

GETTING TO “LET’S TALK”: COMMENTS ON COLLABORATIVE ENVIRONMENTAL DISPUTE RESOLUTION PROCESSES

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Bradley Karkkainen’s excellent paper, *Getting to “Let’s Talk”: Legal and Natural Destabilizations and the Future of Regional Collaboration*, presents some of the latest thinking on the use of regional, experimentalist,² and collaborative processes for dealing with complex environmental issues. These issues include allocation of scarce resources, like water, and conflicting uses of land, as well as competitions between development and environmental interests, such as protection and preservation of animal species, wetlands, etc., and uses of natural resources that lead to degradation (e.g., air pollution). Based on the work of his former colleagues, Charles Sabel and William Simon,³ Professor Karkkainen argues that following an earlier period of command and control public litigation involving prescriptive and rigid injunctive relief, monitored by courts, we have now moved to a period in which courts declare constitutional or statutory violations (“destabilizing” former legal entitlements or understandings) and then remand to states or other appropriate governmental actors to reform, through negotiated processes, and correct particular legal infirmities. Sabel and Simon have argued (as have Sabel and Dorf⁴) that such remanded negotiation processes have encouraged the development of localized or regional creative and innovative solutions to a wide variety of legal problems, involving greater political participation (by plaintiffs, as well as defendants, and other interested parties) and producing ultimately more satisfying, flexible, if contingent and revisable, adaptations to competing interests. These legal theorists also suggest ways in which local or regional innovation should be shared

¹ A.B. Chettle, Jr. Professor of Law, Dispute Resolution and Civil Procedure, Georgetown University Law Center. This Essay is a written summary of comments presented on Bradley C. Karkkainen’s paper in this issue, *Getting to “Let’s Talk”: Legal and Natural Destabilizations and the Future of Regional Collaboration*, 8 NEV. L.J. 811 (2008), prepared for the Symposium, *Collaboration and the Colorado River*. Thanks to our hosts, Michael and Sonja Saltman, the Saltman Center of Dispute Resolution at UNLV, and the work of Ray Patterson, Jean Sternlight, and the student editors of the *Nevada Law Journal* for making this interesting event happen. I disclaim any special expertise with respect to water law and complex environmental issues. I offer these comments as a scholar and practitioner of collaborative dispute resolution processes.

² See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

³ Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004).

⁴ Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000).

and monitored by more centralized governmental institutions for both incremental, but more diffused, solutions to collective problems.⁵

In his paper, Professor Karkkainen adds the important insight that it is not only the threat or actuality of public law litigation that can serve a “destabilization” function, altering the bargaining or legal endowments⁶ of the parties, but that natural (disasters and catastrophes) and anthropogenic (development, human mismanagement, or bad decision making) events⁷ can (and should) alter conventional legal decision-making structures and provide the incentive to solve problems in a different way, providing “new assignments of rights, duties, and institutional arrangements.”⁸ In his paper, Professor Karkkainen suggests that the impending “natural-anthropogenic” crisis (like an Ackermanesque “constitutional moment”⁹) in the competition for water from the Colorado River will necessitate some response and “bargaining from the ground up must begin anew.” He hopes and suggests how that bargaining would best be accomplished by a collaborative process.

In these comments to his thoughtful paper, I offer five sets of comments. First, I offer just a wee bit of criticism or correction about some assumptions and key terms used by Professor Karkkainen with which I disagree (in the context of general agreement and support for the ideas expressed in his paper). Second, I offer my views of the factors that are likely to support or encourage collaborative processes, especially in environmental disputes, with some reference to already existing successes. Third, I offer some countervailing factors, militating against collaborative successes, especially in the environmental context. Fourth, I suggest what some of the challenges or hurdles might be to structuring successful collaborative processes (applicable both in environmental disputes, but more generally for collaborative processes in other legal and political realms). And finally, I offer some advice (to all of us) for what factors, strategies, and incentives there might be (or that we might help to create) to encourage productive collaborative problem solving and negotiated decision making, not only for water issues along the Colorado River, or for environmental issues more broadly, but for collaborative processes in what has come to be called “new governance”¹⁰ models, including more democratic participation, contingent and revisable decision making, and integrative, rather than distributive, solutions to scarce and other resource allocation problems.

⁵ Dorf & Sabel, *supra* note 2, at 419-69.

⁶ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

⁷ Hurricane Katrina and its aftermath are an example of both natural disaster and anthropogenic mismanagement, leading to concerted efforts to reconsider inter-governmental collaboration processes. See, e.g., DANIEL A. FARBER & JIM CHEN, *DISASTERS AND THE LAW: KATRINA AND BEYOND* (2006).

⁸ Karkkainen, *supra* note 1, at 812.

⁹ 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

¹⁰ See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997).

I. SOME DEFINITIONAL QUIBBLES

Although I generally agree that new forms of collaborative decision making have emerged from critiques of the rigid traditional legal processes of courts, in both large scale and “ordinary” cases (a critique I helped to create¹¹), it is also true and instructive that some of the classic public law litigation discussed by Sabel and Simon, from the 1960s and 1970s, in fact did use incremental, inclusive, collaborative, and iterative decision making in ongoing monitoring and review of injunctions, class action settlements, and other judicial decrees.¹² Efforts to reform schools (racial and class integration, decision making, and financing¹³), prisons,¹⁴ police practices,¹⁵ welfare systems, voting practices, and other public institutions,¹⁶ as well as to challenge private activity in employment discrimination, environmental abuses, mass torts,¹⁷ and consumer practices in this era frequently utilized “structural litigation” that engaged judges, special masters, magistrate judges, and other judicial personnel in ongoing reports and hearings for the creation of settlements and judicial orders, contempt hearings, and other ongoing monitoring efforts.

