A PLUMBER RESPONDS TO THE PHILOSOPHERS: A COMMENT ON PROFESSOR MENKEL-MEADOW'S ESSAY ON DELIBERATIVE DEMOCRACY

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Professor Menkel-Meadow's article, *The Lawyer's Role(s) in Deliberative Democracy*,[1] raises to prominence many of the questions that have been simmering for several years: just what does the now extensive practice of public policy ADR teach us about deliberative democracy.[2] Her tour of the philosophical literature is helpful in surveying the competing theories of democracy and how we might improve our own version. Indeed, it provides benchmarks against which we might measure whether a particular approach fulfills the democratic ideal, or least someone's vision of it. It is interesting to conceptualize whether the critical component of democracy is procedural[3] or a function of citizen participation,[4] or whether it is to stimulate a deliberative or reasoned decision on policy;[5] whether recent complexities make these new processes necessary;[6] and whether the new processes supplement existing governmental structures[7] or are semi-free standing and provide a "new order."[8]

My own interest is much more pedestrian: I envisioned the use of consensus as a means for addressing extraordinarily complex and controversial regulatory problems. I was active in the regulatory reform movement and witnessed – indeed contributed to – the "judicialization" of the administrative process.

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[1] Carrie Menkel-Meadow, The Lawyer's Role(s) in Deliberative Democracy, 5 NEV. L.J. 347 (2004/05).

[2] For my own conceptualization of some of the issues, see Philip J. Harter, *In Search of Goldilocks: Democracy, Participation, and Government*, 10 PENN STATE ENVTL. L. REV. 113, 121 (2002).

[3] *See* Menkel-Meadow, *supra* note 1, at 351-52.

[4] *See id.* at 354.

[5] *See id.* at 353.

[6] *See id.* at 352.

[7] *See id.* at 353.

[8] *See id.* at 356-57.

Agencies were forced to undertake extensive factual development and then conduct analytical reviews to ensure that new rules were both cost-effective in achieving their goals and met criteria imposed by a variety of Executive Orders. It occurred to me that much of the analysis was required precisely because the actual parties in interest were not represented in the development of the proposal; while the interested parties may have "participated" in some technical administrative law sense, they had not participated in making the actual decision. I was familiar with the use of a form of consensus to develop technical standards that are frequently used by regulatory agencies[9] and that govern a huge portion of our daily lives. Thus, it seemed like it might be productive to attempt to replicate the standards setting process to develop new rules and policies, bearing in mind the processes would have to be married to the peculiarities of the administrative process. That led to negotiated rulemaking or reg-neg for short.[10]

My interest was in developing "better" rules and policies through direct involvement. In some instances this meant solving controversies that had paralyzed agencies, sometimes for decades, which prevented the agencies from issuing needed rules.[11] The theory was to have a full, robust debate among the parties in interest who would have a practical, "shop floor" expertise and insight into the rule. They would be peculiarly able to determine what information would be necessary to make a responsible decision and to develop a practical solution to the issue. In the back and forth of the discussions – a deliberation[12] – the committee would be more able than under traditional processes to reconcile competing values, indeed sometimes highly antagonistic values, into a workable policy.[13] This is the very essence of a political decision, and it is made by a process that replicates the political process itself. Moreover, the result likely would be more informed rules that would be more widely acceptable because those who were affected crafted them. Further, the rules would be developed faster since there would be no need for defensive research and political wrangling. And, lastly, there would be less judicial review because of that acceptance.

In my view, as I will explain more fully below in Part I, negotiated rulemaking has fulfilled those aspirations. But, before a consensus process – any consensus process – can claim democratic legitimacy, one must know among whom the consensus was struck and that it in fact represented the con-

[9] *See, e.g.*, Philip J. Harter, *Regulatory Use of Standards: The Implications for Standards Writers,* National Bureau of Standards (NBS GCR 79-171)(November, 1979).

[10] Philip J. Harter, *Negotiating Regulations: A Cure for Malaise,* 71 GEO. L.J. 1 (1982); Administrative Conference of the United States, Recommendation 82-4, "Procedures for Negotiating Regulations." 47 Fed. Reg. 30,701 (1982).

