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THE NEGOTIATIONS ALTERNATIVE IN DISPUTE RESOLUTION

JOHN T. DUNLOP†

I. INTRODUCTION: THE EMERGENCE OF THE NEGOTIATED RESOLUTION

In Western societies there have been two approved arrangements over the past century or two for resolving conflicting interests among groups or organizations and their constituent members: the marketplace and government regulatory mechanisms established by the political process. Markets in various institutional forms¹ bring together buyers and sellers without visible hand, to set prices of goods, services, and various factors of production, including land and capital assets. Markets provide the terms of exchange and thus resolve, largely impersonally, disputes between potential buyers and sellers over the countless features of transactions. Adam Smith stated early in the Wealth of Nations more than two hundred years ago:

Give me that which I want, and you shall have this which you want, is the meaning of every such offer; and it is in this manner that we obtain from one another the far greater part of those good offices which we stand in need of. It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest.²

In addition to providing markets with legal status, the political process has established government institutions, from courts to administrative tribunals, to resolve many other conflicts and differences of interests and to restrain methods of conflict. Also, the political process has established and nurtured the “public household”³ or pub-

† Lamont University Professor of Economics, Harvard University. University of California at Berkley, A.B., 1935; Ph.D., 1939.


3. D. Bell, The Cultural Contradictions of Capitalism 220-27 (1976). Bell defines the “public household,” as it is expressed in the government budget, as “the management of state revenues and expenditures.” Id. at 221. This concept stands in juxtaposition to the concept of “domestic household,” the goods “not val-

(1421)
lic sector that complements, competes with and alters the private market economy.

It is not this article's purpose to recount or explain the development of markets or the growth of the "public household," including regulatory institutions, in Western societies or the United States. Rather, the starting point is to note that the received ideas and institutions present to resolve conflicting interests consist of both markets and governmental regulation.

There is abundant evidence that the American community since the Great Depression places less reliance on markets to achieve social purposes, including the resolution of conflicting interests, despite the deregulation movement of the past decade. In international trade, for example, the doctrinaire support for free trade and free markets for international commerce has been supplemented or replaced by a complex network of reciprocal and bilateral agreements negotiated in various forums as reflected in the arrangements for sugar, coffee, tin, wheat, textiles and apparel, steel and other manufactured goods, maritime cargos and airplane fares, not to mention the migration of people across national boundary lines. In the labor market, the presence of collective bargaining, minimum wage regulation, health and safety standards, and pension and nondiscrimination requirements emphasizes the extent to which reliance on the market has been qualified. The regulations of the SEC, Federal Reserve System, Controller of the Currency and the housing finance agencies, fair housing rules, and the Internal Revenue Code, among others, constrain capital flows and money markets. The complex of regulations affecting specific product markets, from public utilities through consumer and producer goods, including agricultural products, has greatly expanded, constricting buyers and sellers and changing the nature of these markets. Moreover, wage and price controls, or some form of incomes policy, were in effect for twenty-two out of the forty-four years that followed 1940.

used . . . because they are not exchanged in the market," such as a housewife's services, and "market economy," valuing goods by the prices used in the exchange of money. Id. at 220. The idea of "public household" stresses the use of the government's budget to distribute its assets to various sectors of the society. Id. at 226-27.


The costs of the complex of regulatory mechanisms, including the distortion of decisions, financial outlays, litigation, delays and greater uncertainty, have come to be increasingly recognized as a heavy burden which complicates the resolution of conflicting interests.\(^6\) The uneconomic consequences of some regulations have helped to cause the rediscovery of the market in the past decade and to advance deregulation, as in developments affecting airlines, trucking and communications.\(^7\) The deregulation movement may still expand, although it is difficult to see deregulation growing faster than the political propensity to regulate. The main thrust of the past generation must clearly be characterized as a movement away from reliance upon the market.

Negotiations and negotiation processes appear to be on the ascendency as compared to markets; in recent years, they have been increasing even when compared to public regulations. It is not uncommon, for instance, for private corporate suits to be settled by direct negotiations between the companies, or with the government, as in the instance of a telecommunication antitrust case after more than twelve years.\(^8\) The major disputes involving the price and supply of uranium between Westinghouse and certain utilities have been settled by direct negotiations and the withdrawal of court suits.\(^9\) The device of plea bargaining on economic questions likewise is illustrative of the general distrust of pure regulation and public agency decision and the tendency to resort to negotiations to limit uncertainty, to speed resolution, and to assure greater attention to features of a settlement that are of special concern to each party. Contestants often achieve a more satisfactory and less risky settlement by direct negotiations, or negotiations with the staff of a public agency, than would be likely were the proceedings to run their full litigious course.

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8. See Telecommunications Regulation Today and Tomorrow (E.M. Noam ed. 1983) (discussing the 1982 consent agreement in which AT&T agreed to divest itself of the Bell Operating Companies after the Antitrust Division of the Justice Department brought suit against it).

A variety of specialized mediation and arbitration devices also have been developing in recent years to facilitate agreement-making and to reduce litigation and formal court processes in fields outside of the industrial relations arena, which has used such methods for many years and where the institutional arrangements are well established.\(^\text{10}\) Thus, malpractice suits, home or product warranty controversies, price or product differences among owners, contractors and architects in construction, or differences between manufacturers and converters in textiles and apparel, or some equal employment opportunity controversies are new areas in which disputes have been submitted to mediation or arbitration under voluntary arrangements developed and administered by the American Arbitration Association. A number of courts have experimented with special mediators, including the Bronx Housing Court in disputes between landlords and tenants, and in some courts in divorce cases.\(^\text{11}\) A number of organizations have sprung up, such as Resolve, to encourage the settlement of complex controversies between environmentalists and businesses by using direct negotiations and mediation.\(^\text{12}\) In all these cases, procedures that are faster, less expensive and more subject to the interests of the contending parties are replacing more formal and legalistic determinations.\(^\text{13}\) It can be expected that these methods of dispute resolution will spread and be more extensively utilized.

Negotiations have not only extended into the resolution of individual cases and disputes; they are also utilized to resolve controversies over public regulations and rule making,\(^\text{14}\) and indeed, in the accommodation of differences over the legislation itself. The procedures used to enact the Arab boycott legislation, the 1979 Trade Lib-


\(^{11}\) See Kraut, Domestic Relations Advocacy—Is There a Better Alternative?, 29 Vill. L. Rev. 1379 (1984) (outlining the special role of the mediator in family dispute proceedings in Chester County, Pa.).