Some of this structural litigation actually was quite collaborative. At least one legal scholar suggested that the lawsuits were even somewhat “collusive” in that government officials desiring social change were happy to “cooperate” in adversarial proceedings in order to get the judicial decree necessary to pry loose some legislative authorization and, most importantly, funding, for legal and social reform.¹⁸

In some cases a court appointed master¹⁹ served as the equivalent of today’s neutral third party facilitators or mediators (true in much of the institutional reform litigation on schools and prisons). In other cases the special masters were actually experts in the fields of the litigation (also true in prison and

¹¹ Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Legal Problem Solving*, 31 UCLA L. REV. 754 (1984).

¹² Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

¹³ The classic case is of course, *Brown v. Board of Education*, 347 U.S. 483 (1954), but the real action lay in the implementation litigation that followed in every major region of the United States. See, e.g., *Milliken v. Bradley*, 433 U.S. 267 (1977); *Milliken v. Bradley*, 418 U.S. 717 (1974); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 699 (E.D.N.Y. 1974) (serving as Special Master was Professor Curtis J. Berger of the Columbia Law School).

¹⁴ See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980); Note, “Mastering” *Intervention in Prisons*, 88 YALE L.J. 1062 (1979); Special Project, *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784 (1978). But see later efforts to limit the jurisdiction and remedial powers of courts in prison litigation. Prison Litigation Reform Act, 18 U.S.C. § 3626 (2000).

¹⁵ *Rizzo v. Goode*, 423 U.S. 362 (1976).

¹⁶ See, e.g., *Martin v. Wilks*, 490 U.S. 755 (1989) (ruling on intervention motions in a “reverse” discrimination action for employment and promotion of public firefighters).

¹⁷ See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

¹⁸ See Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978).

¹⁹ Appointed under FED. R. CIV. P. 53. For examples, see Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991) [hereinafter Sturm, *Normative Theory*]; Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Interventions in Prisons*, 138 U. PA. L. REV. 805 (1990) [hereinafter Sturm, *Strategies*].

education structural litigation). In many of these cases there was the kind of collaboration now being heralded in the new governance and dispute resolution literature, but often with more limited numbers of parties (just those formally in the litigation) and with an absence of governmental authorization and financing, both for the processes and for the outcomes they might have produced.

So, some law reform litigation was adversarial, contested in process, and rigid or “brittle” (my word) in decree or order, but some of the litigation of this period actually did begin some of the collaborative processes many of us now seek to encourage.²⁰ One need not break entirely from the past to speak approvingly of more collaborative and iterative processes. Even those matters dealt with in the “shadow” of structural litigation of the past had some, if not all, of the qualities sought by those urging new forms of governance. We should study and mine those cases for insights about what worked and what didn’t when more parties were involved, when there was judicial monitoring and reporting of progress,²¹ and when injunctions were contingent and modified over time.

Secondly, in a related point, I would argue that not all of the earlier structural litigation was directed at national or even state-level governance issues. The 1960s and ’70s saw local control of such institutions as education, community policing, and housing. So while it is true that much of the larger structural institutional litigation might lead a commentator to conclude that “able judges proved to be clumsy social engineers,”²² this was not true in all cases, and it might be instructive to contrast such failures²³ with a few successes in judicially mandated and monitored “responsive litigation,”²⁴ cases where productive reporting and dialogic processes allowed for judicial interaction in institutional reform.

Third, Professor Karkkainen states that most of the work used by Sabel and Simon to develop the destabilization thesis was developed in the context of

²⁰ I assert this as a former litigator of some of these lawsuits. In the 1970s I was a legal services lawyer (Community Legal Services in Philadelphia) and then a clinical law teacher (University of Pennsylvania Law School) who brought both class action and individual actions in cases seeking law reform in prison conditions, social and child welfare, and public health systems, special education, and both public and private employment. See also Sturm, *Normative Theory*, *supra* note 19; Sturm, *Strategies*, *supra* note 19.

²¹ Indeed, it could be argued that some of the more innovative forms of “problem-solving courts,” recently used in the context of drug courts and integrated family courts, utilize reporting and monitoring processes first used in the structural reform cases of the 1960s and 1970s. See GREG BERMAN, JOHN FEINBLATT & SARAH GLAZER, *GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE* (2005); Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 *HASTINGS L.J.* 851 (1997). Where the earlier cases focused more on institutional change, the recent spate of problem-solving courts focus on individual change and structured behavior modification. And, somewhat ironically, we could say that national and global behavior modification is what we might need for environmental success. See, e.g., AL GORE, *AN INCONVENIENT TRUTH* (2006).

²² Karkkainen, *supra* note 1, at 811.

²³ Such as the decades-long litigation of the Chicago public housing case, *Hills v. Gautreaux*, 425 U.S. 284 (1976).

²⁴ The term “responsive litigation” is my own, but it derives from notions of highly developed “responsive law” in a third stage of legal development described by PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (2001).

public law litigation (civil rights and civil liberties cases, resting primarily on constitutional or federal statutory grounds). In fact some of the earlier structural litigation did also occur in the private sector (admittedly often using federal laws, like employment and public accommodations anti-discrimination laws), but effectuating legal changes in private settings (such as employment, hotels, restaurants, and commercial enterprises). This may seem like a small point, but in the modern move to more collaborative processes it is often important to engage public-private collaborations (certainly in the environmental and land use arena), and so the use of litigation to “destabilize” legal entitlements may be just as significant for private parties as for public entities subject to constitutional and other governance mandates. Thus, the use of litigation or other “destabilizing” events or conditions (of which law is only one form) is relevant for consideration in both public and private sector activity.

Finally, my last point of disagreement is a mistake made by Professor Karkkainen that is commonly made by both legal scholars and practitioners. He states that while he is generally optimistic “about the possibilities for collaborative solutions to complex environmental and natural resources problems,” he also suspects, unlike alternative dispute resolution experts, who “tend to see opportunities for negotiated . . . solutions behind every bush,” that there will not always be a “win-win solution”²⁵ to such problems.