[11] *See, e.g.,* Flight Time Limitations and Request Requirements: All Flight Crew Members, 50 Fed, Reg. 29,306 (July 18, 1985) (to be codified at 14 C.F.R. pts. 121, 135).

[12] The American Heritage Dictionary describes "deliberate" thusly: "1. To take careful thought; reflect. 2. To consult with others as a process in reaching a decision." The consultation and challenges that go on in a negotiated rulemaking certainly fulfill this definition. AMERICAN HERITAGE DICTIONARY (4th ed. 2000).

[13] Oftentimes the rhetoric is so strong in processes where the parties themselves do not make the decisions precisely because they are attempting to build power to sway those who will decide. That is not necessary when the parties share in the decision and can block one they can not live with.

sent of those whose assent is necessary. I explore that part of democratic legitmacy in Part II. Finally, based on my twenty-five years in this business, I am perplexed by the advocacy of lawyers' playing a central role. I devote Part III to the lawyer's role.

I. THE EXPERIENCE WITH NEGOTIATED RULEMAKING

Professor Menkel-Meadow recognizes that negotiated rulemaking is in many ways the closest model for the use of ADR and consensus as a form of deliberative democracy for making decisions that have the force of law or that will in fact be implemented.[14] She qualifies that recognition, however, in a sparsely populated footnote that seems to cast doubt on its efficacy.[15] The lack of full analysis is confounding given the centrality of consensus processes to her overall thesis. And, indeed, a careful examination of the actual experience demonstrates rather conclusively that reg-neg is quite successful.

Although only one is cited, there are, in fact, two prongs to the debate over the experience with negotiated rulemaking. The first, the one referenced, alleges that an empirical analysis found that negotiated rules do not save any time in their development and are frequently subjected to judicial review. The second argues more generally that it is simply inappropriate to use consensus as the basis for agency decisions.[16]

Virtually all criticism of reg-neg's success is based on a purportedly empirical analysis conducted by Professor Cary Coglianese.[17] He uses the time a reg-neg was announced to the time the agency published its final rule as a measure to compare negotiated rules with those developed by the traditional hybrid rulemaking process.[18] This measure would be appropriate if there were hundreds or thousands of negotiated rules, since it seems logical that the reason an agency would invoke reg-neg would be to develop a final rule. But there are not hundreds, precisely because reg-neg is, as Professor Menkel-Meadow notes, an intense process. A reg-neg, then, is typically used only to address highly complex and controversial rules.[19]

Moreover, a number of the rules Professor Coglianese's study had quite peculiar histories – some had been on the agency's agenda for decades but were so controversial that the agency could not complete the rulemaking;[20] some were so controversial that they blew up in the middle of negotiations and it took the agency another five years to complete the rulemaking.[21] In several, the goal of the agency was not a *final* rule but rather an interim decision pending a

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[14] *See* Menkel-Meadow, *supra* note 1, at 364.

[15] *Id.* at 364 n.95.

[16] *See* discussion *infra* following note 30.

[17] Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997).

[18] *Id.* at 1278-86.

[19] For example, Professor Coglianese's data base consisted of thirty-five negotiated rules. *Id.*

[20] *See* Philip J, Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 NYU ENVTL. L.J. 32, 49 n. 88 (2000).

[21] Worker Protection Standards for Agricultural Pesticides, Notice of Public Meetings, 53 Fed. Reg. 25,970, 25,973 (July 8, 1988) (to be codified at 40 C.F.R. pts. 156, 170); Worker

final rule[22] so the agency's purpose was achieved *years* before the final rule was issued.[23] Thus, when conducting an "empirical study" of the efficacy of negotiated rules – that is, to learn from the practical experience – it is inappropriate to rely on fixed points that do not reflect what the agency intended when there are only a small number of cases. To gain that understanding, rather, one must go behind each rule to find out what actually happened.

Coglianese's study is the equivalent of determining whether flights between Washington and Paris are faster on a 747 or the Concorde by looking at thirty-five individuals and concluding that the two are about the same. But, on closer analysis, we see that several of the people took off on the Concorde, went to London for several days, and then went to Paris, with the arrival date in Paris being the one that was counted. A couple of others took off, only to have the plane turn back and not take off again for a week. Lastly, a couple of the passengers had been waiting for years to go to Paris but were unable to do so until the Concorde provided the opportunity (alas, I admit that I cannot think of some clever reason why this should be so, but it has real meaning in the study).[24] In short, to measure which is faster when looking at only a few passengers, one must learn more than the arrival date in Paris to conduct an actual empirical study.