\(^{12}\) See G. Cormick & L. Patten, Environmental Mediation: Defining the Process Through Experience (Feb. 1977) (paper prepared for the American Association for the Advance of Science, Symposium on Environmental Mediation Cases, Denver, Colorado; the authors are associated with the Office of Environmental Mediation, University of Washington).

\(^{13}\) See generally L.S. Bacow, Bargaining for Job Safety and Health (1980). For example, Bacow notes that the GM-UAW and the steel industries have provided for more stringent health and safety arrangements than the standards set by OSHA. Id. at 86-87.

eralization Act and the 1983 Social Security amendments, are illustrative of the successful resort to negotiations procedures prior to and outside the established process. In Massachusetts, the legislation reforming the administration of public employee pensions, including disability pensions, and creating the Public Employee Retirement Administration was negotiated and mediated among various private and governmental interests, including legislators, before enactment.15

One needs to be careful about the meaning of the statement that negotiations are an alternative to or replacement for markets and governmental determinations. It is easy to see that there may have been a change in form or appearance, but the reality is more complex. As with wage and price controls or collective bargaining, market forces are not entirely displaced or replaced. Sooner or later, they continue to operate, limit and shape, to some degree, the decisions made through the new institutions. It is erroneous to assert either that the new institutions make no difference, or that the decisions are entirely different since the market or the regulations have been altered to a negotiations form. Rather, the reality is that both old market forces and new ones generated by the new institutions operate through the new institutions, yielding more or less different results, to be assessed in each situation.

Collective bargaining, for instance, does change the performance of labor markets in many ways not appreciated by econometric studies. The tendency of collective agreements in many industries to be set for three-year terms, or differences between the parties in pure bargaining skills and power, or institutional interests in fringe benefits or union security may be expected to result in somewhat different terms and conditions of employment over time than would arise through markets or under governmental dictation. The quality of management and its policies as well as the characteristics of the labor force are altered. But it would be simplistic to hold that market considerations have been entirely displaced or eliminated. The substitution in form, from market to a negotiations form, has complex results that differ significantly from the market results.

The penetration of negotiations into the arena of governmental determinations, similarly, is not merely a change in institutional form. The costs and time of settlement are likely to be less than protracted litigation. The opportunity to influence more directly the outcome and to secure attention to issues of most vital concern is often greater. These factors are likely to yield different results

through negotiations than through litigation or other formal processes. It must be remembered, though, that in the course of negotiations, the possibility of reverting to a court, to an administrative agency or to legislative bodies is likely to be a continuing influence, and the emerging precedents of litigation are likely to influence relative positions and bargaining tactics. With regard to negotiations on some issues subject to regulatory decisions, such as employment discrimination or protected activity cases, agreements or settlements are subject to attack and to displacement in the very tribunals that negotiations are intended to circumvent. It cannot be denied, however, that negotiating a settlement with one or more adversaries, or with a governmental administrative agency or in a court is a different process with somewhat different results than a commitment to litigation and formal processes.

The field of industrial policy has come to be an area of intense ideological debate, including the role of negotiations and tripartite committees in establishing and administering policies relating to economic growth and industrial configuration. Business Week, in an editorial on the strategy for rebuilding the economy, urges "[t]he leaders of the various economic and social groups that compose U[nited] S[tates] society to agree on a program for reindustrialization and present that program to Washington." The AFL-CIO has repeatedly proposed a tripartite National Reindustrialization Board "to carry forward a rational national industrial policy." The Wall Street Journal takes a different editorial position:

The only industrial policy we need is one that offers the maximum possibility for individual decision makers to apply their initiative and imagination, take their risks and reap their rewards when their judgments are correct. As a group they will be right far more often than government bureaucrats not subject to the disciplines and incentives of the market.

16. A Strategy for Rebuilding the Economy, BUS. WEEK, June 30, 1980, at 146. This editorial recognizes the necessity of reindustrializing the United States and proposes a five step method to redo the manufacturing sector of the economy. Id. These five steps include: 1) agreement on a program of reindustrialization between the leaders of different sectors of the economy, 2) tax cuts for investments and subsidies or tax preferences for research and development spending, 3) a different type of federal budget, 4) redirection of investments away from housing loans and toward research and expert activities, and 5) promotion of exports. Id.


18. Neolib Nonstarters, Wall St. J., Oct. 19, 1982, at 34, col. 1. This editorial discussed a new industrial policy which would favor winning or "sunrise" industries
These introductory observations have been to call attention to the reality of the growing importance of negotiations in resolving real or potential conflicting interest among groups in our society. Negotiations have been making inroads on both markets and governmental mechanisms. These changes are more complex than the apparent changes in form. The expansion of negotiations brings with it growing controversy over the independent consequences of negotiations. The study of markets and, more recently, the study of regulation, are both well established in the disciplines of economics and law. The negotiations process deserves to be much better and more widely understood.

II. APPROACHES TO NEGOTIATIONS

There are a variety of approaches to explicate the negotiations process. A considerable amount of literature utilizes formal models seeking to explain bargaining generally and collective bargaining negotiations in particular. At one time I developed a model of bargaining power (with Benjamin Higgins) based upon different degrees of competition in related product and labor markets and the "pure" bargaining power of negotiators to determine a wage rate.

There are at least two major difficulties with the applicability of abstract models of negotiations. The first is that they are typically simplified to a single issue, such as money, or they assume that other issues are translatable into money on some stable trade-off, effectively creating a single issue. The second difficulty arises from the usual presumption that the negotiators constitute monolithic entities. They are portrayed as having no significant internal differences among the constituent members of the negotiating organizations and no differences between these members and their negotiator. Also, in these abstract models any internal differences which are used are entirely constant throughout the negotiations. In my experience, these sim-

\[ \text{with tax breaks, loan guarantees and other subsidies, while not doing the same for losing or "sunset" industries. Id. The editorial expresses skepticism about the ability of government technocrats to predict which industries will be winners and which losers and instead favors a more market oriented industrial policy. Id.} \]


plifications, essential to analytical rigor, are too abstract to be very helpful for providing much insight into the class of negotiations which are of central concern to me.

