Book Review. Privatization and the New Formalism: Making the Courts Safe for Bureaucracy

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Privatization and the New Formalism: Making the Courts Safe for Bureaucracy

Bryant G. Garth


The Federal Courts provides a powerful statement for an important vision of the courts and their political and social role. It defines a specific role of the federal courts, documents the belief that the courts face a crisis, and proposes a variety of reforms at differing levels of ambition. Many of these proposals appear to be rather reasonable, and they are presented in a straightforward manner. Indeed, while Posner admits that his politics are relevant to his analyses, even the politics in this book are presented in a reasonable manner.

Many readers will recognize the political nature of the discussion but still be persuaded of the soundness of much of the argument, which seems quite commonsensical, and will follow along until they perceive that Posner has shifted from what seem to be commonsensical notions to what they see as clearly political notions. Such readers, however, may be falling into an error characteristic of much commentary on civil procedure and the role of the courts. Is it safe to follow conventional wisdom uncritically as to what is politics and what is common sense? Not that we should neglect common sense by simply asserting that "everything is politics." Rather we should examine what is conventionally assigned to the political realm as opposed to that which

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1. Randolph Bourne in 1917 warned in another context that this kind of realism may "be sometimes a mere surrender to the actual, an abdication of the ideal through a sheer fatigue from intellectual suspense... The realist thinks he at least can control events by linking himself to the forces that are moving. Perhaps he can. But... it is difficult to see how the child on the back of a mad elephant is to be any more effective in stopping the beast than is the child who tries to stop him from the ground." R. Bourne, War and the Intellectuals 12 (New York: Harper & Row, 1964).
seems to fall in the realm of uncontested common sense. We can begin to understand the current movement to transform the courts only if we see the combined power of explicit political agendas and subtle common sense.

Posner's description and analysis are especially helpful today as a guide to related phenomena that can be understood as (1) the privatization of courts and civil procedure, which can be contrasted with the public law model promoted by leading liberal commentators; (2) the narrowing of disputes, as opposed to the expansive trends made possible by the Federal Rules of Civil Procedure and cultivated in the 1960s and 1970s; and, somewhat more speculatively, (3) the rise of a new procedural formalism, which resembles its 19th-century predecessor in several crucial respects. Each of these phenomena represents a perspective that covers many of the same developments, but the perspectives serve to reinforce a general theme. Politics and, above all, common sense, bolstered by the shared perception of crisis, are leading to reforms that are calculated to insulate private and public bureaucratic institutions from close scrutiny by legal institutions and processes. This review will provide a kind of road map to these reforms and then begin to suggest how notions that are apparently commonsensical can lead one astray.

THREE EXAMPLES

The practical implications of the approaches described below can be understood best against a background of some fairly typical examples. Each provides a setting that allows courts to get involved in what could be considered the affairs of a public or private bureaucracy. And while they neither individually nor collectively illustrate all the implications of the movements to be discussed here, they at least make it possible to go beyond such abstract labels as privatization and formalism.

The first example involves an individual burned by the flame of a cigarette lighter.\(^2\) The injury is serious enough, we shall suppose, to interest a lawyer contemplating a contingent fee award from a successful suit, but the damages would be unlikely to go beyond $50,000. We can also assume that the lawyer cannot tell at the outset whether the injured individual had been careless in any respect or whether the lighter could have been manufactured in a way less likely to cause injury. The crucial decision is how much to invest in the case. One possibility is to go for a quick settlement, either informally or by filing the suit and pursuing preliminary discovery. This would keep the matter discrete and essentially private. A second would be to look for culpa-

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\(^2\) In April 1987 the \textit{New York Times} reported allegations that some 200 people a year die from injuries associated with lighters, which allegedly ignite when not in use or explode when used; and that the Bic Corporation had sought to settle all lawsuits alleging fault by Bic in lighter accidents before the suits even were filed. The Bic Corporation denied the allegations that their lighters were unsafe. \textit{Gilpin, Bic Says There Are 42 Suits, N.Y. Times, April 17, 1987, sec. D, p. 3, col.1.}
bility that might amount to punitive damages, such as perhaps a deliberate decision to continue with a defective design despite warnings and other incidents. A third approach would be to try to expand the lawsuit into a class action covering persons who had experienced injury of one form or another through use of the lighter. If a strong claim for punitive damages is found to be plausible, or if a class is certified, the settlement value of the lawsuit and the contingent fee would go way up; and the impact on the defendant’s behavior would likely be substantial.

The second example concerns a purchaser of certain supplies for a factory whose principal supplier suddenly increases prices dramatically. The purchaser searches for an alternative supplier and finds that the competitors also have increased their prices by a comparable percentage. For various reasons, the purchaser finds that it is unable to remain in business because of the higher production costs. As the business unravels, the purchaser consults a lawyer to complain about the prices and ask if anything can be done. We shall assume that the lawyer cannot tell for sure whether the business could have been made competitive despite the price increase or whether the price increase was the result of anticompetitive behavior or other reasons. The lawyer has similar questions about whether to file, how far to probe before terminating through settlement, and how much investment in the litigation is likely to maximize attorney’s fees. There is a special incentive of treble damages for the proof of antitrust violations, but it is very difficult to prove conspiracy. An experienced lawyer will know that the defendants will try to put together a strong summary judgment motion as soon as possible, and the open question will be whether and how much investment can turn up enough information to survive the motion. If the action survives summary judgment, again the settlement value goes up dramatically.