Even if this analysis were accurate,[25] it assumes that expedition is the main reason an agency might negotiate a rule. It ignores the other major benefits that might be derived and that drove the process. Those who have interviewed the participants to understand their actual experience with negotiated rulemaking have been quite positive. Indeed one study concluded:

> On balance, the results . . . of the study suggest that reg neg is superior to conventional rulemaking on virtually all of the measures that were considered. Strikingly, the process engenders a significant learning effect, especially compared to conventional rulemaking; participants report, moreover, that this learning has long-term value not confined to a particular rulemaking. Most significantly, the negotiation of rules appears to enhance the legitimacy of outcomes. [The] data indicate that process matters to perceptions of legitimacy. Moreover, . . . reg neg participant reports of higher satisfaction could not be explained by their assessments of the outcome alone.

Protection Standard, Final Rule, 57 Fed. Reg. 38,102 (Aug. 21, 1992) (to be codified at 40 C.F.R. pts. 156, 170).

[22] *See, e.g.*, Vessel Response Plans, Interim Final Rule, 58 Fed. Reg. 7376, 7378 (Feb. 5, 1993) (to be codified at 33 C.F.R. pt. 155) (created to provide guidance to the maritime industry in the wake of the *Exxon Valdez* disaster); National Emission Standards fro Hazardous Air Pollutants, 56 Fed. Reg. 9315 (Mar. 6, 1991) (to be codified at 40 C.F.R. ch. I) (in which the EPA announced a rule before issuing a final rule so industry could begin to take actions to comply; The reason for the delay in issuing the rule is that it was to be part of another rule that had not yet been completed).

[23] Harter, *supra* note 20, at 45-49.

[24] In a couple of instances the agency simply could not complete the rule until they used reg neg. As one senior agency official commented, "Do we compare the time for a reg-neg to infinity?" Moreover, he also pointed out that reg neg is used for more complex and controversial rules so one would naturally assume that the process would take longer than average. Interview with Neil Eisner, Assistant General Counsel for Regulation and Enforcement of the US Department of Transportation, *cited* in Harter, *supra* note 20, at 45 n.65.

[25] By taking the various confounding factors into account, the actual experience with the rules Coglianese studied shows that reg neg was significantly faster than traditional processes. Harter, *supra* note 20, at 45-49.

> Instead, higher satisfaction seems to arise in part from a combination of process and substance variables. This suggests a link between procedure and satisfaction, which is consistent with the mounting evidence in social psychology that "satisfaction is one of the principal consequences of procedural fairness." This potential for procedure to enhance satisfaction may prove especially salutary precisely when participants do *not* favor outcomes.[26]

This finding was confirmed through an intense analysis of 239 published case studies of stakeholder involvement in environmental decisions. The author concluded:

> The majority of cases contained evidence of stakeholders improving decisions over the status quo; adding new information, ideas, and analysis; and having adequate access to technical and scientific resources. Processes that stressed consensus scored higher on substantive quality measures than those that did not. Indeed, the data suggested interesting relationships between the more "political" aspects of stakeholder decisionmaking, such as consensus building, and the quality of decisions.[27]

Thus, the actual empirical evidence demonstrates that the consensus process of negotiated rulemaking is highly successful. These findings are especially important for Professor Menkel-Meadow's thesis that consensus is a powerful process and contributes mightily to democratic institutions.

As a final point, it should be recognized that reg-neg co-exists with traditional notions of democracy,[28] forming a layered or concentric democratic system, and that care needs to be taken to link the two.[29] That the process is not free standing greatly influences the dynamics within the negotiating committee by establishing BATNAs and potential action forcing events – what the agency might do absent an agreement. It is therefore important for the agency to participate fully in the negotiations. That is critical both for the agency itself to achieve its goals – after all, agencies like the other parties have interests to be maximized – but moreover to provide a means by which the other participants can calibrate their own BATNAs. If the agency does not participate or remains passive, experience has shown time and again that it is difficult for the parties to determine their own BATNAs. Although it is undoubtedly counter intuitive, the committee will be far less likely to converge into an agreement if the agency is passive. Thus, as a practical matter, the agency needs to be active throughout the process. And, of course, if it does so, it will concur that, all things considered, the outcome is more in the agency's interest than the alternative.