Another approach to explicate negotiations is through the use of experimental or simulated bargaining games. In some instances a class is divided into groups to represent the negotiating parties, initial positions are defined for each, and rules of play are specified. The process can generate substantial interest and apparent involvement of the participants.

There has been some effort to use econometric methods to measure aspects of arbitration or collective bargaining. Public sector bargaining has been used most often in view of the availability of data. The results appear to me to be unimpressive; situations are always changing in some respects, and these studies do not appear to center on fundamentals.

There is an approach to negotiations that constitutes an almost verbatim account of the exchanges from the earliest stages of negotiations to the achievement of a settlement. In recent years more condensed case studies of negotiations have been developed for courses in schools of business, law and public policy.

A somewhat different approach is developed in this article: to limit the types of negotiations considered and then to outline a number of key principles that are central to an understanding of the negotiations process. These principles grow out of reflecting on experience; they seek to blend analysis and art forms.

The types of negotiations considered in this article have at least three characteristics that eliminate some negotiations from our con-

21. See H. Raiffa, The Art and Science of Negotiation (1982) (setting forth several game methods involving games against specified players, games not involving any interaction with any player, and games of deception). See also DeNisi & Dworkin, Final Offer Arbitration and the Naive Negotiator, Indus. & Lab. Rel. Rev., Oct. 1981, at 78-87. This article analyzes a game in which undergraduate students played the role of labor and management. Id. at 78-79. It concludes that negotiators try harder to reach their own settlement and feel more positively about their opponents when they fully appreciate the final offer procedure. Id. at 86.


cern in the universe of all negotiations. First, parties or organizations expect to continue to be engaged and to interact over a future period. Thus, the direct sale/purchase of a house between individuals who are unlikely to have any interaction in the future ever again or a transaction by a visitor to a garage sale are a species of negotiations excluded from these principles. In the negotiations under consideration in this article, events during negotiations, in the agreement-making process, or in the breakdown of negotiations, are likely to be significant to the performance of the parties following negotiations. Second, the negotiators represent organizations or groups within which there are important differences in preferences among the constituent members. These relative preferences for bargaining objectives may even shift during the course of negotiations, particularly when the negotiations are protracted. The parties to our negotiations are not monolithic. Third, the negotiators are concerned with more than a single issue, or with one that can be decomposed into more than one subissue. Thus, whenever money is an issue, there is the issue of effective dates of any change in money. Compensation typically has a variety of dimensions. While one issue may be more significant to one party, as compared to others, I have yet to meet a real single issue dispute, recognizing that issues typically are decomposed into a variety of dimensions, or components.

The framework for analysis of negotiations outlined in the next section may provide some insight into these excluded classes of negotiations, but that is not the present primary purpose.

Labor-management negotiations in the United States are characterized by the three inclusions defined above, although few private negotiations are so precisely specified by public policy. The labor organization is certified by law as the exclusive representative of the employees in a precisely defined job territory. The management is clearly identified by law. The subjects over which the parties are or are not required to bargain are also defined by law. The obligation to bargain in good faith has been defined by statute and case law in great detail. The labor organization has the obligation to represent all employees in the bargaining unit fairly and without discrimination, including discrimination against any minority group of employees confronting a majority of employees. Negotiations are to begin a specified number of days before the expiration of the old agreement. Some methods of conflict in negotiations, for example,

26. Id. § 158(d).
27. Id. § 158(b).
relating to a picket, a boycott or violence, are permitted by law while others are prohibited.28

III. FRAMEWORK TO ANALYZE NEGOTIATIONS

The central purpose of this article is to assist those who observe a negotiation through the press, second-hand accounts, or report of isolated events of negotiations to understand better direct negotiations and the role of associated mediation.

No outsider can ever fully participate in an ongoing negotiation or a mediation process. This framework and statement of principles is designed to facilitate a keener intellectual appreciation of what is happening.29 Despite a spate of recent volumes that advertise that one can learn to “negotiate agreement without giving in” or “get the best out of bargaining,” I am inclined to believe that the art of negotiations can only be learned by experience, and often hard experience. A framework for analysis may, however, provide a perspective on what happens in negotiation and reduce the learning time or, perhaps, the pain of experience.

The framework presented below is not highly abstract or elegant. It does, however, reflect a first approximation of experience and analysis of the roles of various negotiating parties in diverse settings.

A. Internal Agreements

Each group or organization that is party to negotiations to seek an agreement has diverse internal interests. Therefore, an internal consensus or formal approval by each party is required to permit the consummation of a negotiated agreement. Thus, in the instance of two parties, it takes three agreements to achieve one agreement: an agreement within each party as well as one across the table. In the instance of three parties, it takes four agreements to achieve one agreement. This simple proposition is a fundamental to agreement-making.

The parties to negotiations, among continuing groups or organi-

28. See, e.g., id. § 158(b). Subsection (b)(4)(ii)(B) of this section is intended to prohibit secondary picketing by a union involved in a dispute with a primary employer, where the picketing forces a secondary employer to choose between keeping its customers or continuing to deal with the target of the worker’s dissatisfaction. Kroger Co. v. NLRB, 947 F.2d 634, 637 (6th Cir. 1981). However, under § 158(b)(4), informational picketing at a common work situs, such as picketing designed to advise the public that an employer pays wages that are lower than union wages, is lawful. Texas Distrib., Inc. v. Local Union No. 1005, 598 F.2d 393, 398 (5th Cir. 1982) (interpreting 29 U.S.C. § 158(b)(4) (1982)).

zations, are never a monolith. Attention to the conflicting interests and internal governance for negotiations is essential to observe perceptively agreement-making or to participate effectively in the process. A great deal of the negotiations process is devoted subtly to communications concerning internal priorities and reactions to various proposals and counterproposals.