The third example concerns a foster mother very much attached to a child who has been entrusted to her for a time and is apparently going to be taken away for no persuasive reason. The woman goes to a lawyer to ask if there can be any possible remedy for the apparently arbitrary action that she faces. The lawyer finds out that no right to a hearing on this issue has been established and that the legal policy has been to give unlimited discretion to

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3. It has not been unusual to allege antitrust conspiracies before all the facts have been collected. Recent examples from the Federal Rules Decisions include: Mary Ann Pensiero v. Lingle, 115 F.R.D. 233 (M.A. Pa. 1987) (attorney fees awarded under Rule 11 to defendant against plaintiff who alleged, without sufficient basis, that defendant conspired with others to refuse to deal with plaintiff); Nassau-Suffolk Ice Cream v. Integrated Resources, 114 F.R.D. 684 (S.D. N.Y. 1987) (sanctions, again under Rule 11, in favor of alleged supplier charged without sufficient factual basis with an illegal tying arrangement with other suppliers). Of particular interest, however, is the Supreme Court approach in Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S.Ct. 1348 (1986), discussed below.

the state bureaucracy. A lawsuit might be plausible enough on the merits to help the client to win a favorable settlement in this one case, or it might be possible to challenge the state's method through a broader attack. As is typically the case in legal challenges to governmental practices, the lawyer is likely to think in terms of a challenge based on due process grounds. If a "property right" in the child can be posited, the court might require a hearing as a matter of procedural due process. An injunctive lawsuit could be pursued through a class action or through linkage with an advocacy group already existing or mobilized for the court battle. An advocacy group might even mobilize through the publicity the lawsuit would generate by getting the facts of the bureaucratic behavior and particular injustices out into the open.

PRIVATIZING THE COURTS AND LITIGATION

One approach to these examples, which emphasizes the particular role for the courts favored by Posner, can be termed privatization. This role starts from the premise that courts exist mainly to apply the law correctly to disputes among private parties unable to reach a settlement. This ideal probably could be applied best to civil litigation in the 19th century, dominated in state courts by the common law of contract, property, and tort. The classic case of Swift v. Tyson, decided in 1842, enlisted federal courts in the general search for the correct common law principles to decide cases of private law.

The second view, of more recent vintage and in the ascendancy in the 1960s and early 1970s, is that courts exist primarily to foster the development of public rights and values that can help regulate bureaucracies and protect individuals. This view tends to favor liberal interpretations of regulatory legislation and of constitutional provisions that can be construed to favor the disadvantaged, and it tends to oppose measures that deprive courts of an op-

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5. In an empirical study of class action litigation in the Northern District of California, we found that virtually every "creative" constitutional theory, e.g., to challenge city towing practices, jail detention, prison discipline, and a variety of social security and retirement provisions, was founded on procedural due process. For a general discussion of the study see B. Garth, I. Nagel, & S. Plager, The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation, 61 So. Cal. L. Rev. 353 (1988). The study was supported by a grant from the Law and Social Sciences Division of the National Science Foundation, No. SES82-18926.

6. 16 Pet. 1, 16 L.Ed. 865 (1842).

7. According to Abram Chayes, the Supreme Court is charged with "exercising an oversight function on behalf of the interests and groups as well as the individuals affected by the challenged bureaucratic actions." Chayes, "Foreword—Public Law Litigation and the Burger Court," 76 Harv. L. Rev. 4, 60 (1982).

Bruce Ackerman represents a good example of someone who is concerned that public values be developed beyond Posner's market approach: "I aim to mediate ongoing political conflict through a legal culture in which public values are developed in the manner of American law." B. Ackerman, Reconstructing American Law 100 (Cambridge: Harvard University Press, 1984). Ackerman emphasizes that these affirmative values, which include distributive issues, go well beyond economic efficiency: "thou shalt nor imagine that perfected market justice is all there is to American law." Id. at 91.
portunity to participate in the public dialogue. Since courts represent an important and distinctive political branch, according to this view, it is crucial to ensure that individuals and groups be encouraged to advocate their interests in judicial forums. Justice Brennan captured this view in 1963 by describing the NAACP's litigation:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts.8

Posner and others dislike the model of political expression by advocacy in the courts. Justice Brennan's idea of access for the promotion of group objectives—law enforcement or the expansion of rights—thus fares poorly. Posner, for example, favors the settlement of cases without judicial decisions9 and wishes to halt what he terms the "promiscuous judicial creation of rights" (at 207). He asserts that courts must be restrained in interpreting the Constitution and also wary of broad interpretations of regulatory legislation presumed to be in the public interest. Rather than search for public principles allowing expansive interpretations, he suggests that courts approach legislation more often as examples of private deals among special interests, which ought to be enforced as narrowly as private contracts in order to minimize their impact on the private economy.

