# Deliberative Democracy and Dispute Resolution*

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## I. INTRODUCTION

Imagine the following: a small city of about 30,000 must decide whether to allow construction of a controversial industrial facility. The plant will generate sorely needed jobs and tax revenue, but it might also pose serious environmental and public-health risks. Under normal circumstances, the city council would require the developer to undertake a set of technical studies that city departments would review before a permit could be granted. Then, the city government (including several elected and/or appointed boards) might hold a hearing, and ultimately vote on whether to approve the project. Along the way, there might be a lot of letters to the editor of the local newspaper and even a referendum.

Consider this alternative: city council hires a professional neutral—a mediator—to meet privately and confidentially with all relevant stakeholders, both in and outside the city, to learn their concerns about the proposed project. Along with the developer of the proposed facility and appointees from a range of city and regional departments, carefully selected stakeholder representatives are invited to engage in joint fact-finding to see if they can resolve their differences. After a year of highly transparent and mediator-facilitated problem-solving, the forty (or so) stakeholder representatives sign an agreement. It spells out the circumstances under which they can all support a revised version of the project. It also commits them to making a series of voluntary payments and other contingent commitments from the developer and the city—maybe even the state and federal government, too—that go well beyond what the city has a statutory right to require. They all present the agreement to the city council, which ratifies it. Its details are added as conditions to the various formal permits granted to the developer. The agreement creates a joint monitoring committee whose staff is paid by the project developer. The project goes forward with little or no political opposition.

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Which of these two scenarios describes a process that is more democratic?[1] Which is more likely to produce a socially beneficial outcome? If it is possible to avoid the rancor and cost of the litigation and political confrontation that typifies the first scenario, wouldn't the second be preferable? If the second scenario yields an informed consensus that all the relevant stakeholders and agencies support, would it, by definition, be a better outcome?

There are three problems with the way our traditional approach to democratic decisionmaking allocates scarce resources, establishes policy

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[1] This is not a rhetorical question. There is no clear understanding of what democracy requires in the United States with regard to this kind of decisionmaking beyond enforcement of the Constitution. At various times in our history, and through regulatory and administrative means, we have added additional mandates regarding public participation in governmental (particularly regulatory) decisionmaking. But it is not clear that these have yet reached the point of requiring the kind of consensus building described above. For more on this debate, see IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 35–49 (2003); Amy Guttman & Dennis Thompson, *Deliberative Democracy Beyond Process*, *in* DEBATING DELIBERATIVE DEMOCRACY 31–53 (James S. Fishkin & Peter Laslett eds., 2003); Robert E. Goodin, *Democratic Deliberation Within*, *in* DEBATING DELIBERATIVE DEMOCRACY, *supra* note 1, at 54–79; Philip Petit, *Deliberative Democracy, the Discursive Dilemma, and Republican Theory*, *in* DEBATING DELIBERATIVE DEMOCRACY, *supra* note 1, at 138–62; JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM 81–104 (1991); *see generally* JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 39–138 (1980) (describing a town meeting as a form of a government system's use of democracy); JOSHUA COHEN & JOEL ROGERS, ON DEMOCRACY 146–83 (1983) (describing a democratic conception of politics and a political philosophy for a social order that is alternative to capitalist democracy). For more on the distinction between deliberative democracy and consensus building, see LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, BREAKING ROBERT'S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS 18–40 (2006) [hereinafter SUSSKIND & CRUIKSHANK, BREAKING ROBERT'S RULES]; LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 136–85 (1987) [hereinafter SUSSKIND & CRUIKSHANK, BREAKING THE IMPASSE]; *see generally* Lawrence Susskind, *An Alternative to Robert's Rules of Order for Groups, Organizations, and Ad Hoc Assemblies That Want to Operate by Consensus*, *in* THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 3–57 (Lawrence Susskind, Sarah McKearnan & Jennifer Thomas-Larmer eds., 1999) (describing consensus building) [hereinafter Susskind, *Alternative to Robert's Rules*]. The comparison between democracy and consensus building was the topic of an MIT Symposium at which the authors listed above participated. *See* Stellar Course Management System, *Workshop on Deliberative Democracy and Dispute Resolution* http://stellar.mit.edu/S/project/deliberativedemocracy/ (last visited June 27, 2009); *see also* Lawrence Susskind, *Can Public Policy Dispute Resolution Meet the Challenges Set by Deliberative Democracy?*, DISP. RESOL. MAG., Winter 2006, at 5, 5–6 [hereinafter Susskind, *Public Policy Dispute Resolution*].