This leads to the second prong of the criticism of negotiated rulemaking or other consensus processes for establishing government policy: that only government agencies should make such decisions, and the use of consensus

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[26] Jody Freeman and Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit,* NYU ENVTL. L.J. 60, 121 (2000) (footnotes omitted).

[27] Thomas C. Beierle, *The Quality of Stakeholder-Based Decisions: Lessons from the Case Study Record* (Resources for the Future Discussion Paper 00-56) (2000), *at* www. rff.org/documents/RFF-DP-00-56.pdf (last visited Jan. 23, 2004).

[28] Indeed this is the case for virtually all other forms of policy oriented ADR: they exist in "the shadow" of decisions by other democratic institutions.

[29] *See, e.g.*, Philip J. Harter, *The Role of Courts in Regulatory Negotiation – A Response to Judge Wald,* 11 COL. J. ENVTL. L. 51 (1986).

debases their ability to achieve the public interest.[30] Much of this criticism is based on a view that it is the function and responsibility of government agencies to act in the public interest – "the best interests of the nation, the people, the body politic."[31] The argument is, to a very real extent, the twenty-first century's version of Landis's view that agencies are experts and can be trusted to reach the appropriate answers with scant procedures or participation.[32] As I have argued elsewhere:

> It is almost as if the "public interest" actually exists just like the "brooding omnipresence" that Mr. Justice Holmes derided. In the abstract, one would wonder just why it is that someone in the private sector cannot divine this thing called the "public interest," but as soon as they take the oath to become a Federal employee they can? That surely would be a powerful, even magical oath. But, of course, neither "the public interest" nor the "brooding omnipresence" of the common law exists as an independent, determinable spirit that is implemented but not decided in individual decisions. In fact, the whole purpose of the "deliberative democracy" is to develop a collective view of what constitutes "the *public* interest" in the particular circumstances. The deliberations need to take account of the factors determined by Congress and of practical judgments as to what works. They, therefore, result in a better informed agency decision.[33]

Indeed, in a negotiated rulemaking, the agency itself must agree that the proposal is actually better than it can otherwise achieve, since otherwise it would have no reason to concur. Moreover, the deliberation is a means of significant practical information and insight that is not otherwise available to the agency, thereby enabling the agency to improve the policy. Finally, the result of a reg-neg is a *proposed* rule, so that anyone who might disagree with it can still file comments and if they are meritorious, the agency will be obliged to meet them if they are meritorious.[34]

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[30] *See, e.g.*, Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy,* Unpublished Paper of the John F. Kennedy School of Government (2000) (on file with author):

> First, an emphasis on consensus would de-center the state. The government would no longer be, in practice or theory, the central, accountable decision-maker but instead would become just a facilitator of bargaining between interest groups, or at most just another player in that bargaining game. Second, a focus on consensus would shift the aim of policy making away from that which will serve the public interest to that which will be agreeable to those interests that are well represented in the political process.

Id. at 8 (cites omitted); William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest – EPA's Woodstove Standards,* 18 ENVTL. L. 55 (1987); William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest,* 46 DUKE L.J. 1351 (1997); Michael McCloskey, *Problems with Using Collaboration to Shape Environmental Public Policy,* 34 VAL. U. L. REV. 423 (2000).

[31] Funk, *Bargaining Toward the New Millenium*, *supra* note 30, at 1383.

[32] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938); for an elaboration on this concept and its evolution into far deeper public participation, see Richard Stewart, *The Reformation of American Administrative Law,* 88 HARV. L. REV. 1669 (1975).

[33] Harter, *supra* note 2, at 130 (footnotes omitted).

[34] Professor Funk argues that part of the difficulty with negotiated rulemaking may be that a committee might reach a conclusion outside the scope of the statute. He provides the example of EPA's woodstove rule which, he argues, is not authorized by the Clean Air Act. Several things need to be noted: first, the structure of the rule was proposed by EPA itself, and not the private parties so that if EPA had issued the rule without using reg neg, it would

But, for the process to meet its goal of reconciling competing values and insights into a "public interest" – a vision shared by the populace and not just imposed by the bureaucracy – it must also be democratic and hence broadly representative.