Moreover, Posner sees the basic role of even the federal courts as that of "primarily common law courts"10 akin to those found in the 19th century. Common law for Posner means much more than case law: it means that the law "is dominated by utilitarian, or in economic terms efficiency-maximizing values" (at 301). The principal public value that comes out of these common law courts is thus the maximization of efficiency, which is designed to protect the operation of private markets and the freedom of private parties to conduct their business. Parties should be encouraged to resolve disputes themselves consistent with their own economic interests but, if matters go to the courts, they should decide the disputes efficiently and consistent with efficiency-maximizing values.

These issues frame an interesting debate on the role of the courts. With respect to issues of access and the importance of courts in articulating and promoting public values other than the value of efficiency, this debate has already become politically controversial.11 It is easy to see that the outcome of

9. At 321. ("the time has come to subsidize settlement rather than litigation").
10. At 294. See, e.g., Bethlehem Steel Corp. v. EPA, 723 F.2d 1303, 1309 (7th Cir. 1983) (opposing effort to find public values in a statute).
11. Another conservative critique of the "rights industry" is R. Morgan, Disabling America:
this debate is important for at least one of the examples outlined above. The problem of the foster parent fits very poorly with the privatized view of the courts. Standing to an advocacy organization would probably not be encouraged, and only the "promiscuous creation of rights" condemned by Posner would seem able to give a foster parent a right to a hearing before the child is taken away. The other two problems, however, are less touched by privatization in the sense used here. The case of the lighter can be treated as a private tort, litigated individually or through joinder of like claims. And the potential price-fixing claim, while grounded on an ostensibly public right, antitrust, fits very well into the efficiency-dominated common law that Posner wishes to see applied. Privatization thus seems to have no real impact on the latter two of my examples.

Readers of The Federal Courts might proceed to just such a conclusion about Posner's general approach to courts and civil procedure. They might conclude that Posner has carved out a politically controversial role for the courts that favors his conservative economic philosophy. I do not think Posner would deny this, and this political debate will no doubt continue. Readers might also think, however, that the conservative economic philosophy is otherwise not implicated by recent and less controversial procedural reform trends.12

NARROWING DISPUTES

The other trends—dispute narrowing and procedural formalism—start not with a politically charged role of the courts but rather with a defense of a certain common characterization of civil litigation today. The current wisdom, which is the principal focus of The Federal Courts, holds that there is a crisis in at least the federal courts13; that frivolous cases are often filed; that

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12. It is worth noting that the privatization side of these debates has been winning recently. The Supreme Court, for example, had in the past developed a legal test to ensure that public law be kept in the courts rather than handled through private, ostensibly consensual, arbitration. Several cases point to a substantial change in approach. The emphasis now is on enforcing the private agreement, rather than promoting some overriding public policy. The result will be that the courts get less opportunity to enforce and elaborate the principles found in public policies with respect to antitrust and securities regulation. See, e.g., Shearson/American Express v. McMahon, 107 S. Ct. 2332 (1987).

13. See, e.g., J. Cound, J. Friedenthal, A. Miller, & J. Sexton, Civil Procedure: Cases and Material 1150 (4th ed. St. Paul, Minn.: West Publishing Co., 1985) (a leading casebook referring to "a dramatic increase in the number of cases filed in the courts of our nation"). According to Posner, his data "make it hard to resist the inference that the great growth in federal litigation since the early 1960s is part of a larger, and poorly understood, national phenomenon" (at 86). Posner insists that the crisis must affect judicial decisionmaking: "[D]ecisions that create rights result in heavier caseloads, which can in turn impair the courts' ability to function . . . . The extremely serious caseload problems that beset the federal courts today make it a question of some
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discovery is routinely abused, often to the disadvantage of the party with fewer resources; that courts are too slow; and that courts are quite limited in what they can do to remedy social problems. Posner has contributed another important dimension by portraying the crisis as unsolvable by simply adding more judges and courts.\(^\text{14}\) In general, we have what Judith Resnik terms a "failing faith" in the courts,\(^\text{15}\) and recent years have seen a consensus emerge that something drastic had to be done immediately to remedy the problem and make the courts function more efficiently in ordinary litigation.\(^\text{16}\) Questions about what will work best, given these assumptions, can be seen as nonpolitical or founded on common sense. We tend to worry about privatization, which has explicit political connotations, but we have paid too little attention to the reforms that seem to be based on conventional common sense.

A series of seemingly innocuous reforms, which together can be characterized as dispute narrowing, are transforming litigation in quite fundamental ways. Posner has not been a leader in particular innovations, but his writing and his decisions place him squarely in support of them. The crisis rhetoric which provides the basis for *The Federal Courts* is also central to this reform effort. And as Posner points out elsewhere, the court crisis that seems to unify procedural reformers is in large part directed against the once-celebrated flexibility of the Federal Rules of Civil Procedure implemented in 1938.\(^\text{17}\)

Once we understand the implications of the dispute narrowing approach, moreover, we can see how it fits into a new procedural formalism that has been emerging in the past few years. We shall see that civil procedure is being shaped quietly to match the formalism that Posner now willingly embraces, and that the overall political impact is more significant than the current focus on privatization debates suggests.

