

The New Formalism in Contract

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Over the past century, contract and commercial law have been prime sites for the debate about formalism in law. Two stages are familiar. In the formalist moment of classical legal thought, lawyers aspired to deduce the vast edifice of contractual rules from an essentialist understanding of the nature of promise and consent. Even details of performance and remedy, such as the perfect tender rule or the preference for expectation damages, were thought to be derivable from the essential nature of promissory obligation.

Equally familiar, the modernist or progressive phase of twentieth century American legal thought—epitomized by figures like Holmes, Corbin, and Llewellyn—rejected the classical aspiration to formality and dismantled ruthlessly the deductive system that the classicists had constructed. The critique drew its impetus from two complementary postulates. First, “abstract rules do not decide concrete cases.”¹ The claim to deduce outcomes from an austere set of formal rules, grounded in an essentialist conception of promissory consent, was a fake. Second, contract and commercial law should instead seek guidance from the concrete, everyday perceptions and understandings of the transactors, “men of affairs” whose innate or inarticulate understanding of commercial needs guided practice and should provide the basis for the rules coercively imposed by the law. At the limit, the law would simply adopt or embody what these men of the world understood, instinctively, to be their transactional obligations. Most notably incorporated into the Uniform Commercial Code (“UCC”), this view also provided a foundation for the “relational” approach to contract.

We are now in the midst of a third phase, a phase of “anti-antiformalism” that seeks to discredit and displace Llewellyn’s claim to found commercial law in immanent commercial practice. The central counterclaim is anti-incorporationist: even demonstrably efficient customs should not be legally enforceable; parties may wish to have customs, or even express undertakings, en-

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¹ *Lochner v New York*, 198 US 48, 69 (1908) (Holmes dissenting).

forced by nonlegal sanctions, but not by the force of law.² Further, custom may often be inefficient and for that reason not a plausible candidate for legal enforcement. While buttressing these two prongs of critique, Lisa Bernstein's current work adds a third, potentially the most devastating of all: that custom, in Llewellyn's sense, simply does not exist.³

This accumulating body of argument seems powerfully to dispose of the most ambitious incorporationist strategies. The current situation therefore calls for reflection on the role of formalism in the current understanding in contract law. Where did Llewellyn's antiformalism—an antiformalism based on reverence for custom—fail? Does anti-antiformalism—that is, the demonstration that Llewellyn's antiformalist strategies are untenable—lead us back to formalism? Do we yet have a prescription for a formalist contract jurisprudence?

In addressing these questions, I wish to emphasize three points. First, a crucial defect of Llewellyn's antiformalist program lay in his failure to anticipate or appreciate the formalism of private enforcement systems: the rulemaking and adjudication of the trade associations. Second, this trade association formalism—though an important discovery—does not counsel formalism in commercial law generally; rather, it reflects, and takes advantage of, the idiosyncratic institutional structures of the associations themselves. Third, and most speculatively, these institutional structures did not emerge or thrive because of efficiency advantages alone; they may have received powerful impetus from a drive towards power by some traders and their managers, and from changes in the dominant social conception of appropriate economic organization.

The key notion for Llewellyn's antiformalism was that immanent local customs and practices could provide for fair and reasonable results case-by-case. Appeal to custom would supply the "situation sense"—responsiveness to the particularities of the transaction before the court—that Llewellyn understood to be the essence of common law adjudication.⁴ This resort to local and

² Work in this vein includes, for example, Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U Pa L Rev 1765 (1996); Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J Legal Stud 271 (1992); David Charny, *Nonlegal Sanctions in Commercial Transactions*, 104 Harv L Rev 373 (1990); Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 Cal L Rev 2005, 2039-46 (1987).

³ Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U Chi L Rev 710 (1999).

