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Collaborative Governance: Integrating Management, Politics, and Law

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Abstract: *Scholars have engaged in an ongoing dialogue about the relationships among management, politics, and law in public administration. Collaborative governance presents new challenges to this dynamic. While scholars have made substantial contributions to our understanding of the design and practice of collaborative governance, others suggest that we lack theory for this emerging body of research. Law is often omitted as a variable. Scholarship generally does not explicitly include collaboration as a public value. This article addresses the dialogue on management, politics, and law with regard to collaborative governance. It provides an overview of the current legal framework for collaborative governance in the United States at the federal, state, and local levels of government and identifies gaps. The institutional analysis and development framework provides a body of theory that incorporates rules and law into research design. The article concludes that future research on collaborative governance should incorporate the legal framework as an important variable and collaboration as a public value.*

Practitioner Points

- In designing public engagement and collaborative processes, public managers must consider the legal framework that governs their action.
- Relevant law varies across the federal, state, and local arenas and shapes design choices.
- Collaboration itself is an important value to the public and stakeholders.
- Public managers must acquire an understanding of basic constitutional and administrative law to plan effective public engagement and collaborative governance.
- In seeking to innovate, public managers should consider what the relevant legal framework is and consult with legal counsel. However, they should also consider the likelihood that in-house counsel may be risk averse.
- When innovation presents a case of first impression, one for which there is no case law, managers should ask not whether they can innovate by using participatory and collaborative processes but how to do it consistent with their legal authority.

Public administration scholars have engaged in an ongoing dialogue about the relationships among management, politics, and law in public agencies' work (Christensen, Goerdel, and Nicholson-Crotty 2011; Rosenbloom 1983, 2013). Collaborative governance presents a new challenge for this dialogue. As an umbrella term, it describes various system designs and processes through which public agencies work together with the private sector, civil society, and the public to identify problems, issues, and potential solutions; design new policy frameworks for addressing them; implement programs; and enforce policies.

Public law is an important variable that is often missing in collaborative governance scholarship. Moreover, some scholars question whether adequate theory exists to motivate public administration's collaborative governance research program (Rosenbloom 2013). Additionally, the public administration literature generally has not explicitly addressed collaboration as a public value.

This article reviews the current dialogue on management, politics, and law as a framework for public administration research and reviews the role of law and public values. It suggests that a body of theory, the institutional analysis and development (IAD) framework (Ostrom 2005, 2011), can frame our collaborative governance research explicitly around law as rules. The article argues for explicitly including collaboration as a public value. It provides an overview of the existing legal framework for collaborative governance at the federal, state, and local levels of government and identifies gaps and public values reflected in administrative laws. Administrative

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law provides rules as variables for future research using the IAD framework on the relations among management, politics, and law in collaborative governance.

The Dialogue on Management, Politics, and Law in Public Administration Research

Running federal agencies requires expertise in public law (Campbell 2005). Agencies function as a "fourth branch of government": they act in both quasi-legislative and quasi-judicial ways in executing law (Schwartz 1991) and develop policy by filling in details left open in legislation and serving as supplementary lawmakers (Schwartz 1991, §§ 1.7–1.9). Agencies administer their legislative scheme through their enabling statute; they adopt and implement rules and regulations and manage projects and programs (Rosenbloom 2015, 63–88; Rubin 1989, 387–97). Through informal agency action and informal and formal adjudication resulting in orders, they enforce rules and regulations (Rosenbloom 2015, 89–122). Agencies affect the legal rights and obligations of the public and stakeholders (Rubin 1984).

The three branches supervise agency action through various means: the executive branch using executive orders, judicial branch using judicial review, and Congress through legislation and oversight. Congress may control administrative agencies through the budget, legislative instructions, and structural constraints, using legislation to react to agency action and committees, hearings, and investigations for oversight (Shipan 2005). Congress can use an agency's individual legislative authorization to limit it procedurally or use crosscutting statutes on public information, public participation, due process, and judicial review to control all agencies (Shipan 2005, 442–44). Understanding basic administrative and constitutional law is essential for public managers (Cooper and Newland 1997; Rosenbloom 2015).

David Rosenbloom (1983) provided a framework for public administration theory suggesting three lenses: management, politics, and law, reflecting action by the executive, legislative, and judicial functions of government, respectively. Management focuses on efficiency and effectiveness, analogous to private sector organizations. Politics examines legislative representativeness, responsiveness, and how interest groups shape policy and its implementation. Law focuses on accountability, procedural integrity, individual constitutional rights, and judicial review.

One approach to management, the New Public Management (NPM), rose to prominence in the 1980s as a reform movement (Hood 1991; Osborne and Gaebler 1992) to allow public agencies to move toward results-based accountability rather than compliance with rules and processes (Hood 1995). NPM uses professional managers as principals dealing with contractors as agents. It employs performance measures, tools such as output controls, competition, and market-like instruments to achieve public values of efficiency and results-based accountability (Hood 1991). Public agencies around the globe have adopted and institutionalized NPM practices (Dunleavy et al. 2006; O'Leary 2014).

Rosenbloom's (1983) managerial perspective encompasses NPM, although he notes (Rosenbloom 2013) that NPM disregards certain values that fall outside the narrow scope of an agency's mission. Other critics observe that NPM's privatization of public work through contracts and partnerships removes administrative law's legal oversight, threatening democratic values, such as accountability and citizen participation (Freeman 2000). O'Leary (2014) reports on how full implementation of NPM has created agency silos in New Zealand and interfered with interagency collaboration.

