

The Beaten Path to Mediator Quality Assurance: The Emerging Narrative of Consensus and Its Institutional Functions

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I. INTRODUCTION

Although controversies over the need for mediator quality assurance standards and the potential impact of such standards on the mediation field have been well articulated,¹ relatively little attention has been paid to the processes by which standards are formulated when quality assurance initiatives do press forward. This is an important area for exploration. The processes by which standards are developed are discursive practices that, when thoughtfully mined, provide insight on the assumptions that drive quality assurance initiatives. The articulation of those assumptions is consequential for the evaluation of the standards so developed, as well as for

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¹ See generally Robert A. Baruch Bush, *Mixed Messages in the Interim Guidelines*, 9 NEGOT. J. 341 (1993); Robert Dingwall, *Does Caveat Emptor Alone Help Potential Users of Mediation?*, 9 NEGOT. J. 331 (1993); Michelle LeBaron Duryea, *The Quest for Qualifications: A Quick Trip Without a Good Map*, in QUALIFICATIONS FOR DISPUTE RESOLUTION: PERSPECTIVES ON THE DEBATE 109, 109–29 (Catherine Morris & Andrew Pirie eds., 1994) [hereinafter QUALIFICATIONS FOR DISPUTE RESOLUTION]; Eric B. Gilman & David L. Gustafson, *Of VORPs, VOMPs, CDRPs and KSAOs: A Case for Competency-Based Qualifications in Victim Offender Mediation*, in QUALIFICATIONS FOR DISPUTE RESOLUTION, *supra*, at 89, 89–106; Christopher Honeyman, *A Consensus on Mediators' Qualifications*, 9 NEGOT. J. 295 (1993); Deborah M. Kolb & Jonathan E. Kolb, *All the Mediators in the Garden*, 9 NEGOT. J. 335 (1993); Barbara Landau, *Qualifications of Family Mediators: Listening to the Feminist Critique*, in QUALIFICATIONS FOR DISPUTE RESOLUTION, *supra*, at 27, 27–49; Craig A. McEwen, *Competence and Quality*, 9 NEGOT. J. 317 (1993); Catherine Morris, *Where Peace and Justice Meet: Will Standards for Dispute Resolution Get Us There?*, in QUALIFICATIONS FOR DISPUTE RESOLUTION, *supra*, at 3, 3–24; Richard A. Salem, *The Interim Guidelines Need a Broader Perspective*, 9 NEGOT. J. 309 (1993); Lisa Schirch-Elias, *Public Dispute Intervenor Standards and Qualifications: Some Critical Questions*, in QUALIFICATIONS FOR DISPUTE RESOLUTION, *supra*, at XX, 79–87; Susan S. Silbey, *Mediation Mythology*, 9 NEGOT. J. 349 (1993).

the possibility of constructing alternatives. One noteworthy trend in the mediation field's meta-narrative² about mediator quality assurance—to claim “consensus”³ as the basis for quality assurance standards⁴—is the subject of this Article.

In this exploratory study,⁵ I analyze “consensus” as a narrative thread in the mediation field's meta-narrative of the quest for mediator quality assurance standards. My goal, in the tradition of applied discourse analysis,⁶ is to critically examine the discursive construction of “consensus” in this

² I use the term “meta-narrative” to describe the field's overarching story of the quest for quality assurance standards, which provides structure and coherence to a variety of more specific narrative threads, such as ethical standards, performance-based standards, and educational and training requirements. *See, e.g.*, NANCY H. ROGERS ET AL., *MEDIATION: LAW, POLICY & PRACTICE* §§ 11.1–11.7 (2d ed. 1994 & 2002 Supp.) (providing one coherent narrative of the quest for quality assurance).

³ *See infra* notes 9–41 and accompanying text.

⁴ *See infra* notes 42–74 and accompanying text.

⁵ I frame this as an exploratory study for a number of reasons. First, I have limited the study in scope to the examination of texts from two projects directed toward the production of performance-based quality assurance standards. *See infra* notes 42–74 and accompanying text. Second, my intent is to open discussion of a little-explored topic, the processes by which quality assurance procedures are developed, and not to make any final pronouncements on that subject. Third, I recognize that meaning is always a matter of interpretation, and contrary interpretations of the data I set forth are possible. Hence, it is my hope that this study will encourage further analysis of, and dialogue about, the processes by which mediator quality assurance standards are developed, the assumptions underlying those processes, and the institutional work they accomplish.

⁶ In general, discourse analysts seek to understand and explain *discourse*—talk and text in context—as social interaction, particularly in terms of broader social forces, influences, and institutions. Discourse analysts study discourse not for its local structure or organization per se, but in order to achieve a better understanding of social life and social interaction in general, and especially, how wider social patterns and phenomena are reflected in and constituted through discourse. *See, e.g.*, MICHAEL BILLIG, *IDEOLOGY AND OPINIONS: STUDIES IN RHETORICAL PSYCHOLOGY* (1991); NORMAN FAIRCLOUGH, *CRITICAL DISCOURSE ANALYSIS: THE CRITICAL STUDY OF LANGUAGE* (1995); Adam Jaworski & Nikolas Coupland, *Introduction: Perspectives on Discourse Analysis*, in *THE DISCOURSE READER* 1, 1–44 (Adam Jaworski & Nikolas Coupland eds., 1999); JONATHAN POTTER & MARGARET WETHERELL, *DISCOURSE AND SOCIAL PSYCHOLOGY: BEYOND ATTITUDES AND BEHAVIOUR* (1987); *DISCOURSE AS STRUCTURE AND PROCESS* (Teun A. van Dijk ed., 1997); *DISCOURSE AS SOCIAL INTERACTION* (Teun A. van Dijk ed., 1997). *Applied* discourse analysis moves “beyond deconstruction and critique” to intervention; that is, to making alternative forms of practice available. Carla Willig, *Conclusion: Opportunities and Limitations of ‘Applied Discourse Analysis’*, in *APPLIED DISCOURSE ANALYSIS: SOCIAL AND PSYCHOLOGICAL INTERVENTIONS* 145, 151 (Carla Willig ed., 1999).

institutional⁷ meta-narrative, in order to open consideration of the institutional work this construction accomplishes and also to open possibilities for the construction of alternative narratives. To frame this study, I begin in Part II with an overview of the variety of meanings the term consensus signifies in the literature of collective decisionmaking, noting in particular the distinction between consensus as a decisionmaking *process* and consensus as a decisionmaking *outcome*. In Part III, I examine the construction of consensus in the institutional meta-narrative of mediator quality assurance initiatives. In Part IV, I analyze the construction of consensus in mediation quality assurance initiatives in light of the conceptual distinctions drawn in Part II, concluding that the orientation is less toward a true consensus decisionmaking *process*, than it is toward consensus as a type of *outcome*. I examine the impact of consensus-based approaches on the validity of the quality assurance standards produced, highlighting how the focus on a consensus outcome has overlooked theory and research findings, and produced internally inconsistent standards that fail to account for the diversity of the field. In Part V, I consider the institutional “work” accomplished by the narrative of consensus, that is, how “it functions to get the work of the institution done,”⁸ which might explain its pervasiveness despite its failure to produce valid, universal standards for mediator quality assurance. Finally, in Part VI, I move beyond critique and offer suggestions for constructing an alternative narrative of mediator quality assurance standards, which includes theory, research, and therefore, the diversity of practice in the mediation field.

II. WHAT IS “CONSENSUS”?

Consensus is a complex term with a variety of meanings, and it is not always apparent in any given context which meanings are in use. To contextualize the institutional work done by claims of consensus in the mediation field, articulation of the various possible meanings is a necessary starting point. For this, a brief detour into the literature of collective decisionmaking is in order.