In the negotiations in 1975 over the five-year grain agreement between the Soviet Union and the United States, for instance, there were diverse interests within the United States. These diverse interests were concerned with the volume of grain to be sold in 1975 and beyond, the urgency of reaching an accommodation, the consequences on domestic living costs, how to resolve a longshoremen’s work stoppage and achieve the use of American tonnage in grain shipments, and the need to include in the document an agreement with the Soviets for oil purchases below the OPEC price. These divergent interests were in part reflected in the different agencies of the government. The Departments of State, Agriculture, Labor, Commerce, OMB and the White House, among others, were all involved in making recommendations to the President on the positions in the negotiations. Although the United States negotiators may have had less hard information, it could be presumed there were some internal differences to be accommodated at some levels within even the Soviet government on questions of immediate needs, agricultural policies, storage capacity, shipping rate structure and oil prices. In the end, the United States had to abandon any linkage to oil if it was to achieve an agreement and the Soviets were under pressure to reach a negotiated settlement if it were to secure the grain volume it sought. The grain agreement, and the related shipping agreement, required considerable internal accommodation and congruent internal positions within each side—three agreements to achieve one formal agreement.

The private collective bargaining process well illustrates the same principle. The negotiating proposals of a labor organization are ordinarily initially put together from the aspirations of a wide range of members and subsidiary groups; the management proposals are no different. The union comprises diverse interests. Younger workers may be more interested in health care, older workers in pension benefits and retired workers in adjusting pensions for increased living

30. R.B. Porter, Presidential Decision Making: The Economic Policy Board 123-56 (1980). It appears that the Soviets were looking at other grain markets, and some Russian officials did not like the publicity that the purchases would generate. *Id.* at 125 & n.3.
costs. Workers in various departments or plants may place high priorities on local working conditions. Women or minorities may regard as their top priority new elements in an affirmative action program. Unemployed workers may be most concerned with supplemental unemployment benefits and the extension of health care benefits. In multi-company bargaining the marginal company employees may be concerned with job security and employment compared with a high priority for wage increases among higher profit companies, and so on. The collective bargaining and negotiations process requires the labor organization (and management) to assess these competing opportunities and to seek a settlement, before or after a work stoppage with a "package" which is congruent with management's (the labor organization's) internal acceptances. The negotiation process eliminates many of the initial aspirations of both sides and seeks mutually consistent items and magnitudes—three agreements to achieve the agreement ratified by the internal procedures of each party and made public.

The diversity in management is evident most clearly in public sector negotiations where mayors, city councils or boards of selectmen, finance committees and personnel bodies may be at odds. These differences are exacerbated by partisan and personality rivalries, and they materially complicate agreement-making and ratification.\(^{31}\)

The emphasis on the internal diversity and complexity of each organization that is party to the negotiations suggests that each negotiator appreciate the informal governance of each side in order to understand the proposals and counterproposals made in the negotiations. It is vital to sense the priorities sought by each side, and the severity of their opposition to proposals, in practice, rather than merely in formal positions or in public pronouncements. Each negotiator, and indeed mediator,\(^{32}\) needs to be sensitive to the possibilities of putting together "packages" of items to constitute an acceptable settlement in view of the respective priorities and negative evaluations of particular proposals. Indeed, negotiations or mediation is often the art of putting together packages that recognize the true priorities on each side that will "sell" to both parties informally as well

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31. See J. Brock, Bargaining Beyond Impasse: Joint Resolution of Public Sector Labor Disputes 144-49 (1982). Brock writes: "A personality conflict, even if it has little to do with the issues at hand, can be damaging to the bargaining relationship... and thus impede settlement." Id. at 147.

as in any formal ratification process. It takes three agreements to resolve the dispute.

B. The Initial Proposals

In negotiations the initial proposals for an agreement by any party tend to be large or extreme relative to eventual settlement terms, except in the case of a very few negotiators. It is important for observers or negotiators to understand the reasons for such inflated proposals and the functions that large initial proposals play in the negotiations process. They should not be simply dismissed with moral indignation as unreasonable; they often reveal a great deal about the internal complex of the side making the proposals.

Many initial proposals are large because they reflect the way they were put together, usually by simply assembling the aspirations of the divergent groups which comprise each party to the negotiations. In order to cut back or scale down proposals, it is essential to establish priorities among groups within the negotiating organizations, as suggested in the first principle. While some culling of raw proposals may be made initially, the process of priority setting and scaling back proposals for one party or another is often an integral part of the bargaining process itself.

Initial proposals may be extensive or large as a deliberate act on the part of negotiators to secure the reactions of the other side. At the outset it is not always clear which items or proposals may be of interest or be most acceptable to the other side or elements of the other side. A wide and diverse menu may permit explorations that otherwise may not take place. Some proposals are also planted for future years. John L. Lewis initially proposed the novel idea of royalty per ton of coal mined for health care of miners as a means to compel the diversified owners to study the approach seriously for the next negotiations.33

When negotiations may be protracted or when the environment of the negotiations may be expected to change significantly, the initial proposals may be large to accomodate such changed circumstances. Parties are likely not to want to make proposals which may appear grossly inadequate to their constituencies after six months or a year of negotiations. Therefore, larger or more extreme initial proposals protect the negotiations from drastic changes in circumstances.

Initial proposals may be substantial to facilitate negotiations

strategy calling for the abandonment or reduction in some items in response to movement by the other party. If a negotiator has advanced only a minimum or final position, it will not be possible to make concessions to see what effects such a change may have on the other party. The need to maneuver in negotiations also encourages large initial proposals.

It was observed above that there are a few situations in which initial proposals for an agreement by a negotiator may be close to the final settlement. Such a strategy may be followed, in my experience, by a negotiator with very considerable authority and prestige so that there is credibility, and when there likely is strong support for the approach within the organization represented. The tactic has the advantage that once it has been successfully established in a previous negotiation, it may contribute to its own success in future negotiations. But the tactic has very limited applicability. The tactic of take-it-or-leave-it from the beginning of negotiations is a dangerous ploy for all but the strongest and most prescient. The process of negotiating from large initial proposals to more reasonable ones is still the ordinary course of negotiations.

C. The Art of Changing Positions

Negotiations constitute the process by which authorized representatives from the different sides, starting from positions that are initially apart, often far apart, change their positions to seek to achieve a procedural or substantive agreement. A procedural agreement would settle a dispute, for instance, by referral to arbitration or to some other tribunal for resolution.

