turn be submitted for judicial review.⁴⁸

The APA fostered agency accountability by providing both transparency and participation in rulemaking; in effect, it limited the closed-room collaboration the Supreme Court rejected in *A.L.A. Schechter Poultry Corp. v. United States*.⁴⁹ However, it sacrificed efficiency by requiring that agencies disclose what they intend to do and engage the public in the rulemaking process. Rulemaking and adjudication are not all, or even most, of what agencies do. Much agency work is termed “informal agency action,” the day-to-day activity of administration and public management not expressly addressed by the APA except most generally when those governed challenge agency action in court.⁵⁰ As the broad scope of informal agency action evolves with technology, it is creating concerns about judicial review, which is a form of accountability.⁵¹

48. Section 555(e) of 5 U.S.C., titled “Ancillary matters,” states:

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

49. 295 U.S. 495 (1935).

50. See generally Rubin, *supra* note 37.

51. The District of Columbia Circuit Court of Appeals described informal agency action as a problem from the standpoint of the judicial review in *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (holding that an EPA guidance document entitled “Periodic Monitoring Guidance for Title V Operating Permits Programs” should have gone through the APA rulemaking process because it expanded the scope of a section of the Code of Federal Regulations). The court concluded:

The phenomenon we see in this case is familiar. Congress passes a broadly worded statute. The agency follows with regulations containing broad language, open-ended phrases, ambiguous standards and the like. Then as years pass, the agency issues circulars or guidance or memoranda, explaining, interpreting, defining and often expanding the commands in the regulations. One guidance document may yield another and then another and so on. Several words in a regulation may spawn hundreds of pages of text as the agency offers more and more detail regarding what its regulations demand of regulated entities. Law is made, without notice and comment, without public participation, and without publication in the Federal Register or the Code of Federal Regulations. With the advent of the Internet, the agency does not need these official publications to ensure widespread circulation; it can inform those affected simply by posting its new guidance or memoranda or policy statement on its web site. An agency operating in this way gains a large advantage. “It can issue or amend its real rules, i.e., its interpretative rules and policy statements, quickly and inexpensively without following any statutorily prescribed procedures.”

B. FOIA and the Sunshine Act

FOIA and the Sunshine Act provided transparency for public records and agency meetings during the “rights revolution” of the 1960s.⁵² FOIA creates a right to access government records.⁵³ The Sunshine Act creates a right to notice and attendance at public meetings at which agencies make decisions and take action.⁵⁴

FOIA and the Sunshine Act used transparency and public participation to ensure accountability, limiting closed room collaboration by multi-member public agency boards or commissions; however, they again sacrificed efficiency by imposing unfunded mandates on agencies.⁵⁵ These two statutes create obstacles and barriers for agencies that want to use processes for negotiation and collaboration.⁵⁶ Federal dispute resolution laws have provided for confidentiality in certain circumstances to balance transparency with the value of collaboration.⁵⁷

C. Federal Advisory Committees

In an effort to make government more responsive, agencies began to create and rely on advisory committees, the use of which grew

Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 85 (1995). The agency may also think there is another advantage—immunizing its lawmaking from judicial review.

Id. at 1020 (citation omitted). *See also Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 23, 30 (D.C. Cir. 2006) (Griffith, J., dissenting). This judicial view tends to make agencies gun-shy. However, the problem in each instance is that while there is transparency, there is no public participation.

52. FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 36, at 676–90, 725–32.

53. 5 U.S.C. § 552 (2006).

54. *Id.* § 552b (2006).

55. *Id.* §§ 552, 552b.

56. *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 DIANA BOXER-MACOMBER, CTR. FOR COLLABORATIVE POL’Y, TOO MUCH SUN? EMERGING CHALLENGES PRESENTED BY CALIFORNIA & FEDERAL OPEN MEETING LEGISLATION TO PUBLIC POLICY CONSENSUS-BUILDING PROCESSES (2003), *available at* http://www.csus.edu/ccp/publications/Too_Much_Sun.pdf.

57. *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.

dramatically within the Beltway after World War II and outside the Beltway during the 1980s.⁵⁸ FACA drew back the curtain on groups of stakeholders that agencies convened.⁵⁹ It grew out of concerns that special interests had come to have unlimited access to federal agency decision-makers.⁶⁰ Moreover, Congress became concerned about the number of committees and potential waste.⁶¹ FACA was adopted to force agencies to give notice of the creation of new advisory committees and to define the scope of their authority.⁶² It requires that the membership of the proposed advisory committee be fair and balanced “in terms of the points of view represented”⁶³ 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.⁶⁴

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 APA⁶⁵ to preserve accountability. It also requires public records⁶⁶ and the availability of public participation in committee meetings⁶⁷ to ensure both transparency and accountability.⁶⁸

58. 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).

59. *See id.* at 549.

60. *Id.* at 453 (citation omitted).

61. 5 U.S.C. app. § 2(b) (2006). *See generally* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 297–300 (Supp. 2006).

62. *See* 5 U.S.C. app. § 2.

63. *Id.* § 5(b)(2).

64. BOXER-MACOMBER, *supra* note 56, at 4.

65. 5 U.S.C. app. § 3(3) (2006) (“The term ‘agency’ has the same meaning as in section 551(1) of title 5, United States Code.”).

66. *Id.* § 8(b)(2)–(3) (2006) (providing 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”).

67. *Id.* § 552b (2006) (providing for open meetings).

68. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 453 (1989) (holding that FACA does not apply to the president and Department of Justice use of an American Bar Association committee’s report evaluating the credentials of judges for nomination to the federal judiciary, because “FACA was enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals”).

FACA specifically excludes from its scope local civic groups and bodies created to advise state and local government.⁶⁹

The primary purpose of FACA was to reduce the use of advisory committees, and it succeeded in this goal.⁷⁰ 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.⁷¹ Agencies have widely differing practices in authorizing advisory committees. Some agencies can turn around a request to create an advisory committee in a matter of days; others take up to six months.⁷² As a result, FACA can be a barrier to collaboration.⁷³ Court decisions may cause risk-averse agency counsel to stop agencies from collaborating with citizens and

69. 5 U.S.C. app. § 4(c) (2006) 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.

70. 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. PRESIDENT OF THE U.S., THE TWENTY-SEVENTH ANNUAL REPORT ON FEDERAL ADVISORY COMMITTEES FOR FISCAL YEAR 1998, PURSUANT TO 5 U.S.C. APP., H.R. DOC. 106-209, at 4 (2000).

71. See Croley & Funk, *supra* note 58, at 456 (describing President Clinton's efforts to encourage negotiation and consensus building and how these are in tension with his goal of reducing the number of advisory committees by one-third).

72. Personal Communication with Susan Podziba, Principal, Susan Podziba & Associates (Apr. 23, 2009) (on file with author). See *generally* Susan Podziba & Associates, About Us, <http://www.podziba.com/aboutus.html> (last visited Mar. 3, 2010).

73. The Department of Health and Human Services violated FACA when it "utilized" a guide that a National Academy of Sciences committee created on the care and use of laboratory animals, although the Department had not itself established the committee. *Animal Legal Def. Fund, Inc. v. Shalala*, 104 F.3d 424, 428 (D.C. Cir. 1997). Subsequently, Congress amended FACA specifically to exclude committees of the National Academy of Public Administration (NAPA) and the National Academy of Sciences. Federal Advisory Committee Act Amendments of 1997, Pub. L. 105-53, 111 Stat. 2689 (codified at 5 U.S.C. app. § 15 (2010)). As a consequence of this amendment, federal agencies can take advantage of the convening services of NAPA as an alternative to using FACA-chartered committees. This was part of the genesis for The Collaboration Project, <http://www.collaborationproject.org/display/home/Home> (last visited Mar. 17, 2010). In addition, the General Services Administration issued regulations that later clarified that the term "*utilized*" in FACA "does not have its ordinary meaning. A committee that is not established by the Federal Government is *utilized* within the meaning of the Act when the president or a Federal office or agency exercises actual management or control over its operation." 41 C.F.R. § 102-3.25 (2002).

stakeholders.⁷⁴ Agencies have developed guidance for managers to help them decide when they do and do not need to comply with FACA;⁷⁵ however, the Act was drafted to discourage collaboration with stakeholders through advisory committees; so, by definition, managers trying to use them are swimming against the tide. The guidance may only reinforce that it is difficult to use advisory committees.

FACA used transparency and agency accountability to limit both participation and collaboration by stakeholders with government employees;⁷⁶ by limiting unnecessary committees, it arguably fostered efficiency. However, in light of the growth in network and new governance, it is time to revisit the policies behind FACA.

D. Negotiated Rulemaking and Dispute Resolution

In its original form, the APA had no explicit provision for processes involving negotiation or dispute resolution. In the 1980s, agencies experimented with collaborative processes and consensus-building.⁷⁷ Agency lawyers had concerns that their clients had no authority under the APA to use these processes in rulemaking or adjudication and that to do so might be *ultra vires* agency action outside the scope of their statutory delegation.⁷⁸ Congress passed two

74. For example, after publishing notice that it proposed to list an endangered species and list critical habitat, the Department of the Interior commissioned scientists to study the issue and report back individually; however, when it decided to convene a meeting so the scientists could collaborate on a single report, it ran afoul of FACA. *Alabama Tombigbee Rivers Coalition v. Dep't of the Interior*, 26 F.3d 1103 (11th Cir. 1994) (holding that the principal purpose of FACA is to permit public participation and transparency during the work of the advisory committee, and permanently enjoining use of the scientists' report as the remedy for violating the Act). In other words, the agency had to foresee that it might find it desirable to ask the scientists to collaborate before it ever commissioned the work. *Id.* at 1105–06. Federal agencies can build technical advisory committees into permits or licenses, provided the committees are giving advice to the permittee or licensee, not to the federal agency itself. *Cowlitz Indian Tribe v. Fed. Energy Regulatory Comm'n*, 186 F. App'x 806 (9th Cir. 2006) (upholding a committee to advise Tacoma as a condition of its license to continue operating a hydroelectric project).

75. See, e.g., Charles Howton et al., Presentation at the 5th National Environmental Conflict Resolution Conference: FACA For Facilitators—Experience from the Field (May 22, 2008), available at <http://www.fs.fed.us/emc/nepa/ecr2008/sessions/materials/25/FACA%20for%20Facilitators%20Presentation.pdf>.

76. See 5 U.S.C. app. §§ 2, 5–15 (2006).

77. FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 36, at 397–410, 941–47.

78. FEDERAL ADMINISTRATIVE DISPUTE RESOLUTION DESKBOOK 1, 9 (2001).

amendments to the APA in 1990⁷⁹ and made them permanent in 1996: the NRA of 1996, and the ADRA of 1996.⁸⁰ They expressly authorized negotiation and dispute resolution in rulemaking and adjudication. The NRA subjects negotiated rulemaking committees to FACA.⁸¹ ADRA sets guidelines for the balance between confidentiality and public access in federal agency use of ADR.⁸² While the use of negotiated rulemaking has been relatively limited,⁸³ there has been dramatic growth in the use of dispute resolution processes in the federal government.⁸⁴

Collaboration is useful and can be efficient. Congress used collaboration in both the ADRA and NRA to foster agency accountability by giving stakeholders a voice in making a decision that closely affected them;⁸⁵ this voice entailed decisional authority, not simply giving an agency advice. Proponents emphasized that these processes would be more efficient by reducing the transaction costs of litigation.⁸⁶ The statutes balanced collaboration with transparency by

79. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. §§ 561-570 (2006)); 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)).

80. 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.).

81. 5 U.S.C. § 565 (2006).

82. FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 36, at 403-05.

83. Steven J. Balla, *Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking*, 1 I/S: J.L. & POL'Y FOR INFO. SOC'Y 59, 65 (2005) (observing that only 4 of 204 major federal agency rules issued between March 1996 to June 1999 used negotiated rulemaking).

84. See generally JEFFREY M. SENER, FEDERAL DISPUTE RESOLUTION: USING ADR WITHIN THE UNITED STATES GOVERNMENT 2 (2003); Interagency Alternative Dispute Resolution Working Group, <http://www.adr.gov/index.html> (last visited Mar. 5, 2010). For an early empirical study of agency ADR use, see Lisa B. Bingham & Charles R. Wise, *The Administrative Dispute Resolution Act of 1990: How Do We Evaluate Its Success?*, 6 J. PUB. ADMIN. RES. & THEORY 383 (1996); 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 in a 2001 follow-up study).

85. See *supra* notes 31-32 and accompanying text.

86. SENER, *supra* note 84, at 2-7; Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000). But see Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386 (2001); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997).

tying the NRA to FACA's transparency rules⁸⁷ and carving out limited exceptions to FOIA in the ADRA.⁸⁸

E. Paperwork Reduction Act

The PRA was enacted to reduce the paperwork burden for individuals, small businesses, educational and nonprofit institutions; federal contractors; state, local, and tribal government; and other persons.⁸⁹ Its goals include ensuring that the greatest public benefit is secured in the information the government collects. The Office of Information and Regulatory Affairs (OIRA) in the OMB enforces the PRA. The basic requirement is that all executive branch agencies get clearance from OIRA before they collect information. The PRA is perceived to pose a barrier to various forms of engagement because these may involve collecting information. It also creates a hurdle for data collection for research and evaluation purposes, an essential tool for new governance coordination designs. The PRA weighs efficiency more heavily than participation or transparency in the form of information the government may collect.

F. E-Government and E-Rulemaking

The federal government has been working to come into to the Internet age over a series of initiatives since the 1990s.⁹⁰ The National Performance Review recommended e-mail, electronic filing, benefit transfers, and integrated electronic access to government information and service. In 1996, Congress passed the Clinger-Cohen Act to improve federal IT management.⁹¹

Congress passed the E-Government Act of 2002 to direct agencies to use new technologies to make government more accessible and transparent to the public.⁹² The Act does not expressly and directly prescribe forms of public participation or interaction online. A recent study of e-rulemaking found that early policy choices had restricted

87. 5 U.S.C. § 562(7) (2006).

88. *Id.* § 574 (2006).