⁴ A good general introduction to Llewellyn's conception of adjudication is Todd D. Rakoff, *Implied Terms: Of "Default Rules" and "Situation Sense,"* in Jack Beatson and

situation-specific custom set itself in opposition to two types of formal rationality. Enforcement of custom meant rejecting the highly formalized rules of the classical law of sale, deduced from basic notions of consent. Moreover, appeal to customary norms would ward off the hegemony of *private* systems of bureaucratic dominance: contracts of adhesion imposed by bureaucratized transactors in their dealings with dispersed consumers or small firms.⁵ From the perspective of “situation sense” adjudication, the authority of the classical rules or of the “modern” contract of adhesion would suffer a common defect: unresponsiveness to the needs and expectations of the participants in the particular transaction before the court. Most deeply, Llewellyn’s antiformalist conception of custom responds to Weber’s conception of rationalization and the “iron cage” of bureaucratic rule. The appeal to custom would be an effective strategy for resisting the oppressions of bureaucratic rationalization—for helping transactors to escape from the iron cage.

Llewellyn’s antiformalist strategy apparently founders at two crucial points. First, Llewellyn overestimated the coherence among immanent local practices. It is surely an overstatement to say that there are no customs in the sense contemplated by Llewellyn. The evidence, to the contrary, indicates that there were numerous local customs. This is hardly surprising: local transactors were repeat dealers, often in direct personal contact; they consequently could develop a relatively complete contingent contract consisting of expressly bargained terms plus the understandings that arose between them or among all of the local transactors. Rather, the key problem arises when one moves from local to national markets. This move exposed the immense variation in custom across local markets, and even within single market types or markets for a single good. Again, in retrospect, this hardly comes as a surprise. Many of the customs at issue are in large measure arbitrary: customs about the referents of agreed-upon terms, upon which the desideratum is simply a focal point that prevents ambiguity or opportunistic insistence on purported private meanings. Rules about transactional conventions also are

Daniel Friedmann, eds, *Good Faith and Fault in Contract Law* 191 (Clarendon 1995).

⁵ See generally Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv L Rev 1173 (1983) (arguing that the law concerning contracts of adhesion should be revised to take account of consumers’ actual understandings of such contracts). The reputed “oppressiveness” of contracts of adhesion can produce game-theoretic terms, as the use of this contract type may permit take-it-or-leave-it offers that include terms that parties will accept even though more efficient terms are available. See, for example, Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 Mich L Rev 215, 272-92 (1990).

focal points. Moreover, even for rules as to which there are efficiency advantages, the efficient rule might have differed widely among local markets in the early part of the century. Particularly for agricultural commodities, local conditions for production and distribution—and, correlatively, appropriate contract rules—would vary with the weather, local harvesting season, quality of output, and the like.

Consequently, while local markets would provide a fertile soil for the development of trade custom, the diversity and pluralism that are likely to result among local markets spell disaster for Llewellyn's project as advances in transportation, communication, and the organization of national firms spurred the union of previously localized traders into a single national market.⁶ Llewellyn's view faced a paradox: the more fecund were local markets at generating customary norms, the more difficulty would arise when these markets were integrated into the national market system. Of course, as dense national trading networks developed, patterns of conduct among repeat dealers in the national market might have become sufficiently well defined to support the identification of "national" customs. But Lisa Bernstein's contribution to this Symposium⁷ makes clear that this process had not progressed very far during the early to mid-twentieth century—the period leading up to the adoption of the Uniform Commercial Code. The work of the trade associations might best be understood as an attempt to accelerate—or to substitute for—the more spontaneous development of national customs; importantly, however, Bernstein's evidence of the diversity of customs suggests that it is unlikely that consensus on the essential features of transactions would have quickly emerged by the mere spontaneous processes that apparently had sufficed to govern transactions when markets were more localized. It would have been unrealistic to expect that customs sufficient to specify a complete contingent contract would have quickly emerged in the absence of the trade associations' bureaucratic reorganization of market governance. Ignoring the complex dynamics of custom in a nationalizing market system, Llewellyn's antiformalist reliance on custom appears to express a nostalgia for an idealized, perhaps mythical premodern age—for the intimate local communities of shared value and custom, enforced by knowledge, reputation, and ties of affectional loyalty—celebrated in classical so-

⁶ A classic description of the national consolidation of American business is Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (Belknap 1977).