The change in the formal position of a party in negotiations is always accomplished with a certain amount of difficulty since a concession may be interpreted as a weakness and invite expectations for further yielding. Yet changes in positions by negotiators, ordinarily substantial changes, are required if the differences between the parties are to be narrowed and an agreement is to be achieved. But each apparent concession tends to create on the other side the impression of a willingness to yield further in continuing negotiations. If a negotiator has reduced (or raised) his offer ten cents an hour, the other side will argue that a further movement is appropriate to close the remaining gap between the parties on that issue. Moreover, an explicit concession once made is almost impossible to withdraw as a practical rather than as a formal or legal matter. It should be no surprise that concessions from initial or previous proposals are often accompanied by the refrain, "This is our last offer" or "This is our
At the outset of negotiations, after the lists of formal proposals have been submitted, each negotiator is likely to enjoy the full support of its organization, and there are sharp conflicts across the table. The positions are far apart and each side has a united constituency on rather extreme proposals. In the course of negotiations, as spokesmen change their positions and make concessions, more and more tension tends to arise within each group just as it may ease across the bargaining table. As each initial proposal is dropped or modified, internal support from additional constituencies may be lost. Indeed, it is a practical rule-of-thumb that as one is nearing agreement across the table, there is more difficulty within each side than between the leading spokesmen across the table. Each principal negotiator is often as much preoccupied with handling the internal conflicts and shaping proposals to satisfy the internal necessities as in handling controversy with the opposing negotiator. Changing positions creates internal tensions, making internal agreement more difficult.

The way in which negotiators for organizations change their positions in order to move toward a settlement is an art form involving considerable style in handling tensions internally as well as across the table. In my experience the characteristic which most distinctively separates experienced from inexperienced negotiators is the way in which they are able to effectuate changes in positions without creating expectations of further concessions and the way they can “read” suggestions of the other side for possible changes in previous positions. These differences in talents and skills do make a difference in the substantive outcomes of negotiations. A related element, absolutely essential to the art of changing positions, is the capacity to listen perceptively and to read between the lines. Timing or mutual understanding of the moods on the two sides is likewise critical to effective negotiating.

In the early stages of negotiations, it would not be unusual for a change in position to be reflected by the withdrawal or scratching of some items from the agenda of one or both sides. But as the negotiations proceed the discussions are often centered on various “packages” of proposals. While a change in position may be reflected in a modification in the magnitudes of the items in the “package,” a change may also be signaled by discussing a “package” modified to exclude some items or to add some items more desirable to the other side. These combinations may not be presented as formal offers or modifications in positions but only as different “packages” for exploration. Only
later may a formal change in position or a withdrawal of an item be conceded.

There is often considerable ambiguity over the status of various package proposals and their composition. At a given stage of the negotiations it may be quite uncertain what is in dispute and what, if anything, has been agreed upon. This is due to an axiom of negotiations providing that there is no agreement until all items in dispute have been resolved one way or the other, unless otherwise explicitly specified. The negotiations process ordinarily consists of steps involving changes in position, or indications of willingness to change, while preserving positions should the negotiations fail to reach a settlement in the current round or forum of negotiations.

Regardless of how artful or clumsy in execution, negotiations is the process of changing positions in movement toward a resolution of the dispute.

D. The Role of Deadlines

A deadline serves a vital function in negotiations. It compels each side to reach decisions and establish priorities that would not otherwise occur, at least not so rapidly. The temptation to procrastinate and to hope the issue will go away or can be postponed is recurrent. In the absence of a deadline, as with a strike or a lockout in collective bargaining, or in a court proceeding or other mandated decision-making in government regulatory agencies, the negotiators or mediators often create artificial deadlines to try to bring issues "to a head" and to resolution.

The passage of time is not ordinarily neutral with respect to the interests and fortunes of each party. Time may run more towards one party than the other, and one or the other may hope for a more favorable setting in which to settle or reach agreement. A deadline is an institutional design in negotiations to reduce dilatory postponement. It could be a natural deadline, as in the expiration of an old collective bargaining agreement, or a synthetic one, created by no less a necessity than to catch an airplane or report to another scheduled meeting.

The question is repeatedly asked as to why negotiations are not settled until a deadline, often at midnight or in the wee hours of the morning, even after a symbolic stopping of the clock. An appreciation of this distinctive feature of negotiations involves the series of points made above concerning the essential nature of negotiations between continuing organizations. The "end game" of negotiations involves concessions, from one side or the other or both, that are more
vital than those changes in position previously made, and they are likely to prove more difficult to make. The less valuable "chips" have already been surrendered. Moreover, settlement involves complex trade-offs, often in "principle," between one group of the constituency and another as they involve different aspirations of the same constituency that is now required to face more realistically the opportunity costs of any priority and what must be conceded to achieve the objective.

These internal decisions involve complex communications. Often there are sharp differences of internal views which are likely to have become acute as negotiations have continued and more concessions have been made. A deadline requires a reconsideration of the easy view that the other side is likely to "blink" first, and it forces a hard review of the consequences of nonagreement. These consequences are more realistic when they are imminent than when viewed in anticipation months ahead. A deadline is an essential ingredient to such hard choices and decisions. Students well understand that it often takes a deadline to produce a term paper.

E. The Final Concession

The endplay of negotiations poses distinctive problems and opportunities that may facilitate agreement or freeze positions into obdurate obstacles to settlement. In the endstage of negotiations the number of issues is reasonably limited and defined, and the distance between the parties are moderate. The critical problem is that each side would prefer the other to move to avoid a further concession itself; any move creates the serious enigma of creating the impression of being willing to move all the way to the position of the other side. The negotiating situation is delicate. As explained in the next section, a mediator can play a vital role. In the absence of a neutral, it is common for the one or two key persons from each side to meet privately at lunch or elsewhere, even without the advanced knowledge of their colleagues, to span the remaining gap. The final steps are seldom taken at the table, although they must be confirmed there and by ratification.

Ronald Reagan, in his autobiography, reports on his experience in negotiations as President of the Screen Actors Guild:

I was surprised to discover the important part a urinal played in this high-altitude bargaining. When some point has been kicked around, until it swells up bigger than the whole contract, someone from one side or other goes to the
men's room. There is a kind of sensory perception that gives you the urge to follow. . . . Then, standing side by side in that room that levels king and commoner, comes an honest question, "What do you guys really want?" . . . Back in the meeting, one or the other makes an offer based on this newly acquired knowledge. . . . Then the other returnee from the men's room says, "Can our group have a caucus?" That is the magic word, like the "huddle" in football—it's where the signal is passed.34

F. The Changing Site of Negotiations

An essential feature of all negotiations is the determination by each negotiator at an early stage whether the other party is serious about reaching an accommodation at the current "table" or whether the parties are engaged in "going through the motions" to end in some subsequent further negotiations in some other forum with some other representatives, or whether the negotiations are a sham concealing a prospective conflict designed to end in the extinction of one party. This judgment is often not easy to make, but it has decisive effects upon the negotiations. There are many negotiations that are perceived by both sides to be preliminary to further negotiations; as long as both sides have the same perceptions, serious difficulties may be avoided. Different expectations, however, can be the source of major conflict and lead to charges of bad faith.