89. 44 U.S.C. § 3501 (2006).

90. Genie N.L. Stowers, *The State of Federal Web Sites: The Pursuit of Excellence*, in *E-GOVERNMENT 2003*, at 17-52 (Mark A. Abramson & Therese L. Morin eds., 2003) (documenting the evolution of federal Web sites as of 2002).

91. Information Technology Management Reform Act of 1996, Pub. L. No. 104-06, 110 Stat. 679 (codified at 40 U.S.C. §§ 11,101, 11,302 (2010)).

92. E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899 (codified at 44 U.S.C. §§ 3601-3606 (2006)).

agency innovation.⁹³ The OMB decided to build a single, centralized system with a common database and public Web site for all agencies to replace any preexisting systems. This system became the lowest common denominator; OMB prohibited agencies from building more sophisticated ones because it considered them duplicative and ancillary.⁹⁴ The system's limits prevented outside groups from easily using rulemaking data to create better public Web sites.

In contrast to a centralized system overall, designers gave individual agencies autonomy to determine much of the data to enter and what public comment practices to use. As a result, beyond a few categories, the unified system lacks common data fields across agencies.⁹⁵ Agencies had to contribute toward funding the system and wanted a say in its governance, but this diffused accountability for its performance. Moreover, there was no significant involvement by public users and stakeholders in the system's design.⁹⁶

The resulting system has strengths and weaknesses. It is a big step forward from paper rulemaking processes. Named the Federal Document Management System (FDMS), it has an agency interface and a public interface. Agencies use the password-protected www.FDMS.gov to maintain an e-docket for rulemaking and store digital copies of rulemaking documents. The public can view materials and submit comments through www.regulations.gov. The FDMS improves access to notices and draft rules, and it makes submitting comments much easier. It is a significant achievement that 170 different rulemaking entities in 15 Cabinet Departments and some independent regulatory commissions all use the same database, docket management system, and public Web site for notice and comment.⁹⁷ Recently, the system added e-mail notification, full-text search, and RSS feed.⁹⁸ It also makes it possible for researchers to learn more about the variety of ways people participate in rulemaking, not just through formal notice and comment or negotiated rulemaking, but also interactive forums like advisory committees, meetings, roundtables, and focus groups.

However, because it is a closed architecture, the FDMS does not begin to tap the potential for expanding public participation in the

93. COMM. ON THE STATUS & FUTURE OF FEDERAL E-RULEMAKING, *ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING, A REPORT TO CONGRESS AND THE PRESIDENT* (2008), *available at* <http://ceri.law.cornell.edu/erm-comm.php>.

94. *Id.* at 12.

95. *Id.* at 24–25.

96. *Id.* at 31.

97. *Id.* at 7.

98. *Id.* at 14.

policy process.⁹⁹ Not all agencies post submitted comments. It lacks interactive tools or Web presentation formats. It imposes a disproportionate fiscal burden on a few agencies. It is a barrier to innovation. The study committee recommended an appropriation for new architecture and new governance, innovative use of Web capabilities, and state-of-the-art Web design to make information more accessible and to increase the breadth and quality of public participation.¹⁰⁰

The E-Rulemaking Act fostered efficiency, transparency, and participation by leveraging evolving technology.¹⁰¹ It specifically encouraged collaboration—one of few statutes to use the word in administrative law.¹⁰² However, it did not broadly authorize innovation and tended to suppress it.

II. COLLABORATIVE GOVERNANCE AND PUBLIC PARTICIPATION: MOVING INTO UNCHARTED TERRITORY

A fundamental element of collaborative governance is participation and collaboration by those outside government in the policy process. The breadth and range of possibilities for public participation are evolving rapidly with advances in interactive online tools for engagement and involvement. However, federal managers and agency offices of general counsel are encountering perceived obstacles or barriers to new forms of public participation. For example, some counsel have advised agency personnel that they cannot use or participate in blogs for rulemaking because it is not clear that comments in the blogs are intended as formal comments on a proposed rule; they may simply be responses to someone else's blog entry.¹⁰³ Similarly, some agencies have explored using large-scale deliberative forums, for example, the *AmericaSpeaks* 21st Century Town Meeting format that

99. *Id.* at 8.

100. *Id.* at 37–40.

101. 44 U.S.C. §§ 3601–3606.

102. *Id.* § 3602(9). 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. *Id.*

103. Personal Communications with Frank DiGiammarino, Director of Collaboration Project, National Academy of Public Administration (Aug. 2008) (on file with author). *See generally* The Collaboration Project, <http://www.collaborationproject.org/display/home/Home> (last visited Mar. 5, 2010).

engages 1,000 to 5,000 people.¹⁰⁴ However, they report that counsel advised this method is inappropriate for rulemaking because it is impossible to capture all the simultaneous dialogue comments of thousands of people in the rulemaking record.¹⁰⁵ There is very little case law involving the question of public participation and alternative technological means.¹⁰⁶

This Part will examine public participation as framed in federal legislation and agency regulations, briefly recap selected emerging practices in public participation, report on a recent groundbreaking experiment called the Open Government Initiative conducted by the White House, and review the new Open Government Directive issued by the OMB. This review shows that there is a gap in our legal framework for participation in governance.

A. Public Participation in Administrative Law

Public involvement in democracy in the United States dates back to New England town hall meetings, but in its modern conception, public participation stems from the New Deal and the birth of administrative agencies.¹⁰⁷ The APA created a form of public participation by requiring opportunities for notice and comment in rulemaking.¹⁰⁸ During the Great Society programs of the 1960s, the 1964 Economic Opportunity Act mandated “maximum feasible participation” among the poor in community action programs; this led to substantial controversy and ultimately repeal of the language.¹⁰⁹ After 1970, Congress explicitly

104. For a description of *AmericaSpeaks* projects and models, see *AmericaSpeaks*, <http://www.americaspeaks.org/> (last visited Mar. 5, 2010).

105. Personal Communication with Robert Carlitz, Executive Director, Information Renaissance (Nov. 29–Dec. 1, 2007) (on file with author). See generally Information Renaissance, <http://www.info-ren.org/info-ren.shtml> (last visited Mar. 5, 2010).

106. Searches of “agency and particip! w/2 public and web or internet or online” yielded primarily a handful of cases in which agencies had published a document online and there was no public participation. Westlaw search performed by Nathaniel Holton on Nov. 14, 2009 (on file with author).

107. NAT’L RESEARCH COUNCIL, PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION-MAKING 36–37 (2008); THOMAS C. BEIERLE & JERRY CAYFORD, DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS 3 (2002).

108. NAT’L RESEARCH COUNCIL, *supra* note 107, at 37.

109. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, CITIZEN PARTICIPATION IN THE AMERICAN FEDERAL SYSTEM 100 (1979); DANIEL P. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING: COMMUNITY ACTION IN THE WAR ON POVERTY 87, 160–61 (1969) (describing how the phrase maximum feasible participation evolved into a theory of social change that those served by the community action program would participate in its governance).

incorporated public participation into new programs, but without targeting a specific population within the general public.¹¹⁰

The phrase “public participation” appears over 200 times in the United States Code.¹¹¹ However, the term does not appear as part of a formal definitions section.¹¹² As there appears to be no clear definition of the phrase “public participation,” this creates an opportunity for clarifying legislation. At present, various sections of the code use the phrase in differing contexts. Most frequently, the phrase appears in connection with the word “rulemaking.”¹¹³ It also appears frequently in connection with land use and the environment in consequence of the National Environmental Policy Act.¹¹⁴ It appears with various adjectives, such as “adequate public participation,”¹¹⁵ “full public

110. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, *supra* note 109, at 100.

111. Between October 2008 and May of 2009, law student researchers at Indiana University sifted through the United States Code and Code of Federal Regulations to locate any statutory references relevant to “public participation,” as well as, alternative terms representing similar concepts of collaborative governance. The Westlaw search terms included: “hearing,” “notice w/10 public,” “collaborat!,” “public hearing,” “public notice,” “deliberat!,” “public access,” “public w/2 particip!,” “public participation,” “notice and comment,” “public w/2 involv!,” “public awareness,” “stakeholder!,” “collaborat! /p public,” “dialogue,” “public hearing /p,” “fed! regist!,” “public involve!,” “public w/2 engag!,” “civic engagement,” “public rulemaking,” “roundtable!,” “defin! /p”public,” participation,” “focus group!,” “citizen jur!,” “share w/2 decision,” “deliberative democracy,” “public conversation,” “participatory budgeting,” “partic! budget!,” “study circle!,” “collab! policy!,” and “stakeholder citi!” (on file with author).

112. A search of the United States Code using “public participation” and defin! provided 118 results, but in none of these was the word definition used in connection with public participation. Westlaw search conducted by author on Apr. 19, 2010 (on file with author).

113. “Public Participation” most notably occurs within proximity to rulemaking. *See, e.g.*, 16 U.S.C. § 825q-1 (2006) (Office of Public Participation); *id.* § 1612 (2006) (Public Participation); *id.* § 5157 (2006) (Public Participation in Preparation of Management Plans and Amendments); *id.* § 6803 (2006) (Public Participation); 31 U.S.C. § 6710 (2006) (Public Participation); 42 U.S.C. § 6974 (2006) (Petition for Regulations: Public Participation); *id.* § 7921 (2006) (Public Participation: Public Hearings); *id.* § 9617 (2006) (Public Participation); 50 U.S.C. § 2159 (2006) (Public Participation in Rulemaking); *id.* § 2588 (2006) (Public Participation in planning for environmental restoration and waste management at defense nuclear facilities).

114. NAT’L RESEARCH COUNCIL, *supra* note 107, at 37.

115. For example, 16 U.S.C. § 6104 (2006), provides in part:

(c) Project proposals

To be considered for financial assistance for a project under this chapter, an applicant shall submit a project proposal that—

- (1) includes—

...

participation,”¹¹⁶ or public participation “to the maximum extent.”¹¹⁷ Sections labeled “public participation” refer to it as “a meaningful opportunity for public comment”¹¹⁸

While not expressly defining the term, some code sections place it in the context by explaining how and with whom agencies should

(D) an estimate of the funds and time necessary to complete the project, including sources and amounts of matching funds;

(2) demonstrates that the project will enhance the conservation of neotropical migratory bird species in the United States, Canada, Latin America, or the Caribbean;

(3) *includes mechanisms to ensure adequate local public participation in project development and implementation*

Id. (emphasis added).

116. For example, 43 U.S.C.A. § 390jj (West 2007), provides in part:

(c) Coordination of ongoing programs; *full public participation*

The Secretary is authorized and directed to enter into memorandums of agreement with those Federal agencies having capability to assist in implementing water conservation measures to assure coordination of ongoing programs. *Such memorandums should provide for involvement of non-Federal entities such as States, Indian tribes, and water user organizations to assure full public participation in water conservation efforts.*

Id. (emphasis added). *See also id.* § 1786(d)(3) (West Supp. 2009); *id.* § 1787(c)(2) (West Supp. 2009), which provides in part:

(2) Consultation; public participation

The *management plan shall be developed—*

(A) in consultation with appropriate Federal, State, county, and local government agencies, the Commandant, the Local Partners, and other partners; and

(B) *in a manner that ensures full public participation.*

Id. (emphasis added).

117. *See, e.g.*, 7 U.S.C.A. § 2009aa-6(d) (West Supp. 2009) (providing that “[t]he Authority and applicable State and local development districts shall encourage and assist, *to the maximum extent practicable, public participation in the development, revision, and implementation of all plans and programs* under this subchapter”) (emphasis added).

118. *See, e.g.*, 50 U.S.C.A. app. § 2412(b) (West 1991) (titled “Public participation” and providing that “[i]t is the intent of the Congress that, to the extent practicable, all regulations imposing controls on exports under this Act [sections 2401 to 2420 of this Appendix] be issued in proposed form *with meaningful opportunity for public comment before taking effect*. In cases where a regulation imposing controls under this Act [sections 2401 to 2420 of this Appendix] is issued with immediate effect, it is the intent of the Congress that *meaningful opportunity for public comment also be provided and that the regulation be reissued in final form after public comments have been fully considered*”) (emphasis added).

conduct public participation.¹¹⁹ Similarly, public participation can include requirements for consultation.¹²⁰ Infrequently, sections address specific processes for public participation, such as workshops,¹²¹ focus groups,¹²² nomination procedures, and public education.¹²³ Some

119. For example, 49 U.S.C.A. § 5307 (West 2007) (a Department of Transportation grant program), provides in part:

(c) Public participation requirements.—Each recipient of a grant shall—

(1) make available to the public information on amounts available to the recipient under this section and the program of projects the recipient proposes to undertake;

(2) develop, in consultation with interested parties, including private transportation providers, a proposed program of projects for activities to be financed;

(3) publish a proposed program of projects in a way that affected citizens, private transportation providers, and local elected officials have the opportunity to examine the proposed program and submit comments on the proposed program and the performance of the recipient;

(4) provide an opportunity for a public hearing in which to obtain the views of citizens on the proposed program of projects;

(5) ensure that the proposed program of projects provides for the coordination of public transportation services assisted under section 5336 of this title with transportation services assisted from other United States Government sources;

(6) consider comments and views received, especially those of private transportation providers, in preparing the final program of projects; and

(7) make the final program of projects available to the public.

Id. § 5307(c).

120. *See, e.g.*, 50 U.S.C.A. § 2584(f)(1) (West Supp. 2009) (“The Secretary of Energy shall consult with the Administrator of the Environmental Protection Agency, the Attorney General, Governors and Attorneys General of affected States, appropriate representatives of affected Indian tribes, and interested members of the public in the development of information necessary to complete the reports required by subsections (a), (b), and (d) of this section.”).

121. *See, e.g.*, 16 U.S.C.A. § 1276(b)(13) (West 2000 & Supp. 2009) (providing in part that “[f]or purposes of such river studies, the Secretary shall consult with each River Study Committee authorized under section 5 of the Michigan Scenic Rivers Act of 1990, and shall encourage *public participation and involvement through hearings, workshops, and such other means as are necessary to be effective*”) (emphasis added). *See also* 16 U.S.C.A. § 1854(i)(4) (West 2000 & Supp. 2009) (referring to “workshops or other appropriate means of public involvement”).