In response to perceived weaknesses in NPM, the New Public Governance (NPG) and/or public value movement arose (Bryson, Crosby, and Bloomberg 2014; Morgan and Cook 2014). NPG encompasses public values and considers "collectively expressed, politically mediated preferences consumed by the citizenry" (O'Flynn 2007, 358), including both value added to the public interest and processes that promote trust and fairness (Moore 1994; O'Flynn 2007). The public value approach calls for more public opportunities to deliberate and participate in administration (Nabatchi 2012) and identify public values (Stoker 2006). Drawing on Rosenbloom's (2013) category of the political perspective, it suits postcompetitive, collaborative, and networked forms of governance by using dialogue to build relationships in the context of mutual respect and shared learning (Stoker 2006). O'Leary's (2006) analysis of guerilla government illustrates conflict over values when public employees seek goals contrary to those of their supervisors; dialogue and conflict management are important within the agency as well as with the public in NPG.

However, some observe that law is often overlooked in public administration (Box et al. 2001; Moe and Gilmour 1995; Rosenbloom 2007). Wright (2011) and Rosenbloom and Naff (2010) find that public administration underutilizes legal resources. Newbold (2014) advocates a constitutional approach to reintegrate law and management to build civic literacy, preserve sectoral boundaries and accountability, embed constitutional values in management, and advance NPG's normative agenda. Recent reviews of collaborative governance scholarship (Ansell and Gash 2008; Bryson, Crosby, and Stone 2015; Emerson, Nabatchi, and Balogh 2012) and collaboration in environmental planning and management (Margerum 2011) acknowledge the role of rules and law but generally do not address specific statutes.

Recently, Rosenbloom (2013) revisited his tripartite framework in light of developments in collaborative governance and reinventing government. This article responds to his query regarding collaborative governance theory. For law and collaborative governance, he focuses on government work, state action, and more formal collaborative relationships such as contracting. However, collaborative governance encompasses a broader reach of networks and collaborative public management; many are informal and not reduced to a contract (e.g., Gazley, Chang, and Bingham 2010).

Christensen, Goerdel, and Nicholson-Crotty (2011) review the perceived conflict between law as a necessary constraint on government power and management as an essential source of innovation in the public interest. Law enables managers to do the public's work (Cooper 1997) and to address democratic values, including public participation, pluralism, and representation; involving public managers in legislation or litigation may advance democratic values and the public good (Christensen, Goerdel, and Nicholson-Crotty 2011, i131–33). This lawmaking role may

provide a synthesis for management, politics, and law; indirectly, it recognizes the increasingly networked and intersectoral, and therefore collaborative, context.

In public administration's ongoing dialogue on the relationship of law to management and politics, some public values may compete with others. Rosenbloom (2013, 3) suggests management's values are market-based efficiency such as cost effectiveness and customer orientation; politics' values are representation, responsiveness, and political accountability; and law's values are constitutional integrity, rights, and procedural due process. He observes elsewhere that values such as "social equity, social capital, citizen engagement, and vibrant democracy" (2013, 7) need more salience in law and practice.

Although scholars urge public managers to collaborate, they do not expressly list collaboration as a public value. Moore (1994) uses the word "collective" but not "collaborative." O'Flynn (2007) and Stoker (2006) use "collaborative" as a public management process for achieving public value, but not as a value in itself. Thomson and Perry (2006, 21) unpack collaboration as a process with five dimensions: governance, administration, organizational autonomy, mutuality, and norms of trust and reciprocity, citing Ostrom's (1990) extensive work on collective action in managing common pool resources. Fung (2015) discusses how citizen participation may advance effectiveness, legitimacy, and social justice. Nabatchi (2012) provides a broader, pluralistic range of public values that emerge from deliberative democratic discourse yet treats collaboration as a process in designing participation to identify public values.

Collaboration, like participation, is indeed a process, and it has instrumental value as a means to an end. However, it also has intrinsic value as an end in itself, unlike conflict or adversarial governance. As an end, collaboration represents broader acceptance of a policy or decision. Omitting collaboration from public values is significant because collaboration is both explicit and implicit in constitutional and administrative law. It is inherent as an end in the constitutional structure for separation of powers, which prevents meaningful action absent collaboration within and across the branches of U.S. government. The *Federalist Papers* illustrate that the founders anticipated and designed for collaboration in government's work (Bingham and O'Leary 2011). In sum, the ongoing dialogue on management, politics, and law has not sufficiently addressed rules as independent variables or collaboration as a public value in collaborative governance.

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Management, Politics, Law, and Collaborative Governance

Rosenbloom (2013, 8) observes that traditional hierarchical Weberian organizations remain dominant in government; contracting may be in decline in public cross-sectoral collaboration. Scholars have not reached consensus on what collaborative governance means (Rosenbloom 2013, 8). Emerson, Nabatchi, and Balogh (2012) acknowledge that the term is amorphous and its use inconsistent. Bryson et al. (2013) provide an analysis of design for public participation but refer largely to stakeholder processes. Ansell and Gash (2008) perform a meta-analysis of case studies on public policy and environmental dispute resolution as collaborative governance; their literature largely ignores collaborative public management (O'Leary, Bingham, and Gerard 2006). Some see collaborative governance as a descriptive term, not a theoretical construct.

Despite this terminological ambiguity, collaboration is here to stay. To respond to Rosenbloom (2013) on whether existing theory can help clarify collaborative governance research, this article uses a broad conception of collaborative governance as an umbrella term; it describes a family of governance processes that entail voice and collaboration among government, the private and nonprofit or civic sectors, and/or the public to accomplish the public's work. It encompasses public voice: the public and stakeholders working together across the policy continuum. It includes policy making in the legislative branch upstream. Within the executive branch, it includes the quasi-legislative arena upstream, implementation and management midstream, and quasi-judicial adjudication downstream. In the judicial branch, it includes adjudication downstream. It includes system designs through which public agencies can work with private and nonprofit sectors, civil society, and/or the public. Collaborative governance differs from traditional command and control arrangements in its use of negotiation, dialogue, deliberation, and consensus.