It is axiomatic that negotiations recognized to be preliminary to a further stage are unlikely to elicit best offers. However, very important functions relating to factual information, exploring priorities among issues, alternative approaches, and sensing internal considerations may be achieved.

In some labor-management negotiations it is possible to envisage a succession of "tables" at which the dispute may be negotiated. Local parties may be followed by national and headquarters representatives of the two organizations; top officials may participate; a succession of mediators and government officials may seek to mediate the dispute; formal factfinding with recommendations may be voluntarily agreed upon or required by legislation; a succession of further negotiations and mediation may follow factfinding; the physical locale of the negotiations may shift a number of times. The White House or the governor may intervene in certain disputes. The negotiators will want to anticipate such shifting "tables" because the timing

of concessions is vital to the negotiators, and mediators may expect additional flexibility in positions.

Some negotiations, at least on the part of one side, may be regarded as a way to secure delay, to postpone legal proceedings, or to secure a lapse of time thought to be favorable to one's position. In such instances the procrastinating side is likely to pay scrupulous attention to the form and protocol of negotiations but to avoid problem solving. While it is vital for an observer or a participant to know whether a case has these characteristics, the determination is often not easy to make.

Among continuing organizations that deal with each other on an ongoing basis, negotiations may at the outset take on the character of mutual problem solving. The process involves careful development of the factual basis of a problem, areas of agreement or disagreement over the facts, including the need for further investigation. The identification of both the more objective character of the problem and the organizational concerns for both parties are likely to be explored. There follows an exploration of alternative resolutions of the problem, as redefined, and the costs and acceptability of each approach to each party. An accommodation, formally or informally, may then be accepted for a temporary or a longer period. In this mode negotiations are problem solving; the negotiators are not characterized simply as traders seeking a sharp advantage. The difference is vital to long term constructive relations between the organizations or groups.

G. The Use of Conflict

Negotiations do not preclude overt conflict, and both may take place simultaneously. Thus, negotiations may begin or continue with a strike or lockout, litigation, political activity, or while public campaigns are also under way. It may be difficult for an organization to conduct warfare and diplomacy simultaneously, but separate representatives of an organization are often involved. In these circumstances, conflict is another form of pressure directed to the bargaining table, and bargaining strategy may take on the form of another element of conflict. It must, of course, be recognized that overt conflict, in the circumstances of ongoing negotiations, may in the course of the conflict, or as a consequence of the results of conflict, alter the position of one side or the other in negotiations. Indeed, that is typically the purpose of the conflict, to facilitate agreement on more favorable terms or more rapidly.
Negotiations are not fruitfully conducted in public, in the press or in the media. Indeed, an indication that negotiators may be serious about reaching a settlement or be willing to explore their problems in earnest is signaled when they exclude the press and refrain from press comment, save in the most general terms, such as, "we met for so many hours" and "explored our mutual proposals constructively." In public sector bargaining, negotiations are ordinarily excluded from the requirements of conducting public business under the open meeting laws. It is important to be analytically clear as to the reasons negotiations need to be conducted in private.

Negotiators desire to explain the concessions they make and the terms they have achieved directly to their constituents rather than have the press or media initially make that explanation and state the merits, or deficiencies, of the settlement. The negotiators know their own constituents and the political alignments within the group. Moreover, the performance in negotiations and the appraisal of the results of negotiations is a major feature of the political life of an organization that is decisive to the performance of leadership. Since negotiations may treat different members of the group somewhat differently, the leadership desires to deal with these differences directly rather than have the media or press present an initial view.

The injection of the press into negotiations would make it even more difficult for the principal negotiator, or the committee, to change positions. The press reports would encourage those opposed to generate hostility as the negotiations proceeded, before the settlement can be considered as a whole. Moreover, as has been noted, much of negotiations is contingent upon overall agreement, so that initial proposals and counterproposals may not even appear in the final settlement.

The proclivity of the press and media to highlight particular items or give a special cast to events does not appear to serve well the success of negotiations in process, particularly when an agreement is subject to a ratification procedure. The public report of the settlement, with any desired editorial comment after the fact, does not affect the outcome.

I. An Essential Gap Filler

The negotiation process, ending in an agreement, typically needs to provide for some procedure to administer or to interpret the terms of the settlement. It is literally impossible to provide for all details,
circumstances or contingencies. Sometimes minor gaps are deliberately left in an agreement since a full understanding cannot be achieved, leaving the resolution to a future process of administration or adjudication. Some questions can only be resolved in the light of future developments. Specialists, or those subordinately involved in particular operations, may be more appropriate to resolve the application questions than the principals involved in the negotiations. The long hours of tiring negotiations may overlook a problem, requiring a subsequent procedure to resolve it.

In many instances the procedures for interpretation or administration may simply constitute a reconvening of the negotiating committees or a subgroup. In other situations the procedures may involve a separate group, including the possibility of resorting to arbitration on a question of the meaning or application of the original agreement. The parties may also agree on voluntary arbitration after a period of future negotiations over the issues raised subsequent to the agreement.

In a continuing relationship the process of interpretation and administration of any agreement develops a substantial body of cases, questions and answers, issues, interpretations and applications that come to constitute, with the original negotiated agreement, a complex and expanding body of common understandings. The terms of those understandings may involve different levels of the organizations' parties to the original agreement, from the top level to the lowest operating level in each. These processes provide the "flesh and blood" of the interaction of the organizations, beyond the "bare bones" of the formal agreement. In a sense, the negotiations process and the administrative process create a complex interrelation of the organizations, on a day-to-day basis, and not merely the written words of the formal agreement or protocol.