II. ASSEMBLING THE NEGOTIATORS FOR ADR EFFICACY AND DEMOCRATIC LEGITIMACY

In most disputes, identifying the parties and the issues is so straight forward as to be taken for granted: the dispute itself is between (or among) specific parties about designated issues. That is not the case, however, for processes involving the determination of public policy that will actually be implemented.[35] By its very nature, the decision will affect people who were not present at its creation. The government is likely to be involved in some capacity, either in establishing or enforcing the decision. The consequences of the decision may have long term, and often irreversible, effects on the public, and it may take a long time to implement fully. Typically, there are high emotions or strong feelings involved. Frequently, the issue is a passion for some but a job for others. At the outset, just what might constitute the "public interest," however that might be defined, is usually unclear and in dispute. All of these factors argue for the need to ensure that all perspectives and concerns are considered.

This complexity of public policy has several important consequences for responsible dispute resolution: Because the decision will implicate the public, care must be taken to ensure that those who will be affected have an opportunity to participate. If an interest is not accorded a seat at the table, it will have to protect its position by opposing those parts of any negotiated agreement with which it disagrees. That in turn can hinder the implementation of the agreement and all the work that went into it.[36] Moreover, the full extent of the issues that need to be resolved are typically unclear at the outset. Rather, the various

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have likely had much the same structure. If a rule were significantly outside the scope of the statute, it would likely be in someone's interest to object, and so the dynamics of the consensus process ensures that it will not stray too far. But, of course, there may nevertheless be some sort of logrolling (or mutual back scratching), and courts will be available to hear a challenge. That no one protested the rule indicates that, all things considered, everyone was satisfied with it. Thus, while the rule may not fit comfortably within a narrow reading of the Clean Air Act, it is within its overall theory, and a decision that is reached by a democratic process should be accorded some leeway in that regard. Funk, *When Smoke Gets in Your Eyes*, *supra* note 30. As Judge Wald has explained, "the court should be able to take account of consensus as a factor suggesting the reasonableness of the rule." Patricia M. Wald, *ADR and the Courts: An Update,* 46 DUKE L.J. 1445, 1468 (1997).

[35] While a thorough convening is often to be recommended in cases that involve only the recommendation of policy, as opposed to making the substantive decision itself (subject, of course, to any further procedures that may be necessary), it may not be as important since there will be a subsequent time for interests which were not represented to make their views known.

[36] I can think of several prominent public policy dispute resolution activities that were not implemented in significant part because major interests were not at the table and opposed key portions of the resulting agreement.

parties will have different perspectives as to what must be resolved in shaping the policy.

We have learned in ADR that convening public policy negotiations is critically important. A neutral professional – the "convener" – works with the parties to independently assess which interests will be significantly affected by the decision[37] and whether there are individuals who can represent those interests. Not only is this a form of outreach in identifying who needs to be at the table, it is a way of ensuring that a broad array of interests will be there, and not just those that are well organized or otherwise powerful. In some instances, that representative may be a surrogate who shares common interests with a broader group.[38] The convener also helps identify the issues that will need to be resolved, which is a function of the broad policy to be developed and the parties themselves, since each may have a slightly different notion of what is in play.

In ADR convening is important for reaching agreements that endure and are implemented. If we abstract from ADR to democracy, convening becomes essential: If a decision is to have democratic legitimacy, those affected must have some means to participate in its formulation. We in administrative law argue that a rule issued by an agency has legitimacy because it is the exercise of authority delegated to it by an elected Congress, the agency officials are appointed by an elected President, and the agency is required to consider public comments on policy proposals. This may be a tenuous means of participation to be sure, but it is the one that undergirds the popular notion of our democratic structure. If, on the other hand, we are talking about ad hoc policy negotiations or those that supplement traditional government/democratic processes, then a direct voice is critical: It is critical to ensure that all the relevant issues are raised in the deliberations. It is critical lest an affected group argue that it was disenfranchised and hence that the result is not legitimate and should not be implemented.[39] It is critical to the theory of democracy.