Scholars made substantial theoretical contributions to our understanding of collaborative governance in work predating use of the term. Examples include earlier work on new governance (Bingham, Nabatchi, and O'Leary 2005; Salamon 2002), networks (O'Toole 1997; Provan and Milward 2001), collaborative public management (Agranoff 2007; Agranoff and McGuire 2003; O'Leary, Bingham, and Gerard 2006), and consensus-building processes involving public, private, and nonprofit stakeholders (O'Leary and Bingham 2003; Susskind, McKearnan, and Thomas-Larmer 1999).

Broadly conceived, collaborative governance encompasses public and stakeholder voice influencing decisions across the policy continuum; figure 1 (adapted from Bingham 2009, 287) provides a map of collaborative governance from upstream to downstream in the policy process.

The stream can include all three branches of government or focus within a single agency (Bingham 2009). Upstream entails a broader spectrum of participants; generally, the stream moves from the diffuse public, to stakeholders, to parties to a dispute. Upstream in the quasi-legislative policy-making arena, it includes public engagement (Rosenbloom 2013, 8; Yang and Bergrud 2008), dialogue, and public deliberation (Fung 2006, 2015; Nabatchi and Leighninger 2015). Midstream in policy implementation and management, all three families of voice overlap, incorporating collaborative public and network management with stakeholders (Agranoff 2007; Agranoff and McGuire 2003; Bingham and O'Leary 2008; McGuire 2006; O'Leary and Bingham 2009; O'Toole 1997, 2015; Provan and Milward 2001) and potentially public engagement and environmental dispute resolution

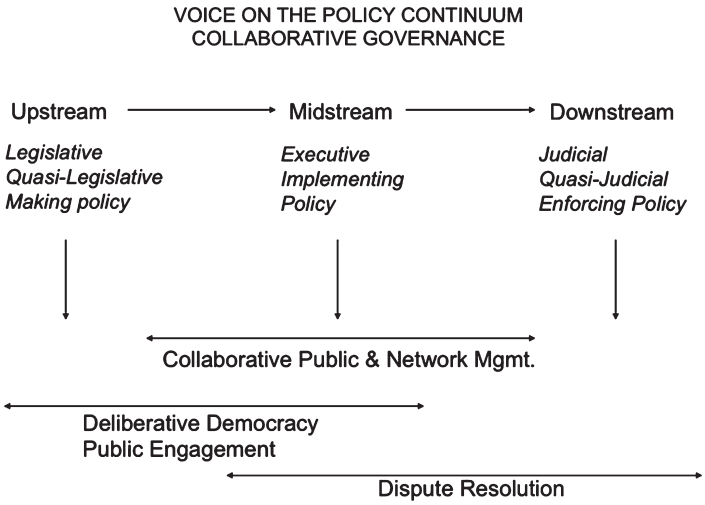

Figure 1 Collaborative Governance: Voice Processes across the Policy Continuum

(Margerum 2011; O'Leary and Bingham 2003; Podziba 2012; Susskind and Cruikshank 1987). Downstream, in the executive branch quasi-judicial arena, it includes negotiation, mediation, and other forms of dispute resolution involving a government actor (Bingham 2008–09; Susskind, McKearnan, and Thomas-Larmer 1999).

Some suggest that we lack theory to frame our research on collaborative governance (Rosenbloom 2013, 8) and would benefit from an explicitly systemic approach to the relationship among management, politics, and law. We actually do have sufficient theory, but we have not always used it. We can find it in the work of Nobel laureate Elinor Ostrom.

In one of the 75 most influential articles published in *Public Administration Review,* Vincent Ostrom and Elinor Ostrom (1971) addressed Wilson's advocacy of hierarchical organizations to produce efficient management outcomes and Simon's alternative of empirical studies to test theory in a variety of organizational forms. They elaborated on public choice theory (Buchanan and Tullock 1962) as substituting "man the decision maker" for "economic man" (Ostrom and Ostrom 1971, 205). They provided a way to integrate management, politics, and law by incorporating how rules shape decisions: "[P]ublic choice theory is concerned with the effect that different decision rules or decision-making arrangements will have upon the production of those events conceptualized as public goods and services" (205). Law provides a set of decision rules; management and politics provide and shape decision-making arrangements.

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Anticipating networked governance in 1961, Vincent Ostrom introduced the concept of polycentricity to describe "multiple levels and diverse types of organizations drawn from the public, private, and voluntary sectors that have overlapping realms of responsibility and functional capacities" (McGinnis and Ostrom 2012, 15). The Ostroms observed that overlapping jurisdictions may be more efficient in some circumstances:

> Once we contemplate the possibility that public administration can be organized in relation to diverse collectivities organized as concurrent political regimes, we might further contemplate the possibility that there will not be one rule of good administration for all governments alike. Instead of a single integrated hierarchy of authority coordinating all public services, we might anticipate the existence of multiorganizational arrangements in the public sector that tends to take on the characteristics of public-service industries composed of many public agencies operating with substantial independence of one another. (Ostrom and Ostrom 1971, 212)

They anticipated public managers negotiating to coordinate across different collectivities.

The Ostroms built the institutional analysis and development framework, a set of variables and relationships among variables (Emerson, Nabatchi, and Balogh 2012, 8). Elinor Ostrom (2005) described a set of universal building blocks and a method for studying how institutions function: participants or actors, positions filled by participants, allowable actions and their linkage to outcomes, the range of potential outcomes, participant control, accessible information, and costs and benefits. Using the IAD framework, an analyst can focus on the simplest unit of analysis, the action situation, which can vary in scale. Action situations and institutions are nested; families, firms, communities, industries, states, nations, and transnational alliances are all structures that can be viewed in isolation or as part of a larger whole (Ostrom 2005, 6).