Unlike dispute resolution populists who coined the phrase “win-win,” more serious scholars of negotiated processes generally don’t use that term, which in a sense, over promises what dispute resolution proponents suggest is a Pareto superior process. “Win-win” suggests that all parties to a negotiated solution will “win” something out of a voluntary engagement with other parties. In reality, sophisticated dispute resolution scholars and practitioners know that “win-win” is seldom really possible.²⁶ What such dispute resolution advocates promise, wisely, is that the parties can be made better off with a problem-solving negotiation process than they would be without engaging in such a process at all.²⁷

Thus, negotiation and collaborative processes do not promise “win-win” but “better than” (whatever the comparative baseline might be—contested litigation with limited parties, non-collaborative, non-interactive, and non-iterative processes, or traditional notice, comment, and litigious administrative processes). Collaborative or negotiated processes permit both certain kinds of

²⁵ Karkkainen, *supra* note 1, at 823.

²⁶ A “win-win” solution may be quite possible in a variety of transactional settings, where negotiators are creating new entities or new contractual relations and increased joint gain is possible for all parties, but this is less true in dispute negotiations. Think especially of how one could never characterize plea bargaining as “win-win.” When a criminal defendant bargains for a “reduced” or better sentence, he may still be going to jail, which will hardly be experienced as a “win,” even for someone who is contrite or remorseful about what he did. The same can be said for the payment of damages or fines by any settling defendant in a civil suit. The damages may be diminished but there is still payment for a “wrong,” whether admitted or not. For distinctions between dispute and deal negotiations, see ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000), and Menkel-Meadow, *supra* note 11.

²⁷ Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 *HOFSTRA L. REV.* 905 (2000).

processes (patterns of communication and dispute resolution management, especially with a third party neutral or facilitator) and the *potential* for different kinds of *solutions* (contingent, iterative, value added, joint gain, future oriented, and with multiple parties, more sources of ideas, as well as resources²⁸). So a wise and more precise description of what dispute resolution proponents actually suggest would both offer more optimism for the use of such processes, as well as avoid “over promising” of what may not be possible.

This is important not just for its semantic precision but because if one of the problems is, as Professor Karkkainen suggests, getting those who believe a problem is a zero-sum game (or a battle for limited and necessarily divisible resources) to come to the table, we must provide an accurate description of what actually might happen at the table. Though Professor Karkkainen labels this, “Getting to Let’s Talk,” I would call it (also adopting the felicitous phrasing of Roger Fisher’s “Getting to Yes”²⁹), “Getting to the Table,” and to get to the table we must accurately describe what expectations the parties might have about how the different processes on offer might produce “better than,” rather than “win-win,” solutions.

It is with those few foundational quibbles I now turn to what we can learn from Professor Karkkainen’s insights about how we might use destabilizing events to create more collaborative “bottom up” processes to solve or at least ameliorate significant water, environmental, and other issues.

II. THE PROGRESS WE HAVE MADE: FACTORS ENCOURAGING COLLABORATION

Professor Karkkainen’s paper recounts several examples of relatively successful collaborative processes in environmental settings: the Southern California gnatcatcher-Endangered Species threatened “listing” to produce the Natural Communities Conservation Planning scheme for development and conservation, and a water quality lawsuit in Southern Florida producing a joint federal-state Everglades restoration effort.³⁰ In both of these examples, either actual or threatened lawsuits or changes in legal statuses forced parties with conflicting interests (including public land or resource use and private interests, such as developers) to negotiate new agreements for the uses of resources (land, species conservation, and water). These negotiations occurred within the “shadow” of

²⁸ These claims for the advantages of collaborative negotiated processes are well argued in the now canonical texts of negotiation and ADR. *See, e.g.*, ROGER FISHER & WILLIAM URY, *GETTING TO YES* (Bruce Patton ed., 2d ed. 1991); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); LAWRENCE SUSSKIND ET AL., *THE CONSENSUS BUILDING HANDBOOK* (1999) [hereinafter *THE CONSENSUS BUILDING HANDBOOK*]; RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS* (1965); MARY PARKER FOLLETT, *Constructive Conflict, in* *PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920s*, at 67 (Pauline Graham ed., 1996); Menkel-Meadow, *supra* note 11; Carrie Menkel-Meadow, *Why Hasn’t the World Gotten to Yes?: An Appreciation and Some Reflections*, 22 *NEGOTIATION J.* 485 (2006).

²⁹ *See* sources cited *supra* note 28.

³⁰ Karkkainen, *supra* note 1, at 816-19.

the law, with recognition by all parties that legal proceedings would likely be too rigid, time consuming, costly, and inadequate. Both cases also involve recognition that “older” laws might not deal with new developments (increased population growth and development in both regions), with needs of expansion of available resources (water) and other allocation problems.

In the Southern-Florida-Everglades case there was also important political leadership from a future-thinking Governor (Chiles). This may be an important condition for successful interjurisdictional collaborations where federal-state partnerships may be necessary to end a conflict or ameliorate an adverse environmental, economic, or social situation. As Professor Karkkainen notes with these examples, with plural legal jurisdictions it is now possible that federal lawsuits or regulatory actions, citizen lawsuits or other protest actions, as well as state legal action, can all serve as “destabilization” events requiring multiple parties, from several legal jurisdictions, to come to the table to reconfigure legal, economic, political, and social relationships, in order to solve a legal or governmental problem.

Professor Karkkainen goes on to suggest that non-legal, “natural and anthropogenic” events (such as the Love Canal incident in New York state, the Bhopal disaster in India, the Santa Barbara oil spill in the 1960s, Hurricane Katrina, September 11, severe draught or flooding, fires, earthquakes, heat waves, ice storms, volcanic eruptions, global warming, resource mismanagement, and natural scarcity) can or have produced the kind of crisis that provides incentives for parties to attempt to solve problems “from the ground up” (with political, governmental, and community collaboration) without waiting for litigation or command and control orders to emerge (later, at great expense, and with less “buy-in” or legitimacy). While crisis responses can give expression to generous and creative,³¹ if episodic, “fellow-feeling” to re-engage the polity in decision making and implementation of solutions, the challenge in such situations is to make the crisis-driven or episodic cooperation more long-lasting or responsive to longer-standing or on-going community needs.