⁷ Bernstein, 66 U Chi L Rev 710 (cited in note 3).

cial science by Tönnies and rediscovered in modern work by Ellickson among the cowboys of Shasta county.⁸

But there is no reason to think that Llewellyn would have had any inherent objection to the development of custom by trade association rulemaking. Rather, the surprise lies in the types of rules promulgated by the associations. The second key failure of Llewellyn's antiformalist strategy was his apparent assumption that the trade practices themselves would be antiformalist. In particular, the trade associations' approach to dispute resolution, which in turn generated the relevant "custom," shows little evidence of the emphasis on case-by-case "situation sense" judgments, which Llewellyn took to be the essence of sound common law judging. Incorporation of trade practices, of course, ceases to be an antiformalist strategy if the trade practices are themselves highly formalized. The sources of this formality—and hence what factors ignorance of which led Llewellyn to his error—are an ambiguity to which we shall return. It is apparent that Llewellyn thought that custom was somehow expressive of the attitudes, preferences, and "mentality" of the transactors themselves, in a way that no bureaucratic rulemaking authority could more than roughly approximate. Were this the case, then local custom would provide the key to escape from Weber's iron cage. What Llewellyn apparently failed to anticipate was that the private trade associations themselves would prove as bureaucratic and formalistic as their public counterparts. As the outcome of the national market system, these organizations each established a bureaucracy for policing its own markets and for herding recalcitrant members into line. Perhaps even more than the emerging bureaucracy of the same period,⁹ they embody the will towards formalization that Weber saw as characteristic of the modern capitalist system.

In short, Llewellyn's antiformalism is a flop. The more pressing question for the new formalists, however, is whether the critique of Llewellyn—the triumphant anti-antiformalism of the current work on commercial custom—provides the foundation for a new, instrumentally based formalism in contract law. Does anti-antiformalism lead us back to formalism?

As a preliminary matter it is worth emphasizing the difficulties that confront the new formalist, ironically, by the very virtue of her methodological rigor. The new formalist properly rejects the simple Hayekianism that would assert that the practices of

⁸ Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Harvard 1991).

⁹ Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge 1982).

the merchant associations themselves should provide guidance as to the practice of courts. Rather, the current approach radically opposes Hayek in two senses: it is skeptical about the efficiency of extant practice; and it rejects incorporationism even when practices appear to be efficient. The key point is that efficiency in one enforcement setting does not imply efficiency in another: rather, as the legal realists emphasized, remedies and procedures for adjudication are crucial to the understanding of purportedly general substantive rights.

Consider, for example, the apparently formalist jurisprudence developed by the trade associations' adjudicatory apparatus, whose arbitral rules often exclude appeals to custom or course of dealing. On one view, formalism in contract law would find decisive support in the fact that the trade associations are themselves formalist in their approach to contract. Their prescriptions for traders come in the form of fairly elaborate formal stipulations; and their approach to dispute resolution tends to insist on mechanical application of these rules, to the exclusion of evidence of local (regional or transaction-specific) variations in custom or trader practice. In a sense, this argument turns Llewellyn's own devices against him: if we are to follow the immanent understandings of those engaged in the practice, is not this decisive evidence that those immanent understandings are themselves formalist, or, perhaps more precisely, demand formalism in governance?

Unfortunately, things are not so simple. As background, one needs to appreciate that Llewellyn's point of view depends upon a fairly complex phenomenology of business practice. Llewellyn's point of view need not suppose that merchants themselves would adopt or endorse his judicial philosophy. Indeed, there would be an element of contradiction if it did so: for just as business persons might be supposed to have a deeply immanent but inarticulate understanding, situationally defined, of appropriate local practice, so might they be correspondingly ignorant of the appropriate practice for lawyers and law courts, whose everyday life and practice is at some remove from the transactional life and practice of the market. This remove generates the problem that Llewellyn's antiformalist incorporationism sought to solve. By no means would a poll of merchants or their testimony before a commission show them to be Llewellynites: to the contrary, they might well misunderstand the appropriate role that law could play in their disputes. Thus, that merchants substantially resisted many of the Code innovations does not show that Llewellyn was wrong. (Rather, as we will see momentarily, one can under-

stand their opposition as a battle for power between two types of institutions.)