Thus, for consensus to have a legitimate claim for a place in democratic decision making, there must be a process to ensure that those interested can in fact be represented at the table. As we have learned from ADR, that means some form of convening. While a thorough convening will identify the major interests in terms of those affected, it can never identify all of them. Therefore, to ensure that an important element was not left out and as a check on the integrity of the process itself, it is also important to afford those interested to come forward and present their case that they will be affected but are not otherwise represented at the table.[40] For this to happen, a public policy dispute

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[37] *See* 5 U.S.C. §563(b) (2000) (use of conveners for negotiated rulemaking).

[38] For example, in the negotiated rulemaking concerning reformulated gasoline, the increased cost of gasoline was a concern, yet no rational individual would be interested in spending months negotiating the rule to save perhaps $200/year. Other organizations, such as a cab company, would represent a similar concern so the issue would be squarely on the table.

[39] That argument can be persuasive to generalist judges and legislators.

[40] I am under no illusions that *all* affected interests will be represented in a negotiated rulemaking or any other public policy process any more than all will be represented in elections or in traditional rulemaking or other policy formulations. The essential ingredient is a realistic opportunity to participate and some effort to bring in the diverse interests. The

resolution process should provide a notice to the public that it is about to be undertaken, that it seeks to have representatives of the full range of affected interests at the table and that anyone who believes they will be affected but are not represented should come forward to participate.[41]

The result is not only a better decision, since the full range of issues will be raised and ventilated, but it is also far more democratic: everyone who would be affected has the opportunity to be represented in its development. It would be, therefore, a representative democracy. Without convening, public policy dispute resolution is only another means of reaching a tentative decision that will be made by another democratic process.

III. THE ROLE OF LAWYERS

I have to admit to being somewhat perplexed by Professor Menkel-Meadow's advocacy for the centrality of lawyers in consensus processes as a form of deliberative democracy. As one who is a lawyer, who is currently in the business of manufacturing more lawyers, and who has been extensively active in the American Bar Association, I am not against lawyers playing key roles in an area I hold dear. But, as she acknowledges, those who built the field – "the first generation of consensus building professionals"[42] – were not lawyers, and they did a very good job of designing and implementing the process. Indeed, the variety of backgrounds and perspectives undoubtedly contributed to the richness of the field. And each exhibited a sensitivity to the critical role procedure[43] plays in reaching a fair, enduring, legitimate consensus.[44]

As a professor and practitioner of Administrative Law, I am at heart a proceduralist and believe in its essential role in reaching legitimate decisions. And, as I argue above, procedures are a requisite component in putting together a public policy negotiation that could lay claim to being an exercise in deliberative democracy. But those processes are not typical of those followed by lawyers,[45] and once the process is underway other skills are more important. Thus, while I think lawyers will, and indeed, should continue to be involved in the art and practice of public policy consensus processes, it would be a mistake to emphasize any preferred status for them. In my view, that could disenfranchise a variety of other professions who have demonstrated rather vividly that they are fully capable of putting together and mediating consensus processes involving complex, controversial issues. If lawyers were to gain the ascendancy, I fear the process would become unduly rigid and too rule-bound because the other perspectives would not be heard and lawyers tend to codify.

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irreducible minimum is to ensure that there are enough interests at the table that one can be relatively confident that the major issues will be raised, deliberated, and resolved. A consensus among a narrow group is not worth much as far as expressing the "public interest" or views of the body politic.

[41] *See* 5 U.S.C. §564(a)(8) and (b) (2000).

[42] Menkel-Meadow, *supra* note 1, at 368.

[43] *See, e.g.*, Gerald W. Cormick, *Strategic Issues in Structuring Multi-Party Public Policy Negotiations,* 4 NEG. J. 125 (1989).

[44] Indeed, part of the debate was just what the term "consensus" means.

[45] In fact, in my class in Public Policy Dispute Resolution I do a series of exercises to get the students out of the mold of "thinking" and "acting" like a lawyer.

CONCLUSION

There is much to be learned from the twenty-five-plus years of experience with pubic policy dispute resolution. It, more than the administrative process, is the embodiment of a deliberative democracy when practiced carefully. It is time to recognize and elaborate on the connection. Professor Menkel-Meadow's essay is a good start to the conversation.