Kathryn Welch and her colleagues⁹ provide a succinct framework for distinguishing the variety of meanings for consensus that is useful for the

⁷ Charlotte Linde, *Narratives in Institutions*, in THE HANDBOOK OF DISCOURSE ANALYSIS 518, 519 (Deborah Schiffrin et al. eds., 2001). For purposes of this Article, I define the mediation field as an “institution.” As Linde observes, the term “institution” can be used “to represent any social group which has a continued existence over time, whatever its degree of reification or formal status may be.” *Id.*

⁸ *Id.*

⁹ KATHRYN A. WELCH ET AL., BUILDING CONSENSUS: IMPROVING QUALITY IN DECISION MAKING 6–7 (1994).

purposes of this study. First, they divide the literature on consensus into two major categories: macro-consensus and micro-consensus.¹⁰ Macro-consensus represents a “convergence of public opinion” at the societal level.¹¹ Micro-consensus applies to groups within societies, and itself can be divided into two subcategories: consensus as a *state* and consensus as a *process*.¹² In the former subcategory, consensus is a *state* of a decisionmaking group, while in the latter subcategory, consensus is a *process* for achieving group goals.¹³ It is micro-consensus that is of interest in this Article, which addresses the use of consensus by a particular group, namely, the mediation community. In the paragraphs that follow, I further define and distinguish the two forms of micro-consensus, in order to frame my study of the use of consensus in the mediation field with respect to mediator quality assurance initiatives.

Consensus in the *process* sense refers to a specific process by which a decisionmaking group attempts to integrate the insights of all members in order to find a solution that incorporates all points of view and that all members can support.¹⁴ The search for consensus presumes the existence of differences among group members as well as the goal of resolving those differences and achieving a single, united decision. In the purest sense, the consensus decisionmaking process generally encompasses a number of specific steps that are designed to ensure that all voices are heard, all objections are taken into account, and dissenters (a term typically used to designate those who object to a proposed outcome)¹⁵ are respected. It is this focus on *integrating* the insights of all members into the ultimate decision that distinguishes consensus decisionmaking processes from other collective decisionmaking processes, like majority rule, which rely upon *aggregating* opinions, preferences, or interests.¹⁶

¹⁰ *Id.* at 6.

¹¹ *Id.*

¹² *Id.* at 6–7.

¹³ *Id.*

¹⁴ *Id.* at 14–15.

¹⁵ See, e.g., JOHN GASTIL, DEMOCRACY IN SMALL GROUPS: PARTICIPATION, DECISION MAKING AND COMMUNICATION 31, 51 (1993); MICHAEL J. SHEERAN, S.J., BEYOND MAJORITY RULE: VOTELESS DECISIONS IN THE RELIGIOUS SOCIETY OF FRIENDS 65–71 (1983).

¹⁶ Political scientist Jane Mansbridge refers to the consensus decisionmaking process as “unitary democracy” based on an ideal of *qualitative* equality (i.e., a feeling of equal respect) while she refers to majority rule as “adversary democracy” based on an ideal of *quantitative* equality (i.e., equal protection of each individual’s interests). JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 3–7 (1980). In adversary democracies, the principle of quantitative equality encourages the aggregation of interests, in pursuit of the greatest good for the greatest number. *Id.*

Consensus in the *state* sense refers to the state of a decisionmaking group and is often used to denote the outcome of the decisionmaking process. That is, a group that has achieved an outcome that can be supported by some or all of the group members is said to be “in consensus.”¹⁷ However, definitions of the state of consensus do differ along a variety of dimensions.¹⁸ For some, the state of consensus suggests that there is unanimity—that is, all members agree with the decision.¹⁹ For others, the state of consensus is achieved when all concerns have been addressed, and therefore all members of the group can accept or live with an agreement, even if they do not completely agree with it.²⁰ For still others, the state of consensus suggests that the group has made a decision or reached an agreement that a substantial majority of the members can support²¹—the substantial equivalent of majority rule.

The difficulty with each of the preceding definitions is that they miss the essence of group consensus by making it a synonym for agreement. As Ellis and Fisher note, “agreement, while often necessary, is not a sufficient condition for consensus.”²² Consensus signifies that group members not only agree with a decision but are also committed to it to the extent that they will accept it and do their part to execute it.²³ As was the case with consensus as a decisionmaking process, consensus as a state of the group ultimately depends on “the extent of group loyalty shared by members.”²⁴ Without commitment to the group, agreements can be produced but not consensus.²⁵ Indeed, such agreements are said to represent “false or superficial consensus: that is, agreement masquerading as consensus.”²⁶ To distinguish these different conceptions of the state of consensus in the remainder of this Article, I will

¹⁷ WELCH ET AL., *supra* note 9, at 6.

¹⁸ *Id.*

¹⁹ *Id.* *But see*, STEVEN SAINT & JAMES R. LAWSON, *RULES FOR REACHING CONSENSUS: A MODERN APPROACH TO DECISION MAKING* 4 (1994) (“Consensus does not mean unanimity or 100 percent agreement on everything by everybody. Consensus is not conformity.”)

²⁰ WELCH ET AL., *supra* note 9, at 6; SAINT & LAWSON, *supra* note 19, at xii, 4; Lawrence Susskind, *An Alternative to Robert’s Rules of Order for Groups, Organizations, and Ad Hoc Assemblies that Want to Operate by Consensus*, in *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* 6 (Lawrence Susskind et al. eds., 1999).

²¹ WELCH ET AL., *supra* note 9, at 7.

²² DONALD G. ELLIS & B. AUBREY FISHER, *SMALL GROUP DECISION MAKING: COMMUNICATION AND THE GROUP PROCESS* 141 (4th ed. 1994).

²³ *Id.*

²⁴ *Id.* at 141–42.

²⁵ *Id.*

²⁶ *Id.* at 142.

refer to either consensus as the state of group *commitment*, or consensus as the state of group *agreement*. The former captures the qualitative nature of the state of consensus, while the latter orients to a quantitative understanding of the state of consensus.²⁷ See Figure 1 for an illustration of these conceptual distinctions.

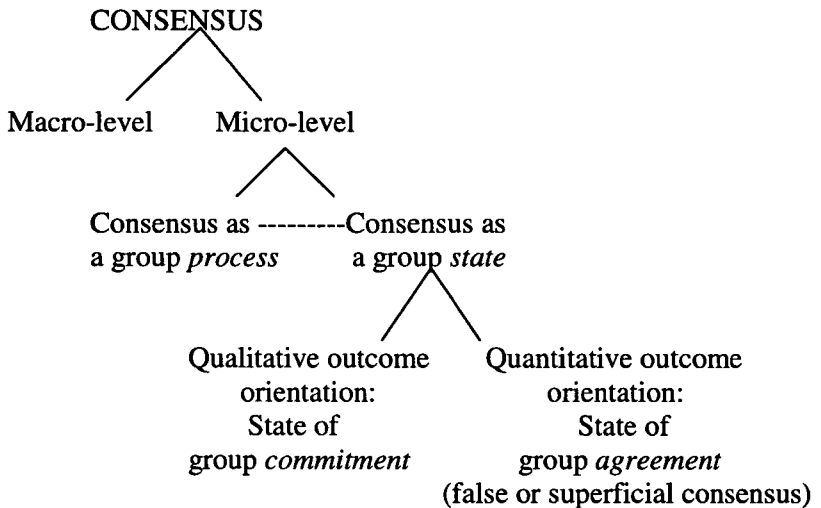


FIGURE 1: Analysis of the various forms of consensus

While the conceptual distinction between consensus as a process and consensus as a state of a group can be drawn fairly clearly, it should be noted that the distinction tends to blur in practice. As Welch and colleagues note, “Most authors viewing consensus as a *process* ultimately talk about using their process to reach the *state* of consensus.”²⁸ Because process and outcome are deeply entwined, what any given group achieves in terms of group outcome (that is, either a qualitative sense of group commitment or a quantitative sense of group agreement) is tied to the decisionmaking process used and how closely it accords with true consensus decisionmaking. I suggest that the consensus decisionmaking process in its purest form is closely related to consensus as the state of group commitment, while

²⁷ See Mansbridge, *supra* note 16, at 3–7.

²⁸ WELCH ET AL., *supra* note 9, at 7. Lawrence Susskind illustrates this entwining of meanings when he describes consensus building as “a *process* of seeking unanimous agreement,” (emphasis added) and notes that the goal of the process is to reach a *state* of consensus, in which “everyone agrees they can live with whatever is proposed after every effort has been made to meet the interests of all stakeholding parties.” Susskind, *supra* note 20, at 6.

agreement-oriented variations on the consensus decisionmaking process are closely related to consensus as the state of group agreement (i.e., false or superficial consensus). My point is best illustrated by considering the role of dissenters.