In any event, the question for the resolute anti-antiformalist is whether she can return to formalism under the guidance of the trade associations' private legislative and adjudicative practices. Particularly, Lisa Bernstein's path-breaking analytic framework for custom cautions against any such ready conclusion. Her analysis emphasizes the radical institutional and transactional specificity of transactional norms. The relationship-specific customs of each transacting pair, for example, should not be enforced by the trade association, as these customs depend on understandings specific to the individual traders in a relationship.

Correspondingly, it appears that the adjudicative approach of the trade associations depended crucially on features that courts could not replicate. One such feature is the private tribunals' expertise in applying the fairly complex and often arcane rule systems promulgated by their associations. We are clearly dealing here with a form of professional expertise that common law judges, of necessity generalists, cannot readily replicate. Indeed, it may be that formalism and expertise go hand-in-hand: that is, that a rule system highly elaborated, and achieving precision by the use of technical terms, is the type of regime with which the common law generalist-judge would be least prepared to deal. This provides the rationale, say, for specialized tax courts (and, partially, for patent courts as well).

A second feature that supports trade association formalism is the ability to adjudicate prospectively. As Bernstein reports, these tribunals frequently include in their opinions drafts of contract terms that should be incorporated into contracts to avoid future disputes. Note how this procedure lays the foundation for formalism in the next round: the trade association adjudicator can now insist that the dispute be resolved decisively by the presence or absence of a particular term, which, for the tribunal, has a built-in imprimatur and a preannounced meaning. In contrast, common law courts lack the institutional machinery for this prospective rulemaking: they are inexpert, they do not face contract cases from any specific industry often enough to mold practice, and they lack the means to communicate their decisions in a way that would reach the full range of transactors.

This leads to a third, and in some ways the most intriguing, feature of trade association formalism. Trade associations take extraordinary measures to inculcate their views of trade practice into the hearts and minds of ordinary traders. Not only are the trade rules and arbitral rulings publicized for the benefit of

members; the trade association also inculcates trade practice by answering questions from members and sponsoring institutes and training programs for traders. Traders who fail to comply with trade practices may be subject to public reprobation or, worse, expulsion from the association, with drastic social and economic consequences.

In short, the trade associations are uniquely situated to implement a formalist strategy for specifying the terms of transaction. Neither their styles of adjudication nor their announced rules present themselves as candidates for automatic incorporation in law. Faced with the repudiation of any incorporationist strategy—including strategies that would incorporate formalism—the new formalist must look elsewhere for foundational material. Consider, at least provisionally, two accounts. A first account depicts formalism as an inevitable solution to the problems of pluralism or complexity.¹⁰ The story goes something like this: transactors, as we have seen, have an extraordinarily diverse, irreconcilable set of expectations about each other's behavior and conceptions of *right* transactional behavior. Often, when the relationship breaks down, it will turn out that the transactors have been in disagreement or have had diverse understandings. Transactors would not have discovered this lack of agreement in advance, simply because transactors match up without incurring (as it would be unreasonable to do) the enormous costs of assuring that they share common understandings on all particulars that might affect their future relationship. Formalism, then, would be a desirable—perhaps inevitable, or necessary, or conceptually required—solution to the problem of diverse, plural transactional understandings. There is simply no alternative to adopting a set of relatively formalized rules to govern commonly arising aspects of transactions and to insisting that parties who wish to depart from, or supplement, these rules do so by express language—to formulate, contractually, their own “formally realizable” rules. Here, the move to formalism has particular appeal because there is a readily available device in the contractual setting for closing the purported “gap” between the formally mandated rules and the underlying set of normative judgments: “consent” to the gap is plausibly inferred, at least arguably, from the voluntary decision to enter into the transaction.

¹⁰ See Larry Alexander's contribution to this Symposium. Larry A. Alexander, “*With Me, It's All er Nuthin*”: *Formalism in Law and Morality*, 66 U Chi L Rev 530, 531-50 (1999).