J. The Personality Factor

There is at least one facet of the negotiations process about which it is most difficult to generalize in principle. This facet relates to the importance of the personal relationships among the principal negotiators. Agreements are made not merely among organizations but also among individuals acting on behalf of these organizations. Some individuals in these settings get along well and some do not. This factor of personality, experience, skill, chemistry, attitude, demeanor, as well as status in the organization, does not tend to make much difference in the agreement-making process in some situations, while in others it matters very much. It is not unusual in negotiations
for the chief negotiator of each side, sometimes with an aide, to meet
to talk "off-the-record" about procedures, timing or substance, or to
"try on for size" next moves or proposed settlements, and even to
compare notes on constituencies. Therefore, these personal relation-
ships may be pivotal. Even with respect to entirely professional nego-
tiators, the factor of personality influence is not inconsequential in
many cases.

While it may not be possible to adjudge its quantitative impact,
a careful observer of any negotiations or a mediator will want to ap-
praise and take into account the personality and the interaction of
the principal negotiators. The reference to this factor may not be analyti-
cally neat, but it does reflect a principle of practical import in many
instances.

In summary, the framework developed to elucidate negotiations
among continuing organizations that expect to continue to relate to
each other involves the following propositions:

1. It takes an agreement within each side to reach an agree-
   ment across the table; in two-party negotiations, it takes three agree-
   ments to make one.

2. Initial proposals in negotiations are typically large compared
to eventual settlements, to serve a variety of purposes. Priorities
   within each side are often actually established in the course of
   negotiations.

3. Negotiation is the process of changing positions and making
   concessions from initial positions while moving toward an agreement.

4. A natural or artificial deadline is an essential feature of most
   negotiations. Time is not neutral in its effects on the relative position
   of the negotiators.

5. The end stages of negotiations are delicate, where issues are
   limited and the distances apart may not be large. Private discussions
   between one or two key persons on each side are often used to close
   the gap in the absence of a mediator.

6. Negotiations will be significantly influenced by whether the
   negotiating table is the final one or merely a step toward further neg-
   otiations, in new locales, with other higher-ranked negotiators or
   with neutrals.

7. Negotiations and serious conflicts may be carried on simulta-
nreously; the purpose of the overt conflict is typically to serve as a tool
of agreement-making, although the conflict, and its results, may affect
the bargaining objectives and priorities of the negotiators.

8. Agreement-making in negotiations does not flourish in pub-
lic, with press and media coverage. Serious negotiations require that the leaders at the table first communicate directly with their constituents concerning settlement and explain their recommendation, in terms of the internal political life of the organization.

9. An agreement typically reflects the need for a recognized procedure to resolve questions of the meaning and application of the agreement or fill in lacunae.

10. The personality of negotiators and how they relate to each other does affect the outcome in some instances.

IV. THE COURSE OF NEGOTIATIONS

There is one further set of ideas that may give insight into interpreting negotiations from the perspective of the observer or the negotiator. Ordinary negotiations tend to follow a pattern or course, and it may be helpful to locate a given session or point in time in the course of this succession of stages or life cycle. A number of stages have been reflected in the above discussion.

The initial stage involves each side presenting its credentials, for whom they speak and their authority to settle or to recommend settlement. Each organization then formally presents its proposals for an agreement, with supporting facts and argument.

The next stage involves each side in asking questions about the proposals, seeking to understand how they would operate and in probing the reasons for the proposals and searching for the true priority items for the current negotiations. Factual material may be developed and sidetables or subcommittees may be asked to generate data on particular questions in dispute.

Some effort may next be made to narrow the number of issues or the magnitudes involved. The next stage is likely to involve the attempt to develop a package or alternative packages of proposals for a settlement. This process involves a search for relative priorities and trade-offs. The internal tensions within each side complicate this process.

The endplay stage of negotiations, closing the gap, often involves side-bar and private discussions of principal negotiators, or a mediator if one is involved. Seldom is agreement reached directly at the negotiating table. There is typically considerable emotional release on reaching agreement; there are joys of settlement.

An agreement needs to be reduced to "legal" language, to the extent that has not been accomplished, and typically checked by both
counsels. The appropriate ratification and approval processes also need to be accomplished.

Not every day or night at the negotiating table is the same. There is typically a beginning and an end and a sense of flow or a process through stages toward an agreement. While there is often a good deal of backing and hauling, and even starting over again, the negotiators and close observers need a sense of location or stage in the course of the negotiations process.  

V. THE ROLE OF MEDIATION

The framework of the negotiation process among continuing organizations, summarized above, provides a setting to consider the questions: What do mediators do to facilitate agreement making? What are the potentials and the limitations of the mediator?

It has often been appropriately observed that there are various types of mediation and mediators; the extent of penetration into the substantive bargaining discourse, as well as the bargaining process, varies a great deal. Moreover, just as among negotiators, personality factors and status may be significant factors with some mediators. Some mediators may do little more than preside over meetings and maintain a modicum of order, while others may be deeply involved in proposing packages for settlement and in seeking acceptances of these proposals. But whatever the role of a mediator in an individual situation, the concern, as with negotiations, is the analytics of the mediation process.

A. Controlling the Flow of Information

The strategic position of the mediator relates fundamentally to the communication flow between the parties, and on occasion, depending on location and time, the flow between the principal negotiators and their larger committees and constituencies. Particularly in

35. The discussions of negotiations and mediation in this article has significant implications for public policy. The NLRB and the courts have created the concept of “impasse” in negotiations, and public sector agencies in various states have followed their lead. An employer may be free to make unilateral changes in working conditions, withdraw from an association, or take similar action if an “impasse” exists. This is an utterly unsatisfactory and ambiguous standard. The parties may not be able to settle the dispute directly; with one mediator they may but not with another; the dispute may remain one night but be settled in a further week; an “impasse” may be largely in the eye of the beholder. Or, it may be an excuse to destroy the other side. As a mediator, I am unwilling to recognize or to announce a permanent “impasse.” For a discussion of the law, see C.J. Morkis, THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 330-32 (1971).
mediation in which the parties are separated, and the parties meet separately with the mediator (which is true at the most critical stages of most negotiations with mediation), the control over information flow between the parties is in the hands of the mediator.