In its purest form, the consensus decisionmaking process rests on the assumption that dissenters serve the group by promoting careful deliberation and the eventual achievement of group unity with respect to whatever outcome is produced.²⁹ In other words, dissenters are viewed as respected participants in the process because all involved assume that the overriding commitment of all group members, even dissenters, is to group unity. Where this approach to consensus decisionmaking is followed, there are generally specific processes in place to allow dissenters to voice their concerns, and be recognized, when a proposal is formulated and put before a group.³⁰ The commitment to group unity evidenced by groups that favor consensus decisionmaking led Jane Mansbridge to refer to such groups as “unitary democracies,” which she contrasts with “adversary democracies” based on self-interest.³¹ Moreover, she suggests that certain qualities of the group are essential to the success of unitary democracies: (1) equal respect for all group members; (2) a commitment to face-to-face interaction; (3) a high degree of common interest on matters requiring collective decisions; and (4)

²⁹ This orientation is most visible in the literature about the consensus decisionmaking process among members of the Religious Society of Friends, also known as Quakers. See, e.g., BARRY MORLEY, *BEYOND CONSENSUS: SALVAGING SENSE OF THE MEETING* (1993); ROBERT HALLIDAY, *MIND THE ONENESS: THE FOUNDATION OF GOOD QUAKER BUSINESS METHOD* (1991).

³⁰ SHEERAN, *supra* note 15, at 64–71. Sheeran observes that in the Religious Society of Friends a dissenter may: (1) express orally his or her dissent from a proposal and in turn stimulate the group towards further discussion and greater clarity; (2) express dissent and at the same time indicate that he or she will stand aside and allow the group to move forward; (3) deliberately absent himself or herself from the meeting at which a critical decision will be made; (4) request that the written minute expressing the sense of the meeting record his or her opposition; or (5) choose not to unite with the action. At each progressive step along this spectrum, it becomes more and more likely that the group will delay the decision and continue discussions in order to preserve group unity. On the other hand, Mansbridge’s analysis of consensus decisionmaking groups would suggest that at each step along this spectrum, particularly if the group does not share common interests, the group is more likely to exert social pressure on the dissenter to conform or to reach an impasse. Mansbridge, *supra* note 16, at 31. However, because agreement per se is not the goal of the decisionmaking process used by the Religious Society of Friends, the term impasse is not favored. Rather, dissent indicates a lack of clarity about what is good for the group, and thus, the “Quaker rule” in such situations is, “when in doubt, wait.” SHEERAN, *supra* note 15, at 64.

³¹ MANSBRIDGE, *supra* note 16, at 3–7, 18.

commitment to a consensus decision rule.³² Where these qualities exist in the group, the state of consensus, in the sense of group commitment, is also likely to exist with respect to a group decision.

Where these qualities of the group do not exist, the process engaged in is unlikely to be a pure consensus decisionmaking process. Accordingly, the group is likely privileging the state of consensus in the sense of group agreement (i.e., “false or superficial consensus”),³³ rather than in the sense of group commitment.³⁴ This is not to say that the group is without a structured process, but the process used is more akin to an interest-based bargaining process that will accommodate the aggregation of interests should integration prove difficult.³⁵ Again, the role of dissenters highlights this difference, as this excerpt illustrates:

Most consensus building efforts set out to achieve unanimity. Along the way, however, there are sometimes *holdouts*: people who believe that their interests are better served by remaining outside the emerging agreement. Should the rest of the group throw in the towel? No, this would invite blackmail (i.e., outrageous demands by the holdouts that have nothing to do with the issues under discussion). Most dispute resolution professionals believe that groups or assemblies should seek unanimity, but settle for overwhelming agreement that goes as far as possible toward meeting the interests of all stakeholders.³⁶

It is worth noting that the assumptions regarding the role of dissenters in this excerpt are expressed in terms of self-interest. There is no presumption that the dissenters are acting for the good of the group. On the contrary, dissenters are presumed to be acting out of self-interest. As a result, it

³² *Id.* at 23–35. Similarly, Ellis and Fisher argue that the groups likely to succeed in producing a consensus have the following qualities: “(1) members share objectives, (2) members are status equals, (3) participation is balanced, and (4) opinions are not strong and unwavering.” ELLIS & FISHER, *supra* note 22, at 142.

³³ ELLIS & FISHER, *supra* note 22, at 142.

³⁴ For this reason, some Quakers prefer to distinguish “consensus” from “sense of the meeting,” arguing that only the latter term honors the value of group unity that underlies the Quaker decisionmaking process. MORLEY, *supra* note 29, at 5 (arguing that consensus is a “secular process” and the “product of an intellectual process. Sense of the meeting is a commitment to faith”).

³⁵ See, e.g., Sarah McKernan & David Fairman, *Producing Consensus*, in THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 325, 330–33 (Lawrence Susskind et al. eds., 1999); David A. Straus, *Managing Meetings to Build Consensus*, in THE CONSENSUS BUILDING HANDBOOK, *supra*, at 287, 305–15; Susskind, *supra* note 20, at 6; WELCH ET AL., *supra* note 9, at 14–15.

³⁶ Susskind, *supra* note 20, at 6–7.

becomes easier to attribute suspect motivations to dissenters (i.e., blackmail). It is also worth noting that, while the goal of consensus is initially framed as unanimity, by the end of the excerpt it is reframed to “overwhelming agreement.” Both concepts reflect a quantitative orientation toward the aggregation of interests during group decisionmaking rather than a qualitative orientation toward integration, as well as a corresponding orientation toward consensus as agreement rather than consensus as commitment based on group unity. In sum, the key requirements of a successful unitary democracy, as defined by Mansbridge,³⁷ are not in place. On the contrary, the underlying assumptions of the group process are more consistent with those of adversary democracy based on self-interest: (1) equal protection of interests rather than equal respect; (2) reduced commitment to face-to-face interaction; (3) conflicting interests rather than common interests; and (4) a shift toward majority rule.³⁸

Two important insights are afforded by the foregoing analysis. First, the variety of meanings of consensus, and the subtlety of the differences between them, suggest that use of the term is likely to confound more often than clarify. That is, because most readers, writers, speakers, and audiences do not distinguish among these many meanings, the use of the term consensus by any speaker or author has great potential for obfuscation. If the meaning is not made clear, audience members may well draw upon any and all connotations of consensus and attribute meaning that does not exist. Second, the above analysis highlights the possibility of an ideological dimension³⁹ to narratives of consensus generally, and in particular to narratives that portray

³⁷ See *supra* notes 31–32 and accompanying text.

³⁸ MANSBRIDGE, *supra* note 16, at 15–22.

³⁹ Discourse analysts draw upon group-based explanatory frameworks to relate the individual and the social, and to thereby explain the function of discourse as social interaction. DOROTHY J. DELLA NOCE, *IDEOLOGICALLY BASED PATTERNS IN THE DISCOURSE OF MEDIATORS: A COMPARISON OF PROBLEM-SOLVING AND TRANSFORMATIVE PRACTICE* 20–37 (2002). For example, analysts may draw upon culture, gender, institutions, or ideology, depending upon the level of explanatory power each offers for the phenomenon in question. *Id.* at 24. In this study, ideological frameworks are relevant because they reflect group values and group preferences regarding the moral order of society, which serve to explain the group’s social practices in general and its discourse in particular. Further, they enable people to coordinate their actions, reproduce their values, maintain their social positions and resources, and negotiate the conflicts of daily life. See generally TEUN A. VAN DIJK, *IDEOLOGY: A MULTIDISCIPLINARY APPROACH* (1998) (offering detailed explanations of ideological frameworks and their social functions). Ideological frameworks are the clusters of shared social beliefs, or systems of ideas, of the members of a social group, and ideological influence is particularly profound in professional settings, where the values, norms, resources, and social identity of professional group members are at stake. *Id.*

mediator quality assurance initiatives as consensus-based. That is, the use of the term consensus may draw upon and reproduce fundamental social values shared by group members and also mark a site of inter-group conflict.⁴⁰ The relevance of this point will become clear after an examination of the discourse of consensus in the mediation field.