Whatever the force of the conceptual argument for formalism in a general setting, there are distinctive difficulties with its transfer to the realm of contract and commercial practice. It is simply not clear in the present context that there is any "gain" from the move to a more formalizable set of rules. If the gain consists of avoidance of controversy, then perhaps the best approach would be to conduct more rather than less inquiry into the commitments and understandings of particular transactors. The questions are fundamentally empirical. For example, knowing that disputes would be resolved contextually, transactors in particular disputes might settle the disputes themselves, resolving controversy without the need for recourse to the legal system. Moreover, a more extensive inquiry into parties' expectations or understanding might discover common understandings that the formal rules had obscured. In the regulation of consensual transactions, then—contrary to Larry Alexander's depiction of the general operation of law¹¹—the use of vague and open-ended standards may enable the courts to resolve apparent social conflicts, rather than simply reviving them in a new guise.

The relevant considerations are perhaps best understood in terms of the general economics of formalism in the face of diversity. Crisp formal rules save the courts the task of deciphering reasonable expectations in particular circumstances—a task that becomes more costly as understandings become more diverse. But this invokes an instrumental dialectic whose indeterminacy is now familiar. Although a set of simple formal rules saves on the costs of administering the legal system, it may do so at the risk of drastically increasing the costs of transacting, by requiring the anticipation of numerous improbable contingencies or forcing parties to avoid altogether transactions that might culminate in punitive forfeitures as a result of mere small misunderstandings.

Again, the issues here are fundamentally empirical. Bernstein's data on trade disputes supply the formalist with some support. An arresting finding is that courts often invoke trade usage to resolve disputes on core issues that the parties might have been expected to address by contract and that could have been readily clarified by a contract term—indeed, that the various trade associations *require* to be identified by a contract term. This is useful, but the dyed-in-the-wool antiformalist will object that there is a bit of wisdom by hindsight—the french *l'esprit de l'escalier*—at work. Of course *in retrospect*, when the relationship has broken down, one may realize that "slaw cabbage" is taken by

¹¹ *Id.*

some parties to mean "large cabbage." (One recalls *Frigalment*,¹² Judge Friendly's celebrated foray into the "chicken" question.) Prospectively, the rule—set to inform parties how to draft to cover all of the contingencies—requires precisely the sort of standardization apparently achievable either by large bureaucratized repeat transactors who can impose their forms on all or by the essentially legislative and rule-elaborating work of the trade associations. Hence, the fairly complex specifications of what goes into a contract¹³ are the product of trade association rules. (Presumably, the litigants in Bernstein's sample of court trade custom cases are either not members of such associations or were breaking their rules.) Trade associations clearly have a very substantial drafting advantage over individual transactors. But this leaves unresolved the question whether the courts should "help out" transactors who do not have the advantage of a trade association's rulemaking in the background.¹⁴

Note too the antiformalist cast of transactors' reliance on "wiseman" clauses to resolve difficulties in interpretation. The suggestion is very much in the spirit of Llewellyn's enthusiasm for merchant juries—that is, for dispute resolution by those endowed, again, with that immanent knowledge of business practice that Llewellyn and Bernstein alike rightly consider the key to understanding the proper structure of contract and commercial law.¹⁵ In short, this is an anti-antiformalism that lends but tepid support to the aspiration for a formalist dispute resolution.

A second take on the return of formalism would extend the notion of the "endgame." In Bernstein's valuable account, an aspect of the relational specificity of custom is the commercial expectation that a distinctive set of rules applies to relationships when they terminate.¹⁶ The practices of forgiveness and mutual toleration that help transactors to maintain their relationships—

¹² *Frigalment Importing Co v B.N.S. International Sales Corp*, 190 F Supp 116 (S D NY 1960).

¹³ Bernstein, 66 U Chi L Rev at 747-48 (cited in note 3).