122. *See, e.g.*, 42 U.S.C.A. § 300ff-12(b)(4) (West Supp. 2009) (“The planning council established or designated under paragraph (1) shall . . . (G) establish methods for obtaining input on community needs and priorities which may include public meetings (in accordance with paragraph (7)), conducting *focus groups, and convening ad-hoc panels*”) (emphasis added).

123. *See, e.g.*, 16 U.S.C.A. § 1455b(b)(5) (West 2000) (“Opportunities for public participation in all aspects of the program, including the use of public notices

provisions attempt to foster public participation by addressing the location.¹²⁴ Others directly address the quality of participation, mentioning communication, cooperation, and exchange of information.¹²⁵ There is even a connection between public participation and “good governance.”¹²⁶

An alternative phrase is “public involvement.”¹²⁷ However, its use is substantially the same as that of public participation.¹²⁸ In one

and opportunities for comment, *nomination procedures, public hearings, technical and financial assistance, public education, and other means.*”) (emphasis added).

124. For example, 16 U.S.C.A. § 1604(d) (West 2000) provides:

(d) Public participation in management plans; availability of plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at locations that foster public participation in the review of such plans or revisions.

125. For example, 16 U.S.C.A. § 4303(c) (West 2000 & Supp. 2009) provides that:

The Secretary shall—

(1) ensure that significant caves are considered in the preparation or implementation of any land management plan if the preparation or revision of the plan began after November 18, 1988; and

(2) foster communication, cooperation, and exchange of information between land managers, those who utilize caves, and the public.

126. See, e.g., 22 U.S.C.A. § 262o-1(b)(2) (West 2004) (providing that “the respective institution supports lending operations which assist efforts of recipient governments to promote *good governance, including public participation . . .*”) (emphasis added). Similarly, 22 U.S.C.A. § 262p-6(a)(1)(F) (West 2004) ties together poverty reduction, good governance, transparency, and participation of citizens, and urges countries “to broaden public participation and popular understanding of the principles and goals of poverty reduction, particularly through economic growth, and good governance . . .” *Id.*

127. For example, 16 U.S.C.S. § 1a-5(c)(1) (LexisNexis 2005), “Additional areas for National Park System,” provides:

(c) Report. (1) The Secretary shall complete the study for each area for potential inclusion in the National Park System within 3 complete fiscal years following the date on which funds are first made available for such purposes. Each study under this section shall be prepared with appropriate opportunity for *public involvement*, including at least one public meeting in the vicinity of the area under study, and after reasonable efforts to notify potentially affected landowners and State and local governments.

Id. (emphasis added). For similar references as to national parks, management plans, and conservation, see, e.g., *id.* § 410oo-5(c) (LexisNexis 2005) (providing in part that “Advisory Commission meetings shall be held at locations and in such a manner as to ensure adequate public involvement”); *id.* § 410qq-2(g)(2) (LexisNexis 2005) (“Notice

context, the term “public involvement” is defined as “the opportunity for participation by affected citizens in rulemaking, decisionmaking, and planning with respect to the public lands, including public meetings or hearings held at locations near the affected lands, or advisory mechanisms, or such other procedures as may be necessary to provide public comment in a particular instance.”¹²⁹ A less frequent term is “civic engagement,” but this term is used more in connection with

of meetings and agenda shall be announced in advance and meetings shall be held at locations and in such a manner as to insure adequate public involvement.”); *id.* § 410tt-3(c)(1) (LexisNexis 2005) (providing in part that “the Secretary, in consultation with the Commission, and with public involvement, shall develop and submit to the Committee on Energy and Natural Resources of the United States Senate and the Committee on Natural Resources of the United States House of Representatives a general management plan for the park”); *see also id.* § 410tt-4(f) (LexisNexis 2005); *id.* § 410iii-7(f) (LexisNexis 2005); *id.* § 429b (LexisNexis 2007); *id.* § 430g-8(c) (LexisNexis 2007); *id.* § 460ii-5(c) (LexisNexis 2007); *id.* § 460kk-5(n)(3)(A) (LexisNexis 2007); *id.* § 460vv-13(a) (LexisNexis 2007); *id.* § 460aaa-6(a) (LexisNexis 2007); *id.* § 539m-5(a)(3) (LexisNexis 2009); *id.* § 544(e) (LexisNexis 2009); *id.* § 668dd(e)(4)(A) (LexisNexis 2009); *id.* § 669 (LexisNexis Supp. 2009); *id.* § 698r(f) (Lawyers Coop. Publ’g 1994); *id.* § 698u-5(f) (LexisNexis Supp. 2009); *id.* § 839b(g)(1) (Lexis Publ’g 2000); *id.* § 1244(a)(22)(E) (Lexis Publ’g 2000 & LexisNexis Supp. 2009); *id.* § 1274(67)(B)(iii) (Lexis Publ’g 2000); *id.* § 1601[(c)](d) (Lexis Law Publ’g 1999); *id.* § 1604(f)(4) (Lexis Law Publ’g 1999); *id.* § 1854(i)(4) (LexisNexis Supp. 2009); *id.* § 6803(c) (LexisNexis 2007). For examples in education, *see, e.g.*, 20 U.S.C.S. § 1098(a)(1) (LexisNexis 2009); in highways, *see, e.g.*, 23 U.S.C.S. § 134(k)(5)(d) (LexisNexis 2009); as to navigable waters, *see, e.g.*, 33 U.S.C.S. § 1509(a) (LexisNexis 2005); as to public health, *see, e.g.*, 42 U.S.C.S. § 1397gg(c) (Lexis Publ’g 2001); and as to transportation, *see, e.g.*, 49 U.S.C.S. § 5303(k)(5)(D) (LexisNexis Supp. 2009); *id.* § 5305(e)(4) (LexisNexis Supp. 2009).

128. *See, e.g.*, 16 U.S.C.S. § 45f(e) (LexisNexis 2005), provides in part:

(2)(A) In preparing the comprehensive management plan required by this subsection and in preparing any subsequent revision of such plan, the Secretary shall provide for full public participation and shall consider the comments and views of all interested agencies, organizations, and individuals.

(B) For purposes of insuring such *full public participation*, the Secretary shall provide reasonable advance notice to State and local governments, interested Federal agencies, private organizations, and the general public of hearings, workshops, meetings, and other opportunities available for such participation. Such notice shall be published in newspapers of general circulation in the localities affected by the development and management of the park, published in the Federal Register, and communicated by other appropriate means. The Western Regional Advisory Committee of the National Park Service (or a subcommittee thereof) shall also be utilized for purposes of facilitating *public involvement*.

Id. (emphasis added).

129. 43 U.S.C.S. § 1702(d) (Lawyers Coop. Publ’g 1995). *See also id.* § 1712(f) (Lawyers Coop. Publ’g 1995); *id.* § 1714(c)(10) (Lawyers Coop. Publ’g 1995).

promoting the general civic engagement of the public in community service, voting, and related activity,¹³⁰ it does not generally refer to participation in the federal policy process.

In sum, while there are a variety of different contexts within which the United States Code uses the phrase “public participation,” there is no express definition.

B. Agency Regulations and Public Participation

Agencies have used the phrase “public participation” in their rules. The phrase “public participation” appears over 1000 times in the Code of Federal Regulations.¹³¹ However, the term is defined in a formal

130. See, e.g., 20 U.S.C.S. § 1161w(c) (LexisNexis Supp. 2009) (“A community college awarded a grant under this part [this section] may use such grant to . . . (2) establish and carry out an education program that includes classes for eligible individuals that . . . (C) promote the civic engagement of such individuals”); 42 U.S.C.S. § 3002(12) (LexisNexis 2008) (“The term ‘civic engagement’ means an individual or collective action designed to address a public concern or an unmet human, educational, health care, environmental, or public safety need.”); *id.* § 3012(c)(1) (LexisNexis 2008) (concerning “[c]ommunity capacity-building initiatives” that will “encourage and permit volunteer groups (including organizations carrying out national service programs and including organizations of youth in secondary or postsecondary school) that are active in supportive services and civic engagement to participate and be involved individually or through representative groups in supportive service and civic engagement programs or activities to the maximum extent feasible”); *id.* § 3056n(2) (LexisNexis 2008) (stating that “[i]t is the sense of Congress that . . . placing older individuals in community service positions strengthens the ability of the individuals to become self-sufficient, provides much-needed support to organizations that benefit from increased civic engagement, and strengthens the communities that are served by such organizations”); *id.* § 12,639a(d)(1)(B) (LexisNexis 2010) (referring to “voting and other forms of political and civic engagement”); see also *id.* § 3026(b)(3)(I) (LexisNexis 2008); *id.* § 3032f(a)(1) (LexisNexis 2008); *id.* § 12,523(a)(5) (LexisNexis 2010); *id.* § 12,572(j) (LexisNexis 2010); *id.* § 12,638(g)(2)(C) (LexisNexis 2010); *id.* § 12,639(k)(6) (LexisNexis 2010); *id.* § 12,653k(f)(3)(G) (LexisNexis 2010).

131. Between October 2008 and May 2009, law student researchers at Indiana University sifted through the Code of Federal Regulations to locate any statutory references relevant to “public participation,” as well as, alternative terms representing similar concepts of collaborative governance. The Westlaw search terms included; “hearing,” “notice w/10 public,” “collaborat!,” “public hearing,” “public notice,” “deliberat!,” “public access,” “public w/2 particip!,” “public participation,” “notice and comment,” “public w/2 involv!,” “public awareness,” “stakeholder!,” “collaborat! /p public,” “dialogue,” “public hearing /p,” “fed! regist!,” “public involve!,” “public w/2 engag!,” “civic engagement,” “public rulemaking,” “roundtable!,” “defin! /p”public,” participation,” “focus group!,” “citizen jur!,” “share w/2 decision,” “deliberative democracy,” “public conversation,” “participatory budgeting,” “partic! budget!,” “study circle!,” “collab! policy!,” and “stakeholder citi!” (on file with author).

definitions section only five times.¹³² At present, various agencies of the code use the phrase in differing contexts. Most frequently, the phrase appears in connection with the phrases “public access”¹³³ and “public notice.”¹³⁴ It appears with various adjectives, such as “adequate public participation”¹³⁵ and “full public participation.”¹³⁶ While not expressly

132. See, e.g., 11 C.F.R. § 9407.2 (2009) (providing in part that “[a]s used in this part, the term . . . *Public participation* means the presentation or discussion of information, raising of questions, or other manner of involvement in a meeting of the Commission by one or more members of the public in a manner that contributes to the disposition of Commission business”); 36 C.F.R. § 216.2(b)(2009) (providing in part that “[p]ublic participation activities are actions initiated by the Forest Service to facilitate an exchange of information with the public. These actions include, but are not limited to, oral and written measures such as public notices, letters, discussion papers, and gatherings such as meetings, workshops, and hearings”); *id.* § 219.16 (2009) (providing in part that “[d]efinitions of the special terms used in this subpart are set out in alphabetical order. . . . *Public participation*: Activities that include a wide range of public involvement tools and processes, such as collaboration, public meetings, open houses, workshops, and comment periods”); 40 C.F.R. § 300.5 (2009) (providing in part that “[t]erms not defined in this section have the meaning given by CERCLA, the OPA, or the CWA. . . . *Public participation*, see the definition for community relations. . . . *Community relations* means EPA’s program to inform and encourage public participation in the Superfund process and to respond to community concerns. The term ‘public’ includes citizens directly affected by the site, other interested citizens or parties, organized groups, elected officials, and potentially responsible parties (PRPs)”); 50 C.F.R. § 560.2 (2009) (providing in part that “[f]or purposes of this part, the term . . . *Public Participation* means the presentation or discussion of information, raising of questions, or other manner of involvement in a meeting of the Commission by one or more members of the public in a manner that contributes to the disposition of Commission business”).

133. A search of “public access” % (public/2 particip!) yielded 1,316 results. Westlaw search performed on Apr. 20, 2010 (on file with author).

134. A search of “public notice” % (public/2 particip!) yielded 1,108 results. Westlaw search performed on Apr. 20, 2010 (on file with author).

135. See, e.g., 7 C.F.R. § 634.4(j)(4)(2009) (providing in part that “[t]he duties of the committee are to insure that a process exists . . . [t]o incorporate adequate public participation, including public meeting(s), and appropriate environmental assessment in the preparation of RCWP applications”).

136. For example, 14 C.F.R. pt. 11, app. 1 (2009), provides in part:

3. What is DOT policy on ex parte contacts?

It is DOT policy to provide for open development of rules and to encourage full public participation in rulemaking actions. In addition to providing opportunity to respond in writing to an NPRM and to appear and be heard at a hearing, DOT policy encourages agencies to contact the public directly when we need factual information to resolve questions of substance. It also encourages DOT agencies to be receptive to appropriate contacts from persons affected by or interested in a proposed action. But under some circumstances an ex parte contact could affect the basic openness and fairness of the rulemaking process. Even the appearance of impropriety can affect public confidence in the process. For this reason, DOT policy sets careful guidelines for these contacts. The kind of ex parte contacts

defining the term, some code sections place it in the context by explaining how and with whom agencies should conduct public participation.¹³⁷ Similarly, public participation can include or be

permitted and the procedures we follow depend on when the contact occurs in the rulemaking process.

137. For example, 7 C.F.R. § 650.9 (2009), provides in part:

(d) *Public participation*—(1) *General*. Public participation activities begin early in the EE and are to be appropriate to the proposed action. For example, extensive public participation activities are required in the implementation of new programs and project actions, but limited public participation is appropriate for nonproject technical and financial assistance programs on nonfederal land.

(2) *Early public involvement*. The public is to be invited and encouraged to participate in the early stages of planning, including the consideration of the potential effects of NRCS-assisted actions on significant environmental resources such as wetlands, flood plains, cultural values, endangered species, important farmland.