Beyond the initial action situation, a researcher can "zoom out" to understand the exogenous variables. Ostrom (2005) suggested three exogenous categories: (1) the rules that participants use to order their relationships, (2) the biophysical world's attributes that the arena acts upon, and (3) the structure of the arena's more general community. Ostrom defined rules as "shared understandings by participants about enforced prescriptions concerning what actions (or outcomes) are required, prohibited, or permitted" (2005, 18). Rules can emerge through processes of democratic governance or through groups that organize privately, such as corporations, membership associations, families, or work teams (18–19). Working rules can evolve as functions of individual decisions in practice. Rules can be rules on paper or rules in use.

Researchers have used the IAD framework extensively to study collaborative community systems for managing common pool resources such as forests and seas (Ostrom 1990; for a searchable database of studies, see https://ostromworkshop.indiana.edu/library/database). Based on extensive empirical research, Ostrom (2000, 151–52) identified eight key design principles for effective and enduring collaborative institutions:

1. Boundary rules are clear.
2. Local rules in use assign costs proportional to benefits.
3. Members participate in making and modifying the rules.
4. Members select their own monitors, who are accountable.

5. Sanctions are graduated.
6. Users have "access to rapid, low-cost, local arenas to resolve conflict among users or between users and officials" (Ostrom 2000, 152).
7. National or local governments recognize the right to organize.
8. Governance activities are nested in multiple layers of an enterprise.

These principles suggest a framework for collaborative governance research that incorporates law, politics, and management. Formal rules and rules in use are a critical piece of institutional infrastructure in IAD. All forms of law are rules within this framework, whether in a constitution, statutes, regulations, executive orders, or court decisions. Similarly, rules in use can be contracts, policies, or text to codify practices.

An agency's enabling statute may be an independent variable as to the agency's work; however, the agency's regulations may be dependent variables shaped in part by the enabling statute.

Scholars are using Ostrom's work to analyze collaborative governance (Emerson, Nabatchi, and Balogh 2012) and collaboration in land use, urban, and environmental planning and management (Margerum 2011); they expressly reference rules within the IAD framework. Other scholars are explicitly examining the institutional structures embedded in legal text. For example, Feiock et al. (2016) use IAD to analyze city charters to identify structural and institutional diversity in the mayoral position, a question of management and politics. They propose a research agenda using this approach (Feiock and Scholz 2010) and intend to code for meaningful avenues for citizen input into public decision making, in part a political question. Siddiki et al. (2015) use a content analysis of policies and IAD to determine how policy rules affect collaborative governance arrangements in local food systems. Other theoretical approaches to empirical research on rules as law or rules in use, including sociolegal studies on procedural justice, legitimacy, and compliance (Tyler 1990), use the IAD framework. Emerson, Nabatchi, and Balogh (2012, 2, 6, 14–15) incorporate Ostrom's notion of rules in their work on collaborative governance regimes.

We do, then, have a theoretical framework that brings together management, politics, and law. In the IAD universal building blocks, arguably politics includes participant control, management includes costs and benefits, and law includes allowable actions and accessible information. Ostrom's (2000) design criteria include members participating in making rules and selecting their own monitors, which are questions of politics. Monitor accountability, graduated sanctions, and contexts in nested layers of governance are all questions of management. Moreover, Ostrom (2000, 2005) makes controlling for rules and laws as independent variables an essential part of comprehensive empirical research on governance systems. To advance research on public administration generally, we need to examine formal rules and rules in use that constitute the legal framework and practices for management and governance.

Collaboration as a Public Value: The Federal Legal Framework for Collaborative Governance

Collaboration is both a process and an outcome, both a means and an end in itself. As an end, it is a public value that is reflected in the history and language of administrative law. Rules in law and practice vary across national contexts. They shape the institutional structure on which we conduct public administration research. For this reason, scholars should both control for and be explicit regarding rules as variables. An agency's enabling statute may be an independent variable as to the agency's work; however, the agency's regulations may be dependent variables shaped in part by the enabling statute.

In the United States, administrative law reflects six key public values: those commonly addressed in the literature—accountability, efficiency, effectiveness, transparency, participation—but also collaboration (Bingham 2010, 303–5). Administrative law at the federal, state, and local levels has similar features but varies substantially. Moreover, collaborative governance may involve intergovernmental relations across these three arenas. The following is an overview of these arenas of administrative law and how specific statutes either facilitate or obstruct collaborative governance.

Over time, Congress has modified how it controls administrative agencies, particularly in relation to participation and collaboration. Independent from their enabling statutes, executive branch agencies must comply with many general crosscutting laws that affect collaboration. These include the Administrative Procedure Act (APA, 5 U.S.C. §§ 551–59, 701–6, originally passed in 1946) and subsequent legislation amending it, specifically, the Freedom of Information Act (FOIA, § 552) as amended by the Openness Promotes Effectiveness in Our National Government Act of 2007 (also referred to as the OPEN Government Act, Public Law 110–175), Government in the Sunshine Act (§ 552b), the Federal Advisory Committee Act (FACA, app. §§ 1–16), Negotiated Rulemaking Act (NRA, §§ 561–70), Administrative Dispute Resolution Act (ADRA, §§ 571–84), Government Performance and Results Act (GPRA, 5 U.S.C. § 306), and GPRA Modernization Act of 2010 (Public Law 111–352). The E-Government Act (44 U.S.C. § 3601) and Paperwork Reduction Act (PRA, 44 U.S.C §§ 3501–21), also relevant, were codified separately from the APA.

While President Barack Obama's executive memorandum on transparent and open government and the subsequent Open Government Initiative both urged agencies to adopt more participatory and collaborative governance practices, they are not embedded in the legal framework. These are not executive orders; they are not necessarily permanent. Moreover, most agencies have focused substantially more on transparency than participatory, deliberative, and collaborative processes (Amsler and Foxworthy 2014).

Major crosscutting administrative laws vary in their authorization of collaboration as a public value and of specific designs, including collaborative networks, public policy dispute resolution, mediation, public participation, dialogue, and deliberation (Bingham 2009, 2010). This section will review these federal statutes and specific provisions about public voice to identify law in relation to collaborative governance.