priorities, and sets health, safety, and related standards in the public arena. The way we make public policy and "do" democracy in America can be improved in a rather straightforward manner by addressing these three problems in a new and different way. The purpose of this article is to describe these three problems and then explain why and how a "consensus building approach" to public decisionmaking can produce better—that is, fairer, stabler, wiser, and more efficient—results.[2]

The three problems are:

1. The Majority Rule Problem: we allow the majority to rule, but if we tried, we could come close to meeting the needs of all the stakeholders affected by or involved in key public policy choices.

2. The Representation Problem: we rely on general-purpose elected officials rather than ad hoc representatives selected specifically to speak on behalf of the scope and intensity of concerns of key stakeholder groups in public policy decisions.

3. The Adversarial Problem: we accept an adversarial approach to decisionmaking when facilitated joint problem-solving would produce results that are fairer in the eyes of the parties, more efficient from the standpoint of an independent analyst, more stable as defined by the terms of the agreement, and wiser, in retrospect, according to the parties and independent analysts.

## II. THE PROBLEMS OF DEMOCRATIC DECISIONMAKING

### A. *The Majority Rule Problem*

Our democracy's legislative bodies rely on majority voting. Most people think that the best a democracy can do is to identify choices and make decisions that satisfy 51% of those who vote on the matter. The other side of this assumption is that the other 49% should accept defeat.

We rarely even try to make policies or decisions aimed at meeting the interests of all (or almost all) the stakeholders involved in key public policy decisions. Why not? After all, it is unlikely that we will come close to meeting the interests of all the stakeholders by accident. There is little or no chance of it if we do not make a good-faith effort to try. Near-unanimity will not emerge as a byproduct of majoritarian decisionmaking. Why not at least try to achieve consensus? Many people assume that consensus will take too

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[2] For a more complete discussion of these four criteria, see SUSSKIND & CRUIKSHANK, BREAKING THE IMPASSE, *supra* note 1, at 80–81. The importance of these four criteria and their relationship to democratic decisionmaking were raised initially in Lawrence E. Susskind, *Keynote Address: Consensus-Building, Public Dispute Resolution, and Social Justice*, 35 FORDHAM URB. L.J. 185, 196 (2008).

long to work out, cost too much, and risk the prospect of a stalemate. But why not specify a limited timeframe and budget to try to achieve near-unanimity, and then settle for something as close to that as possible once it is clear we can not do any better?[3]

We tend to think that majority rule is the best method a democracy can implement. However, the fact is that large and diverse groups of stakeholders have confronted divisive and complex decisions and have achieved near unanimity.[4] In almost all instances, they committed to a process that offered all the relevant stakeholders the chance to help generate a proposal that was better for everyone involved than the most likely alternative.[5] These groups agreed at the outset that consensus would be achieved only if almost every

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[3] *See* Susskind, *Public Policy Dispute Resolution*, *supra* note 1, at 6–7 (defining "consensus" as the result of an effort to seek unanimity, but in which participants settle for overwhelming agreement, as long as every effort has been made to accommodate holdouts who, in turn, have been given a chance to propose modifications to the prevailing agreement that would make it better for them and no worse for anyone else).