There are some positive indicators pointing in the way of incentives for greater collaboration in environmental, as well as other governmental, problem

³¹ I do not in this Essay analyze the important differences between crisis responses in such natural and anthropogenic events as September 11, Hurricane Katrina, and Southern California wildfires, but this is an important part of any analysis of collaborative processes. From these few examples it is easy to see that, as is often the case, the better resourced (New York, San Diego, and Los Angeles) will be advantaged in collaborative and ameliorative efforts. The response to Hurricane Katrina demonstrates that poverty, class, and race will continue to play a significant role in resource allocation and can have significant impacts on collaborative processes, just as they do in more traditional legal or economic activity. There is a whole strand of important literature in the dispute resolution field, worrying about and documenting how inequalities may be recapitulated or exacerbated in less “formal” processes. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 LAW & SOC'Y REV. 767 (1996). As the disparities in disaster response are documented in comparative analysis of Katrina and other recovery efforts, we are likely to see further evidence of this significant problem. One answer of course, is an old one—better advocates for those who are disempowered in the political regime, economy, and society generally.

solving. First, and most importantly, since the birth and heyday of institutional law reform litigation, a new field of process expertise has developed and is burgeoning—the field of mediation, facilitation, and consensus building. In the last two decades, a field of multi-party conflict resolution has developed an extensive body of knowledge (both technical, as in group dynamics and coalitional behavior,³² decision rules,³³ social and cognitive psychology,³⁴ and procedural, including meeting management, and process rules for mediation and collaborative events³⁵). Using this expertise, a group of talented and multi-disciplinary expert facilitators or leaders of collaborative processes has been developed. The field includes an ideological and political commitment to “bottom up” and inclusive participation by all affected and interested parties.³⁶ There is much evidence of success of such processes as consensus building in local, state, federal, and interjurisdictional consensus building in environmental, transportation, financial, health, community development, social services, and inter-ethnic group relations issues, conflicts, and policy decision making.³⁷ As Professor Karkkainen notes, a commitment by an important government official to the use of this new expertise can be instrumental in its success. In addition to the Southern California example he cites, Bruce Babbitt as Secretary of the Interior, and long a proponent of collaborative processes (from his law practice), used Endangered Species “destabilization” threats to create positive collaborations and negotiations in habitat regulatory processes (or, as he has called them, “quasi-legislative dispute resolution” or LDR³⁸). Similarly, Governor John Kitzhaber of Oregon actively promoted collaborative processes in his state, including such issues as transportation policy (the development of

³² IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOS* (2d ed. 1983); James K. Sebenius, *Sequencing to Build Coalitions: With Whom Should I Talk First?*, in *WISE CHOICES: DECISIONS, GAMES, AND NEGOTIATIONS* (Richard Zeckhauser et al. eds., 1996); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 *YALE L.J.* 71 (2000).

³³ LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 189-94, 198-203 (2d ed. 2001).

³⁴ *BARRIERS TO CONFLICT RESOLUTION* (Kenneth J. Arrow et al. eds., 1995); MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* (1992); THOMPSON, *supra* note 33; Chris Guthrie, *Insights from Cognitive Psychology*, 54 *J. LEGAL EDUC.* 42 (2004); Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, in *THE NEGOTIATOR'S FIELDBOOK* 351 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006); Jeffrey J. Rachlinski, *Heuristics, Biases, and Governance*, in *BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING* 567 (2004); Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 *U. CHI. L. REV.* 933 (2006).

³⁵ *THE CONSENSUS BUILDING HANDBOOK*, *supra* note 28; LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING ROBERT'S RULES: THE NEW WAY TO RUN YOUR MEETING, BUILD CONSENSUS, AND GET RESULTS* (2006); David A. Straus, *Managing Meetings to Build Consensus*, in *THE CONSENSUS BUILDING HANDBOOK*, *supra* note 28, at 287.

³⁶ This commitment is based in Habermasian principles of participation in decision making by those affected by decisions. See, e.g., JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (1996); 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (1984); Carrie Menkel-Meadow, *The Lawyer's Role(s) in Deliberative Democracy*, 5 *NEV. L.J.* 347 (2004/05).

³⁷ See case studies in *THE CONSENSUS BUILDING HANDBOOK*, *supra* note 28.

³⁸ Bruce Babbitt, *ADR Concepts: Reshaping the Way Natural Resources Decisions Are Made*, *ALTERNATIVES TO HIGH COST OF LITIG.*, Jan. 2001, at 13, 14.

access exit/land use³⁹). There have been many successful uses of a process termed “reg-neg” or negotiated rulemaking utilizing the expertise of this new field to create governmental rules and regulations out of collaborative and negotiated processes, rather than litigative, administrative, and contested processes.⁴⁰

Second, there has been increased use of incremental, flexible, and contingent agreements in complex matters, recognizing that parties that get to the table may work out tentative solutions, those that need to be tested and evaluated both scientifically and politically, and then renegotiated in light of new information or changed circumstances such as “adaptive management” in the environmental area. Following on from the days of monitoring compliance with institutional injunctions (as in prison, school reform, and employment discrimination cases), collaborative processes can result in regulations, consent decrees, settlements, legislative, contingent multi-party “compacts” or contracts, and they often have “reopener” clauses to revisit agreements and commitments when facts or circumstances change.