The APA: Rulemaking and Adjudication

The basic provisions of administrative law do not map perfectly onto federal agency activity. The APA framed agency action as adjudication and rulemaking following the New Deal (Funk, Lubbers, and Pou 2008). The APA gives the public the right to know about and, to a limited extent, participate in federal administrative agency action (Rubin 2003). It encompasses formal and informal agency action (Rubin 2003, 106), addressing quasi-legislative action (formal or informal rulemaking) and quasi-judicial action (formal or informal adjudication). 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 public opportunity to comment, although generally not through an oral evidentiary hearing. Historically, public access to comments was limited to the agency viewing room, and few but professional lobbyists participated (Rubin 2003, 102). Now, comments are available online (see http://www.regulations.gov). Agencies also have statutory authority for formal rulemaking using adjudicatory procedures (5 U.S.C. § 553), but formal rulemaking is infrequently used (Rubin 2003, 107; exceptions include the Food and Drug Administration approving new drugs). The only required public or stakeholder participation involves notice and comment in rulemaking and due process protections in formal rulemaking using adjudication; there is no express language on collaboration.

The APA also provides for adjudication to determine individual rights through a retrospective examination of evidence and facts resulting in an order (5 U.S.C. § 554). The APA speaks directly only to formal adjudication, which involves an adjudicatory hearing before an administrative law judge with many features of procedural due process, including notice, confrontation and cross-examination of witnesses, and a written decision. Federal agencies commonly do more informal adjudication, which is still subject to constitutional due process (Rubin 2003, 107). The APA is largely silent on this aspect of agency authority, although it expressly allows the public to petition for an agency response that can, in turn, be submitted for judicial review (5 U.S.C. § 555[e]).

The APA fostered agency accountability by providing both transparency and participation in rulemaking. In response to *Schechter Poultry* (*A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 [1935]), it limited secret collaboration with the captains of industry. Its disclosure and public comment requirements arguably sacrificed efficiency. However, the majority of agency work is not rulemaking and adjudication but rather administration, implementation, and public management. The APA does not expressly address these, except indirectly through judicial review (5 U.S.C. § 706), when those governed challenge agency action in court. Technological innovation is creating concerns about judicial review of informal agency action and hence accountability (Bingham 2010, 307–8). In sum, the basic provisions of the APA as adopted in 1946 did not contemplate or expressly authorize collaboration. They do not address collaborative governance; they contemplate a single agency engaged in rulemaking and adjudication.

FOIA and the Sunshine Act

FOIA and the Sunshine Act provided transparency for public records and agency meetings (Funk, Lubbers, and Pou 2008, 676–90, 725–32). FOIA creates a right to access government records (codified as an amendment to the APA, 5 U.S.C. § 552). The OPEN Government Act of 2007 amended it by broadening the definition of a news media representative and requiring a FOIA public liaison "who shall assist in the resolution of any disputes." The Sunshine Act created a right to notice and attendance at public meetings involving multimember boards or commissions at which agencies make decisions and take action (5 U.S.C. § 552b). FOIA and the Sunshine Act used transparency and public participation to ensure accountability, limiting secret or confidential collaboration; however, they again sacrificed efficiency by imposing unfunded mandates. These two statutes create barriers for agencies that want to negotiate and collaborate in ways that require confidentiality to build trust (Boxer-Macomber 2003; Faure 1996). Agenda rules restrict the topics of discussion; absent notice on the agenda, multimember boards and commissions cannot engage in creative deliberative dialogue with and among stakeholders and the public. This can inhibit collaboration and is an open realm for research on collaborative governance.

Federal Advisory Committees

In an effort to make government more responsive and collaborative, agencies created advisory committees; the practice grew dramatically inside the Beltway after World War II and outside it during the 1980s (Croley and Funk 1997). FACA made transparent the groups of stakeholders that agencies convened (Croley and Funk 1997, 459) because of concerns that special interests had gained unlimited access to decision makers (453). FACA requires (1) agencies to give notice of new advisory committees, (2) agencies to define the scope of their authority, (3) advisory committee membership to be fair and balanced in points of view represented, (4) a federal official to convene and attend each meeting, (5) meetings to be open to the public, and (6) public participation (Boxer-Macomber 2003, 4).

FACA anticipates a collaborative stakeholder group, the committee, which comprises representatives of organizations and can have some attributes of a network. However, FACA ties that group to a single agency as defined in the APA (5 U.S.C. app. § 3[3]). It also requires public records and public participation in committee meetings to ensure transparency and accountability. FACA specifically excludes from its scope local civic groups and bodies created to advise state and local government.

FACA met its congressional purpose; it substantially reduced the use of advisory committees (President of the United States 2000). By limiting unnecessary committees, it arguably fostered efficiency. However, it may have succeeded at the expense of effective policy making through collaborative governance. Inherent tension exists between practices favoring consensus building and FACA's restriction of advisory committees. Under FACA, risk-averse agency counsel may stop agencies from collaborating with citizens and stakeholders. In light of the growth in network, collaborative, or new governance, it may be time to revisit FACA.

Negotiated Rulemaking and Dispute Resolution

The original APA was silent on negotiation and dispute resolution. In the 1980s, agencies experimented with collaborative processes and consensus building (Funk, Lubbers, and Pou 2008, 397–410,

941–47; Senger 2003). Agency lawyers had concerns about statutory authority to use these processes in rulemaking or adjudication, fearing processes might be *ultra vires* agency action (Breger, Schatz, and Laufer 2001, 1, 9). Congress passed two amendments to the APA that were made permanent in 1996: the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act. The statutes expressly authorized negotiation and dispute resolution in rulemaking and adjudication respectively. The NRA subjects negotiated rulemaking committees to FACA (5 U.S.C. § 565). Use of negotiated rulemaking has been limited (Balla 2005), although there has been some recent expansion.