In summary, this analysis of the various meanings of “consensus” suggests some criteria for determining which meaning of “consensus” the members of any given group draw upon as they engage in consensus-based processes and as they describe their accomplishments. First, the nature of the *process* used, and more specifically, the presumed role of dissenters in that process, should be examined for evidence of an orientation toward *integration or aggregation* of member’s opinions, preferences or interests. While integration would suggest that a true consensus decisionmaking process is in use, aggregation would not. Second, the nature of the decisionmaking *outcome* should be examined for evidence of a *qualitative orientation to group commitment or a quantitative orientation to group*

⁴⁰ VAN DIJK, *supra* note 39. Drawing on the analysis of ideological frameworks offered by Bush & Folger, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 229–59 (1994), I suggest that groups that prefer the consensus decisionmaking process, and therefore consensus as a state of group *commitment*, are oriented to an Organic worldview. An Organic worldview is an ideology in which the survival and welfare of some collective entity is the paramount value. The “good” is defined as “satisfying the collective will.” *Id.* at 240–41. One of the vital functions of social institutions is to “provide some means for the articulation of the collective will” *Id.* at 241. Human beings are viewed as “having an inherent consciousness of and responsiveness to something outside self.” *Id.* at 240. Hence, valued qualities that human beings are assumed to possess are “the capacity to be aware of participating in something larger than the self, to feel connected to others and to a common entity, and furthermore the capacity for subjugating the needs of self to the needs of the whole, for self-sacrifice and service.” *Id.* at 240. Compare this description of the organic worldview to Mansbridge’s description of the essential qualities of a unitary democracy based on a consensus decisionmaking process. *See supra* notes 31–32 and accompanying text. Those that prefer consensus as a state of *agreement*, with a corresponding emphasis on interest-based processes, are oriented to Individualist ideology. Individualist ideology is a worldview in which satisfaction of individual self-interest for all individuals is the paramount value. BUSH & FOLGER, *supra*, at 239. The “good” is defined by each individual for each individual, and there is no common definition of the good. *Id.* at 237. One of the vital functions of social institutions is to mediate between “the multiplicity of separate and unique persons pursuing their own ideas of what is good and satisfying.” *Id.* at 238. Institutions must be “protective and facilitative, but not directive.” *Id.* Hence valued qualities that human beings are assumed to possess are “capacities for self-knowledge, self-determination, and self-assertion.” *Id.* The individual is viewed as “unique, separate, and autonomous, as well as self-aware and deliberate.” *Id.* Compare this description of the Individualist worldview to Mansbridge’s description of the qualities of an adversary democracy. *See supra* note 38 and accompanying text.

agreement. The former would reflect true consensus, while the latter would reflect false or superficial consensus. Finally, the *nature of the group* itself should be examined for the *qualities of group loyalty and commitment* that are the foundation of true consensus. I will return to these criteria in Part IV; but first, I examine in the next section how “consensus” is constructed in two important quality assurance initiatives in the mediation field.

III. THE EMERGING NARRATIVE OF CONSENSUS IN MEDIATOR QUALITY ASSURANCE INITIATIVES

As I stated earlier, a meta-narrative of quality assurance efforts has been developing in the mediation field for more than two decades.⁴¹ As the diversity of the field has become more apparent, in terms of styles or models of practice, consensus has been emerging as a prominent narrative thread woven through that meta-narrative. Consensus has been claimed as the basis of such diverse mediator quality assurance initiatives as the Test Design Project,⁴² Family Mediation Canada’s Family Mediator Certification Program,⁴³ ACR’s Report of the Task Force on the Unauthorized Practice of Law,⁴⁴ the Maryland ADR Commission’s Practical Action Plan,⁴⁵ and ACR’s current initiative to certify mediators.⁴⁶ It appears to be part of the

⁴¹ For an encapsulation of the “story” of mediator quality assurance and an historical overview, see ROGERS ET AL., *supra* note 2.

⁴² THE TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT: A METHODOLOGY, FOR USE IN SELECTING, TRAINING AND EVALUATING MEDIATORS 1 (1995) [hereinafter TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT]; see also the precursor of this document, TEST DESIGN PROJECT, INTERIM GUIDELINES FOR SELECTING MEDIATORS (1993) [hereinafter TEST DESIGN PROJECT, INTERIM GUIDELINES].

⁴³ As reported in Linda C. Neilson & Peggy English, *The Role of Interest-Based Facilitation in Designing Accreditation Standards: The Canadian Experience*, 18 MEDIATION Q. 221 (2001). The program is described on the Family Mediation Canada website, <http://www.fmc.ca/?p=Members>.

⁴⁴ REPORT OF ACR’S TASK FORCE ON THE UNAUTHORIZED PRACTICE OF LAW 2 (Aug. 2002), available at <http://www.acrnet.org/about/taskforces/> (last visited Apr. 8, 2004).

⁴⁵ The Maryland ADR Commission’s Practical Action Plan is a “statewide consensus building process” for advancing the use of ADR in the state. THE HONORABLE ROBERT M. BELL, JOIN THE RESOLUTION: THE MARYLAND ADR COMMISSION’S PRACTICAL ACTION PLAN 2, 6–9 (1999). The Commission claims that its work is distinctive for “using ADR to advance ADR.” *Id.* at 2. The Action Plan addresses matters of quality assurance and mediator qualifications. *Id.* at 27–33, 67.

⁴⁶ ACR TASK FORCE ON MEDIATOR CERTIFICATION: INITIAL REPORT AND RECOMMENDATIONS TO THE ACR BOARD OF DIRECTORS 2 (June 2003), available at <http://www.acrnet.org/about/taskforces/certification.htm> (last visited Apr. 8, 2004); see also Audio tape: Marvin Johnson (co-chair of the Task Force), Credentialing with ACR,

unexamined, unquestioned “common sense” of the field that, given the diversity of mediator practices, quality assurance initiatives should have a consensus basis. By analyzing how the term consensus is constructed in quality assurance initiatives, insight may be gained on why this is and how it functions to accomplish the work of the field.

For purposes of this exploratory study, I have chosen to examine texts in the public domain that describe and explain the use of consensus in mediator quality assurance initiatives for an audience of mediation scholars and practitioners.⁴⁷ These texts are part of the overall emerging narrative of consensus. Specifically, I examine how “consensus” is constructed⁴⁸ in texts produced by two important projects that sought to develop performance-based assessment standards: the Test Design Project⁴⁹ and Family Mediation Canada’s Certification Project.⁵⁰

A. *The Test Design Project*

Concerns with quality control in the mediation field led the Society of Professionals in Dispute Resolution (SPIDR) to establish a Commission on Qualifications in 1987. The Commission concluded that quality control standards for mediators should be “performance-based,” that is, built on understanding what mediators actually do in the course of mediation practice and how they do it, rather than identified with any particular degree or educational background.⁵¹ The Commission cited an effort by Christopher Honeyman to identify “performance-based” criteria for the selection and

comments recorded at the Annual Conference of the Association for Conflict Resolution (Oct. 15–18, 2003), *available at* www.conventionrecordings.com (last visited Apr. 8, 2004).

⁴⁷ I used “theoretical sampling” to make this selection. That is, my sample is purposive rather than statistically random and aimed towards the sampling of incidents relevant to theoretical concepts. Accordingly, the significance of this study must be understood in theoretical rather than statistical terms. What is significant is that certain patterns in the discourse can be identified and explained. *See generally* BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* 45–77 (1967).

⁴⁸ I make no claims of a cognitive nature (e.g., what the authors of these texts “meant”). My claims are of a discursive nature, that is, oriented to the function of the discourse as available for interpretation in the narrative itself, whether by myself or other readers of the text.

⁴⁹ TEST DESIGN PROJECT, *PERFORMANCE-BASED ASSESSMENT*, *supra* note 42.

⁵⁰ The program is described on the Family Mediation Canada website, <http://www.fmc.ca/?p=Members>; *see also* Neilson & English, *supra* note 43.