Third, as Professor Karkkainen notes,⁴¹ more parties (particularly developers in environmental settings, but also utilities, private resource managers, and even commercial enterprises like Wal-Mart) have begun to take “forward looking” or prophylactic action when they fear a change of governmental rules, a new lawsuit or changed circumstances, or they seek to avoid the transaction costs of litigating zoning or other regulatory processes rather than negotiating directly with a community. In a growing number of land, water, and other resource cases, parties choose to come to the table to negotiate an agreement about use, allocation, taxation, and other issues *before* there is a legal change or an actual *crisis*. While there may be the threat of a looming natural or anthropogenic (including lawmaking) event (encouraging bargaining in the “shadow” of destabilization or crisis events), wise actors now see the benefits of negotiating joint-gain, interest satisfying, or maximizing benefits to as many parties as possible before the crisis event occurs. This is called collaborative planning or “partnering,”⁴² and collaborative negotiation processes have been used effectively in land use and other environmental planning processes, both for ordinary land use planning and in more crisis types of events.⁴³ This is especially important to recognize when there are temporal variations in “triggering events.” Hurricane Katrina was a single, disastrous event that occurred more or

³⁹ See, e.g., Videotape: Building Consensus: Transportation Rulemaking in Oregon (Policy Consensus Initiative 2000).

⁴⁰ Though the variable success of these processes is still hotly debated among their users and scholars. See, e.g., Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997); Freeman, *supra* note 10; Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000).

⁴¹ Karkkainen, *supra* note 1, at 827.

⁴² The concept of pre-dispute planning for good multi-party relationships on major projects and transactions originated in the construction field. See, e.g., FRANK CARR ET AL., PARTNERING IN CONSTRUCTION: A PRACTICAL GUIDE TO PROJECT SUCCESS (1999).

⁴³ See, e.g., JOHN FORESTER, THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES (1999).

less “suddenly,”⁴⁴ but it now looks more like an example of the gradual degradation of resources (such as the Everglades) because of the anthropogenic mis-assessment and mismanagement of the levees in Louisiana.

Thus, there does seem to be some greater sensitivity to the role of timing in these efforts at collaborative problem solving. There are variations between those that are triggered by a single crisis event, those that are attempts to deal with more gradual erosion or degradation of resources, and those that attempt to avoid a problematic future, or plan for a more constructive future. These temporal variations are similar to efforts to develop taxonomies for different types of mass torts (single catastrophic events, like building collapses, degradation like dam breaks, medical device failures, or slower, harmful, hazardous, and toxic products or resources (asbestos, chemical waste in water, etc.)).⁴⁵

Fourth, related to both of the above developments, there is increased recognition of the need for and use of evaluation, both of processes used and of outcomes developed. So when parties adopt a water or other resource use, evaluation is built into the agreement. When measures and metrics demonstrate a need for change because some strategy is not working, the parties must return to the table. Agreements made can be objectively based on particular evaluative criteria that trigger renegotiation, or specific time limits can be used to revisit and evaluate what is working and what is not.

Finally, as the Everglades example illustrates, there has been an increase, likely out of necessity, for intergovernmental and interjurisdictional collaboration. Most modern problems (environmental, land use, resource allocation, finances, natural disasters, human resources) will often transcend political boundary lines. Increasingly, governmental and community units have been willing or forced to engage in processes that require collaboration and cooperation from several political entities (local, state, and federal) or contiguous units (multiple states in a region, as is the case with Colorado River water allocations) in order to solve problems and effectuate change. Similarly, whether for better or worse, public and private partnerships (in utilities, major dam and other construction, agricultural uses, resource harvesting, and conservation, etc.) have proven successful and necessary to solve some of the anthropogenic and natural disasters described by Professor Karkkainen. As with intergovernmental collaboration, public-private partnerships often need brokering, mediation, and management by those skilled in the new process expertise of consensus building and multi-party mediation.

The development of expertise, a body of knowledge, evaluation and metrics, and most importantly, a new generation of professional process facilitators and managers of deliberative democracy are all indicators of a positive trajectory for the use of collaborative decision-making processes. Nevertheless,

⁴⁴ There is still the question of whether weather predictions permit more planning, such as for evacuation and ameliorative efforts, than a man-made disaster like September 11 or a less predictable earthquake.

⁴⁵ See, e.g., Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587 (1995); Francis E. McGovern, *Settlement of Mass Torts in a Federal System*, 36 WAKE FOREST L. REV. 871 (2001).

there are also some contraindications to progress in collaborative decision making to which I now turn.

III. COUNTERVAILING FACTORS: IMPEDIMENTS TO COLLABORATIVE PROCESSES

What do we do when water is power? Or, to put it another way, as Professor Karkkainen⁴⁶ and many others have done, what do we do when the “haves” control not just the resources in question but also the political power or the bargaining power needed to negotiate and collaborate?⁴⁷ I say this as a sometime resident of the water-hungry and greedy city of Los Angeles, most famously depicted for its corrupt, and power and money driven water policies seen in the film *Chinatown*.⁴⁸ How can we make the “haves” sit down with the “have nots” (and bargain in good faith⁴⁹)?

And speaking of *Chinatown*, as someone who has just returned from China, what do we do when we are internationally interdependent with other countries who may not share either our legal regimes or environmental or other goals? Recent differences in the acceptability and regulation of toxic toys, defective goods, and air pollution in China have a large impact on the United States. In Colorado River water policy, Mexico is also clearly an interested party. And, lest you think I am concerned that others will not bargain with us, there is the United States’ refusal to participate in the Kyoto Accords and international global warming reduction negotiations.

Thus, at both domestic levels of power, and international levels of unshared political and economic goals and inadequate legal regimes, what can we do when we cannot bring all the interested parties to the table, or be assured that once at the table they will bargain as “equal” parties?

The legal destabilization rights described by Professors Sabel, Simon, and Karkkainen may not apply when we are dealing in an international environment without the “force” or “rule” of law that can be used to motivate collaborative processes. Perhaps in this setting, more serious natural or anthropogenic trigger events may be better motivators—consider the global response (at least for aid) in the wake of the 2004 Tsunami in Southeast Asia. If legal claims (lawsuits, threats of regulation, etc.) are the incentive and sources for “destabilization” rights that lead to collaboration in domestic matters, we may have a further level of difficulty in the transnational locus of many environmental and resource disputes (not to mention nuclear power and weapons development, as well as traditional state to state or internal violent conflicts), where there is very little binding law or credible threats of legal action to motivate negotiated

⁴⁶ Karkkainen, *supra* note 1, at 823.