[4] For analyses of large sets of successful collaborative efforts, see LAWRENCE SUSSKIND ET AL., MEDIATING LAND USE DISPUTES: A HANDBOOK FOR LOCAL OFFICIALS (1999); THOMAS C. BEIERLE & JERRY CAYFORD, DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS (2002) (providing research on developing an understanding of the social value of public participation and understanding what makes some processes successful and others not); Howard Kunreuther et al., *Siting Noxious Facilities: A Test of the Facility Siting Credo*, 13 RISK ANALYSIS 301, 301–18 (1993) (describing the use of collaborative efforts in the siting of noxious facilities); Center for Public Policy Dispute Resolution, *Case Studies of Resolving Public Disputes*, http://www.utexas.edu/law/academics/centers/cppdr/services/resolv_pub_disp.php (last visited June 27, 2009); *cf.* Thomas C. Beierle & Jerry Cayford, *Evaluating Dispute Resolution as an Approach to Public Participation*, RESOURCES FOR THE FUTURE, Aug. 2001, at 11–15, *available at* http://www.rff.org/documents/RFF-DP-01-40.pdf. Beierle and Cayford look at several hundred cases studies of dispute resolution, but their sample includes many instances where no effort was made to ensure that (1) stakeholder group representatives were actually chosen by the relevant constituencies (and not appointed by public agencies); (2) representatives were given a clear mandate by their constituents after being involved in some kind of joint fact finding process; and (3) representatives were responsible for bringing back the penultimate version of any agreement to their constituents for review before anything was finalized. In recent years, these have come to be considered best practices (along with the involvement of a trained mediator selected with the concurrence of all the parties). So, it is not surprising they found that many dispute resolution efforts did not lead to enthusiastic implementation of agreements by large numbers of stakeholders who were not at the table themselves. In contrast, perhaps the most compelling analysis of case studies of consensus building efforts is Judy Innes & David Booher, Beyond Collaboration: Planning and Public Policy for the 21st Century (unpublished manuscript, on file with the author).

[5] *See generally* SUSSKIND ET AL., *supra* note 4.

stakeholder representative got a better outcome than they could have expected otherwise.[6]

First, consider the logic of it. With a tightly drawn timetable and detailed ground rules that they helped to establish, a wide range of stakeholders volunteered to sit at a table. They did so because they were offered a chance to participate in shaping public policy and because there was a proviso: There would be no agreement unless almost all participants signed a written set of commitments that offered, in their view, a better result for them than they could otherwise reasonably expect.

How can a voluntary problem-solving approach to policymaking come up with something better for all parties than a majority-rule vote by duly elected and appointed officials? The answer is to be found in the system of representation, management of the conversation by a professional neutral, a commitment to joint fact-finding, and the techniques of value creation or integrative bargaining.[7]

### B. *The Representation Problem*

General-purpose elected officials can rarely if ever reflect the intensity of concern of all the various factions within the electorate.[8] Elected officials usually see themselves as accountable to the people who voted for them and whose votes they will need to secure re-election.[9]

Even if that were not true, all-purpose elected officials cannot possibly know enough about every issue that comes before them to shape the most effective way of addressing the issues while balancing constituents' conflicting interests. It is unrealistic to expect even the appointed staffs they select to be both experts on every issue and also willing, able, and allowed to bring an independent non-partisan perspective to the choices before them.

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[6] *See id.*

[7] For a more complete discussion of these criteria, see MULTIPARTY NEGOTIATIONS (Lawrence Susskind & Larry Crump eds., 2008). *See also* SUSSKIND AND CRUIKSHANK, BREAKING THE IMPASSE, *supra* note 1, at 33–34 (explaining value creation in multiparty negotiation).

[8] SOL ERDMAN & LAWRENCE SUSSKIND, THE CURE FOR OUR BROKEN POLITICAL PROCESS: HOW WE CAN GET OUR POLITICIANS TO RESOLVE THE ISSUES TEARING OUR COUNTRY APART 33–46 (2008).

[9] *See generally* G. BINGHAM POWELL, JR., ELECTIONS AS INSTRUMENTS OF DEMOCRACY: MAJORITARIAN AND PROPORTIONAL VISIONS 159–232 (2000) (describing how citizen preferences, the majoritarian policy vision, and the proportional influence vision may affect political parties and politicians).

We gave up any claim to this possibility when we politicized the selection of almost every layer of expertise in government. To the winner go the spoils.[10]

It makes more sense for each stakeholder group to choose an ad hoc representative to speak for them on each key public-policy choice that concerns them. In addition, we need to be able to redefine the relevant categories of stakeholders for each public policy decision if we are going to ensure accountable and effective representation.