⁵¹ SPIDR COMMISSION ON QUALIFICATIONS, *QUALIFYING NEUTRALS: THE BASIC PRINCIPLES* (1989).

training of mediators as an example of the type of criteria it endorsed.⁵² With this endorsement, Honeyman carried forward his work on performance-based standards under the auspices of the Test Design Project, a grant-funded initiative with the goal of describing the essential elements of mediation practice in order to create standardized scales for evaluating mediators.⁵³

To develop measurement scales for core mediator competencies in a rapid and economical way, the Test Design Project team built upon Honeyman's original scales, but modified them using a "consensus" process. First, the group compiled a list of tasks expected of mediators by studying training manuals and job descriptions. Then, the group discussed and amended what it had compiled, reaching an agreed list of knowledge, skills, abilities, and other attributes necessary for competent mediation practice. In 1993, the Test Design Project released the *Interim Guidelines for Selecting Mediators* (hereinafter *Interim Guidelines*).⁵⁴

A special issue of *Negotiation Journal* dedicated to commentary on the *Interim Guidelines* followed.⁵⁵ While some of the commentary lauded the guidelines as a service to the field and the public,⁵⁶ criticism of the assumptions, methods, and consequences of the *Interim Guidelines* abounded.⁵⁷ Notably, the overwhelming weight of critique directed toward

⁵² *Id.* While conducting on-the-job training of mediators within the Wisconsin Employment Relations Commission (WERC), Honeyman observed that trainees were likely to encounter vast differences in the working styles of various mediators, which caused certain practical difficulties. To address these difficulties, in 1985–86 he undertook a study designed to find out if there was a common matrix of basic skills that could be used to explain mediator practice generally and inform mediation training programs in particular. First, he identified five mediators who met two criteria: "demonstrated consistency of results and the maximum possible variation of character and known style of mediation." *Id.* at 152. Honeyman then observed a total of 16 mediation cases conducted by members of this group of mediators. He interviewed the mediators before and after the mediation sessions, and made notes of his observations during the sessions. He concluded that all mediators studied engaged in five generic types of activities: investigation, empathy, persuasion, invention, and distraction. The results of this study were then used to develop training materials to teach each of the five dimensions, and to create assessment scales for evaluating the performance of mediator candidates in a mediation role play simulation. See Christopher Honeyman, *Five Elements of Mediation*, 4 NEGOT. J. 149, 149–58 (1988).

⁵³ TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT, *supra* note 42, at 7.

⁵⁴ TEST DESIGN PROJECT, INTERIM GUIDELINES, *supra* note 42.

⁵⁵ 9 NEGOT. J. 4 (1993).

⁵⁶ See generally Dingwall, *supra* note 1; Carrie Menkel-Meadow, *Measuring Both the Art and Science of Mediation*, 9 NEGOT. J. 321 (1993).

⁵⁷ Critics of the *Interim Guidelines* noted, among other things, that they failed to articulate a definition of mediation and its purposes (Bush, *supra* note 1; Salem, *supra* note 1); failed to capture certain skills that some authors deemed vital to the process

the work of the Test Design Project was that it did not account for the diversity of practice in the field.⁵⁸

The Test Design Project resumed its work, taking these criticisms into account. In 1995, the Test Design Project issued its final report, *Performance-Based Assessment: A Methodology for Use in Selecting, Training and Evaluating Mediators* (hereafter *Methodology*), which replaced the *Interim Guidelines*.⁵⁹ In this report, the Test Design Project team specifically addressed the consensus-based nature of its work. Excerpts from this report provide samples of text that are instructive on the construction of “consensus” in this project.

Excerpt 1

This document brings to a conclusion a consensus-based effort to provide mediation programs, courts and other interested parties with improved tools for selecting, training and evaluating mediators. In so varied a field, the term consensus-based must be given specific meaning: Experience has demonstrated that agreement on every point of this difficult subject matter is not to be had, and the term is used here in the more limited sense of a process which has the goals of consensus and uses, broadly, the methods of consensus-building. This Methodology attempts to provide as rounded a discussion as is possible at this time, and tries to resolve several different approaches to mediation; but it also demonstrates the whys and wherefores of a complex discussion in which a number of statements should not be attributed to all members of the team.⁶⁰

Excerpt 2

This Methodology is based on experience gained in these and other early experiments, on a consensus of experts from diverse backgrounds, and on

(Bush, *supra* note 1; Menkel-Meadow, *supra* note 56; Salem, *supra* note 1); implicitly imposed or promoted a single style of mediation in a diverse field (Bush, *supra* note 1; Kolb & Kolb, *supra* note 1; McEwen, *supra* note 1); lacked validity (Menkel-Meadow, *supra* note 56); took an overly mechanistic approach (Kolb & Kolb, *supra* note 1); gave mixed messages about mediators' goals (Bush, *supra* note 1); and promoted the mythology of the passive and neutral mediator (Silbey, *supra* note 1). Later, on the issue of qualifications, Duryea, *supra* note 1, at 115, criticized the *Interim Guidelines* for failure to take account of cultural differences, implicit promotion of the dominant culture of individualism and instrumentalism, and the assumption that the skill of the mediator operates independently of parties being served. At the same time, Morris, *supra* note 1, criticized the universalizing assumptions underlying the *Interim Guidelines* and their failure to explore the diversity of values, goals and methods used by practitioners.

⁵⁸ See, e.g., Bush, *supra* note 1; Duryea, *supra* note 1; Kolb & Kolb, *supra* note 1; McEwen, *supra* note 1; Morris, *supra* note 1.

⁵⁹ TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT, *supra* note 42.

⁶⁰ *Id.* at 1.

subsequent reconsideration following critiques of the Project group's tentative conclusions.⁶¹

In both excerpts, the diversity of practice in the mediation field is marked as a source of conflict and the problem to be resolved through consensus-building. In Excerpt 1, the source of conflict is described as resolving "several different approaches to mediation." In Excerpt 2, the "diverse backgrounds" of the experts are noted, in what functions as an implicit link between the backgrounds of the experts to the diversity of mediator practices. This suggests that the final product addresses the diversity of the field. In both excerpts, the report also makes direct reference to "consensus." The project is described in Excerpt 1, the first paragraph of the Executive Summary, as consensus-based. In the remainder of the paragraph, however, the term is problematized and qualified.⁶² First, the definition of consensus is circumscribed, given the varied nature of practice in the mediation field. Second, unanimity is disclaimed, both by the statement that agreement on every point is not to be had and by the later statement that statements in the report should not be attributed to all members of the team. At the same time, this disclaimer marks an implicit expectation that such agreement was the goal of consensus. Third, the process used is described as one that has the goal of consensus and uses consensus-building methods, but that claim is qualified with "broadly."

Excerpt 3

For anyone contemplating the introduction of any kind of standard, complicating factors abound; nearly every criterion of a mediator's job which has been articulated has also been disputed. . . . Two trains of thought in the mediation literature have sought to resolve these conflicts.⁶³

Excerpt 4

The other approach is to describe a *common core* of behavior which many mediators engage in. This can be broken down into a series of criteria which are explicitly admitted to contain values which are not universally shared—but which also provide the seeds of alternate criteria which programs may substitute in a "seasoning to taste" process. The common core approach was

⁶¹ *Id.* at 3.

⁶² In the language of discourse analysis, the claim of consensus is marked as a "troubled" discursive position that requires further accounting. Margaret Wetherell, *Positioning and Interpretative Repertoires: Conversation Analysis and Post-structuralism in Dialogue*, 9 DISCOURSE & SOC'Y 387, 398 (1998).

⁶³ TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT, *supra* note 42, at 4–5.

the origin of this project, and continues to be the primary mode of discussion here.⁶⁴

Excerpts 3 and 4 again display the project team's orientation to the diversity of practice in the field. In Excerpt 3, differences of opinion about the nature of a mediator's work are framed in terms of dispute and conflicts to be resolved. In Excerpt 4, the project team's assumption about how best to resolve differences among mediator practices—to describe a common core of behaviors that many mediators engage in—is articulated. This, too, appears to be a troubled discursive position.⁶⁵ The assumption of a common core and the team's preference to identify one are juxtaposed with an acknowledgement that the criteria that make up a proposed common core of practice are value-laden and not universal. Nonetheless, the notion of a common core is retained as a framework that programs can adjust as needed, indicating an assumption that, differences in values aside, any given program could establish its own criteria by merely modifying (i.e., "seasoning to taste," but not changing the entire menu) the criteria set forth in the report. In this excerpt, we also see the struggle the project team has between articulating a methodology alone, and identifying a substantive common core of practice as it originally set out to do.