(3) *Project activities*. The following are general considerations for providing opportunities for public participation:

(i) *Identification of interested public*. The interested public consisting of but not limited to individuals, groups, organizations, and government agencies are to be identified, sought out, and encouraged to participate in and contribute to interdisciplinary planning and environmental evaluation.

(ii) *Public notices*. (40 CFR 1506.6) If the effects of an action are primarily of local concern, notice of each public meeting or hearing should be: Submitted to State and areawide clearinghouses pursuant to OMB Circular A-95 (revised); submitted to Indian tribes if they are interested; published in local newspapers; distributed through other local media; provided to potentially interested community organizations including small business associations; published in newsletters that may be expected to reach potentially interested persons; mailed directly to owners and occupants of nearby or affected property; and posted onsite and offsite in the area where the action is to be located.

(iii) *State statutes*. If official action by the local units of government cooperating in the proposal is governed by State statute, the public notice and mailing requirement of the statute is to be followed. If the effects of an action are of national concern, notice is to be published in the FEDERAL REGISTER and mailed to national organizations reasonably expected to be interested.

(iv) *Public meetings*. The RFO, after consultation with the sponsors, is to determine when public meetings or hearings are to be held. Public meetings may be in the form of a workshop, tour, open house, etc. Public involvement will include early discussion of flood-plain management and protection of wetlands, where appropriate. Environmental information is to be presented and discussed along with other appropriate information. To the extent practical, pertinent information should be made available before the meetings.

included within requirements for consultation.¹³⁸ Infrequently, sections address specific processes for public participation, such as workshops¹³⁹ and nomination procedures.¹⁴⁰

(v) *Documentation.* The RFO is to maintain a reviewable record of public participation in the environmental evaluation process.

(4) *Nonproject activities.* Public participation in the planning and application of conservation practices with individual land users is accomplished primarily through conservation districts. These districts are governed by boards of supervisors directors, commissioners, etc., who are elected and/or appointed to insure that soil, water, related resources, and environmental qualities in the district are maintained and improved. The public is to be encouraged to participate in the development of long-range district programs and district annual plans. The district keeps the public informed through public meetings, district newsletters, news stories, radio and television programs, and annual reports.

138. For example, 18 C.F.R. § 4.38 (2009), titled “Consultation requirements,” provides in part:

(g) *Public participation.* (1) At least 14 days in advance of the joint meeting held pursuant to paragraph (b)(3) of this section, the potential applicant must publish notice, at least once, of the purpose, location, and timing of the joint meeting, in a daily or weekly newspaper published in each county in which the proposed project or any part thereof is situated. The notice shall include a summary of the major issues to be discussed at the joint meeting.

(2)(i) A potential applicant must make available to the public for inspection and reproduction the information specified in paragraph (b)(2) of this section from the date on which the notice required by paragraph (g)(1) of this section is first published until a final order is issued on any license application.

(ii) The provisions of § 4.32(b) will govern the form and manner in which the information is to be made available for public inspection and reproduction.

(iii) A potential applicant must make available to the public for inspection at the joint meeting required by paragraph (b)(3) of this section at least two copies of the information specified in paragraph (b)(2) of this section.

139. *See, e.g.,* 43 C.F.R. § 426.22(e) (2009) (providing “*Opportunities for public participation.* (1) Reclamation can provide, as appropriate: meetings, workshops, or hearings to provide local information. Advance notice of meetings, workshops, or hearings will be provided to those parties who make timely written request for such notice. Request for notice of meetings, workshops, or hearings should be sent to the appropriate Reclamation regional or local office”).

140. *See, e.g.,* 43 C.F.R. § 1784.4-1 (providing, under the title “Calls for nominations,” that “[e]xcept where otherwise provided, candidates for appointment to advisory committees are sought through public calls for public nominations. Such calls shall be published in the FEDERAL REGISTER and are made through media releases and systematic contacts with individuals and organizations interested in the use and management of public lands and resources”).

Similarly, some sections use the phrase “public involvement;” perhaps the most comprehensive is a Federal Highway Administration regulation that prescribes minimum contents for a state’s public involvement policy for statewide transportation planning that includes “early and continuous public involvement opportunities that provide timely information about transportation issues and decision-making processes” to a long list of potential stakeholders.¹⁴¹

C. Agency Practices and Public Participation

Public agencies have diverse practices in the public participation and transparency that they offer the public.¹⁴² In research that predated the Open Government Initiative, researchers divided a list of federal agency Web sites and combed each of the Web pages for “public participation” opportunities¹⁴³ other than agency links to www.regulations.gov, the uniform federal Web site for e-rulemaking.¹⁴⁴ Some agency Web pages featured links to various forums for discussion, open blogs, and policy blog posts with comment options.¹⁴⁵ Most did not have any form of public participation on their Web site that was clear and obvious.¹⁴⁶

141. 23 C.F.R. § 450.210 provides a long stakeholder list and requires reasonable public access to technical and policy information, adequate public notice of public involvement activities and time for public review and comment at key decision points, and “[t]o the maximum extent practicable” that meetings occur at convenient and accessible locations, use visualization techniques to describe the plan and studies, and make public information available electronically. *Id.* at § 450.210(a)(1)(iv) (2009). It also requires that the state plan demonstrate explicit consideration and response to public input and include a process for seeking out those traditional underserved and minority households, among other provisions.

142. For a collection of empirical studies on a variety of forms of public participation, see *THE AGE OF DIRECT CITIZEN PARTICIPATION* (Nancy C. Roberts ed., 2008) (describing citizens as co-producers, owners, and co-investors, individuals, in small groups, in large groups, for consensus-building and strategic planning, and using deliberative democracy).

143. USA.gov, A-Z Index of U.S. Government Departments and Agencies, http://www.usa.gov/Agencies/Federal/All_Agencies/index.shtml (last visited Mar. 31, 2010) (listing U.S. government agency Web sites).

144. *See supra* Part II.C.

145. Each of the following agency Web sites contain some form of public participation: Administration on Aging, Department of Health and Human Services, Press Room, http://www.aoa.gov/AoARoot/Press_Room/index.aspx (last visited May 16, 2010) (encouraging media advocacy); Advisory Council on Historic Preservation, Protecting Historic Properties: A Citizen’s Guide to Section 106 Review, <http://www.achp.gov/citizensguide.html> (last visited May 16, 2010) (helping citizens make their voices heard) (last visited May 16, 2010); Agricultural Research Service, United States Department of Agriculture, Contact Us, <http://www.ars.usda.gov/contactus/contactus.htm> (containing a feedback form); AMTRAK, Amtrak Customer

Advisory Committee, http://www.amtrak.com/servlet/ContentServer?c=AM_Content_C&pagename=am%2FLayout&cid=1241245659781 (last visited May 16, 2010) (soliciting opinions and complaints of Amtrak users); Animal and Plant Health Inspection Service, United States Department of Agriculture, About APHIS: Legislative and Public Affairs (LPA), http://www.aphis.usda.gov/about_aphis/programs_offices/lpa/ (last visited May 16, 2010) (soliciting stakeholder communications); Bureau of Alcohol, Tobacco, Firearms and Explosives, Contact ATF, <http://www.atf.gov/contact/> (last visited May 16, 2010) (containing page soliciting feedback); Bureau of Engraving and Printing, U.S. Department of the Treasury, Contact Us, <http://www.moneyfactory.gov/contactus.html> (last visited May 16, 2010) (containing a comment form); Bureau of Industry and Security, U.S. Department of Commerce, Forms and Telephone Numbers You can Use to Contact BIS, <http://www.bis.doc.gov/forms/formlist.html> (last visited May 16, 2010) (containing forms to contact BIS for a variety of purposes); Bureau of Land Management, U.S. Department of the Interior, National Environmental Policy Act (NEPA), <http://www.blm.gov/wo/st/en/info/nepa.html> (last visited May 16, 2010) (describing NEPA standards that require public hearings); Bureau of Reclamation, U.S. Department of the Interior, We Welcome Your Comments, <http://www.usbr.gov/main/comments.cfm> (last visited May 16, 2010) (containing a comment form); Delaware River Basin Commission, Public Access to Records and Information, <http://www.state.nj.us/drbc/FOIA.htm> (last visited May 16, 2010) (providing instructions for requesting documents from the agency); ED.gov, U.S. Department of Education, Twitter: Hey There! usedgov is using Twitter, <http://twitter.com/usedgov> (last visited May 16, 2010) (inviting citizens to receive agency tweets); EDPubs: Order Free U.S. Department of Education Publications, <http://www.edpubs.gov/> (last visited May 16, 2010) (providing order forms for agency publications); Federal Communications Commission, Welcome to the New Electronic Comment Filing System, <http://fjallfoss.fcc.gov/ecfs/> (last visited May 16, 2010) (inviting public comments on the Web site and consumer complaint forms); Federal Energy Regulatory Commission, For Citizens, <http://www.ferc.gov/for-citizens/for-citizens.asp> (last visited May 16, 2010) (providing a portal for citizen involvement); HHS.gov, U.S. Department of Health & Human Services, Get Involved, <http://www.hhs.gov/open/getinvolved/> (last visited May 16, 2010) (offering various methods of participating); HHS.gov/Open, U.S. Department of Health & Human Services, Share Your Ideas on Participation, <http://www.hhs.gov/open/plan/plan/participation.html> (last visited May 16, 2010) (soliciting citizens' ideas and expertise); Indian Affairs, U.S. Department of the Interior, Contact Us, <http://www.bia.gov/ContactUs/index.htm> (last visited May 16, 2010) (containing a comment form); NASA, Connect with NASA on Social Networking Sites, <http://www.nasa.gov/connect/index.html> (last visited May 16, 2010) (listing social networking sites for communicating with the administration); National Institutes of Health, U.S. Department of Health & Human Services, Public Involvement with NIH, <http://www.nih.gov/about/publicinvolvement.htm> (last visited May 16, 2010) (soliciting the public's involvement); U.S. Department of State, Public Liaison and Intergovernmental Affairs, <http://www.state.gov/r/pa/pl/> (last visited May 16, 2010) (stating a goal of "creat[ing] and coordinat[ing] opportunities between the Administration and the American public"); U.S. Immigration and Customs Enforcement, <http://www.ice.gov/> (last visited May 16, 2010) (providing links to proposed rules and regulations); United States Department of Agriculture, Contact Us, http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?navtype=MA&navid=CONTACT_US (last visited May 16, 2010) (containing a link to an instructional pamphlet titled "How to Get Information from the United States Department of Agriculture"); United States Department of Justice, Contact Us, <http://www.justice.gov/contact-us.html> (last visited May 16, 2010)

(inviting citizen comment on agency activities); United States Election Assistance Commission, Public Meetings and Hearings, <http://www.eac.gov/News/meetings> (last visited May 16, 2010) (listing schedule of public meetings and hearings); United States Environmental Protection Agency, Office of Public Affairs, <http://www.epa.gov/adminweb/opa/> (last visited May 16, 2010) (including links to the agency's social media sites).

146. The following Web pages had no direct and obvious links to public participation outlets. However, most did have "contact us" pages. *See* African Development Foundation, <http://www.adf.gov/> (last visited May 17, 2010) (containing "Contact Us" link); Agricultural Research Service, United States Department of Agriculture, <http://www.ars.usda.gov/> (last visited May 17, 2010) (containing "Contact Us" link); Board of Governors of the Federal Reserve System, <http://www.federalreserve.gov/> (last visited May 17, 2010) (containing agency's address); Bureau of International Labor Affairs (ILAB), United States Department of Labor, <http://www.dol.gov/ilab> (last visited May 17, 2010) (containing "Contact Us" link); Bureau of Justice Statistics, <http://ojp.usdoj.gov/bjs/> (last visited May 17, 2010) (containing "Contact Us" link); Bureau of Labor Statistics, United States Department of Labor, <http://www.bls.gov/> (last visited May 17, 2010) (containing "Contact Us" link); Bureau of the Public Debt, United States Department of the Treasury, <http://www.publicdebt.treas.gov/> (last visited May 17, 2010) (containing "Contact Us" link); Center for Nutrition Policy and Promotion, United States Department of Agriculture, <http://www.cnpp.usda.gov/> (last visited May 17, 2010) (containing "Contact Us" link); Centers for Disease Control and Prevention, <http://www.cdc.gov/> (last visited May 17, 2010) (containing "Contact CDC" link); Centers for Medicare & Medicaid Services, U.S. Department of Health & Human Services, <http://www.cms.hhs.gov/> (last visited May 17, 2010) (containing "Contact CMS" link); Central Intelligence Agency, <https://www.cia.gov/> (last visited May 17, 2010) (containing "Contact CIA" link); Chief Financial Officers Council, <http://www.cfoc.gov/> (last visited May 17, 2010) (containing "Contact Us" link); COMMERCE.gov, United States Department of Commerce, <http://www.commerce.gov/> (last visited May 17, 2010) (containing "Contact Us" link); Commissaries.com, <http://www.commissaries.com/> (last visited May 17, 2010) (containing "Connect With DeCA" link); Comptroller of the Currency Office, Administrator of National Banks, U.S. Department of the Treasury, <http://www.occ.treas.gov/> (last visited May 17, 2010) (containing "Contact the OCC" link); Congressional Budget Office, <http://www.cbo.gov/> (last visited May 17, 2010) (containing "Contact Us" link); Defense Advanced Research Projects Agency, <http://www.darpa.mil/> (last visited May 17, 2010) (containing "Contact DARPA" link); Defense Finance and Accounting Service, <http://www.dfas.mil/> (last visited May 17, 2010) (containing "Contact Us" link); Defense Information Systems Agency, Department of Defense, <http://www.disa.mil/> (last visited May 17, 2010) (containing "Contact Us" link); Defense Logistics Agency, <http://www.dla.mil/> (last visited May 17, 2010) (containing "Directory" link to contact information); Defense Nuclear Facilities Safety Board, <http://www.dnfsb.gov/> (last visited May 17, 2010) (containing "Contact" link); Defense Security Cooperation Agency, <http://www.dsca.mil/> (last visited May 20, 2010) (containing "Contact Us" link); Defense Security Service, <http://www.dss.mil/> (last visited May 17, 2010) (containing "Contact DSS" link); Defense Threat Reduction Agency & US STRATCOM Center for Combating WMD, <http://www.dtra.mil/> (last visited May 17, 2010) (containing "Contact Us" link); Economics and Statistics Administration, <http://www.esa.doc.gov/> (last visited May 17, 2010) (containing no contact information); ED.gov, U.S. Department of Education, Office of English Language Acquisition, <http://www2.ed.gov/about/offices/list/oela/>