How would this work? To flesh out the hypothetical example introduced above, imagine that a city council charged with making a decision selects a professional neutral. This person initiates a procedure called a conflict assessment.[11] The neutral meets with each potential stakeholder group to learn about its interests, priorities, and concerns. With this information in hand, the neutral "maps the conflict."[12] The neutral identifies the public policy questions involved and the stakeholder groups that ought to be included in an attempt to address them.[13] He or she suggests ground rules, a timetable, a budget, and a joint fact-finding agenda.[14] This assessment, structured as a draft proposal, is then circulated for comment among everyone interviewed. Based on their reactions, the neutral can offer the elected body a clear statement regarding whether it is desirable to move ahead with a consensus-building process, and if so, who should be involved and how it should be structured.[15]

If the neutral moves forward with this process, ad hoc representation is guaranteed. Clusters of stakeholders in relevant categories can caucus to select their own spokespeople. Proxies can speak for hard-to-represent constituencies. The neutral can assist any group that needs help preparing to participate.[16] The neutral can also manage a process of documenting the

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[10] For a recent example of this problem, see DAVID IGLESIAS, IN JUSTICE: INSIDE THE SCANDAL THAT ROCKED THE BUSH ADMINISTRATION (2008) (describing the Bush administration's politically partisan management of the Justice Department).

[11] *See* Lawrence Susskind & Jennifer Thomas-Larmer, *Conducting A Conflict Assessment*, *in* THE CONSENSUS BUILDING HANDBOOK, *supra* note 1, at 99–135; Todd Schenk, *Assessing the State of Conflict Assessment* (Apr. 2008), http://cbuilding.org/publication/article/2008/assessing-state-conflict-assessment (last visited June 27, 2009).

[12] *See* SUSSKIND & CRUIKSHANK, BREAKING ROBERT'S RULES, *supra* note 1, at 41–60; *see also* Susskind & Thomas-Larmer, *supra* note 11, at 99–135.

[13] Susskind & Thomas-Larmer, *supra* note 11, at 99–135.

[14] *Id.*

[15] *See* SUSSKIND & CRUIKSHANK, BREAKING ROBERT'S RULES, *supra* note 1, at 23–24, 46–53, 170.

[16] For more on the roles that a professional neutral can play, see SUSSKIND & CRUIKSHANK, BREAKING THE IMPASSE, *supra* note 1, at, 140–50.

dialogue in a way that is accessible to all the constituents and stakeholder groups.

It is up to the initial elected body to make a decision whether to go forward with the collaborative process recommended by the neutral.[17] If they do, the presumption is that the elected body would review and endorse a consensus agreement produced within the constraints approved at the outset. Near-unanimous agreements should then be submitted to elected officials for their approval. And why wouldn't they approve? All the constituents to whom they are accountable have participated voluntarily in a process of generating a negotiated agreement. Even their own personnel participated.

Each stakeholder representative must take the final draft of the agreement back to his or her constituents for review before any final agreement is signed into policy.[18]

### C. *The Adversarial Format Problem*

In most public decisionmaking contexts, the presumption is that the only way to move forward in the face of conflicting interests, values in dispute, or variations in policy priorities is to pick a winner and loser, or winning and losing coalitions.[19] Facing a win-lose situation, most groups invest as much time in trying to discredit those who oppose them as they do in trying to demonstrate how and why their favorite proposal is the best.[20] The

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[17] I am not proposing to substitute ad-hocracy for representative democracy. *See* SUSSKIND & CRUIKSHANK, BREAKING ROBERT'S RULES, *supra* note 1, at 41–60. The aim of the dialogue I am describing is to produce an informed proposal that must then be acted upon by the body with the formal authority to do so. *Id.*

[18] *See id.* at 133–53, 185–87 (describing how to draft strong, nearly self-enforcing agreements to present to constituents by stakeholders, then how to hold the parties to their commitments).

[19] *See* James K. Sebenius, *Negotiation Arithmetic: Adding and Subtracting Issues and Parties*, 37 INT'L. ORG. 281, 284–85 (1983) (observing this presumption).