The basic approach of the Federal Rules of Civil Procedure, which we

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\(^\text{14}\) One reason is that "it is politically impossible to raise federal judges' salaries to a level that would attract high quality candidates, in the number required," at 99. See also at 29-47.

\(^\text{15}\) Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494 (1986). According to Resnik, id. at 529: "The dominant claim today is that the framework [of 1938] has provided too many opportunities for exploitation and manipulation and too little guidance for the untutored."


might term the Spirit of '38, included very liberal pleading requirements, relatively easy joinder of parties and claims, wide-open discovery, and very flexible remedies. Imbued with a hostility to formalism, the Realist drafters sought to design procedures that would get out the true facts of a dispute for a correct decision. They thus borrowed devices from the tradition of equity, culminating a long movement away from the rigid rules of the forms of action. They sought, in short, to avoid having a party lose for a failure to plead correctly or from an inability to produce all the facts at the outset, and they wanted to maximize the participation of interested persons in the lawsuit. Consistent with this approach, the amendments to Rule 23 in 1966 made it easier to bring actions on behalf of a class of people: class members no longer had to "opt in" to a class action for damages; they were considered in unless they opted out.

This remarkable Spirit of '38, which inspired reforms in state systems as well, provides litigants with a variety of means to expand a dispute. An individual or group can initiate an action easily in response to some perceived injustice, commence discovery to attempt to learn exactly what the opponent knows, perhaps gain allies through publicity of the fruits of discovery or through the organizing capabilities of the class action, and then, if successful, win a detailed and enforceable settlement or an intrusive, court-ordered remedy. The courts can be used in this way to expand the political importance of a dispute, raise the stakes for the defendant, and gain a remedy with considerable potential impact.

Consistent with the Spirit of '38, the lawyer confronted with the lighter accident can file a lawsuit without knowing what, if any, defect caused the problem; use discovery to find out if there had been other accidents; perhaps turn the proceeding into a class action organized around the common question of the lighter defect; and also explore exactly how the lighter is made and what design alternatives had and had not been explored. Similarly, in the antitrust example the lawyer could file, make a detailed inquiry into the pricing practices of the supplier, and see if the alleged justifications for price increases could withstand careful scrutiny. Competitor suppliers and their pricing practices would also be subject to investigation through discovery. And in the third example, the foster care problem, the lawyer could transform the lawsuit into a systematic investigation of foster care practices on behalf of a class of foster parents.

Such possibilities for expansion are not necessarily tapped routinely by litigants and their attorneys. In the first place, disputes are narrowed simply

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because the grievance must be translated into the language of the law.\textsuperscript{20} A foster care problem turns into a question of due process. Complicated relationships affected by countless economic and social factors and extending over long periods must be redefined in terms of the elements of a claim or defense. Second, there are always pressures on litigants and attorneys to keep their investment small and to go for a quick settlement. Nevertheless, the impact of the cases that are expanded can be quite significant. Many more people may be affected and the social practices of litigants may be successfully challenged. The Federal Rules are notable because they offer tools that can, with sufficient resources and energy, be employed to expand a lawsuit significantly in special cases.

Possibilities provided by the Federal Rules can also be abused, and the abuses have the attention of reformers today. In response to claims of crisis and complaints about the courts, the possibilities for expansion are being systematically curtailed. Without suggesting that all these changes are wrong, it is important to understand the cumulative impact. A brief discussion of a number of seemingly unrelated changes can then be illuminated by reference to the earlier examples.

First, Rule 11, which was amended in 1983, appears to have had a dramatic impact on the conduct of ordinary litigation.\textsuperscript{21} Rule 11 invites the courts to sanction lawyers and litigants who file and continue civil litigation that “reasonable inquiry” would have shown to be not “well grounded in fact” or suffering from other defects. For obvious reasons, this sanction has had a “chilling effect” on litigation. For better or worse, it is not as easy to initiate and pursue a risky action.

Second, the approach to the development of information is changing. There has been a move to limit discovery in the name of costs\textsuperscript{22} and also to limit the use of materials that have been gained through discovery.\textsuperscript{23} In com-

\begin{itemize}
\item Posner would like to deter litigation by more fee-shifting against losing parties (at 137-38). As judge, Posner has not hesitated to invoke Rule 11 aggressively against weak appeals, Hill v. Norfolk & Western Rys, 814 F.2d 1192 (7th Cir. 1987); Bacon v. Am. Fed’n of State, County & Mun. Employees, 795 F.2d 33 (7th Cir. 1986), and even to remand a case for sanctions against an unrepresented plaintiff who thought he was the victim of discrimination but did not probe whether the defendant had an alternative explanation, Shrock v. Altru Nurses Registry, 810 F.2d 658 (7th Cir. 1987). An especially strong assertion of a fee-shifting power, criticized in Hirshmann, 63 Chi.–Kent L. Rev., at 202-3, is Analytica v. NPD Research, 708 F.2d 1263 (7th Cir. 1983).
\item See, e.g., Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (denying access to a membership list revealed as part of the discovery in the case).
\end{itemize}
bination with the new emphasis on active judicial case management,\textsuperscript{24} the clear tendency is for trial judges to ask the parties to come up with some facts very early. A reinterpretation of summary judgment law in turn threatens those who cannot quickly bolster their assertions through discovery.\textsuperscript{25} And most importantly, the emphasis of case managers and a host of alternative dispute resolution mechanisms is on early settlement.\textsuperscript{26}