The ADRA has been broadly construed to apply to upstream public policy dialogues and downstream administrative hearings. It balances confidentiality with public access in federal agency alternative dispute resolution (Breger, Schatz, and Laufer 2001, 403–5), providing for confidentiality in certain circumstances to encourage collaboration (Interagency ADR Working Group 2006). The federal government has dramatically increased its use of dispute resolution processes (Bingham and Wise 1996; Nabatchi 2007; Senger 2003). The ADRA provides the strongest legal basis for collaborative governance processes.

Congress also fostered agency accountability in both the ADRA and NRA by giving people and stakeholders a voice in decisions that closely affect them. More than mere public participation, this voice affects the language of draft regulations through negotiation or the outcome of administrative adjudication by sending the case to mediation. Congress concluded that these processes would reduce transaction costs and improve agency efficiency (Senger 2003, 2–7). The statutes balanced collaboration with transparency by tying the NRA to FACA's transparency rules and carving out limited exceptions to FOIA in the ADRA.

However, the NRA and ADRA commit the use of these processes to agency discretion. Moreover, they do not directly address collaboration across agency boundaries or collaborative public or network management over time. They address primarily one-time events or cases. That gap in legal authority for collaborative governance persists.

Paperwork Reduction Act

The PRA reduced the paperwork burden for individuals, small businesses, educational and nonprofit institutions; federal contractors; state, local, and tribal governments; and other persons (44 U.S.C. § 3501). It seeks to ensure that the government collects information that confers the greatest public benefit. All executive branch agencies need clearance from the Office of Information and Regulatory Affairs before collecting information.

Practitioners perceive the PRA to pose certain barriers to public engagement, for example, in participatory budgeting through citizen surveys. It creates a hurdle for data collection for research and evaluation, essential tools for new governance coordination. The PRA weighs cost-effectiveness, a form of efficiency, more heavily than participation or transparency in the form of information collection. Croudsourcing through the Open Government Initiative may provide a collaborative alternative (Amsler and Foxworthy 2014).

E-Government and E-Rulemaking

The federal government has been working to modernize technologically since the 1990s (Stowers 2003). 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 information technology management (40 U.S.C. §§ 11,101, 11,302 [2010]).

Congress passed the E-Government Act of 2002 to apply new technologies to make government more accessible and transparent (44 U.S.C. §§ 3601–6). The act does not expressly require online public participation or interaction. Early policy choices restricted agency innovation (Commission on the Status and Future of Federal e-Rulemaking 2008). The Office of Management and Budget built a single, centralized system with a common database and public website for all agencies. The public can view materials and submit comments (see http://www.regulations.gov). The comment process itself is not deliberative or collaborative. The Federal Docket Management System improved access to notices and draft rules and simplified comment submission. It added e-mail notification, full-text search, and an RSS feed. It also enabled researchers to learn more about how people participate in rulemaking, both through formal notice and comment or negotiated rulemaking and interactive forums such as advisory committees, meetings, roundtables, and focus groups.

The E-Rulemaking Act fostered efficiency, transparency, and participation by leveraging evolving technology. It specifically encouraged collaboration—one of few statutes to use the word in administrative law (44 U.S.C. § 3602[9]); it refers 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. However, unlike the Open Government Initiative, it did not broadly authorize innovation.

Public Participation in Administrative Law

Public involvement in democracy in the United States dates back to colonial town hall meetings, but in its modern conception, public participation stems from the New Deal and the birth of administrative agencies (Beierle and Cayford 2002). The APA provided notice and comment in rulemaking as public participation. 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 (ACIR 1979; Moynihan 1969). After 1970, Congress explicitly incorporated public participation into new programs.

A 2010 study found that variations on the phrase "public participation" appeared more than 200 times in the United States Code (Bingham 2010), although not within a formal definitions section. Most frequently, the phrase appeared with the word "rulemaking" and often with regard to land use and the environment following the National Environmental Policy Act. It appeared as "adequate public participation," "full public participation," or "public participation to the maximum extent," or as a meaningful opportunity for public comment (Bingham 2010).

Some sections explained how and with whom agencies should conduct public participation, required consultation, or addressed specific processes such as workshops, focus groups, nomination procedures, and public education. Some required convenient location or quality by mentioning communication, cooperation, and exchange of information. Public participation was "good governance." "Public involvement" was also public participation. In contrast, "civic engagement" related to community service and voting rather than to participation in governance (for statutory references, see Bingham 2010).

In sum, although the United States Code used the phrase "public participation" in multiple contexts, no single express definition cut across all federal agencies (Bingham 2010). Our legal framework fails to adequately address participation in governance. Collaborative governance entails participation in the policy process by people and organizations outside government. Public engagement and involvement are evolving rapidly with advances in interactive online tools. This presents an opportunity for legislation expressly authorizing agencies to engage in participatory processes and collaboration across agency boundaries and sectors.

Collaborative governance entails participation in the policy process by people and organizations outside government.

Federal Administrative Law and Collaboration along the Policy Continuum

Figure 2 illustrates federal statutes related to public managers' use of collaborative governance in executive branch agencies on the policy continuum.

Upstream in policy making before rulemaking, individual agency enabling statutes may require public participation; FACA allows advisory committees. On the boundary between upstream and midstream, the NRA authorizes negotiated rulemaking as a quasi-legislative process. Midstream and downstream, the APA addresses quasi-legislative rulemaking and quasi-judicial formal or informal adjudication. Similarly, midstream and downstream, the ADRA authorizes voice and consensus processes.