index.html?src=mr (last visited May 17, 2010) (containing a “Contact” link); Export-Import Bank of the United States, <http://www.exim.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Farm Credit Administration, <http://www.fca.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Federal Aviation Administration, <http://www.faa.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Federal Bureau of Investigation, <http://www.fbi.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Federal Bureau of Prisons, U.S. Department of Justice, <http://www.bop.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Federal Deposit Insurance Corporation, <http://www.fdic.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Federal Election Commission, <http://www.fec.gov/> (last visited May 17, 2010) (containing the Commission’s address and telephone information); Federal Emergency Management Agency, United States Department of Homeland Security, <http://www.fema.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Federal Housing Finance Agency, <http://www.fhfa.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Federal Maritime Commission, <http://www.fmc.gov/> (last visited May 17, 2010) (containing “General Inquiries” link); Federal Trade Commission, <http://www.ftc.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Health Resources and Services Administration, U.S. Department of Health & Human Services, <http://www.hrsa.gov/> (last visited May 17, 2010) (containing “Contact Us” link on searching “HRSA Information Center”); Homeland Security, <http://www.dhs.gov/> (last visited May 17, 2010) (containing “Contact Us” link); HUD.GOV, U.S. Department of Housing and Urban Development, <http://www.hud.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Indian Affairs, U.S. Department of the Interior, <http://www.bia.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Interagency Alternative Dispute Resolution Working Group, <http://www.adr.gov/index.html> (last visited May 17, 2010) (containing red suggestion box soliciting comments and suggestions); International Trade Administration, <http://trade.gov/index.asp> (last visited May 17, 2010) (containing “Contact ITA” link); IRS.gov, <http://www.irs.gov/> (last visited May 17, 2010) (containing “Contact IRS” link); Library of Congress, <http://www.loc.gov/index.html> (last visited May 17, 2010) (containing “Contact” link); National Institute of Food and Agriculture, United States Department of Agriculture, <http://www.csrees.usda.gov/> (last visited May 17, 2010) (containing “Contact Us” link); National Mediation Board, <http://www.nmb.gov/> (last visited May 17, 2010) (containing “Public Information” link to contact information); National Oceanic and Atmospheric Administration, United States Department of Commerce, <http://www.noaa.gov/> (last visited May 17, 2010) (containing “Contacts” link); Office of Community Oriented Policing Services, U.S. Department of Justice, <http://www.cops.usdoj.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Office of Disability Employment Policy, United States Department of Labor, <http://www.dol.gov/odep/> (last visited May 17, 2010) (containing “Contact Us” link); Office of Science, U.S. Department of Energy, Low Dose Radiation Research Program, http://lowdose.energy.gov/national_labs.aspx (last visited May 17, 2010) (containing “Contact Us” link); Research and Innovative Technology Administration, Bureau of Transportation Statistics, <http://www.bts.gov/> (last visited May 17, 2010) (containing “Contact Us” link); Transportation Security Administration, <http://www.tsa.gov/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Chemical Safety Board, <http://www.csb.gov/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, <http://www.uscis.gov/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Commodity Futures Trading Commission, <http://www.cftc.gov/> (last visited May 17, 2010) (containing “Contact Us” link); U.S.

However, agencies were doing more than their Web sites or federal regulations reflected before the Open Government Initiative. Professor Carmen Sirianni documented how the Environmental Protection Agency (EPA) has been an innovative leader in collaborative governance.¹⁴⁷ He described how EPA uses watersheds as a cognitive frame for civic organizing; sponsors conferences of the watershed

Consumer Product Safety Commission, <http://www.cpsc.gov/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Customs and Border Protection, <http://www.cbp.gov/> (last visited May 17, 2010) (containing “Contacts” link); U.S. Department of Energy, <http://www.energy.gov> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Department of State, <http://www.state.gov/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Department of the Interior, <http://www.doi.gov/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Department of the Treasury, <http://www.ustreas.gov/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Drug Enforcement Administration, <http://www.usdoj.gov/dea/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Equal Employment Opportunity Commission, <http://www.eeoc.gov/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Fish & Wildlife Service, <http://www.fws.gov/> (last visited May 17, 2010) (containing “Find Us” link); U.S. Food and Drug Administration, U.S. Department of Health & Human Services, <http://www.fda.gov/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Forest Service, <http://www.fs.fed.us/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. General Services Administration, <http://www.gsa.gov/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Government Accountability Office, <http://www.gao.gov/> (last visited May 17, 2010) (containing “Contact Us” link); U.S. Government Printing Office, <http://www.gpo.gov/> (last visited May 17, 2010) (containing “Contact” link); U.S. Securities and Exchange Commission, <http://www.sec.gov/> (last visited May 17, 2010) (containing “Contact” link); U.S. Small Business Administration, <http://www.sba.gov/> (last visited May 17, 2010) (containing “Contact” and “Contact SBA” links); U.S. Social Security Administration, Social Security Online, <http://www.ssa.gov/> (last visited May 17, 2010) (containing “Contact Us” link); United States Access Board, <http://www.access-board.gov/> (last visited May 17, 2010) (containing “Contact Us” link); United States Agency for International Development, <http://www.usaid.gov/> (last visited May 17, 2010) (containing “Contact USAID” link); United States Coast Guard, U.S. Department of Homeland Security, <http://www.uscg.mil/> (last visited May 17, 2010) (containing “Contact Us” link); United States Department of Defense, <http://www.defense.gov/> (last visited May 17, 2010) (containing “Contact Us” link); United States Department of Justice, <http://www.usdoj.gov/> (last visited May 17, 2010) (containing “Contact” link); United States Department of Labor, <http://www.dol.gov/> (last visited May 17, 2010) (containing “Contact Us” link); United States Department of Transportation, <http://www.dot.gov/> (last visited May 17, 2010) (containing Department’s address and telephone information); United States Department of Veterans Affairs, <http://www.va.gov/> (last visited May 17, 2010) (containing “Contact Us” link); United States Institute of Peace, <http://www.usip.org/> (last visited May 17, 2010) (containing “Contact Us” link); United States International Trade Commission, <http://www.usitc.gov/> (last visited May 17, 2010) (containing “Contact Us” link); United States Trade and Development Agency, <http://www.ustda.gov/> (last visited May 17, 2010) (containing “Contact Us” link).

147. CARMEN SIRIANNI, INVESTING IN DEMOCRACY: ENGAGING CITIZENS IN COLLABORATIVE GOVERNANCE (2009).

movement; uses citizen advisory committees; hosts trainings, Web casts, and conferences; develops handbooks for planning conservation and management; provides matching grants; provides guides for deliberation in the form of community watershed forums; and enlists volunteers in monitoring performance.¹⁴⁸ He termed these “tools for democratic watershed collaboration.”¹⁴⁹ We have only begun to chart this new world of agencies using collaborative governance.

D. Technology-Driven Changes in Public Participation

Technological changes have yielded a lively scholarly debate over the future of public participation in governance. This debate has often focused on the narrow opportunity for participation through public comment on rulemaking, but technology is expanding the possibilities for public participation across the range of agency work.¹⁵⁰

Professor Cary Coglianese has argued that there is unlikely to be great benefit from technologically aided public participation.¹⁵¹ In a review of the empirical studies of rulemaking, he reports that traditional (that is, non-electronic) rulemaking generally did not produce many comments, with means ranging from six to twenty-five per rule in some studies, and medians ranging from twelve to thirty-three per rule in others, while most of the comments were from industry or organized stakeholders—not ordinary citizens.¹⁵² In comparison, more recent studies found that large numbers of citizen comments submitted by e-mail produced as much as a twenty-fold increase in the number of comments per rule.¹⁵³ However, other studies suggest no overall statistically significant change in the total number of citizen comments. Thus, he observes that the increase may be the product of outlier rules that generate disproportionate amounts of attention. Professor Coglianese discounts citizen comments on two inconsistent grounds. Either citizen comments are useless,¹⁵⁴ or citizens will not bother to

148. *Id.* at 166.

149. *Id.* See also XAVIER DE SOUZA BRIGGS, *DEMOCRACY AS PROBLEM SOLVING: CIVIC CAPACITY IN COMMUNITIES ACROSS THE GLOBE* (2008).

150. Markell, *supra* note 10, at 8.

151. Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943 (2006).

152. *Id.* at 950.

153. *Id.* at 956.

154. *Id.* at 951 (“Of those comments submitted by citizens, most were only the briefest of letters. Often they were handwritten notes; sometimes they expressed flippant, derogatory remarks toward the agency; and sometimes they were obviously cribbed from a grassroots group’s form letter. Business submissions were consistently longer and more sophisticated . . .”). Reporting on more recent e-mailed comments,

comment because it is easier to free ride on the comments of others.¹⁵⁵ He ultimately concludes technology may facilitate some modest increase in citizen participation.

There are several problems with this analysis. Clearly, a citizen who submits a form letter or e-mail is not free riding; she is using technology as an aid in organizing. Cognitive psychology teaches us that people will use fairness heuristic theory to take short cuts in decision-making; they will follow trusted others.¹⁵⁶ Lowering the costs of communicating make it easier for people to discover and then follow the trusted other. Moreover, not all rules are created equal. The outlier or salient rules are likely those that affect strongly held values among citizens. Coglianese appears to equate sophistication with expertise and substance, while the sheer numbers of unsophisticated comments are irrelevant. The problem is that numbers themselves can provide useful information; the comments may be all the same, but if they all identify the same strongly held value among thousands of ordinary citizens, this may be important information for an agency to consider. The most significant problem is that this critique of technologically aided participation accepts as valid the top-down, paternalistic, and expert-driven culture embedded in agencies that can itself be a barrier to meaningful participation.

In contrast, Beth Simone Noveck has argued that technology can strengthen democracy by broadening citizen capacity to collaborate in governance.¹⁵⁷ The key is to use technology to structure participation to avoid the mass of duplicative and unfocused text.¹⁵⁸ She describes Peer-to-Patent, a program that allows volunteer scientists and technology experts to collaborate with federal government patent officials to help them assess patent applications through online networks of self-selecting experts who share expertise in a form patent officials find

he observes that most “remain quite unsophisticated, if not duplicative. According to one recent study of about 500,000 comments submitted on an especially controversial EPA rule, less than 1 percent of these comments reportedly had anything original to say.” *Id.* at 958–59 (citations omitted).

155. *Id.* at 967 (observing that citizens “can simply free ride on the comments submitted by organized interest groups”) (citation omitted).

156. Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171 (2005), available at <http://arjournals.annualreviews.org/doi/pdf/10.1146/annurev.lawsocsci.1.041604.115958>.

157. See generally BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER, DEMOCRACY STRONGER, AND CITIZENS MORE POWERFUL (2009). Previously a professor at New York University School of Law and Director of the Institute for Information Law and Policy, she now serves in the Office of Science and Technology Policy as Deputy Chief Technology Officer.

158. *Id.* at 138–45.

useful.¹⁵⁹ Moreover, Noveck rejects paternalistic assumptions about citizens, observing that “amateurs possess extraordinary expertise.”¹⁶⁰ Ultimately, the question comes down to design.¹⁶¹

There are key differences between these perspectives. Not only do they differ as to the value of public knowledge, they differ dramatically in their vision of the potential for participation across the policy process. Professor Steven Balla conducted an empirical study of the ways that agencies have broadened participation beyond conventional notice and comment or negotiated rulemaking, which are the subject of most academic commentary.¹⁶² He documents agency invitations to participate far upstream in the policy process, before contemplated rulemaking, at a point when “agencies are seeking feedback on their initial ideas”¹⁶³ He uses information technology to catalogue this range of public involvement in a sample of rules at the Department of Transportation, describing collaborative forums, hearings, roundtables, and focus groups aimed not at consensus but at fostering collaboration more broadly; these are not negotiated rulemaking committees.¹⁶⁴ Moreover, he documents the communication between the agency and stakeholders through informal channels, such as telephone calls, letters, and in-person meetings with stakeholders.¹⁶⁵ The significance of this research is that there is plenty of room to expand public participation in governance in ways not expressly addressed by existing legal infrastructure.¹⁶⁶

159. *Id.* at 3–24.

160. *Id.* at 142.

161. *Id.* at 171 (arguing for careful design of policy wikis, citizen juries, online brainstorming, and other innovations). *See also* Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U. J. SCI. & TECH. L. 1 (2003); Beth Simone Noveck, *The Future of Citizen Participation in the Electronic State*, 1 I/S: J.L. POL’Y FOR INFO. SOC’Y 1 (2005).

162. Steven J. Balla, *Between Commenting and Negotiation: The Contours of Public Participation in Agency Rulemaking*, 1 I/S: J.L. POL’Y FOR INFO. SOC’Y 59, 61 (2005).

163. *Id.* at 62.

164. *Id.* at 80 (observing that “[i]n general, it was not uncommon for the DOT to turn to multiple forms of interaction and deliberation in specific cases where stakeholder interest and conflict were particularly pronounced”).

165. *Id.* at 81. While it is common knowledge such contacts occur, the research illustrates the gap in scholarly discussion and empirical research.

166. For an example of a policy pursuing broader engagement, see National Park Service, Director’s Order #75A: Civic Engagement and Public Involvement (Aug. 30, 2007), <http://www.nps.gov/policy/DOrders/75A.htm>, providing in part,

This philosophy means that we do more than meet the minimum legal requirements for public involvement in our decisions and activities. It means a regular, natural and sustained level of interaction with people both from within and outside the NPS. This, in turn, will enhance our ability to

E. A New Paradigm: The Open Government Initiative

President Obama's executive memorandum launched the Open Government Initiative (OGI), an effort across the federal government to transform how it uses technology and collaborative governance.¹⁶⁷ Collaborative governance can take various forms, from network governance, public-private partnerships, and contracts, to deliberative democracy and innovative online tools for civic engagement. However, for people to collaborate and participate meaningfully in governance, they must have information. The president's memorandum ties transparency and open government to collaborative and participatory governance. It also directs agencies to harness the power of technology to put information online.