Excerpt 5

The working group that has prepared this document is not unanimous as to the relative value of each of the criteria discussed. Unanimity in this context, however, is not as necessary as clarity. By seeking to identify differences in values within the Test Design Project working group, disagreements about the purpose, character and style of mediation have been forced to the surface. These issues have been thoroughly discussed, the varying views have been accommodated to the extent possible, the criteria that result are made explicit, and these are treated as samples which any given program may justifiably use merely as a starting point for developing its own list.⁶⁶

The text of Excerpt 5 emphasizes conflict—among members of the working group as well as in the field. The observation that the working group did not reach a unanimous decision is made yet again, and possible reasons are identified as "differences in values" and "disagreements about the purpose, character and style of mediation." While there is mention of thorough discussion, the claim that different views were accommodated is

⁶⁴ *Id.* at 6.

⁶⁵ Wetherell, *supra* note 62, at 398.

⁶⁶ TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT, *supra* note 42, at 6.

qualified with “to the extent possible.” The criteria that were framed as a common core of mediation in Excerpt 4 are reframed as samples, and as “merely a starting point” for programs that are developing their own lists.

Excerpt 6

This Project has had an intricate career, beginning as an informal and relatively simple experimental follow-up to the first SPIDR Commission on Qualifications. NIDR’s extensive review of the original proposal resulted in a shift toward more rigorous methods. But as time went on, it became apparent that the field was not ready for broad application of standardized tools—and that its funders were not ready for the costs of such an effort. Meanwhile, a consensus-based approach to developing tools that could be adapted program-by-program became more attractive, as the variations in intentions and resources between different programs made themselves felt.⁶⁷

In this excerpt, a consensus-based approach is claimed yet again. However, the focus of the consensus approach is not expressed in terms of a common core of practice, but rather as a method for developing tools that programs can adapt. This excerpt continues to reflect ambiguity about the group’s goals and accomplishments: whether the group agreed on a normative set of evaluation scales needing only program-by-program modifications or whether it agreed simply that role play evaluations (against any set of scales) are an appropriate method for mediator performance evaluation.

In sum, these excerpts reflect that the Test Design Project working group struggled to articulate the nature and extent of the “consensus” reached by members of the team. Although it used the term consensus to describe the process and the outcome of the group’s decisionmaking, it repeatedly qualified that term. I will further analyze these excerpts in Part IV; but first, I display in the next subsection similar excerpts from a text describing Family Mediation Canada’s Certification Project.

B. Family Mediation Canada’s Certification Project

In 1999, Family Mediation Canada (FMC) instituted a voluntary certification process for family mediators. Like the Test Design Project, the FMC project sought to produce a performance-based test and a set of assessment scales. English and Neilson published an article discussing the design and implementation of the certification process.⁶⁸ Excerpts from that

⁶⁷ *Id.* at 31.

⁶⁸ Neilson & English, *supra* note 43.

article provide samples of text that are instructive on the construction of “consensus” in this project.

Excerpt 1

The certification process was designed to accommodate various professional orientations and models of practice. . . .

We have concluded that practitioner involvement was key to the success of the FMC’s certification process, in terms of both its design and practitioner endorsement of its implementation. Consequently we begin this article with a discussion of some of the reasons we believe that a collaborative, facilitative, and interest-based approach works, not only within mediation, but also in designing accreditation standards for mediators.⁶⁹

This excerpt sets the stage for the story of the FMC project. The project is positioned as one that accommodates various professional backgrounds and various models of mediation, a positioning that problematizes the diversity of mediator practices. The design of the standards was based on “a collaborative, facilitative, interest-based approach,” claims which align the process with what the authors portray as the values of the mediation process and mediation field. Finally, the project is positioned as successful on the basis of practitioner involvement and ultimately, practitioner endorsement.

Excerpt 2

A number of authors have suggested that differences and divisions among mediators prohibit the creation of standards or the development of methods to assess competent performance of those standards. . . . The irony here is that many of these discussions appear to be grounded in advocacy, persuasion, hierarchy, and competition; they seem to concentrate on division and difference and to assume the need to judge in order to identify better and best, right and wrong. Indeed, we find within these debates some of the adversarial methods of analysis that mediation seeks to avoid. It is our belief that much of the controversy surrounding these issues is generated by adversarial forms of analysis and by the types of questions being asked rather than by fundamental disagreement within the discipline.⁷⁰

Excerpt 3

Basically, there are two approaches to beginning research on training, practice and certification standards. The first is to focus on matters that divide. A focus on controversy and debate makes it necessary to prove the

⁶⁹ *Id.* at 222.

⁷⁰ *Id.* at 223.

relative merits of, for example, transformational as opposed to transitional models of mediation or the merits and applicability of various theories. Positions are presented, evaluated, and adjudicated. The goal is to identify the best model of practice in order to develop practice standards that would require mediators to perform mediation in accordance with that model. The second approach is to try to identify, within the discussions and debates, common understandings and interests in order to synthesize these into a consensus about the fundamental nature and quality of mediation. More by instinct than by academic design, we adopted the second approach. We reasoned that a focus on difference would produce adversity, whereas a focus on common interests could produce consensus.⁷¹

In Excerpts 2 and 3, the “differences and divisions” among mediators are identified as a source of conflict in the field, and against this backdrop, the project is positioned as one that resolves these conflicts. In the process, the authors articulate how their belief system informed their approach to setting standards. They align advocacy, adversarial analysis, persuasion, competition, debate, and evaluation with poor quality conflict resolution processes and therefore elect not to focus on differences among various models of practice. At the same time, they align their own approach (to focus on common interests and consensus) with mediation, that is, high quality conflict resolution. Because this discursive move problematizes the nature and extent of practice differences in the field, in Excerpt 2, the level of disagreement about standards for mediation practice in the field is minimized as little more than the by-product of poor quality dispute resolution processes. Said another way, the impression is created that fundamental disagreements are minimal, but that the appearance of serious disagreement is exacerbated by how the discussions are being framed.

Excerpt 4

Identifying the areas of consensus that could be articulated in standards and then subsequently assessed, while attempting to ensure that differences would be respected and thus would not result in disadvantage during the assessment process, was one of the major challenges of the project.⁷²

In this excerpt, a rhetorical tension emerges with respect to just how serious the practical differences among mediators are. Creating an assessment instrument that reflects areas of consensus and respects differences is identified as a “major challenge” of the project. Yet, in Excerpt 4, the authors

⁷¹ *Id.* at 223–24.

⁷² *Id.* at 224–25.

expressed the view that they did not really accept that a serious level of fundamental disagreement existed within the discipline. What Excerpt 4 highlights, especially in light of Excerpt 3, is that differences among mediators are not explicated or operationalized—a reader does not know what differences are being considered or how those differences might be measured.

Excerpt 5

We shared, and continue to share, a common assumption: academics and experts do not necessarily know best the requirements for disciplinary practice. We believe that if you want to learn the fundamentals of a disciplinary practice, you should consult the people who practice the discipline, not the academics and experts who merely think about it.⁷³

In Excerpt 5, conflict is constructed between practitioners and academics and experts. This limits the stakeholders in this project to practitioners, with the implication that only practitioners can speak on matters of practice competency. Academics and experts “merely think” about practice, a claim that obscures two other possibilities: academics and experts might also be practitioners, and academics and experts might conduct useful research on practice that more accurately captures the realities of practice than do practitioner accounts of their own activities. A related implication of this passage is that academics and experts would speak in a voice that is somehow necessarily opposed to the interests of practitioners.

Excerpt 6

We have only indirect data indicating that the FMC certification process does indeed accommodate diversity while respecting the fundamental nature and qualities of mediation.⁷⁴

This Excerpt should be read in light of Excerpt 1, in which the project positioned itself as one that successfully accommodated various professional backgrounds and models of practice. Excerpt 6 suggests that direct evidence of the actual accomplishment of this goal is lacking.

⁷³ *Id.* at 227.

⁷⁴ *Id.* at 236.

In sum, these excerpts from the FMC certification project demonstrate that the project group oriented to consensus as both a process and an outcome. The consensus process included practitioners and actively excluded academics and experts. As for the nature of the outcome, the achievement of the goal of obtaining practitioner endorsement of the standards was claimed without qualification, but the achievement of the goal of creating an inclusive, generically-applicable set of standards is left ambiguous.

IV. WHICH “CONSENSUS” IS IT —AND WHOSE?

What is constructed in the texts of the two projects analyzed above, at first glance, is the notion that each project was somehow based on a consensus process and that a state of consensus resulted. It is only upon close analysis, in the context of the articulation of the multitude of possible meanings of consensus and the criteria developed in Part II of this Article, that it becomes clear that what actually occurred was probably neither.