This is a substantial and significant tool. What the parties know of each other's changing positions, the explanation and rationales for changes, any view as to how far apart the parties may truly be, the status of internal conflicts of view, and critical attitudes and feelings all are within the control of the mediator. An encouraging or dismal picture may be portrayed by the mediator to each party. The way in which this "switch" in the control over information is utilized is the first principle in understanding the function of mediation in negotiations. The parties might have transmitted to each other some of the information available to the mediator were they meeting across the table. But the mediator alone is privy to some information as a consequence of private discussions with each side, due to the confidence and trust with each side.

In the event the parties communicate directly with each other, around the mediator, a signal has been given as to the mediator's limited usefulness, probably restricting the role to housekeeping functions.

B. Impartial Factfinders

The mediator function often involves the development of mutually acceptable factual data to provide a setting for the more informed and more dispassionate discussion of particular issues. In some cases the costing of various proposals and the validation of data regarding other settlements or levels of wages and benefits may be significant to settlement. The costing of complex pension plans or health care arrangements may be done with the mediator or with agreed-upon outside experts. It is difficult to exaggerate the importance and effectiveness, as a mediation tool, of working through background factual material with the parties in a dispassionate mode.

C. Engendering Understanding

The mediator serves privately as an informal advisor to each side in the delicate art of putting together packages for consideration by the other. This role involves a sensitivity to the internal priorities and constituencies of each party. It also includes a sympathetic interpretation of each side to the other as to its problems and aspirations.
D. The Neutral Proponent

The mediator has the opportunity to formulate a distinctive and imaginative package proposal on his own out of an independent and creative perspective. The mediator is free to try on ideas without having to commit to either party as to where the ideas originated. The parties may have so pursued particular solutions of course that they have neglected new or original ideas that might more acceptably resolve their differences. Mediators differ greatly in their willingness to take such initiatives, although the most distinguished in the past generation, such as George Taylor or David L. Cole, were never bashful in this respect if the option appeared to offer an alternative for settlement.

E. Finalizing Agreement

The mediator has a special opportunity in the “endgame” of negotiations. When the parties are relatively close to settlement, and they are aware of it, the final steps may be very difficult. Each side may well believe the other should make the final concessions. The dispute may appear particularly intractable at this juncture; each side has made many moves that have hurt and the internal hostility to a further accommodation is likely to be very high. In these circumstances a third party may greatly facilitate agreement. The separate conditional acceptance to the mediator by one side of a proposal does not prejudice the position of that side if there is no agreement. It is not unusual for a mediator to secure the separate acceptance of each side to a “package” of the mediator’s design and then to bring the parties together to announce that, even if they do not know it, they have an agreement.

F. The Importance of Mutual Respect

A critical factor affecting the role of the mediator is the circumstances by which he or she entered the dispute. In general, the strongest possible position derives from a joint invitation of the parties to the mediator to assist in the resolution of the controversy. The past relationship of the parties with the mediator, if any, is also likely to be a factor. A mediator may have so sought to induce agreement in a previous case as to be unacceptable to either one or both parties in another situation.

G. Potential Arbitrator

A mediator may be asked to serve as an arbitrator, with author-
ity to determine a settlement on one or more specified issues. While arbitration is a different proceeding, and bears a different relationship to negotiations than mediation, there is a class of arbitrations which involve the mediator in formally decreeing an agreed-upon settlement which the parties for one reason or another desire to be formally specified as an arbitration award. The arbitration format of a settlement may be more acceptable to certain internal constituencies or external groups.

H. The Public Perspective

Finally, some mediators may play a role in settlement of some disputes by asserting a moral authority or position for the public interest that they may seek to represent or to project. This role may be supported by public officials, by the press, or by interests among affected businesses or communities. In some limited circumstances this role may help to induce settlement, although rarely has this factor alone been very effective.

In summary, in the negotiations process among established organizations as analyzed earlier, mediations may play an independent role in achieving settlement. The analytical process of mediation achieves its outcome through the following processes:

1. Control of the communication patterns among the parties and the use of these flows to encourage settlement.
2. The dispassionate development of factual material thought to be relevant to the issues in negotiations.
3. Assisting the parties in developing settlement package proposals.
4. Developing distinctive settlement packages different from those initiated by the parties.
5. Facilitating settlement without prejudicing the position of the parties when further movement is required during the “end game” of negotiations.
6. The role of the mediator is significantly influenced by the circumstances and sponsorship under which the neutral entered the dispute.
7. The mediator may facilitate acceptance of a settlement, on occasion, by issuing an arbitration award.
8. A mediator may, on rare occasion, be in a position to exert a moral authority or reflect a public interest in the resolution of a dispute.
VI. CONCLUSION: THE CASE FOR NEGOTIATIONS IN DISPUTE RESOLUTION

As a means for the resolution of conflict between organizations, negotiations and agreement-making have a variety of advantages compared to litigation, governmental fiat, or warfare to extinction, although there are some agreements that may be unacceptable to the society expressed in its political and legal processes. The significant feature of an agreement is that its parties are committed to live by it rather than to continue conflict and warfare after a decision unacceptable to one side. There is simply no decision so precise or detailed that parties cannot continue to fight about its meaning, application and scope if they choose to do so. There is an important sense in which no decision among groups can genuinely resolve a controversy unless the parties agree to accept it. The likelihood of parties enforcing their own agreement is far greater than their accepting a decision adverse to one party.

Beyond the basic superiority of genuinely settling a controversy, if agreement is achieved, negotiations have the virtue that they may reduce the high costs to the parties of litigation, the time required for a resolution, and the uncertainty of the resolution. Further, the two sides are ordinarily capable of more imaginative solutions to problems than any outsiders, since they presumably know more about their problems and controversies than do others. It is also the case that many of the conflicts among groups are so complex, or groups are so powerful relative to each other, that increasingly issues cannot be decided with a winner and a loser. The negotiations process often discovers a viable form of accommodation not previously evident. Negotiations can be creative and problem-solving, while most litigation tends to be formalistic and sterile.

These observations suggest that an understanding of the general principles of negotiations and some rudimentary skills are an essential feature of the education for managers of public, nonprofit and business organizations alike. The emphasis that is placed in education on an appreciation of markets and governmental processes including litigation, for practitioners and officers alike, needs to be shifted to some degree toward negotiations and agreement-making, since they play a growing role in conflict resolution today, and they are likely to be even more significant in the future of organizations.36

36. The substance of this article appears in Mr. Dunlop's new volume, J.T. Dunlop, Dispute Resolution, Negotiation and Consensus Building 3-28 (1984).