The OGI is an umbrella for a number of innovative activities, including open data, spending, and open technology platforms, and efforts to increase public participation through more open policy development. For example, agencies must make data available in machine-readable data sets on a new Web site, www.DATA.gov, that includes three searchable data catalogs: "raw" data, tools, and geodata. Each is individually ratable on a five-point scale. There are new Web sites for citizens to track government spending on the economic recovery,¹⁶⁸ and the budget more generally.¹⁶⁹ The General Services Administration hosts a site for more open technology platforms.¹⁷⁰ The Office of Science and Technology Policy (OSTP) created a gallery to showcase other experiments. One was www.regulations.gov EXCHANGE¹⁷¹ to explore how to improve e-rulemaking. Moreover, the federal government is encouraging state and local governments to start their own open government efforts, with success in California¹⁷² and

achieve our mission, which is conserving park resources unimpaired for the enjoyment of present and future generations.

Id. at Part I.

167. Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 26, 2009).

168. See [Recovery.gov](http://www.recovery.gov), <http://www.recovery.gov> (last visited Mar. 1, 2010).

169. See [USAspending.gov](http://www.usaspending.gov), <http://www.usaspending.gov> (last visited Mar. 1, 2010).

170. See [Apps.gov](http://www.apps.gov), <http://www.apps.gov> (last visited Mar. 1, 2010).

171. See [regulations.gov EXCHANGE](http://www.regulations.gov/exchange/), <http://www.regulations.gov/exchange/> (last visited Mar. 1, 2010).

172. See [CA.gov, State of California, Data](http://www.ca.gov/data/default.html), <http://www.ca.gov/data/default.html> (last visited May 18, 2010).

2010:297

Collaborative Governance

335

others.¹⁷³ These efforts represent potentially transformative transparency. The OGI has generated high level positions like Chief Information Officer, Chief Technology Officer, Chief Information Officers, and other staff in many federal agencies.

The OGI also encourages agencies to involve the public in generating ideas for improving government and policy. Agencies are experimenting with a variety of technologies and social media to engage the public in the policy process. For example, the Department of Homeland Security conducted the Quadrennial Homeland Security Review using a three-stage dialogue process generate ideas on six topics related to security, deepen the discussion, prioritize goals, and recap conclusions.¹⁷⁴ To model more open platforms for generating ideas, the OSTP used the Open Government Dialogue for input to develop the OMB Directive.

F. The Open Government Dialogue

President Obama's executive memorandum launched the OGI, a federal government effort to develop policy in partnership with the public.¹⁷⁵ Governance requires sharing information, building knowledge, and using it to make policy. OSTP conducted a unique experiment: the Open Government Dialogue, a three-stage participatory online process for developing new policy. The National Academy of Public Administration (NAPA) later observed that agencies usually approach rulemaking top-down: experts draft a proposed rule and then seek public comments.¹⁷⁶ OSTP inverted this: it sought public comments before drafting anything. NAPA called it transformational—an effort to make a foundational shift in the relation of the public to policy-making. OSTP used commercially available tools.

173. See Data.gov, State/Local/Tribal Data Sites, <http://www.data.gov/statedatasites> (last visited May 18, 2010), showing state open data plans in California, Maine, Massachusetts, North Dakota, Utah, and the District of Columbia.

174. See *generally* Homeland Security, Quadrennial Homeland Security Review (QHSR), http://www.dhs.gov/xabout/gc_1208534155450.shtm (last visited May 28, 2010) (containing links to NAT'L ACADEMY OF PUB. ADMIN., THE NATIONAL DIALOGUE OF THE QUADRENNIAL HOMELAND SECURITY REVIEW (QHSR) Report to Congress on February 1, 2010, and archives of the the three-stage of dialogue process).

175. Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 26, 2009).

176. The White House, Office of Science and Technology Policy, <http://www.whitehouse.gov/administration/eop/ostp> (Wrap-Up of the Open Government Brainstorming: Collaboration, posted by Beth Noveck & Michael Baldwin on June 16, 2009 at 7:37 PM EDT) (on file with author) [hereinafter OSTP Blog].

NAPA hosted Phase I, in which OSTP asked participants to brainstorm online using www.IdeaScale.com.¹⁷⁷ After creating an account and logging in, participants posted ideas for making the government more transparent, participatory, and collaborative; for example, how to better use federal advisory committees, rulemaking or e-rulemaking or how best to use Web 2.0.¹⁷⁸ Participants could vote on each other's ideas. NAPA monitored the site for seven days and observed traffic that included 30,222 visits and 20,830 unique visitors from every state and territory and 123 countries.¹⁷⁹ About 4,000 people registered as users (19 percent of the unique visitors), contributing 1,129 unique ideas, 2,176 comments, and 46,469 votes.¹⁸⁰

After Phase I, NAPA's summary concluded that voters did use the voting mechanism to provide feedback on ideas. However, "birthers" flooded the site with comments regarding the President's birth certificate that most other users felt were off topic. NAPA could not remove comments and put them in a "parking lot" in www.IdeaScale.com. Moreover, the site did not let other users self-moderate by voting ideas down to minimize or hide them.

OSTP addressed these problems in Phase II, a Discussion Phase using the OSTP blog with a voting mechanism for self-moderating; a majority of negative votes minimized an entry but left an active link.¹⁸¹ Phase II allowed participants to deepen the conversation about ideas from Phase I by drafting longer suggestions and commenting directly on each other's entries. It ran from June 3–21, 2009, and attracted more than 1,000 comments in response to 16 topics.¹⁸² OSTP continues to use its blog for discussions concerning other Open Government

177. See National Academy of Public Administration, *Open Government Dialog*, <http://opengov.ideascale.com/> (last visited May 18, 2010).

178. See OSTP Blog, *supra* note 176, (Wrap-Up of the Open Government Brainstorming: Collaboration, posted by Beth Noveck & Michael Baldwin on June 16, 2009 at 7:37 PM EDT).

179. Brian Robinson, *Open Government Initiative Provides Plenty of Lessons* FED. COMPUTER WK., July 15, 2009, <http://fcw.com/articles/2009/07/20/feat-lena-trudeau-qanda.aspx>.

180. *Id.* Complete files of all the entries during the three phases of the process were freely available for download by following a link at <http://mixedink.com/opengov/> to a zip file at <http://blog.ostp.gov/2009/08/07/data-from-public-consultation-on-open-government/> (last visited Mar. 31, 2010) (on file with author).

181. See OSTP Blog, *supra* note 176, (Wrap-Up of the Open Government Brainstorming: Collaboration, posted by Beth Noveck & Michael Baldwin on June 16, 2009 at 7:37 PM EDT).

182. *Id.*

issues, such as the policy regarding cookies on government Web sites¹⁸³ and the White House visitor records.¹⁸⁴

Phase III used a wiki tool to draft policy; it lasted from June 22–July 6, 2009, and resulted in 305 drafts by 375 authors, with 2,256 people voting.¹⁸⁵ In theory, participants could draft language collaboratively. Of the three tools, Mixed Ink attracted the fewest participants by far. It had problematic features that allowed participants to use each other's language out of context. The tool was best suited to small groups who share a common goal and know each other.

G. The Open Government Directive

In December 2009, OMB issued the Open Government Directive,¹⁸⁶ informed by White House Chief Technology Officer recommendations and input from the Dialogue. The Directive focused primarily on the issue of transparent and open government and provided less guidance on how to make agencies more participatory and collaborative. The Directive established deadlines for agencies to adopt open government plans and take action. It directed agencies to publish government information online, including at least three high-value open format data sets within forty-five days and an open government Web page as the agency gateway within sixty days. It asked agencies to improve the quality of government information by designating a high-level senior official within forty-five days to be accountable for the quality and objectivity of agency spending information. It directed agencies to create and institutionalize a culture of open government by directing senior leaders to incorporate the values of transparency, participation, and collaboration into the ongoing work of their agency using all the professional disciplines. It directed each agency to develop an Open Government Plan within 120 days that describes how it will improve transparency and integrate public participation and

183. See Bev Goodwin, The White House, The White House Blog: Cookies Anyone (the http kind)?, <http://www.whitehouse.gov/blog/2009/07/24/cookies-anyone-http-kind>, July 24, 2009, 2:07 p.m. EDT.

184. See Norm Eisen, The White House, Open Government Institute, More than 250,000 White House Visitor Records Now Online, <http://www.whitehouse.gov/blog/2010/03/26/more-than-250000-white-house-visitor-records-now-online>, Mar. 26, 2010, 2:41 p.m. EDT.

185. See Executive Office of the President of the United States, Open Government Directive, Phase Three: Drafting, <http://mixedink.com/opengov/> (last visited May 18, 2010).

186. See The White House, Open Government Initiative, Open Government Directive, <http://www.whitehouse.gov/open/documents/open-government-directive> (last visited Apr. 20, 2010).

collaboration into its activities. It also created an enabling policy framework for open government to realize the potential of new technologies and forms of communication.

The Directive committed the Deputy Director of OMB to issue guidance on the quality of published federal spending information, develop a longer-term comprehensive strategy for federal spending transparency, and together with the federal Chief Information Officer and Chief Technology Officer, establish a working group. The working group focuses on transparency, accountability, participation, and collaboration within government to provide a forum to share best practices, coordinate efforts, promote participation and collaboration, experiment with new technologies, and take advantage of the expertise and insight of people inside and outside government, including researchers, the private sector, and civil society. The Directive's attachment provided more detailed guidance for agencies on the components of their Open Government Plan.

On April 7, 2010, federal agencies released their draft Open Government Plans.¹⁸⁷ Each agency has created a Web page dedicated to public engagement and transparency.¹⁸⁸ While a comprehensive analysis

187. See The White House, Open Government Initiative, Around the Government, <http://www.whitehouse.gov/open/around> (last visited May 18, 2010). This Web site has links to each agency's Open Government Plan.

188. See Council on Environmental Quality, <http://www.whitehouse.gov/administration/eop/ceq> (last visited May 18, 2010); Ed.gov, U.S. Department of Education, Open Government Initiative at ED, <http://www2.ed.gov/about/open.html> (last visited May 18, 2010); HHS.gov/OPEN, U.S. Department of Health & Human Services, (last visited May 18, 2010); NASA (United States National Aeronautics & Space Administration), Open Government at NASA, <http://www.nasa.gov/open/> (last visited May 18, 2010); Office of National Drug Control Policy, <http://www.whitehousedrugpolicy.gov/> (last visited May 18, 2010); Office of the United States Trade Representative, <http://www.ustr.gov/> (last visited May 18, 2010); Social Security Administration, The Open Government Initiative, <http://www.ssa.gov/open/> (last visited May 18, 2010); The White House, Office of Science and Technology Policy, <http://www.whitehouse.gov/open/around/eop/ostp> (last visited May 18, 2010); The White House, Open Government Initiative, United States Office of Management and Budget: Open Government, <http://www.whitehouse.gov/open/around/eop/omb> (last visited May 18, 2010); U.S. Department of Energy, Open Government Initiative, <http://www.energy.gov/open/> (last visited May 18, 2010); Homeland Security, Open Government, <http://www.dhs.gov/xabout/open-government.shtm> (last visited May 18, 2010); U.S. Department of State, Open Government Initiative, <http://www.state.gov/open/> (last visited May 18, 2010); U.S. General Services Administration, GSA's Open Government Initiatives, http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=29010 (last visited May 18, 2010); U.S. Small Business Administration, Open Government, <http://www.sba.gov/open/> (last visited May 18, 2010); United States Department of Agriculture, <http://www.usda.gov/open/> (last visited May 18, 2010); United States Department of Commerce, <http://open.commerce.gov/> (last visited May 18, 2010);

2010:297

Collaborative Governance

339

of these plans is outside the scope of this Article, it is safe to say that these plans and their associated Web sites are a great improvement over the previous limited contact and participation links.

OMB has also issued guidance clarifying the relation of the PRA to open government goals and policies.¹⁸⁹ That guidance allows agencies to use the internet and social media to conduct the functional equivalent of a public meeting without triggering the PRA.¹⁹⁰

H. The Future of the Open Government Initiative

The OGI is a major effort to transform how the federal government uses technology and collaborative governance. Its gains in transparency are potential game-changers. However, it has not made as much actual progress toward the goals of making government more

United States Department of Defense, DoD Open Government, <http://open.dodlive.mil/open-government-plan/> (last visited May 18, 2010); United States Department of Housing & Urban Development, <http://www.hud.gov/> (last visited May 18, 2010); United States Department of Justice, <http://www.justice.gov/open/> (last visited May 18, 2010); United States Department of Labor, <http://www.dol.gov/open/> (last visited May 18, 2010); U.S. Department of the Interior, Open Government Initiative, <http://www.doi.gov/open/> (last visited May 18, 2010); United States Department of the Treasury, Open Government Initiative, <http://www.treasury.gov/open/> (last visited May 18, 2010); United States Department of Transportation, Open Government Initiative, <http://www.dot.gov/open/> (last visited May 18, 2010); United States Department of Veterans Affairs, <http://www4.va.gov/open/> (last visited May 18, 2010); United States Environmental Protection Agency, <http://www.epa.gov/open/> (last visited May 18, 2010); United States National Science Foundation, Open Government Directive, <http://www.nsf.gov/open/> (last visited May 18, 2010); United States Nuclear Regulatory Commission, The NRC Approach to Open Government, <http://www.nrc.gov/open/> (last visited May 18, 2010); United States Office of Personnel Management, <http://www.opm.gov/open/> (last visited May 18, 2010); USAID (United States Agency for International Development), <http://www.usaid.gov/open/> (last visited May 18, 2010).

189. Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, Information Collection Under the Paperwork Reduction Act (Apr. 7, 2010), *available at* http://www.whitehouse.gov/omb/assets/inforeg/PRAPrimer_04072010.pdf.