The pressure on litigants to get quickly to the immediate settlement value of the case makes it more difficult to use litigation to expand a dispute.\textsuperscript{27} The emphasis is instead on containment and expeditious settlement. Even expanded litigation is likely to settle eventually, but the terms and impact of a dispute reduced quickly to a private settlement value are likely to be different from those where the dispute and its implications have been more fully developed.

There is another way in which the process of expanding disputes is being changed dramatically. Changes in the law with respect to class actions and private attorneys general\textsuperscript{28} have made it more difficult for a lawyer to expand an individual claim into the kind of litigation likely to change the behavior of a corporate or governmental bureaucracy. Part of the change is simply in the requirements for class certification.\textsuperscript{29} Potentially more significant are the recent changes in the way the legal profession approaches so-called public interest law. Privatization has affected the legal profession as well as the attitudes toward courts, and there has been a public policy shift from publicly funded legal services organizations and foundation-sponsored public interest law firms to private firms that can be termed mercenary law enforcers. The mercenary law enforcers depend on the attorneys' fees that are paid under many laws to successful plaintiffs. The publicly and foundation-funded law firms could be encouraged to think creatively about the lawsuits they would pursue; try imaginative legal theories; advocate in a variety of forums, including administrative agencies and legislatures; and focus on the impact of their activities. Those dependent on fees awarded to prevailing parties, in contrast, are discouraged from trying imaginative legal theories because they are paid only for successful plaintiffs.

\begin{thebibliography}{99}
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\bibitem{24} See, e.g., Peckham, \textit{A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution}, 37 Rut. L. Rev. 235 (1985).
\bibitem{25} A useful discussion of some of these tendencies is Marcus, 86 Colum. L. Rev., at 490-91. Cf. Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Marrese v. Orthopaedic Surgeons, 706 F.2d 1488 (7th Cir. 1983) (Posner opinion limiting discovery, in part because plaintiff had not shown an anti-competitive effect of defendant's behavior).
\bibitem{26} See, e.g., Brazil, Kahn, Newman, & Gold, \textit{Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution}, 69 Judicature 279 (1986). The order providing for the use of alternative dispute resolution in the Claims Court emphasized that these methods "should be employed early in the litigation process in order to minimize discovery." U.S. Court of Claims, General Order No. 13, April 14, 1987 (reported at 55 U.S.L.W. 2571 (Apr. 28, 1987)).
\bibitem{27} A helpful analysis of this impact on the role of the courts is Macklin, Promoting Settlement: Forgoing the Facts, 3 N.Y.U. Rev. L. & Soc. Change 575 (1986).
\bibitem{28} See generally Garth, Nagel, and Plager, So. Cal. L. Rev. (cited in note 5).
\end{thebibliography}
Finally, the current law of remedies tends also to shrink disputes by putting certain parts of the defendants' behavior practically out of bounds. In some respects these changes are part of the substantive law, but they are grounded in efforts to curb judicial power, and they surely help to determine the shape of litigation. They make it so that even if a litigant can prove a violation of legal rights, the court will be disabled from potential remedies deemed to be too intrusive. Examples include the personnel decisions protected in Rizzo v. Goode, the wall erected around state conduct by the new interpretations of the Eleventh Amendment, and a host of other limitations charged to the doctrine of separation of powers.

In the example of the lighter, the lawyer will have to consider Rule 11. Could the injury have been the fault of the client? Can a particular defect of the lighter be specified? Would punitive damages be worth claiming? The real questions, however, will arise from pressure to settle the claim quickly and quietly, prior to significant discovery into the details of manufacture and design. Pressure could mount further through a mandate to pursue alternative dispute resolution, such as that provided by court-annexed arbitration. Many, if not most, litigants would probably be happy with a quick settlement that covered medical expenses and a bonus for some pain and suffering, but even a determined and aggressive plaintiff will have trouble going further. Penalties for failure have increased the risks of an expansive approach, and pressures for an early settlement have increased. In a situation resembling this example, Bic apparently postponed judicial scrutiny of its lighters by pursuing a strategy of settling cases quietly. It is becoming substantially easier to pursue such a strategy. A class action could be sought to expand the lawsuit, but changes in

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30. The incentive to go only for risk-free cases has been underlined by the recent case of Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 107 S. Ct. 3078 (1987) (rejecting claim for greater fees because of risk).