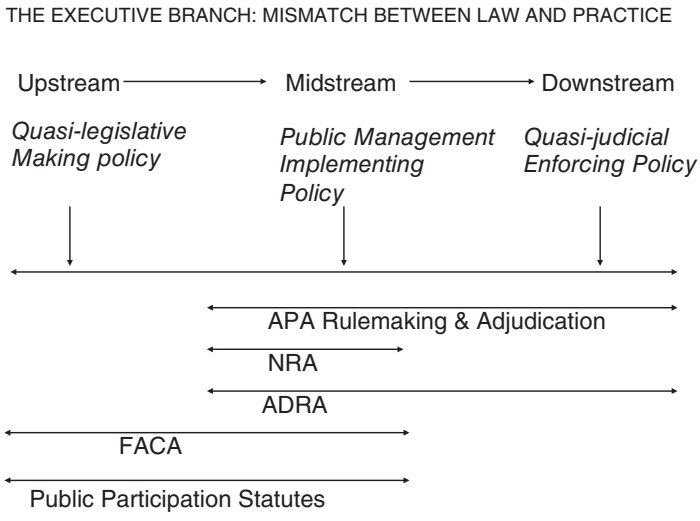

Figure 2 The Executive Branch and the Mismatch between Law and Collaborative Governance Practice

There is a major gap upstream in the legal framework for public engagement. Moreover, these foundational federal statutes for administrative law do not expressly address collaborative governance, collaborative public management, or network governance. The open research question is how this legal framework affects collaborative governance practice and systems.

The State Legal Framework for Collaborative Governance

The legal framework for collaborative governance at the state and local government levels is similar (for a detailed review, see Amsler and Nabatchi, forthcoming). States have APAs, FOIAs, Sunshine Acts, and often advisory committee statutes. Some have state ADRAs and NRAs (Texas and Florida). A few have the Uniform Mediation Act. Many have agency-specific enabling statutes on dispute resolution and mediation. Generally, the state legal framework for collaborative governance is weaker than the federal.

While there are 50 variations, states enact versions of the Model State Administrative Procedure Acts (MSAPA) of 1961, 1981, and 2010 as adopted by the Uniform Law Commission (http://www.uniformlaws.org). In 1961, the MSAPA did not use the word "participation." However, in section 2, "Public information; Adoption of Rules," it provided in part that "each agency shall … adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency." This authorized agencies to adopt rules for public interaction through participation in informal procedures. It was silent on negotiation and collaboration. Similar language exists in many states; it authorizes agencies to adopt rules that could promote participation and collaboration.

Importantly, in 1981, the MSAPA added a new provision on public participation, section 3–104, which required publishing "notice of proposed rule adoption" and that people have "the opportunity to submit in writing, argument, data, and views on the proposed rule." It also required "an oral proceeding on a proposed rule" open to the public upon timely written request submitted by 25 people. This allows the public to "present oral argument, data, and views on the proposed rule." It mandates that agencies adopt "rules for the conduct of oral rule-making proceedings." This expressly authorizes public participation, but it is silent on collaboration, dispute resolution, negotiated rulemaking, and mediation.

Negotiated rulemaking expressly engages the public through representative stakeholders in a consensus-based process that yields a draft rule. Both the 1961 and 1981 MSAPAs were silent on negotiated rulemaking; the 1961 version did not use the word "negotiate," and the 1981 version used it for commercial arrangements. Before 2010, some states added negotiated rulemaking to their APAs. In 2010, the Uniform Law Commission amended the MSAPA to include express language on negotiated rulemaking in section 303, "Advance Notice of Proposed Rulemaking; Negotiated Rulemaking" (see http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf). It authorized agencies to "solicit

comments and recommendations from the public by publishing an advance notice of proposed rulemaking" and to appoint a committee "to comment or make recommendations on the subject matter of a proposed rulemaking" provided the agency makes "reasonable efforts to establish a balance in representation among members of the public known to have an interest in the subject matter of the proposed rulemaking." It required that the committee operate by consensus decision making.

Section 303(d) also opened a door for other collaborative or public engagement processes: "This section does not prohibit an agency from obtaining information and opinions from members of the public on the subject of a proposed rule *by any other method or procedure*" (emphasis added). The Uniform Law Commission arguably authorized forms of collaborative governance.

Similarly, the 1961 MSAPA did not use the words "dispute," "resolve," "resolution," "mediation," or "negotiation" in any form. The 1981 MSAPA, although silent on dispute resolution and mediation, did use "resolve" and "resolution," but not in connection with alternative dispute resolution. It used "negotiate" with commercial agreements and "dispute" with regard to fact and law in adjudication.

Before 2010, some states added mediation or dispute resolution to their APAs. The 2010 MSAPA, section 403(c), "Contested Cases," expressly authorized mediation or dispute resolution in adjudication: "The presiding officer, with the consent of all parties, may refer the parties in a contested case to mediation or other dispute resolution procedure."

The Uniform Law Commission, independently and through a separate committee, drafted the Uniform Mediation Act (UMA), adopted in 2003. It expressly authorized government to mediate in section 2 (6), which defines "person" to include government or governmental subdivision, agency, or instrumentality. Section 2 (7) defines "proceeding" to include administrative or other adjudicative process. Section 3 provides that the UMA "applies where parties are required to mediate by…administrative agency rule or …referred… by …[an] administrative agency." Numerous states have enacted the UMA (see http://uniformlaws.org/Act.aspx?title=Mediation%20Act).

The language in the MSAPA and UMA provides authorization for state agencies to use voice on the policy continuum that is similar to federal administrative law. However, the state legal framework also contains significant gaps regarding collaborative governance. APAs authorize or require public participation but seldom define it; they lack express authority for dialogue, deliberation, or collaboration. They are silent on collaborative public or network governance. Although there is a reasonable basis to imply agency authority to make rules on collaborative processes, the gap inhibits innovation. Agencies could use the various participatory, deliberative, collaborative, and consensus-based processes that fall under the umbrella term "collaborative governance" from their inherent powers and APAs, but we have little empirical evidence on how their legal framework shapes public managers' choices.