There is no evidence from either project that the conditions of a unitary democracy⁷⁵ necessary for a true consensus decisionmaking process, and for the related consensus outcome in the sense of group *commitment*, are in place. On the contrary, there is evidence from the text of each project that: (1) the process reflected an orientation toward the aggregation, rather than the integration, of member’s opinions, preferences, and interests;⁷⁶ (2) the outcome reflects a quantitative orientation to group agreement rather than a qualitative orientation to group commitment; and (3) a loyal, committed, cohesive group did not preexist the project.⁷⁷

First, with respect to the *process* used by the Test Design Project and the FMC project, I suggest that an orientation toward aggregation rather than integration of interests is apparent. For the Test Design Project, aggregation is reflected in its ultimate abandonment of the claim of having articulated a single “common core” of practice for mediators, in favor of presenting a Methodology for assessment, with the assessment scales representing only a starting point for other programs. In effect, by presenting the Methodology as such, with various sample assessment scales, the Test Design Project group could claim it encompassed all styles or forms of mediation practice. But it

⁷⁵ See *supra* notes 31–32 and accompanying text.

⁷⁶ Bush, *supra* note 1, argued that the *Interim Guidelines*, the precursor to the *Methodology* ultimately produced by the Test Design Project, sent “mixed messages” about standards of quality practice for mediators. Similarly, Bush argues that the assumption of monolithic practice in the field has led both the Test Design Project and the FMC project to produce internally inconsistent standards. Robert A. Baruch Bush, *One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance*, 19 OHIO ST. J. ON DISP. RESOL. 981–1000 (2004).

⁷⁷ See *supra* notes 32–34 and accompanying text.

could not claim that it integrated the insights of all members of the mediation community into a single set of assessment scales that applied throughout the field and still addressed the diversity within the field. An orientation toward aggregation rather than integration is also reflected in the repeated comments in the Test Design Project report that unanimity (i.e., 100% agreement) was not achieved and that the conclusions presented could not be attributed to all members of the project team. As for the FMC project, Neilson & English stated that they did not focus on matters of difference, but only on matters of common ground, which suggests that the report reflects an aggregation of commonalities more than any integration of differences. Since differences were not taken seriously enough to be articulated, there is little reason to believe they were actively and creatively integrated. Another indication that the FMC project was based more on aggregation of interests is its own claim that it employed an interest-based process. As I noted in Part II of this study, interest-based processes are founded on principles of self-interest that favor equal protection of interests through aggregation rather than on principles of group unity and commitment that favor integration.

Second, as to the *outcomes* claimed by the Test Design Project and the FMC project, I suggest that there is more evidence of a quantitative orientation to group agreement than a qualitative orientation to group commitment. Because process is deeply entwined with outcome, as I noted in Part I, evidence of an orientation toward the aggregation of interests as discussed in the preceding paragraph also bespeaks a quantitative orientation to group agreement or false consensus. It is not consensus in the true sense of group commitment. In addition, evidence that each project oriented more toward the quantitative aggregation of interests, and the associated production of an agreement, than to a qualitative integration of insights, and the associated production of group commitment, while not visible in the excerpts I have provided, is available in the text of the reports themselves, and is addressed elsewhere by Professor Bush. Professor Bush has noted that both the Test Design Project and the FMC project have produced internally inconsistent standards—a collection of rules with no unifying principles—which is an outcome more indicative of quantitative aggregation than qualitative integration.⁷⁸

Finally, as I noted in Part II, it is important to assess the nature of the group itself for the qualities of group loyalty and commitment that are the foundations of true consensus. Such an assessment foregrounds questions about the identification of the group members and the preexisting cohesiveness of the group. Answers to such questions, however, are largely obscured in the text of the reports. For example, in the Test Design Project,

⁷⁸ Bush, *supra* note 76.

consensus appears to refer to a consensus of experts from diverse backgrounds. However, the dimensions of “diversity” are not explicated or operationalized: is diversity a function of context of practice, professional background, or theoretical framework? More importantly, did the diversity of the experts bear any relation to the diversity of the field that was flagged as the problem to be resolved? If it did not, the consensus of experts is relatively meaningless in terms of the larger goal of the project to resolve differences among mediator practices. The strength of the group commitment is also suspect because the report disclaims unanimity and states that all conclusions cannot be attributed to all members, but it leaves unstated which members supported which provisions and with what level of commitment. Analysis of the Family Mediation Canada examples leads to a similar conclusion. Consensus appears to refer broadly to the entire community of practitioners in the mediation field. While this would appear to support a claim that the standards produced reflect the diversity of the field, again, questions of the identification of the participating group members and the strength of the agreement come into the foreground. Diversity was neither explicated nor operationalized so that a determination could be made whether participants representing all dimensions of that diversity were included and heard. Voices of dissenters are not present in the report, except as examples of poor quality conflict resolution competencies. The single-minded focus on common interests means that dissenters’ concerns are not identified and readers do not know what, if anything, became of their objections. Accordingly, readers cannot reach any solid conclusions about whether the outcome actually integrated, or even aggregated, the views of all participants and thus, whether the goal of transcending the differences in the field was met.

Questions about the nature and outcome of the two consensus-based projects studied here do frame the ultimate question for each project. Did either project accomplish what it set out to accomplish—the development of valid performance-based assessment standards that transcended the diversity of the field? I suggest that they did not, and in fact, given the orientation toward consensus on which each was based, they could not. One irony of dealing with practice diversity appears to be that, if it cannot be adequately defined (explicated and operationalized), one cannot know or claim with confidence that it has been transcended. The Test Design Project, by its own admission, clearly did not produce performance-based standards that transcended diversity in the field. It presented in the end only a Methodology, a way to evaluate practice, but not substantive scales that were appropriate throughout the field. Rather, multiple variant evaluation scales were presented, and programs were encouraged to create their own evaluation scales based on the needs of their own context. Likewise, neither did the Family Mediation Canada project produce evaluation standards that

transcended the diversity of the field. The text of this project acknowledges this possibility,⁷⁹ and Professor Bush demonstrates elsewhere that the FMC project offers internally inconsistent standards.⁸⁰ Moreover, despite its claim to represent diversity, the FMC project does not encompass the transformative approach to practice, but instead contains standards of competence that are directly contrary to those established for transformative practice.⁸¹

If the consensus-based approaches used by the Test Design Project and the FMC project do not yield valid assessment processes and standards that transcend the diversity of the field, an important question is: Why has the narrative of consensus become part of the story of the quest for qualifications in the institution of mediation?⁸² Or, asked another way, if the use of consensus does not produce valid standards that transcend practice diversity, what does it produce that justifies the field's continued reliance on consensus? I turn to that question in the next section.

V. THE INSTITUTIONAL FUNCTIONS OF THE NARRATIVE OF CONSENSUS

To consider the functions the claim of consensus serves in mediator quality assurance initiatives, it is helpful to look specifically at the "institutional work"⁸³ done by claims of consensus. Linde suggests that institutional narratives function "to reproduce the institution, reproduce or challenge its power structures, induct new members, create the identity of the institution and its members, adapt to change, and deal with contested or contradictory versions of the past."⁸⁴ I consider such functions in this section, first in terms of the narrative being told and then in terms of the narratives that are not being told.

⁷⁹ See FMC Excerpt 6, *supra* note 74 and accompanying text.

⁸⁰ Bush, *supra* note 77.

⁸¹ Compare the standards articulated by Neilson & English, *supra* note 43, at 237–44, with the discursive markers for transformative practice identified through comparative discourse analytic research by Della Noce, *supra* note 39, Chapters 6 and 8, and also with the discursive markers for competent transformative practice, derived from discourse research and set forth by Della Noce, Antes & Saul. Dorothy J. Della Noce et al., *Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model*, 19 OHIO ST. J. ON DISP. RESOL. 1021–36 (2004). The standards set forth by Neilson & English contain provisions that are directly contrary to the root metaphors and discursive practices of competent transformative mediators. See also Bush, *supra* note 76, at 981–1000.

⁸² Narrative analysis "opens up the forms of telling" and asks, "Why was the story told *that way*?" CATHERINE KOHLER RIESSMAN, *NARRATIVE ANALYSIS* 2 (1993).

⁸³ Linde, *supra* note 7, at 519–25.

⁸⁴ *Id.* at 519.