Posner has generally supported the private attorney general idea, even exceeding the Supreme Court's generosity in Marek v. Chesney, 473 U.S. 1 (1985). The Court found that the encouragement of settlements essentially took precedence over the need for the attorney fee incentive. Posner had held otherwise. 720 F.2d 474 (7th Cir. 1983). See also e.g., Lenard v. Argento, 808 F.2d 1242 (7th Cir. 1987) (general discussion); Henry v. Webermeier, 738 F.2d 188 (7th Cir. 1987); Pine v. Barash, 705 F.2d 936 (7th Cir. 1983); Waldrop v. U.S. Dept. of Airforce, 688 F.2d 36 (7th Cir. 1982).

31. 423 U.S. 362 (1976) (overturning a district court order on the grounds that it "injected itself into the internal disciplinary affairs of [the police department]." See also United States v. Stanley, 55 U.S. L.W. 5101 (June 23, 1987) (rejecting an implied action for damages by an alleged victim of Army LSD testing).

32. In Green v. Mansour, 474 U.S. 64 (1985), for example, the majority held that the Eleventh Amendment forbade the district court from issuing a declaration or providing notice that the state of Michigan's AFDC program had been operating inconsistently with federal law.

33. One interesting limitation found in Heckler v. Day, 467 U.S. 104 (1984), was that a specific district court injunction forcing compliance with a congressional prohibition on unreasonable delay was an abuse of separation of powers. See also Posner at 213-14.

34. See Gilpin, N.Y. Times (cited in note 2).
class action law make it more difficult to get such an action certified by the court.

With respect to the antitrust problem, many of the concerns would be the same. Pressures for alternative dispute resolution might diminish because the antitrust allegations would push the lawsuit out of the ordinary tort or contract situation. What should be highlighted here, however, is the specter of summary judgment and the pressure it generates for an early settlement and a retreat from vigorous discovery. Defendants can be expected to move quickly for summary judgment based on their affidavits of good faith. And it is very difficult to demonstrate a conspiracy to fix prices. An impatient, case-managing judge could move quickly by saying to plaintiffs, for example, that they have six months to settle the case or find evidence of a conspiracy, and otherwise summary judgment will follow from the evidence of defendants. The industry may be in violation of antitrust laws, but it is increasingly difficult and risky to get enough insight into the practices to challenge them effectively. Sometimes lawyers might circumvent the problem by drawing on a grand jury investigation, but such investigations are infrequent and the fruits not always available to a private litigation.\(^\text{35}\)

The foster care problem presents a risky effort toward law reform. Even without Rule 11, it is doubtful that any lawyer would bring such a suit attacking the system of removing children from foster parents if attorneys' fees were available only for successful claims. A similar action was brought by a public interest law firm in New York,\(^\text{36}\) but the firm did not need attorneys' fees to continue its legal practice. It could decide the legal strategy according to the problem it sought to remedy. A lawyer who did bring such an action as a modern mercenary law enforcer, moreover, would have no incentive to try to promote favorable legislation or administrative change. Economic incentives favor advocacy only in court. The desire for attorneys' fees also militates in favor of a relatively narrow legal attack, even if the class action device is used. It is expensive and time-consuming to investigate the challenged bureaucracy in any detail, and an aggressively managed court might want to rule quickly on the relatively discrete due process issue or even to focus on the individual placement problem and its settlement. Finally, while not necessarily relevant in this particular problem, restrictions on federally ordered remedies can help persuade a lawyer to further limit the scope of the attack. Why invest in showing violations of rights when restrictions on remedies constrain what can be done to affect the situation?

In all three examples, therefore, narrowing could have quite a serious impact. It affects the decision to sue, and the ability to keep the lawsuit going.

\(^{35}\) See, e.g., Illinois v. Moran, 740 F.2d 533 (7th Cir. 1984). Judge Posner's opinion allowed defendant to kill plaintiffs' efforts to get the grand jury transcripts of defendant concerning alleged antitrust violations.

\(^{36}\) The lawsuit was filed by the New York Civil Liberties Union through a special children's rights project. See Chambers & Wald, in Mnookin, ed., at 75 (cited in note 4).
long enough to probe deeply into such bureaucratic discussions as product design, price setting, and foster care placement. And pressures for early disposal of cases—by settlement, alternative dispute resolution, or summary judgment—help deter lawyers and litigants from expanding the factual context and legal and social implications of any given lawsuit. Whatever the beneficial effects of each of the reforms that promote dispute narrowing, they also serve to privatize in ways neglected by the debate discussed earlier. Litigation is contained in the private sphere of quick settlements and early disposals, with little effect on bureaucratic behavior or public awareness.

Common sense may promote these reforms as efficient responses to a general procedural crisis, but we should recognize that they point powerfully in the same direction as the more often debated concern with privatization and the role of the courts. The Spirit of '38 facilitated a relatively easy transition from private to public. The Spirit of the 1980s, which Posner's discussion of crisis has helped to create, is of containment, privatization.