[20] Arthur Schopenhauer sarcastically "recommends" this strategy in a treatise that also suggests it is common because it requires little rhetorical skill. *See* Arthur Schopenhauer, *Stratagems*, *in* THE ART OF CONTROVERSY (T. Bailey Saunders trans., 2009) (1896), *available at* http://ebooks.adelaide.edu.au/s/schopenhauer/arthur/controversy/. A less glib explanation links this tactic to a dynamic called "reactive devaluation," which is the tendency to devalue a proposal because its source is perceived to be an opponent. *See* Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, *in* BARRIERS TO CONFLICT RESOLUTION 26–42 (Kenneth Arrow et al. eds., 1995). It is perhaps also related to, and in some ways dependent upon, what social psychologists call "the fundamental attribution error," which is the tendency to overestimate the importance of personal causes, and underestimate that of situational ones, in interpreting other people's behavior. *See* Lee

adversarial format presumes that any gains to one side necessarily take the form of losses to others. Once that assumption is in place, there is no reason to take seriously the information and the arguments put forward by other stakeholders.[21] The adversarial format drives out joint problem-solving. It also inhibits value creation, the invention of options, trades, or packages that dovetail or trade across interests to produce good outcomes for all sides.[22] Given the mixed motives of parties in complex negotiations—they have a cooperative interest in creating as much value as possible, while pursuing their competitive interest in claiming as large a share as possible—it is often necessary to have a nonpartisan individual manage deliberative interactions.[23]

Once a group adopts near unanimity as its decision rule, factions within it begin to put a premium on meeting the interests of others. Consensus building encourages value creation. Relative to the factions' BATNAs, all-gain becomes an achievable alternative to win-lose or adversarial negotiation.[24] Until we require public policymakers to embrace consensus as a decision rule, then whenever public policy is made, the losers will have no hope of achieving more than their minimal procedural rights. To achieve a higher level of social benefit in public policymaking, we need to require the imposition of near unanimity as the decision rule and provide the necessary management support structure.

None of what I have said is meant to suggest that we should substitute ad-hocracy for representative democracy. Rather, I am proposing that prior to decisionmaking, we have the option of supplementing the work of elected and appointed officials by engaging all relevant stakeholders in consensus-building.

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Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, *in* 10 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 173, 184–87 (Len Berkowitz ed., 1977). Lastly, in formal logic this discouraged tactic is widely known as an *ad hominem* argument. IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 97–100 (8th ed. 1990).

[21] MAX H. BAZERMAN & MARGARET A. NEALE, NEGOTIATING RATIONALLY 16–22, 74–76, 87–88, 172–73 (1992); *see generally* HOWARD RAIFFA ET AL., NEGOTIATION ANALYSIS: THE ART AND SCIENCE OF COLLABORATIVE DECISION MAKING 279–83 (2002) (explaining the zero sum bias as an example).

[22] For more on value creation, see RAIFFA ET AL., *supra* note 21, at 191–306 (describing two-party integrative negotiations). For more on how a neutral can facilitate value creation, see SUSSKIND & CRUIKSHANK, BREAKING ROBERT'S RULES, *supra* note 1, at 83–113.

[23] *See, e.g.*, DAVID A. LAX & JAMES K. SEBENIUS, 3D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS 108–09 (2006).

[24] ROGER FISHER, WILLIAM URY & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 104–11 (2d ed. 1992).

If it is actually this easy to extend and deepen our commitment to democratic ideals—and if it has already been put to work with great success—what arguments or motives are strong enough to inhibit institutional shifts in its direction?

## III. THE OBSTACLES TO USING CONSENSUS BUILDING FOR PUBLIC DECISIONMAKING[25]

Elected and appointed officials are generally unfamiliar with the consensus-building approach (CBA). Most know that certain minimal public participation requirements must be met: open meetings, hearings, impact assessment reports, and circulation of draft statements. But they are generally unfamiliar with the idea of tapping a professional mediator to undertake a conflict assessment that gets all the relevant parties to the table in order to address an agenda of issues the leaders helped frame. And they are unfamiliar with the dynamics of a consensus-building process aimed at generating near unanimity on a proposal for their consideration.