Local Government and Voice

Some state APAs apply to local government and may provide them authority for collaborative governance processes such as dispute resolution and something analogous to negotiated rulemaking in draft ordinances. Generally, the legal framework for public participation presents a challenge for local government (Nabatchi and Amsler 2014). Early nineteenth-century courts viewed municipalities as creatures of the state that had only powers explicitly delegated in legislation; they enforced a public/private distinction to limit municipal action (Barron 2003). Municipalities coordinated with wealthy private actors and property owners who paid for public improvements such as streets through special assessments (Barron 2003, 2282) or paid for police protection through private deputies or fire protection through volunteers (2283). Dillon's rule conceived of municipalities as corporate creatures of the state with limited power to administer local affairs and make economic expenditures (2285); they were not government. In the late nineteenth century, urban reformers promoted "home rule" efforts to strengthen municipalities by creating a zone of action insulated from state legislative interference and corruption through special acts for a particular city. Ultimately, participation within home rule shifted from "the representative nature of government" to "direct participation by the citizenry in day-to-day activities" (Stewart 1976, 1). State home rule acts are generally silent on public participation, leaving it to APAs and Sunshine Acts. Special-purpose mandates for public participation may appear in land use and planning, transportation, elections, budgeting, education, environmental policy, and other statutes.

State legislatures rarely define "public participation" or "public comment." Sunshine laws confine public meetings to published agendas that may limit elected officials responding to public comment (Nabatchi and Amsler 2014). Monitoring requires staff resources, which leads municipal authorities to the "three-minutes-each-at-the-microphone" tactic (Leighninger 2013) rather than more deliberative approaches.

Few local governments have formally adopted new systems of deliberative public participation. Exceptions include Los Angeles, California (Cooper, Bryer, and Meek 2006); Portland, Oregon (Sirianni 2009); Minneapolis, Minnesota; and Dayton, Ohio (Leighninger 2006), which have institutionalized public participation. Examples include neighborhood councils or community boards with a formal role in local decision making and involving the public with government departments. These tend to be representative bodies rather than deliberative empowered ones for the diffuse public (Leighninger 2006, 2012). The local government arena has been a rich source for case studies on collaborative governance and public engagement (Agranoff 2007; Agranoff and McGuire 2003; Nabatchi et al. 2012).

However, public law remains undiscovered territory in empirical research on collaborative governance involving local government. A working group has drafted model language for a state Sunshine Act amendment, local ordinance, and policy to facilitate innovation in public engagement with governance (Amsler et al. 2013). The collaborative public management and network literature has not sufficiently addressed the public role in these forms of governance, nor is the relationship between administrative law geared to a single agency and collaborative governance through networks clear. Again, this is an open area for future research.

Building Collaboration as a Public Value into Governance

The legal framework for collaborative governance is incomplete in federal, state, and local law. Figure 2 illustrates the mismatch between administrative law and collaborative governance practices in the federal sector. Words such as "collaborate," "network," "dialogue," and "deliberative democracy" do not appear in Title 5 (Bingham 2010). Statutes mandate "public participation" but generally do not define it; the APA is silent on upstream uses. Statutes do not provide broad-based authority or mandate dialogue and deliberation, deliberative democracy, or collaborative public management. FACA and sunshine laws provide perceived constraints on collaboration by limiting advisory committees, mandating agenda adherence, and prioritizing transparency over the confidentiality necessary for trust building. Agencies are attempting innovation, particularly under the federal Open Government Directive, but obstacles persist as agency and in-house lawyers may restrict deliberative democratic practices to comply with APA rules on recording comments. State and local administrative law presents comparable issues affecting state agencies and local government.

The legal framework presents problems for public managers and agencies attempting to engage in collaborative governance. Using the IAD framework, we might apply empirical methods to compare governments' breadth and depth of collaboration and public engagement by controlling for differences in their legal frameworks. Law represents rules that shape the action arenas. Scholars are examining collaborative governance practices through various case studies. Using the IAD (Ostrom 2005), we can synthesize approaches from management, politics, and law to address the challenges of collaborative governance and help managers innovate.

Scholarship on institutional design focuses on the impact of specific rules on impartiality, uncertainty, accountability, voting, delegating, judging, transparency, and deliberation (Vermeule 2007). Researchers can build questions into surveys and interview protocols to determine what obstacles, barriers, incentives, or disincentives for collaboration stem from the legal framework. We can seek to identify how specific laws and rules shape the context for collaborative governance. We have considerable work to do.

Conclusion: Rules, Law, and Research on Collaborative Governance

Vincent and Elinor Ostrom's scholarship and the IAD framework can provide a set of tools for empirical research on systems using collaborative governance that might facilitate a synthesis of management, politics, and law. We seem to agree that there are elements of all three at work in every public agency. The challenge is capturing the influence of each on collaborative governance. Elinor Ostrom developed a syntax and language for institutional analysis, focusing on how collaboration and cooperation emerge and work in stable governance structures. She urged researchers to use a common language; without it, we were left talking past one another in a "babbling equilibrium" (Ostrom 2005, 176).

Our scholarship has implications for practice. Collaborative governance entails innovation. In seeking to innovate, public managers should consider the relevant legal framework and consult with legal counsel. However, they should also be aware that in-house counsel may be risk averse. When innovation presents a case of first impression because there is no relevant case law, managers should ask how to innovate by using participatory and collaborative processes consistent with legal authority.

Collaboration is embedded in law as an independent public value, an end in itself and not simply a process. The law shapes what public agencies do and how public managers manage; it reflects the process of representative politics. The legal framework for collaborative governance needs improvement. Future work will consider model legislation to provide public managers and agencies with legal authority to integrate public and stakeholder voice and collaboration across the policy continuum. The legal framework helps shape collaborative governance; it is time to build law back into our research designs in public administration.

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