⁴⁷ See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974); Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Justice Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

⁴⁸ CHINATOWN (Paramount Pictures 1974).

⁴⁹ The question of what good faith bargaining is in such “quasi-legal” contexts is itself a complicated issue. See, e.g., John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002).

processes. If law and legal rights are the “destabilization threats” in domestic settings, is violence, conflict, death, disease, or planetary health the non-legal equivalent in transnational issues?

Then there is the question of resources for collaboration. Who will pay the costs of collaborative negotiations? These costs include structuring and facilitating meetings (paying those expert facilitators described above), travel and time costs for participants, as well as facilities fees, etc. While the incentive to collaborate is often to save the transaction costs of litigation or other command and control options, collaborative processes are not themselves transaction cost free—in time, money, and opportunity costs. And, in at least some forms of legislative, administrative, or litigative solutions, many of the costs will be borne by the state.

Finally, there is the problem of the institutional or process pessimist. Some subscribe to gloom and doom scenarios with respect to environmental usage and are skeptical that any “mushy” collaborative process can solve zero-sum resource or complex scientific problems.⁵⁰ Others prefer to defer to future generations or other decision makers (as the Bush Administration’s denial of global warming seems to do). How do we get reluctant parties (for whatever complex and multifarious motives) to come to the table?

IV. CHALLENGES PRESENTED TO THE USE OF COLLABORATIVE PROCESSES

I have outlined a few specific impediments to the use of collaborative processes above. Here I want to suggest a few more general challenges to the use of collaborative negotiation or governance models, so that I might suggest some productive responses.

First, to the extent that Professor Karkkainen’s model of destabilization rights is built on Sabel and Simon’s conception of legal rights and the threat of court intervention, we must ask whether we need strong, enforceable, up-to-date, and relatively unambiguous legal entitlements and endowments for this form of destabilization to be a credible threat. What happens when, in the domestic context, legal rules are ambiguous or arguable or have not kept pace with environmental or technological change? If a powerful “have” wants to grab resources or delay through objections, continuing to litigate and contest legal doctrines and meanings may remain an option.

In the international context where there are few, if any, enforceable legal endowments, “destabilization” is unlikely to occur through threats of lawsuits or regulation. The closest tool we have (and many have argued it is powerful) is entry to international communities and treaties, as well as trade benefits (such as WTO membership and multi-lateral trade treaties and regional economic alliances like the EU, NAFTA, or Mercosur), but hold-outs or those who see the advantages of economic development without environmental sustainability cannot be coerced to come to the collaborative bargaining table.

Thus, as Professor Karkkainen suggests, and I want to reinforce, we may do better (in the sense of encouraging) with natural or anthropogenic triggers

⁵⁰ For a critique of such a process, without sufficient structuring and evaluation, see Alejandro E. Camacho, *Beyond Conjecture: Learning About Ecosystem Management from the Glen Canyon Dam Experiment*, 8 NEV. L.J. 942 (2008).

than with legal triggers—weather and man-made disasters that have affected millions of people have been able to galvanize social action in recent years far more effectively than more formal and traditional legal or diplomatic processes.

Second, as noted above, “getting to the table” may be very difficult in multi-party settings where it may be necessary to have all, not some, of the parties participate in and enforce and implement a final agreement. Multi-party negotiations are different from bilateral negotiations. A few can always gang up or exclude others (that is coalition theory⁵¹), and a single “hold-out” may have veto power over any deal that requires all. These problems of participation, joint gain, veto power, and negotiation management demonstrate just how important negotiation and dispute resolution expertise is, but it must be married to realist political science and governance theory and practice. How a process is designed and what incentives (sticks and carrots) can be brought to bear on the parties is crucial (and very difficult, especially when leaders, legislators, or private CEOs and boards change over time).

Third (and related to my last point), even if a special triggering event (whether a crisis or a more gradual degradation) occurs and results in a collaborative process that produces some kind of agreement, compact, or resource allocation system, how can such “episodic” successes be translated into long-term monitoring and management? Many of the so-called successes noted both in Professor Karkkainen’s paper and in others I have cited here require enormous commitment on the part of the parties and political leadership. What happens when that leadership changes or the commitment wanes? As many of us have learned from mediation practice, a good agreement without a good implementation, management, evaluation, and feedback plan may be no agreement at all. With all the challenges suggested here about “getting to talk” or “getting to the table,” there may be bigger challenges to successfully “leaving the table” (concluding an enforceable, implementable agreement) or “staying at the table” (for the difficult task of implementation and enforcement).

Fourth, what do we do about possible externalities? If a good collaborative water use agreement is reached for the present, how do we account for the potential loss for future generations or those downstream? If the American states along the Colorado River make their own accommodations with each other, what impact will that have on Mexico? And what moral, political, or other concerns should we consider? Who will stand in for the costs we impose on non-participating parties or the benefits that we fail to confer on the absent or unrepresented parties, such as future generations?⁵²

Fifth, how do we prevent ourselves from either over-reacting or under-reacting to whatever crisis or trigger forces us to the collaborative negotiation process? This is the danger of primacy and recency—a heuristic error we often make legislating, regulating, or deciding something from the last terrible thing that has happened, without taking proper account of other possible dangers,

⁵¹ See THOMPSON, *supra* note 33; Sebenius, *supra* note 32.

⁵² I have raised these ethical and moral questions with respect to all forms of negotiation and mediation, where a set of parties make an agreement, whether voluntary and consensual, or “forced” in some way, that has an impact on others not present. CARRIE MENKEL-MEADOW & MICHAEL WHEELER, WHAT’S FAIR: ETHICS FOR NEGOTIATORS (2004).

disasters, or “unknowables.”⁵³ How can we be sure that whatever collaborative process we convene will deal adequately with all the issues that might have an impact on the problem we are trying to solve?