Elected and appointed officials might think that using a CBA will undermine their authority or their political power.[26] Often, this is because someone has suggested that they "turn over" decisionmaking responsibility to an advisory group of some kind. However, that is not what the CBA involves.[27] Confusion abounds nevertheless. Powerful stakeholders in any given decisionmaking situation expect to "win" by pursuing one of the traditional approaches to public decisionmaking and resist any suggestion that consensus building is necessary or desirable. And inversely, less-powerful groups believe that only direct confrontation or legal action will give them any chance of "winning."[28] Of course, those expecting litigation to "level the playing field" are often disappointed, as others with financial resources use the courts to gain procedural victories, cause needless delays

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[25] *See* SUSSKIND & CRUIKSHANK, BREAKING ROBERT'S RULES, *supra* note 1, at 154–66, 191–95.

[26] *See id.* at 187–88.

[27] *See id.* at 167–87.

[28] *See generally* GREGG P. MACEY & LAWRENCE SUSSKIND, USING DISPUTE RESOLUTION TECHNIQUES TO ADDRESS ENVIRONMENTAL JUSTICE CONCERNS: CASE STUDIES (Consensus Building Institute, U.S. E.P.A., Office of Environmental Justice, 2003), *available at* http://www.epa.gov/compliance/resources/publications/ej/cbi-case-study-report.pdf (showing that litigating environmental justice cases has produced few, if any, victories for environmental justice groups, whereas a mediated approach has produced substantial gains for the least powerful parties).

through unnecessarily lengthy discovery and motion practices,[29] or to spend their opponents into submission.

Some parties mistakenly assume that deadlines or financial constraints preclude the use of a CBA. Many people assume that a consensus-building approach is not compatible with a strict deadline. But the costs of litigation and the delays caused by extended political battles are almost always greater than the cost of a consensus-building approach.[30]

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[29] It has been argued that there are monetary incentives to delay for as long as possible. *See* John B. Henry, *Fortune 500: The Total Cost of Litigation Estimated at One-Third Profits*, THE METROPOLITAN CORP. COUNS., Feb. 1, 2008, at 28, *available at* http://www.metrocorpcounsel.com/current.php?artType=view&EntryNo=7862.

[30] For a more extended argument about cost comparisons, see SUSSKIND & CRUIKSHANK, BREAKING ROBERT'S RULES, *supra* note 1, at 157–58. For empirical and testimonial support, see STATE OF OREGON DEP'T OF JUSTICE, COLLABORATIVE DISPUTE RESOLUTION PILOT PROJECT 5 (2001), *available at* http://www.doj.state.or.us/adr/pdf/gen74031.pdf. A report submitted January 30, 2001 to Gene Derfler, Senate President, Mark Simmons, House Speaker, and members of the legislature found that mediation was the least expensive of seven dispute resolution options used in over 500 civil cases involving the State of Oregon and closed between 1998–2000. The average monthly process cost of mediation was $9,537, followed by dispositive motion ($9,558), settlement negotiations ($10,344), arbitration ($14,290), trial-settlement ($19,876), judicial settlement ($21,865), and trial-verdict ($60,557). *Id.* at 6; *see also* U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION, ECR COST-EFFECTIVENESS: EVIDENCE FROM THE FIELD (2003), *available at* http://www.ecr.gov/pdf/ecr_cost_effect.pdf; *see generally* Rosemary O'Leary & Maja Husar, *What Environmental and Natural Resource Attorneys Really Think about Alternative Dispute Resolution: A National Survey*, A.B.A. SEC. ENVTL, ENERGY, & RESOURCES NEWSL., Vol. 4, Feb. 2003, at 2, *available at* http://www.abanet.org/environ/committees/adr/newsletter/feb03/attorneys.shtml. The respondents estimated average cost-savings (to the client) of choosing ADR over litigation to be $167,589.80 per case, and that ADR shortened case duration by 20.3 months on average. *See* FLA. CONFLICT RESOLUTION CONSORTIUM, STATE AGENCY ADMIN. DISP. RESOL. PILOT PROJECT REPORT, REPORT TO THE GOVERNOR JULY 2000, *available at* http://consensus.fsu.edu/ADR_Project/index.html; *see also Partnering Program Saves ADOT Millions*, POL'Y CONSENSUS INITIATIVE NEWSL., June 2002, at 6–7, *available at* www.policyconsensus.org/publications/news/docs/PCI_Newsletter_June_02.pdf. It reported that the Arizona Department of Transportation saved $35 Million in the execution of 1,140 construction contracts since 1991 through the use of collaboration and dispute resolution process. In Florida, the Department of Business and Professional Regulation's mediation program has reduced the average case length from 136 days to 47 days and the average cost from $1,225 to $211, netting a savings of over $400,000. *See* Policy Consensus Initiative, *Governing Tools for the 21st Century: How State Leaders Are Using Collaborative Problem Solving and Dispute Resolution* 5 (2002), *available at* http://www.policyconsensus.org/publications/reports/docs/GoverningTools.pdf. Note that some of these involved just mediation, which is a less powerful version of the consensus-