190. Sunstein states:

It is worth emphasizing that facts or opinions obtained in connection with public meetings do not count as “information.” This “public meeting” exception allows agencies to engage with the public on the Internet so long as the engagement is the functional equivalent of a public meeting (i.e., not a survey). In addition, it is important to underline that general solicitations, such as *Federal Register* notices, do not trigger the PRA. It follows that agencies may offer the public opportunities to provide general comments on discussion topics through the Internet. More generally, agencies may use social media and web-based technologies in a variety of specific ways without triggering the PRA.

Id. at 3.

participatory and collaborative. There is tremendous potential. While experiments with open policy dialogues are exciting and groundbreaking, future efforts need to build on what we have learned so far. We need to find better ways to recruit participants, move from input to partnership, and embed continuous collaboration in government.

New research on public deliberation suggests that, contrary to the “stealth democracy” thesis that most people dislike politics,¹⁹¹ the overwhelming majority of people would like more opportunity to participate in some kind of deliberative session on public policy generally.¹⁹² Critics of public deliberation have pointed out that the usual suspects who participate are not representative of the general population—they are disproportionately white, well-to-do, older, and well-educated. The new research suggests that the existing forums have not reached people who are in fact more willing to deliberate than the usual suspects—people who are non-white, lower-income, and younger.

The Open Government Dialogue, while open to the public through published notice, entailed limited outreach beyond organized networks of interested stakeholders. The Dialogue allowed only a week or so for Phase I; this may have advantaged participants who knew it was coming. While individuals were in the majority in Phase I, by Phase III, participants were more representatives of organizations or networks. People who are less tech-savvy or tech-resourced may have found it difficult to participate. Moreover, it is critical to combine online with face-to-face means of collaborative governance. It guards against bias through any single form of public involvement.

Another area where there is room for improvement is the quality of participation. Some commentators have criticized the result as masses of less-than-useful text. Using a platform with appropriate functionality, a moderation feature enables users to police their own community, setting clearer expectations, and providing briefing materials can give people context and keep them on task. Giving users credit for their contributions may create an incentive for higher-quality suggestions.

The OGI produced input for OSTP to consider as it drafted the Open Government Directive, which is policy guidance for federal agencies from OMB. However, there is potential to do more than simply get good quality public input. Fung et al. describe the concept of

191. HIBBING & THEISS-MORSE, *supra* note 10.

192. Michael A. Neblo et al., *Who Wants to Deliberate – And Why?* (Harvard Kennedy Sch., Faculty Research Working Paper Series, Paper No. RWP09-027, 2009), available at <http://web.hks.harvard.edu/publications/workingpapers/citation.aspx?PubId=6772>.

“collaborative transparency,” using information technology to enable users to shape information content and act as self-disclosers; collaborative transparency systems employ interactivity and customize data.¹⁹³ The difference is that government is not providing information. Instead, government acts as convener and facilitator. For example, the public can create information for government by reporting an outbreak of disease to authorities online to map a pandemic.¹⁹⁴ Similarly, Noveck describes Peer-to-Patent, an online community of volunteer experts who help the federal government evaluate the originality of patent applications.¹⁹⁵ In both cases, the public is not commenting on policy; it is helping govern.

The United States is not alone. The United Kingdom¹⁹⁶ and Australia¹⁹⁷ are also exploring the power of technology for engaging citizens in governance. EU initiatives cover the entire spectrum of improving access, participation, efficiency, public agency coordination, and rethinking government processes.¹⁹⁸

193. ARCHON FUNG ET AL., FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY 151–69 (2007).

194. *Id.* at 141–45.

195. NOVECK, *supra* note 157, at 70–103.

196. *See generally* HM GOVERNMENT, PUTTING THE FRONTLINE FIRST: SMARTER GOVERNMENT (2009), *available at* <http://www.hmg.gov.uk/frontlinefirst.aspx>. The report finds that citizens want accountability, transparency, and more of a say in shaping public services.

197. *See generally* GOV'T 2.0 TASKFORCE DRAFT REPORT 2009, ENGAGE: GETTING ON WITH GOVERNMENT 2.0 (2009), *available at* <http://gov2.net.au/files/2009/12/Draft-Government-2-0-Report-release.pdf>. It proposes a “Declaration on Open Government” that finds that public information is a national resource; recommends that government use technology to increase collaboration in making policy and providing services; that government be more consultative, participatory and transparent; and that public servants use online engagement. *Id.* at xvi.

198. *See generally* Europe’s Information Society, ICT for Government and Public Services, http://ec.europa.eu/information_society/activities/egovernment/index_en.htm (last visited Mar. 31, 2010); *see also* Ministerial Declaration on eGovernment, approved unanimously in Malmö, Sweden on 18 November 2009, *available at* http://ec.europa.eu/information_society/activities/egovernment/conferences/malmo_2009/press/ministerial-declaration-on-egovernment.pdf; Smarter, Faster, Better eGovernment: 8th Benchmark Measurement: 8th Benchmark Measurement, Prepared by Capgemini, Rand Europe, IDC, Sogeti, and DTi for European Commission, Directorate General for Information Society and Media (November 2009), *available at* http://ec.europa.eu/information_society/eeurope/i2010/docs/benchmarking/egov_benchmark_2009.pdf.

III. A COLLABORATIVE GOVERNANCE ACT: A MORE MULTI-DIMENSIONAL MAP

There is a void on the map of administrative law; collaborative governance is uncharted territory. The OGI illustrates this. The OGI is entirely different from traditional public participation in rulemaking. It has moved public involvement far upstream in the policy process. The White House identified a policy issue through the presidential memorandum on transparent and open government; it ties together transparency, participation, and collaboration.¹⁹⁹ It set policy goals for these three dimensions of the relationship between government and the governed. However, it did not presuppose the means to reach those goals. It invited a dialogue. It was wholly transparent. It did not set an OMB directive in stone before it consulted broadly. Instead, it asked for public help in writing the OMB directive. This is not rulemaking or adjudication; moreover, it is not informal agency action as commonly envisioned.

The current state of administrative law is the product of unique moments in history that each produced a particular balance of five key dimensions in the relationship between government and the governed: accountability, efficiency, transparency, participation, and collaboration. The APA fostered agency accountability by providing both transparency and participation in rulemaking;²⁰⁰ in effect it limited the closed-room collaboration the Supreme Court rejected in *Schechter Poultry*;²⁰¹ however, it sacrificed efficiency. FACA used transparency and agency accountability to limit both participation and collaboration by stakeholders with government employees;²⁰² by limiting unnecessary committees, it arguably fostered efficiency. FOIA and the Sunshine Act used transparency and public participation to ensure accountability, this time limiting closed-room collaboration by multi-member public agency boards or commissions,²⁰³ it again sacrificed efficiency by imposing unfunded mandates on agencies.

However, collaboration is useful; sometimes it is efficient; and it is also fundamentally human. Hence, Congress used collaboration in both the ADRA and NRA to foster agency accountability by giving stakeholders a voice in making a decision that closely affected them,²⁰⁴

199. Transparency and Open Government: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4685 (Jan. 26, 2009).

200. 5 U.S.C. §§ 551–559, 701–706 (2006).

201. 295 U.S. 495 (1935).

202. 5 U.S.C. app. 2 §§ 1–16 (2006).

203. 5 U.S.C. §§ 552, 552b.

204. *Id.* §§ 571–584 (2006).

this voice entailed decisional authority, not simply giving an agency advice. Proponents emphasized that these processes would be more efficient by reducing the transaction costs of litigation. The statutes balanced transparency with collaboration by tying the NRA to FACA's transparency rules and carving out limited exceptions to FOIA in the ADRA.²⁰⁵ The E-Rulemaking Act fostered efficiency, transparency, and participation by leveraging evolving technology.²⁰⁶ It specifically encouraged collaboration, one of few statutes to use the word in administrative law.²⁰⁷ On its face, it supports innovation in collaborative governance through technology.

205. *Id.*

206. 44 U.S.C. §§ 3601–3606 (2006).

207. Unlike many other administrative laws, it makes express reference to collaboration and dialogue in 44 U.S.C.S. § 3602 (LexisNexis Supp. 2009):

(f) Subject to requirements of this chapter [44 USCS §§ 3601 et seq.], the Administrator shall assist the Director by performing electronic Government functions as follows:

...

(9) Sponsor ongoing dialogue that—

(A) shall be conducted 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 and enhance understanding of best practices and innovative approaches in acquiring, using, and managing information resources;

(B) is intended to improve the performance of governments in collaborating on the use of information technology to improve the delivery of Government information and services; and

(C) may include—

(i) development of innovative models—

(I) for electronic Government management and Government information technology contracts; and

(II) that may be developed through focused discussions or using separately sponsored research;

(ii) identification of opportunities for public-private collaboration in using Internet-based technology to increase the efficiency of Government-to-business transactions;

(iii) identification of mechanisms for providing incentives to program managers and other Government employees to develop and implement innovative uses of information technologies; and

(iv) identification of opportunities for public, private, and intergovernmental collaboration in addressing the disparities in access to the Internet and information technology.

However, other existing laws create obstacles and barriers to collaborative governance for risk-averse public servants in law departments and management. If we accept the normative goal of fostering collaborative governance, then it is time for the next generation of administrative law, one that realigns the five dimensions. Transparency has historically been a means to ensure governmental accountability. At this moment in history, technology is giving rise to nonlinear and potentially transformative increases in transparency.²⁰⁸ Current experiments like www.DATA.gov make it possible for citizens to use technology to organize and analyze machine-readable data sets; this is far beyond any disclosure required under FOIA.²⁰⁹ Geographic information system monitoring permits citizens to hold agencies accountable for local conditions related to policy. Live streaming video makes it possible for people anywhere in the nation to view and possibly participate in significant meetings or hearings. Technological transparency may make it possible to have more participation and collaboration without sacrificing either efficiency or accountability.

To do this, we need to authorize agencies to use public participation and collaboration much differently, much more, and much earlier in the policy process. The OGI and the Directive have some of the policy elements of a potential Collaborative Governance Act, but they are missing broad definitions of both online and in person processes, guidance for meaningful engagement, and the status of law. They are merely policy, reversible at the will of the next president. A CGA does not require any change to the APA provisions on rulemaking and adjudication. However, it could open the door to participation and collaboration upstream in the policy process, before rulemaking, and it could allow agencies to use collaborative governance across the vast bulk of what they do, the largely unregulated category of informal agency action.

The ADRA sparked a wave of agency innovation, the successes of which get overlooked in the ongoing criticism of negotiated rulemaking. The key elements of a CGA might mirror the ADRA. The ADRA contains four key structural components: (1) broad and non-exclusive authorization to use a variety of forms and processes in ADR; (2) a mandate that each agency appoint a dispute resolution specialist;

208. This might even be termed invasive transparency. Google Earth, online court filings, www.regulations.gov, and other applications are only the beginning.

209. 5 U.S.C. § 552 (2006); *see* Markell, *supra* note 10, at 7–12. Markell describes “dramatic developments in the world of technology” and how they “operate to facilitate government openness and opportunities for civic engagement.” *Id.* at 8. Professor Markell also discusses the relationship between these developments and heightened accountability. *See generally id.*

(3) required statements of agency ADR policy for the public; and (4) easing bureaucratic barriers to ADR use.²¹⁰ These four elements have combined to increase the use of ADR by federal agencies.²¹¹ Surprisingly, the ADRA accomplished this without a federal monetary appropriation to support agency efforts to implement programs.

A CGA could broadly authorize the family of deliberative and consensual processes in use across the policy continuum with the simple expedient of defining the phrase “public participation” for all purposes in the United States Code. For example, the CGA could provide that the phrase “public participation” includes but is not limited to collaborative governance with the general public, state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders at any point in the policy process. It could then define the key terms:

1. “Policy process” is defined as any action by the executive branch in developing, implementing, or enforcing public policy, including but not limited to identifying and defining a public policy issue, defining the options for a new policy framework, expanding the range of options, identifying approaches for addressing an issue, setting priorities among approaches, selecting from among the priorities, implementing solutions, project management, developing and adopting regulations, enforcing regulations, and assessing the impacts of decisions.
2. “Collaborative governance” includes engaging the public and stakeholders in person or aided by technology in the policy process through any method, model, or process including but not limited to public involvement, civic engagement, dialogue, public deliberation, deliberative democracy, public consultation, multi-stakeholder collaboration, collaborative public management, dispute resolution, negotiation, or other deliberative and consensual means.

210. 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 [and] . . . 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.”).

211. For a variety of resources describing federal agency ADR use, see Interagency Alternative Dispute Resolution Working Group, <http://www.adr.gov/> (last visited Mar. 31, 2010).

This would in one simple step authorize agencies to experiment with the broadest range of practices.

There is no consensus in the literature about best practices in collaborative governance. There has been insufficient research and evaluation, although there is promising work in the procedural justice literature that would provide a useful theoretical frame.²¹² Thus, it would be important to follow the ADRA model in two other respects. The ADRA gives agencies nonbinding guidance on principles to guide agency choice to use ADR. It also commits that choice to agency discretion. Similarly, it would be important to provide both guidance in the form of principles for collaborative governance and protect agencies in their experimentation by insulating the decision of whether or not to use collaborative governance from judicial review.

One source for principles to guide agency choice stems from the codes of practitioner groups. For example, the National Coalition for Dialogue and Deliberation has adopted certain principles of engagement,²¹³ as has the International Association for Public

212. See, e.g., David L. Markell, *Understanding Citizen Perspectives on Government Decision Making Processes as a Way to Improve the Administrative State*, 36 ENVTL. L. 651 (2006); David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 KAN. L. REV. 1 (2008); David L. Markell & Tom R. Tyler, *The Public Regulation of Land Use Decisions: Criteria for Evaluating Alternative Procedures*, J. EMPIRICAL LEGAL STUD. (forthcoming 2010), available at <http://ssrn.com/abstract=1475378>.