BEYOND PRIVATIZATION:
A NEW PROCEDURAL FORMALISM

There are important substantive implications that flow from this privatization through dispute narrowing. We have seen how Posner's vision of the courts emphasizes the predominance of private litigation akin to that which characterized the 19th century, and the dispute narrowing trend helps to promote that private dimension. The impact on substantive law and the regulatory state can best be understood, however, if we introduce the Weberian concept of procedural formalism. The promotion of a new formalism may turn out to be Posner's most enduring contribution toward entrenching his conservative law and economics analysis into American law.

Procedural formalism means a system of rigid limits on the information that reaches the decision maker. Strict rules of evidence have historically provided examples of this formalism. A system where the parties have complete control over the evidence is also a kind of procedural formalism because, in Weber's terms, the judge can then aim "at establishing only that relative truth which is attainable within the limits set by the procedural acts of the parties." The key notion here is "relative truth," since the decision maker cannot go beyond the information available through court procedures.

38. See M. Weber, 2 Economy and Society at 884.
39. Id. at 812.
tive truth means further that the decision maker cannot effectively promote values from outside a formal reasoning process. A blindness to social context and the information needed to understand it has the following result, again quoting Weber: "[T]he judge cannot comply with the quest for the optimal realization of substantive demands of a political, ethical or affective character by means of an adjudication which could give effect to considerations of concrete expediency or equity in individual cases." 40

To return to the examples, in some respects the meaning of procedural formalism is obvious. If the cases settle earlier or if less discovery takes place, the context of the dispute will not be developed very richly. Neither the parties nor the judge will be able to assess a settlement very well except according to relatively formal criteria: How much money was saved by avoiding the costs of litigation? Was the outcome formally consistent with cases litigated on the known facts? Maybe, for example, the state foster care placement system was a particularly good one or an especially bad one, but a decision that draws only on the question of formal due process could not be assessed according to that crucial contextual knowledge.

Whatever the virtues of procedural formalism in the 19th century, however, it has few defenders today. It requires a little more discussion to see how it fits with Posner's reform agenda. Posner recognizes, of course, that such procedural formalism cuts off the process and limits the kind of decision-making criteria that can be applied, thus promoting a substantive formalism. The result, he notes, is that there is less likely to be a "realistic" decision or settlement. 41

Posner has in fact been critical of certain kinds of formalistic reasoning, 42 but the emerging varieties of substantive and procedural formalism are much more to his liking. As made clear in a recent article, he sees economic analysis as the defining feature of today's formalism, defined as "the use of deductive logic to derive the outcome of a case." 43 Since Posner characterizes the federal courts as primarily common law courts, meaning that the courts are supposed to elaborate common law that is based on economic logic, procedural formalism fits his agenda quite nicely. The economic analysis substitutes a number of important theoretical premises for the close contextual and factual analyses. Economic theory has little need for factual details.

In the earlier examples, therefore, Posner's formalism actually encourages a decision maker to cut off the process early. Discovery can be limited and a quick summary judgment or settlement reached. If we assume as a matter of

40. Id.
42. E.g., at 201. ("Formalism is often thought to be hypocritical and wrong. But this depends on the period.")
43. Posner, 37 Case W. Res. L. Rev., at 185. Posner is not bothered by the formalism because he considers economic analysis "realistic" in the major premises.
economic theory that there likely was sufficient price competition in the anti-
trust problem and that market forces drove the plaintiff out of business, there
is no strong reason to scrutinize too carefully the decision making processes of
the companies that raised their prices simultaneously. The new formalistic
processes thus assume that the market generally is working well enough. By
the same token, the manufacturer of the cigarette lighter might be assumed to
be trying to make as safe a product as is economically rational, and there
would again be no good reason to promote a careful inquiry into product
safety before settling a lawsuit. If we place our faith in the invisible hand,
there is no reason to promote litigation procedures that make these workings
visible to the decision maker. Indeed, there are good reasons to cut off waste-
ful inquiries that are unlikely to add to conclusions derivable from formal eco-
nomic theory.

A recent decision by the Supreme Court, authored by Justice Powell, pro-
vides a nice illustration of how civil procedure and economic theory can rein-
force each other. Matsushita Electrical Industrial Co. v. Zenith Radio Corporation,
decided in 1986, concerned the appropriate standard for summary judgment
in an antitrust conspiracy case. The question was whether Zenith had pro-
duced enough evidence of a predatory pricing conspiracy. Speaking for a nar-
row majority, Justice Powell rejected some evidence of conspiracy because the
economic theory he cited made it implausible. The Court then remanded to
the Court of Appeals to consider whether “there is other evidence sufficiently
unambiguous to permit a trier of fact to find that petitioners conspired to
price predatorily for two decades despite the absence of any apparent motive
to do so.” Formal economic reasoning thus overcame the facts offered by
Zenith, making summary judgment appropriate. Economic theory helped to
cut off this case and made it less likely that facts gained through discovery
would be useful to a plaintiff in a future predatory pricing case. If fewer facts
are going to be produced in this and other cases through the new procedural
formalism, then there is even less chance of a successful challenge to the sub-
stantive formalism used ultimately to decide this case.