So, with all of these impediments and challenges to collaborative processes, can we be as hopeful or sanguine as Professor Karkkainen would like us to be about the possibility of either crisis-driven or good will “forward looking” collaborative processes in environmental and other governance issues? Below I offer some advice for how to meet these challenges.

V. MEETING THE CHALLENGES FOR COLLABORATIVE GOVERNANCE PROCESSES: ADVICE FOR THOSE WHO WANT TO “GET TO TALK”

For those of us who think that better solutions to modern social, legal, political, and environmental problems are more likely to occur with participatory, inclusive, and collaborative processes that respond to difficulties in modern governance, what can we do to make the use of such processes more likely?

First, it is important to consider what kinds of events can serve as motivating or incentivizing “triggers” for convening interested parties with an interest or stake in solving a particular problem (government agencies, community groups, environmental groups, private parties). Professor Karkkainen’s paper focuses on two types of more emergent “triggers”—legal “destabilization” events such as lawsuits, threatened regulatory action, or other threatened legal action (which could be lawsuits, administrative regulation, or legislation), and anthropogenic or natural events, such as physical disasters, or human mismanagement causing crises or serious degradation of resources of some kind. He recognizes in his paper that it is also possible that occasionally some good will and “forward looking” party or set of parties will realize it makes sense to convene a process absent an immediate crisis or trigger, and act more proactively to deal with a potential problem or for future resource planning.

So, as one suggestion, we need to think carefully and *proactively* about the anthropogenic construction of “triggering events” for convening collaborative processes. Most of the examples described by Professor Karkkainen reflect a reactive or responsive process after a crisis of some kind has arisen. Crises are important motivators, but in many cases convening when there are problems to be solved before there are extreme positions or hardened interests in a specific situation might produce more effective collaboration and creative solutions.

Second, to the extent that I have suggested a wide variety of impediments and challenges to convening collaborative processes, especially under conditions of unequal power and international (or non-legally bound) parties, it is essential to look for *linkages* in issues that might bring parties to a table, give them an interest in looking for solutions and trading and bargaining. So, while the United States might seem the more “powerful” party in many negotiations with Mexico, the pollution of water and air in Baja California and San Diego and California’s needs to have clean water, air, beaches, fish, etc. for the Cali-

⁵³ JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980).

fornia economy and health of its citizens gives Mexico an interest in demanding assistance and cooperation on a variety of other issues (e.g., immigration, labor, trade). Like looking for *linkages* of seemingly irrelevant and unconnected issues, recognition of mutual *interdependence* (such as is true in global warming initiatives) may enhance possibilities for “getting to talk.” And, as we have learned from negotiation theory, in complex, multi-party, multi-issue negotiations it is actually better to have more, rather than fewer, issues. There are gains to be made from trades, especially when there are complementary interests.⁵⁴

Third, it might enhance motivation to participate if “*positive*” *triggering events* (not only negative crises) could be identified. Opportunities for mutual gain include trade, technical exchange, educational exchange, joint venture energy projects, tourism and cultural exchange, and shared revenues from taxation, etc. There has been a marked increase in regional collaborations over infrastructure, ports, airports, energy, water, etc. in domestic settings and regional collaborations with shared economic gain and efficient specialization in international settings. Where collaborations are established over “positive or joint gain” possibilities, communication lines may be open for when things get tough on scarce resources, disasters, or other “competitive” issues.

Fourth, it is not enough to identify problems or triggering events, it helps to generate creative solutions, sometimes apart from a litigative or bargaining setting. As Professor Karkkainen describes, Professor Joseph Sax’s reconception of the public trust doctrine was an innovative recharacterization of legal relationships, initially set in a more abstract context and then applied to a variety of concrete environmental situations.⁵⁵ Similarly, development of creative solutions to problems may need to be tested experimentally and intellectually before they can become viable alternatives in concrete situations. (Think about trading pollution credits as one such example.)

Fifth, as a corollary to some of the comments above, if there is to be legal destabilization to encourage collaborative processes, with the possibility of using creative solutions to solve complex problems, there will still be a need for the development and enactment of legal entitlements and endowments. To the extent that law does provide one of the major “triggers” for collaborative processes, it cannot be abandoned by informal dispute resolution advocates or those who govern. There will always be a need and room for advocacy, to create needed and important baseline endowments and entitlements, to give

⁵⁴ See Menkel-Meadow, *supra* notes 11, 27, 36; see also LAX & SEBENIUS, *supra* note 28. Linkage in negotiations is common in diplomatic negotiations, as in current negotiations with North Korea. See, e.g., MICHAEL WATKINS & SUSAN ROSEGRANT, BREAKTHROUGH INTERNATIONAL NEGOTIATION: HOW GREAT NEGOTIATORS TRANSFORMED THE WORLD’S TOUGHEST POST-COLD WAR CONFLICTS (2001).

⁵⁵ Karkkainen, *supra* note 1, at 814. Professor Sax can be credited with many legally creative and innovative ideas, such as his work on slumlordism as a tort. Joseph L. Sax & Fred J. Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1967) (arguing for both regulatory action and a cause of action for private litigation). I have argued for the need for “legal creativity” in effective problem solving. See Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97 (2001).

parties power and representation in important environmental (and other governance) settings.