213. See generally National Coalition for Dialog & Deliberation, *The Seven Core Principles for Public Engagement*, http://www.thataway.org/?page_id=1442 (last visited Mar. 31, 2010). This document provides:

These seven principles reflect the *common* beliefs and understandings of those working in the fields of public engagement, conflict resolution, and collaboration. In practice, people apply these and additional principles in many different ways.

1. Careful Planning and Preparation

Through adequate and inclusive planning, ensure that the design, organization, and convening of the process serve both a clearly defined purpose and the needs of the participants.

2. Inclusion and Demographic Diversity

Equitably incorporate diverse people, voices, ideas, and information to lay the groundwork for quality outcomes and democratic legitimacy.

3. Collaboration and Shared Purpose

Support and encourage participants, government and community institutions, and others to work together to advance the common good.

4. Openness and Learning

Participation.²¹⁴ There is much to learn about how best to design collaborative governance in the policy process. A CGA could include provisions and budget for evaluation and research.

In anticipation of Congress and until we have a CGA, the executive branch could make progress through an appropriately forward-looking executive order incorporating these ideas. The contours of a draft executive order emerged from conference to strengthen democracy through transparency, electoral reform, dialogue

Help all involved listen to each other, explore new ideas unconstrained by predetermined outcomes, learn and apply information in ways that generate new options, and rigorously evaluate public engagement activities for effectiveness.

5. Transparency and Trust

Be clear and open about the process, and provide a public record of the organizers, sponsors, outcomes, and range of views and ideas expressed.

6. Impact and Action

Ensure each participatory effort has real potential to make a difference, and that participants are aware of that potential.

7. Sustained Engagement and Participatory Culture

Promote a culture of participation with programs and institutions that support ongoing quality public engagement.

Id.

214. *See generally* International Association for Public Participation, IAP2 Core Values: Core Values for the Practice of Public Participation, <http://www.iap2.org/displaycommon.cfm?an=4> (last visited Apr. 1, 2010). This document provides:

Core Values for the Practice of Public Participation

1. Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
2. Public participation includes the promise that the public's contribution will influence the decision.
3. Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
4. Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
5. Public participation seeks input from participants in designing how they participate.
6. Public participation provides participants with the information they need to participate in a meaningful way.
7. Public participation communicates to participants how their input affected the decision.

Id.

and deliberation, and community development (attached as Appendix A).²¹⁵

CONCLUSION

Collaborative governance is already in use at the local, regional, state, national, and transnational levels of government. It provides an alternative to adversarial governance based on interest group politics. It may provide ways for the public and stakeholders to partner with government to solve problems and further the collective good. The existing legal framework of collaborative governance within the executive branch provides no mandate or right to participate except (1) notice and comment in rulemaking (APA); (2) transparency or observation (FOIA and Sunshine Acts); and (3) miscellaneous dispersed public involvement mandates for specific agencies. There is discretion at the federal level to use collaborative processes under the rubric of negotiated rulemaking or dispute resolution, but there is no clear agency authority to provide for more public participation, collaboration, or deliberative practice than required by law. This ambiguity pits public involvement champions against more risk-averse agency legal counsel. Agency willingness and infrastructure for collaborative governance are mixed. On the federal level, the Open Government Directive is a step forward, but it focuses primarily on transparency and online input, not ongoing stakeholder collaboration or in-person deliberative public participation.

In order to learn what collaborative governance practices work in which contexts, we need to unleash the creativity and innovation of agencies in partnership with NGOs and the public. We need to develop our understanding of institutional design for collaborative governance.²¹⁶ In sum, we need clearer legal authority for agencies to experiment creatively with participatory democracy and collaborative

215. See AMERICA SPEAKS ET AL., WORKING TOGETHER TO STRENGTHEN OUR NATION'S DEMOCRACY: TEN RECOMMENDATIONS (2009), available at <http://www.everyday-democracy.org/en/Article.1040.aspx> (a final report on the August 2009 Strengthening Our Nation's Democracy).

216. ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (2005); see also Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1 (2008) (applying institutional analysis and development framework to dispute system design and surveying the relation of designs to various definitions of justice); Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323 (2009) (arguing the need to recognize the contextuality of new governance and reframe it as a contingent model of cause lawyering, but also applying design concepts by arguing that success depends on relationships among the parties, the substantive issues at stake, and the role of lawyers).

2010:297

Collaborative Governance

349

governance. By removing obstacles and barriers in administrative law, we can make way for creativity and learn how best to design processes for collaborative governance.

APPENDIX A: DRAFT COLLABORATIVE GOVERNANCE EXECUTIVE
ORDER

Section 1. *Policy.* Federal Agencies shall assure that the general public, state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders have the fullest opportunity permitted by law to engage meaningfully in governance and the policy process and to provide their Government with the benefits of their collective expertise and information.

Section 2. *Findings.* Public participation and collaboration enhance the Government's effectiveness, expand its range of options, improve the quality of its decisions, and enlist the problem-solving capacities of citizens and organizations outside Government. Knowledge and talent are widely dispersed in society, and all benefit when those skills and abilities are directed toward common goals.

Section 3. *Definitions.* For the purposes of this order:

(a) "Agency" means: (i) an executive agency as defined in section 105 of title 5, United States Code, other than the Government Accountability Office; and (ii) the United States Postal Service and the Postal Regulatory Commission.

(b) "Governance" means the acts, functions, processes, and powers of government, including but not limited to involvement of third parties, contracts, networks of public, private, and nonprofit organizations, and other new forms of governance.

(c) "Participation" means meaningful engagement in the processes of governance at all stages of policy process.

(d) "Collaboration" means working together with diverse interests to achieve common goals across boundaries and in multi-agency, multi-sector, and multi-actor relationships and may include the general public, state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders to address issues that cannot easily be addressed by any one organization on its own.

(e) "Participatory and collaborative governance" means engaging the general public, as well as state, regional, and local government agencies, tribes, nonprofit organizations, businesses, and other nongovernmental stakeholders in the policy process through methods including but not limited to public involvement, civic engagement, dialogue, public deliberation, public consultation, multi-stakeholder

collaboration, collaborative public management, dispute resolution and negotiation.

(f) "Policy process" means any action by the Executive branch in developing, implementing, or enforcing public policy, including but not limited to identifying and defining a public policy issue, defining the options for a new policy framework, expanding the range of options, identifying approaches for addressing an issue, setting priorities among approaches, selecting from among the priorities, implementing solutions, project management, developing and adopting regulations, enforcing regulations, and assessing the impacts of decisions.

(g) "Agency Participation and Collaboration Officer" means an employee of an agency who is a member of the Senior Executive Service or equivalent service, and who is designated by the head of the agency to carry out the duties set forth in section 6 of this order.

Section 4. *Fundamental Principles and Policy-making Criteria.* In formulating and implementing policies for participatory and collaborative governance, agencies shall, to the extent permitted by law, be guided by the following fundamental principles:

(a) Agencies shall interpret federal statutes and regulations broadly in favor of enhancing participatory and collaborative governance. The Administrative Procedure Act provides for the minimum level of public participation in the regulatory process. Federal agencies shall use their discretion to offer broader and more meaningful participation in governance beyond the floor set by the Administrative Procedure Act and other federal statutes providing for public participation.

(b) Federal managers shall acknowledge and use public input, to the fullest extent possible, in making policy decisions.

(c) Agencies shall recognize and support existing efforts by their employees to make government participatory and collaborative through the broad range of existing practitioners, including public involvement and civic engagement practitioners, conflict prevention and dispute resolution specialists, ombuds offices, regulatory affairs staff, and other disciplines. These staff shall be provided with appropriate resources, technical tools, and support. In deciding how to organize, expand, and institutionalize participatory and collaborative governance, agencies shall consult broadly with their own employees.

(d) Throughout the policy process, agencies shall follow best practices for public engagement and participation, which include but are not limited to careful planning and preparation, designing participation processes to occur early and at multiple points with the potential to have a meaningful impact on policy, incorporating diverse voices and ideas, collaboration and shared purpose, openness and transparency, shared learning, and rigorous evaluation for effectiveness. Agencies shall use generally accepted principles for public engagement:

(1) The public should have a say in decisions about actions that could affect their lives;

(2) Public participation includes the promise that the public's contribution will influence the decision;

(3) Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision-makers;

(4) Public participation seeks out and facilitates their involvement of those potentially affected by or interested in a decision;

(5) Public participation seeks input from participants in designing how they participate;

(6) Public participation provides participants with the information they need to participate in a meaningful way; and

(7) Public participation communicates to participants how their input affected the decision.

(e) Agencies shall use appropriate participatory and collaborative methods, including face-to-face, electronic, or other methods for participatory and collaborative governance, recognizing that the selection and mix of methods may vary

(1) across the policy process,

(2) in level of engagement,

(3) in who participates,

(4) in influence over the decision or outcome, and

(5) in the level of transparency or confidentiality

that is appropriate to the process, method, or topic.

Section 5. *Duties of Heads of Agencies.*

(a) To assist in implementing the policy set forth in section 1 of this order, the head of each agency shall integrate participatory and collaborative governance into its mission and operations to the extent permitted by law, including but not limited to:

2010:297

Collaborative Governance

353

(1) Amending all existing policies to ensure that they are consistent with the fundamental principles and policy making criteria articulated in section 4 of this order;

(2) Implementing new policies that are consistent with and necessary to further the fundamental principles and policy-making criteria set forth in section 4 of this order;

(3) Developing a plan for collaboration and public engagement, and incorporating that plan's goals into agency strategic plans and core processes, including but not limited to permitting, rulemaking, and other processes;

(4) Dedicating appropriate staff and budget to achieve the plan's goals for participation and collaboration activities;

(5) Developing human resource management policies that incorporate competencies in participatory and collaborative governance into hiring and promotion practices, training for managers and staff, measuring performance, and rewarding performance;

(6) Sharing competencies and capacity building training with federal, state, tribal and local partners and the public;

(7) Developing personnel and programmatic incentives, including recognition and awards for outstanding work in the areas of participation and collaboration;

(8) Developing metrics to measure and evaluate participatory and collaborative governance; and

(9) Building on existing staff resources and best practices whenever possible.

(b) Heads of agencies shall:

(1) Appoint a Participation and Collaboration Officer to assist with carrying out the duties described in section 5;

(2) Develop or enhance at least one demonstration project in participatory and collaborative governance dealing with a major agency policy issue in the policy process for the period of fiscal year 2010;

(3) Collaborate with other agency heads as appropriate on joint participation and collaboration initiatives. Agencies shall build on existing structures, such as the Federal Executive Boards, to implement

collaborative partnership efforts related to this order at the regional level. Agencies shall report to the interagency working group on their plans for national and regional collaboration related to this order; and

(4) Report annually to the Office of Management and Budget on the use and impact of both face-to-face and online approaches to participatory and collaborative governance.

Section 6. *Additional Duties of the Director of the Office of Management and Budget.*

(a) To assist in implementing the policy set forth in section 1 of this order, the Director shall issue instructions to the heads of agencies concerning the contents, and schedule for approval, of the plans and annual reports required by section 5 of this order.

(b) The Office of Management and Budget shall publicly report each year on progress implementing this Executive Order.

Section 7. *Duties of Agency Participation and Collaboration Officers.* Subject to the direction of the head of the agency, each agency's Participation and Collaboration Officer shall:

(a) Supervise the participation and collaboration activities of the agency, including development of the goals, specific plans, and budgets for which section 5 of this order provides;

(b) Advise the head of the agency, with respect to participation and collaborative activities administered in whole or in part by the agency, whether:

(1) goals proposed for the approval of the head of the agency under section 5(a)(3) of this order are:

(A) sufficiently aggressive toward full achievement of the purposes of Section 1 of this Executive Order; and

(B) realistic in light of authority and budgetary resources assigned to the specified agency personnel referred to in section 5(a)(4) of this order with respect to that program;

(2) means for measuring progress toward achievement of the goals are sufficiently rigorous and accurate; and

(c) Convene the specified agency personnel referred to in section 5(a)(4) of this order, or appropriate subgroups thereof, regularly throughout each year to:

2010:297

Collaborative Governance

355

- (1) assess performance of participation and collaboration activities administered in whole or in part by the agency;
- (2) consider means to improve the performance and efficiency of such activities; and
- (d) Report to the head of the agency on the implementation within the agency of the policy set forth in section 1 of this order.

Section 8. *Establishment and Operation of Participation and Collaboration Working Group.*

(a) The Director shall establish, within the Office of Management and Budget for administrative purposes only, a Participation and Collaboration Working Group (Working Group), consistent with this order.

(b) The Working Group shall be overseen by the President's Management Council and consist exclusively of:

- (1) the Deputy Director for Management of the Office of Management and Budget, who shall serve as Chair;
- (2) such agency Participation and Collaboration Officers, as determined by the Chair; and
- (3) such other full-time or permanent part-time employees of an agency, as determined by the Chair with the concurrence of the head of the agency concerned.

(c) The Chair or the Chair's designee, in implementing subsection (d) of this section, shall convene and preside at the meetings of the Working Group, determine its agenda, direct its work, and establish and direct subgroups of the Working Group, as appropriate to deal with particular subject matters, that shall consist exclusively of members of the Working Group.

(d) To assist in implementing the policy set forth in section 1 of this order, the Working Group shall:

- (1) Develop a federal community of practitioners of participatory and collaborative governance;
- (2) Create a clearinghouse across federal agencies for knowledge, programs, and expertise;
- (3) Develop extended networks of practitioners at the federal, regional, state, and local levels;
- (4) Develop an electronic platform to share information and expertise on participatory and collaborative practices;
- (5) Work with agencies to modify and augment existing performance management systems to include

public engagement, transparency and collaboration criteria and metrics;

(6) Coordinate its efforts with transparency and open government initiatives; and

(7) Collaborate with the staff at the Administrative Conference of the United States for administrative and technical support.

(e) To the extent permitted by law,

(1) the Office of Management and Budget shall provide the funding and administrative support the Council needs, as determined by the Director, to implement this section; and

(2) the heads of agencies shall provide, as appropriate, such information and assistance as the Chair may request to implement this section.

Section 9. *Judicial Review.* This order is intended only to improve the internal management of the executive branch, and it is not intended to, and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.