The procedural formalism in this manner helps to protect private enter-
prise from governmental regulation. It also helps to keep courts from letting
their visions of the public interest intrude into the work of public bureaucra-
cies. With respect to the foster care example, if it is then assumed that the
courts ought not to get too involved in regulating bureaucratic behavior, there
is no need for the context to be explored in much detail. A court insulated

44. 475 U.S. 574 (1986).
45. 106 S.Ct. at 1362.
46. Weber can also be invoked here: “it is primarily the capitalist market economy which
demands that the official business of public administration be discharged precisely, unambigu-
ously, continuously, and with as much speed as possible.” See M. Weber, 2 Economy and Society
at 974 (cited in note 37).
47. It is true, however, that a court could decide without much factual analysis that foster
children represent a kind of property right, and then conclude by requiring a hearing. See Cham-
from a realistic understanding of the situation cannot decide intelligently what approach to take if it wishes beneficial results. The court might still find some new economic property right in the children cared for by the foster parent, but it cannot intervene without making that rather formal and somewhat silly decision. Procedural formalism as a practical matter thus precludes any real regulation of the foster care system through judicial intervention.

Procedural formalism completes and reinforces the transformation of the courts promoted by Posner's vision. Privatization argues for a particular, politically controversial role for the courts. Those who are not persuaded by Posner's arguments for privatization, however, need to think critically about reforms that have not generated much political controversy. Dispute narrowing and the procedural formalism that has tended to go with it may quietly be leading us toward a radical privatization of the courts. The formula for cleaning up the litigation excesses supposedly generated by the Federal Rules may bleach out the opportunities for courts to promote public values and use them to scrutinize public and private bureaucracies.

CONCLUSIONS AND CRITICISMS

What, one might ask, is the problem? All I have done is suggest that a conservative view of courts, promoted by Posner, is making good progress. The conservatives are in power, so we ought not be surprised by the success of that agenda. Perhaps we should admire the coherence which holds together privatization, dispute narrowing, and procedural formalism. The opposite position—perhaps a liberal ideal of publicization, dispute expansion, and broad judicial inquiries for the setting and implementation of public policies—does not fit very well any coherent ideal for courts. Our traditional images of courts in fact come from the economic policies that Posner and his allies favor.48

The first problem, however, is that today's victory is coming too easily. Those who are hostile to privatization but favor the dispute narrowing reforms must decide whether they are comfortable with the implications of the latter. The procedural system has plenty of flaws. But are the costs of reform in terms of values they favor worth the gains made in the name of one value—the efficient production of case dispositions? Are there other means to reform that will be less likely to discourage some dispute expansion? So far these basic concerns have not been given sufficient attention.

The second problem is that the current wave of reforms is designed to perpetuate itself. Procedural formalism entrenches economic theory because the kind of factual inquiry that might challenge the theory is discouraged as

procedural waste. If one believes the theory, closer factual inquiry would be a waste of time, but how will we know?

The major problem, however, is simply that the entire structure may be a house of cards. One can disagree with Posner about the political role of the courts in the United States. One can also disagree about whether we should insulate bureaucracy from scrutiny by the courts through a privatization of the processes and a revived system of procedural and substantive formalism. But the real power of his position today comes not from the ideology but rather from the arguments grounded in necessity, or at least a common-sense understanding of necessity. It is hard even to fault formalism if it comports with common sense. The arguments appear quite powerful. First, if the courts are overburdened with claims based on new public rights, perhaps we ought to encourage privatization. Second, if the processes of expanding disputes lead to undue expense and waste for everybody, we must search for ways to shrink the process and narrow the focus. And third, if meddling by courts threatens the conduct of both the public and the private bureaucracies, we must look for ways to promote a retreat in the name of economic growth. The alleged crisis thus provides the reform movement with allies who do not share the Posner political outlook.

For the research community an important challenge is to test the vision of crisis. This testing has begun to have an impact. First, the caseload crisis appears highly suspect.\(^49\) Even anecdotes about judicial excesses have recently been found to be imagined or misstated.\(^50\) Courts have not performed so poorly even in very complicated institutional reform cases.\(^51\) Other assumptions about the crisis must be explored. We do not really know what, if anything, the Spirit of '38 contributed to crisis and, moreover, what the Spirit of the '80s really offers in the way of constructive reforms. And is it really true, as Posner insists, that we cannot increase the number of judges too much because (1) it would dilute the prestige necessary to attract the best judges and (2) salary increases assumed to be necessary to make up for lost prestige would be "politically impossible"? (at 45).

Finally, we are left with the necessity of maintaining dissenting values in approaches to scholarship and reform.\(^52\) Scholars quick to favor public values emanating from the courts should not forget those values in other settings. The challenge is to rethink common sense as to what can be termed a crisis, a


cause, and a remedy. Large numbers of individuals and groups challenging bureaucratic behavior may be a crisis for some, a necessity for others. The cause of the situation for some could be meddling by the courts; for others, bureaucratic behavior. And the remedy could be to halt the legal challenges or change the bureaucratic behavior. Put simply, if orthodox definitions are used, orthodox answers are likely to follow. Posner’s vision has been successful not because he has persuaded us of his politics, but because he has succeeded so far in defining the acceptable values for the common-sense, nonpolitical domain.