Obviously, the narrative being told is one of consensus. As I noted earlier, consensus is a term with many meanings, and it is not always clear to audiences which meaning is in use. By using the language of consensus, the projects analyzed here benefit from all connotations of the word. Accordingly, I suggest that this narrative serves a number of institutional functions. First, the narrative of consensus serves to produce and reproduce an institutional identity. It emphasizes a strong commitment to conflict resolution, agreement production, and the identification of common ground, consistent with the values of much of the mediation field. Given the importance of ideology in the reproduction of institutional identity,⁸⁵ it is also worth noting that ideological influence is suggested by the claims of consensus in mediator quality assurance initiatives. That is, consensus building efforts based on the principles and practices of interest-based bargaining models reproduce the Individualist ideology that dominates the mediation field,⁸⁶ and naturalize the dominant problem-solving model of mediation practice based in Individualist ideology.⁸⁷

Second, the narrative of consensus functions to mask majority rule under the guise of consensus, which positions those with opposing views as dissenters.⁸⁸ Dissenters face a dilemma. If they do not participate in the discussion, they have no voice. But if they do participate, the claim that a consensus process was used operates to co-opt their voices. By their mere presence, they can be portrayed as part of the process, even if the outcome is one they do not and would not support. This may or may not be due to any animus toward dissenters; my only claim is that this positioning of dissenters is functional. It keeps the project of creating quality assurance standards, in the face of dissent,⁸⁹ moving forward.

Third, the narrative of consensus, with its connotations of conflict resolution, integration, agreement production, and identification of common ground, creates an appearance of a unified and monolithic field of endeavor, even where one does not truly exist.⁹⁰ The field appears to speak with one voice, an important consideration when shaping internal policy and when trying to influence external policymakers. This could contribute to the political power of the field and its leadership, by fostering the appearance of an authoritative, unified voice, which is useful in dealing with dissenters in

⁸⁵ See *supra* notes 39–40 and accompanying text.

⁸⁶ BUSH & FOLGER, *supra* note 40, at 237–39.

⁸⁷ *Id.* at 59–77, 248–52.

⁸⁸ See Billig, *supra* note 6, at 152–53.

⁸⁹ See note 1, *supra*, for examples of a variety of dissenting views on the subject of mediator quality assurance.

⁹⁰ Bush, *supra* note 76.

the field, as well as political challenges from outside the field. Finally, the appearance that the process engaged in was inclusive and democratic fosters endorsement of the outcome by members of the mediation community.⁹¹ This, too, contributes to the political power of the field and its leadership.

At the same time, while the narrative of consensus prevails, there are other narratives that must pierce through this prevailing story in order even to be told—and that may in fact be subject to active suppression. One is the narrative of the nature and extent of fundamental practice diversity in the mediation field based on deeply held values and the consequences of that diversity for practice and policy. For example, the texts of neither of the projects analyzed in this study took the possibility of practice diversity seriously. Both texts minimized diversity, by either implying that diversity was not so fundamental that it precluded the identification of a common core of practice⁹² or by simply pronouncing that it was not as fundamental a matter as practitioners, scholars, and experts made it seem.⁹³ The dominance of such a narrative hinders the full development of a competing story of fundamental diversity based in deeply held social values and theoretical frameworks for practice.⁹⁴

A second narrative that is hindered by the prevailing narrative of consensus is that of research insights into the diversity of practices in the mediation. There is a wealth of research that tells the story of the diversity of mediator practice by identifying specific mediator practices and important differences between various practices.⁹⁵ However, the voices of researchers are notably absent from the Test Design Project report and are actively silenced in the FMC report.⁹⁶ Instead, the evaluation standards that emerge represent only what mediators (or mediation experts in the case of the Test Design Project) *say* they do, which may be very different from what research would suggest competent mediators actually *do* and *should do* in practice.

I conclude from this analysis that claims of consensus in mediation quality assurance initiatives should be regarded with skepticism. To date,

⁹¹ Neilson & English, *supra* note 43, at 222.

⁹² TEST DESIGN PROJECT, PERFORMANCE-BASED ASSESSMENT, *supra* note 42.

⁹³ See generally Neilson & English, *supra* note 43.

⁹⁴ Dorothy J. Della Noce et al., *Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy*, 3 PEPP. DISP. RESOL. L.J. 39, 63 (2002) (presenting an account of differences in the mediation field that is based on fundamental value-based and theory-based differences).

⁹⁵ Della Noce, *supra* note 39, at 45–75, collects and analyzes much of this research. She also presents comparative discourse analytic research insights of her own on the question of the differences in practices among mediators who orient to problem-solving practice and those who orient to transformative practice. *Id.* at 148–304.

⁹⁶ Neilson & English, *supra* note 43, at 227.

such claims appear to be motivated more by political expediency than by any genuine attempt to produce valid quality assurance standards that transcend the diversity of the field. This is because the use of consensus in quality assurance initiatives to date reflects an interest-based, agreement-focused, quantitative orientation to the aggregation of common interests, rather than a commitment-focused, qualitative orientation to the integration of differences. In the next and final section, I turn to a discussion of how to develop an alternative to the narrative of consensus in the mediation field's quality assurance initiatives by recovering the voices of theorists and researchers.

VI. BEYOND CRITIQUE: AN ALTERNATIVE NARRATIVE FOR THE QUEST FOR QUALITY

I have argued elsewhere, along with my colleagues Bush and Folger, that the mediation field lacks "a field-wide discourse that accommodates and nurtures meaningful difference; on the contrary, the dominant discourse of the field operates on many levels to obscure, marginalize or even eliminate important differences."⁹⁷ I suggest that an alternative narrative of the quest for quality assurance depends on discourse that actively explores, honors, and nurtures fundamental differences. I further suggest that three valuable components of such a discourse would be: (1) a pluralistic rather than monolithic view of the field,⁹⁸ (2) the acknowledgement of theory, and (3) the integration of research findings.

Neilson & English stated that they sought out common ground in order to avoid adversity and possible contests between mediators for whose framework was the best.⁹⁹ The underlying assumption was that acknowledgement of fundamental differences in the mediation field could only produce unhealthy, even destructive, competition. I suggest, however, that competitive discourse among mediators is not bred by the mere acknowledgement of differences, but by policies and initiatives that create the impression (and the fear) that only one model can be sanctioned as "good." To put this another way, if a quality assurance initiative creates the impression that there can be only one test or only one set of evaluative scales, it is that impression that breeds conflict. If, however, the field can acknowledge that different practices can lead to different policy standards,¹⁰⁰

⁹⁷ Della Noce, et al., *supra* note 94, at 58.

⁹⁸ Bush, *supra* note 76.

⁹⁹ Neilson & English, *supra* note 43, at 223–25.

¹⁰⁰ See Della Noce et al., *supra* note 94, at 61–65, for an argument and proposal for analyzing when multiple standards might be appropriate and how they might be developed.

the need for competition diminishes. The field can speak with multiple voices and not be constrained to speak in one voice.

Another important step is for the mediation field to come to terms with differences among mediator practices at the level of value-based theoretical frameworks.¹⁰¹ If the mediation field can move toward open discussions of the different values underlying mediator practices and how these values shape different conceptions of “good” goals, outcomes, and practices, theory-specific policy initiatives that encourage a multiplicity of voices can be pursued.¹⁰²

Finally, the field could benefit tremendously from the insights of researchers. There is a large body of mediation research available to inform quality assurance initiatives—research on what mediators do, how they do it, why they do it, and how they differ.¹⁰³ There are researchers available to undertake serious study of such questions in the future if called upon. The use of research data to inform policy initiatives will provide far more validity to the assessment methods produced than a consensus process can.

In summary, I have presented in this Article an explanatory analysis of the many meanings of consensus and the emerging narrative of consensus in mediator quality assurance initiatives. I have also considered the validity of quality assurance standards produced through consensus-based projects and the institutional work accomplished by consensus if it is not the production of valid standards. I have concluded with suggestions for building an alternative narrative of mediator quality assurance, embedded in both theory and research. It is my hope that these suggestions can encourage the mediation field to leave the beaten path and venture into new, creative, and valid approaches to quality assurance that tell the story of the true diversity of the field.

¹⁰¹ *Id.* at 53–65.

¹⁰² *Id.* at 65.

¹⁰³ *See Della Noce et al., supra* note 94.