## IV. OVERCOMING OBSTACLES TO CONSENSUS BUILDING

I suggest a few strategies for promoting the more widespread use of consensus building as an approach to public decisionmaking.

The easiest and most effective is to incorporate mandates in statutes and regulations spelling out how administrative and policymaking processes are supposed to work.[31] Elected and appointed officials can advocate for CBA whether or not law requires it. There are a number of reasons they might want to do this. First, before they have to make a key decision, almost every elected official would like to know what version of that decision would be likely to have unanimous support. The CBA can produce that information.[32]

Second, almost every elected and appointed official would like to stand for "more democracy," and a consensus building approach is inherently more democratic. Key stakeholders could even go so far as to insist that anything less than a consensus-building approach is undemocratic. While there are not many groups that have made that argument, the burgeoning public-engagement movement (sometimes called the deliberative democracy or "new governance" movement) makes what I consider an analogous argument.[33]

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building approach that might, however, take less time due to CBA's "go slow to go fast" strategy.

[31] In 1996, Congress permanently enacted the Administrative Dispute Resolution Act, 5 U.S.C. §§ 571–584 (1996), which requires all executive agencies to promote the use of ADR. *See* Lawrence E. Susskind et al., *When ADR Becomes the Law: A Review of Federal Practice*, 9 NEGOT. J. 59, 59–75 (1993). There are other federal, state and local laws that have been adopted in recent years that either permit or encourage CBA. S*ee* Indiana Conflict Resolution Institute, *The State of the States in Environmental Dispute Resolution* (1999), http://www.spea.indiana.edu/icri/sos/sos_main.htm. (last visited June 27, 2009) (displaying a (less than current) list of these by state). For more on how Congress is and could be equipped to handle these kinds of disputes and dispute resolution processes, see Peter S. Adler et al., *Science and Technology Policy in Congress: An Assessment of How Congress Seeks, Processes, and Legislates Complex Science and Technology Issues*, April 2008, *available at* http://cbuilding.org/sites/default/files/Final_report6092_4_2008_0.pdf. For a review of American states' laws and regulations in the land use and public disputes area, see Matthew McKinney & Patrick Field, *Evaluating Community-Based Collaboration on Federal Lands and Resources*, 21 SOC'Y & NAT. RESOURCES 419, 419–29 (2008).

[32] *See* SUSSKIND & CRUIKSHANK, BREAKING ROBERT'S RULES, *supra* note 1, at 167–87.

[33] *See* ARCHON FUNG & ERIK OLIN WRIGHT, DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 3–45 (2003);

Finally, increasing the supply of trained mediators skilled in public dispute resolution would make it easier to apply CBA.[34]

## V. CONCLUSION

A consensus building approach to public decisionmaking has both theoretical appeal as the next step in the development of our democratic system and practical appeal as a more effective way of dealing with controversial decisions in the public arena.

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*see generally* MATT LEIGHNINGER, THE NEXT FORM OF DEMOCRACY: HOW EXPERT RULE IS GIVING WAY TO SHARED GOVERNANCE . . . 149–223 (2006). It is encouraging that the Obama administration appears committed to the kind of collaboration and transparency that can best be achieved through the consensus building process. *See* Memorandum For The Heads of Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 15 (Jan. 26, 2009).

[34] For more on balancing the supply and demand of public dispute mediators, see Lawrence Susskind & Sarah McKearnan, *The Evolution of Public Policy Resolution*, 16 J. ARCHITECTURE & PLAN. RES. 96, 109–10 (1999). Those interested in training to become public dispute mediators should see The Public Disputes Program, The Inter-University Program on Negotiation at Harvard Law School, http://web.mit.edu/publicdisputes/ (last visited June 27, 2009).