Sixth, as some of the illustrations above suggest, never underestimate the power of leadership—Governors Chiles (Florida) and Kitzhaber (Oregon) took active roles in shifting process dynamics in some of the problems facing their states, by falling away from their “swords” and seeking to engage multiple parties in alternative solutions, through multi-party consensus building processes. Secretary Babbitt risked controversial legal action by threatening listing on the Endangered Species List, and other western governors (from conservative states) have been among those most encouraging of collaborative policy initiatives about land use, resource conservation, and wildlife.⁵⁶

Seventh, no one template will be the quick fix for all collaborative processes. If the alternative dispute resolution movement has taught us anything, it is that process pluralism, variability, and flexibility in process design, tailored for particular disputes and parties, may be necessary for effectiveness in different settings.⁵⁷ As I have argued in other settings, Jon Elster’s rigorous comparisons of constitutional processes (differences in publicity and transparency vs. secrecy and confidentiality, and principled vs. trading and bargaining processes) demonstrate that different processes may be appropriate for different settings, levels of government, and whether problems are constitutive, organizational, or ad hoc.⁵⁸

Eighth, there is growing recognition that many governance decisions, including even constitutive ones (the making of constitutions), might need to be transitional, contingent, and flexible, with ongoing processes and opportunities for reconsideration and reopening and renegotiation as conditions change and political systems mature.⁵⁹

Finally, it is important in this new form of collaborative governance to avoid gross generalizations. We are in an important period of “democratic experimentalism,” trying out different models of political, social, and economic decision making, in the context of enormously complex problems that implicate multiple jurisdictions and a great variety of parties. What is needed is “thick description”⁶⁰ and comparisons of successes as well as failures. Consider comparisons of several notable disaster litigation cases (the Buffalo Creek disaster,⁶¹ Agent Orange,⁶² September 11,⁶³ and Woburn water pollution⁶⁴), some

⁵⁶ See Policy Consensus Institute, 2007 Board of Directors, <http://www.policyconsensus.org/about/board.html>.

⁵⁷ CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, ANDREA KUPFER SCHNEIDER & JEAN R. STERNLIGHT, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* chs. 11-14, 16 (2005); Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 *GEO. L.J.* 553 (2006).

⁵⁸ See Menkel-Meadow, *supra* note 36; Jon Elster, *Strategic Uses of Argument*, in *BARRIERS TO CONFLICT RESOLUTION*, *supra* note 34, at 237.

⁵⁹ Elster, *supra* note 58; Vicki C. Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 *WM. & MARY L. REV.* 1249 (2008).

⁶⁰ CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (3d ed. 2000). For examples of such thick descriptions in this field of collaborative policy and legal decision making, see the case studies reported in *THE CONSENSUS BUILDING HANDBOOK*, *supra* note 28, and the webpages of the Policy Consensus Initiative, policyconsensus.org, and the Consensus Building Institute, cbuilding.org.

⁶¹ GERALD M. STERN, *THE BUFFALO CREEK DISASTER* (1976).

handled with class action treatment, some with mediation and special masters, others with private settlements and consent decrees, and the difference in legislative enactments for the mass diseases (caused by modern industrialization) in Black Lung (federal worker's compensation program⁶⁵) and asbestos (where every effort to legislate a compensation program has so far failed, leaving hundreds of thousands of cases being litigated (or settled) in an overtaxed legal system). Scholars have focused on a variety of negotiated rulemaking processes and problem-solving courts to assess whether outcomes differ and are longer lasting depending on what processes are used.⁶⁶ We need to continue to create new processes, experiment with them, describe them, and evaluate them.

To the extent that new collaborative processes might emerge from environmental problems and conflicts, such as have been suggested here for the Colorado River and water usage in the western states, we may have the opportunity to craft positive anthropogenic solutions to complex natural and anthropogenic problems.

The following summarizes the "take-home" points of my reflections on Professor Karkkainen's paper on the possible uses of collaborative processes to deal with environmental problems, resource allocation, and governmental and public policy decision making:

Factors Encouraging Collaborative Processes:

1. Development of a body of knowledge and field of expertise in consensus building and collaborative governance
2. Increased use of contingent, flexible and incremental agreements in complex matters
3. More use of prophylactic "forward looking" problem solving and collaboration
4. Recognition of need for evaluation
5. Increased use of intergovernmental and interjurisdictional collaborative processes

Impediments to Collaborative Processes:

1. Unequal bargaining power in participating parties ("haves vs. have nots")
2. Lack of background legal regime for bargaining endowments and legal destabilization in international settings
3. Transaction costs in collaboration (actual costs and opportunity costs)
4. Psychological impediments "doom and gloom"—skeptical or pessimistic assumptions and outlooks (e.g., assumptions of scarcity)

⁶² PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986).

⁶³ KENNETH R. FEINBERG, *WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005).

⁶⁴ JONATHAN HARR, *A CIVIL ACTION* (1995).

⁶⁵ Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (2000).

⁶⁶ See sources cited *supra* note 40.

Challenges in the Use of Collaborative Processes:

1. Need for clear, unambiguous, and enforceable legal rights for legal “destabilization” to serve as incentive for collaborative processes
2. Incentives for participation of all necessary parties to a multi-party collaboration—practical and ethical problems when not everyone participates
3. Translation of “episodic” or event-driven agreements for long-term management and implementation
4. Externalities? Effects on those outside the collaborative process, e.g., future generations and absent parties in environmental settings
5. Danger of primacy or recency affecting best possible solutions for longer term

Suggestions for Meeting the Challenges and Encouraging Collaborative Processes:

1. Consider a variety of “triggering events” for collaborative processes; destabilizations can occur from legal, natural, anthropogenic events or actions, and different sources of triggers may lead to the need for different kinds of processes
2. Look for linkages in issues and interdependence among parties to encourage reluctant parties to participate in good faith
3. Look for “positive” or proactive trigger events or incentives—do not wait for only negative, crisis-driven opportunities to negotiate
4. Develop creative solutions to complex legal and other problems “away from the table” and separate from the crisis
5. Pursue, develop, and enact needed legal endowments to create incentives and baseline entitlements, bargaining power, and effective advocacy
6. Leadership
7. Process pluralism—one size/template will not fit all
8. Recognize need for transitional, incremental, and contingent agreements with opportunities for reopeners and renegotiation
9. Thick descriptions—evaluate successes and failures in terms of outcome and process measures

If we can utilize some of the recent learning of how complex multi-party processes work, and learn to evaluate them as they are employed and modified in different contexts, we may begin to build some knowledge and experience with “getting to the table to talk” and collaborate on how we humans (and animals and other life) can learn to share and productively cohabit and use this earth.