¹⁴ It is important to note here that the commercial law may influence not only the conduct of individual transactors, but also the activities of the trade associations. For example, it is well understood, at least in theory, that a formal rule may serve as a type of "penalty default" that induces more careful transacting—disclosure of information, or the drafting of a more precise term—by the parties themselves. But we have virtually no models for the analogous influence that the choice of legal rule may exert on the regulatory decisions of the trade associations. This is clearly an important topic for future research. (I am indebted to Ed Morrison for bringing this point to my attention.)

¹⁵ Contrast the attitude of Richard A. Epstein, *Simple Rules for a Complex World* (Harvard 1995), which seems to propose that broad principles of contract can be deduced from general principles without reference to specific practice at all.

¹⁶ Bernstein, 144 U Pa L Rev at 1796-1815 (cited in note 2).

to paper over small differences by tolerating minor good faith deviations—are extinguished when the conduct of one transactor has been so egregious as to require the other to end the relationship. At that point, the transactors regress, as it were, to the more primitive state in which they assert only their legally specified entitlements, without recourse to the moderating and civilizing influences of their long-standing practices of accommodation.

Ought the law to which the parties have recourse be particularly a formalist one? The endgame model clearly gives reason to think that the courts should not have recourse automatically to the norms that the parties had developed to apply to their relationship when it was expected to last into the future. In that respect, it is of a piece with the general anti-antiformalist strategy. But it would require a formalist leap of faith to conclude therefore that we ought to return to the more austere version of the common law of contract, with its insistence on perfect tender, “literal” reading of contracts, and sharply defined measures of expectation damages, including distinctive limitations on consequential damages. Might it not be plausible, alternatively, to suggest that this signally important—economically and socially—moment in the relationship deserves to be parsed in accordance with an “all things considered” judgment of the competing claims of the two transactors? After all, the most characteristic feature of formalist adjudication is the sharp discontinuities it introduces into the parties’ rights: a one day delay may mean loss of the transactor’s business, a small or inadvertent error is equivalent to the conflagration of a heap of goods. It is not entirely clear why this approach is appropriate to the parsing out of the losses from a relationship gone awry. When marriages fall apart, for example, we are inclined to divide gains and losses by an “all things considered” approach, with a full reference to comparative fault, personal needs, and other equitable factors (and this often even in the presence of an antenuptial agreement).¹⁷ Of course these commercial relationships are not marriages, but the analogy points to the familiarity, the naturalness, of an alternative approach to relational settings. The depiction of an elaborate set of relationship-promoting norms strengthens the analogy, for it reminds us that courts would be intervening, not in casual or ephemeral transactional affairs but in the relatively rare and im-

¹⁷ See, for example, Elizabeth S. Scott and Robert E. Scott, *Marriage as Relational Contract*, 84 Va L Rev 1225, 1271-81, 1306-26 (1998) (discussing various legal rules for the distribution of marital assets upon divorce).

portant event—the acrimonious collapse of a long-term relationship.

Of course, crucial to the assessment of the alternative approaches would be the incentives they create for the parties, both before and after the contract is formed. Consider, as one example, the case for protecting the transactor who relies on custom or on course of dealing. Identifying and enforcing the custom incurs large court costs, and particularly may encourage fake or perjured claims about customary usage. But refusing to enforce a custom or a course of dealing may permit one party to act opportunistically against the other. We cannot assume that the first transactor to cry “foul” does so in good faith; the opportunism lies in the party’s insisting on the literal terms of the contract, not because he legitimately wants the benefit of that term, but rather to get out of a deal that has gone sour. Faced with the threat of opportunism, traders may forgo a transaction altogether;¹⁸ or, if they enter into the transaction, they may feel impelled to hew inefficiently to the formal letter of contract terms in circumstances where custom would efficiently let them off the hook, thereby saving performance costs for both buyers and sellers. Bernstein’s model of the endgame implicitly relies on the nonlegal sanctions to deter this type of opportunism; but demonstrating the comparative advantage of nonlegal over legal enforcement clearly requires more evidence than we have now before us.¹⁹

The anti-antiformalist gives some support to the formalist approach. First, the formalist might deny that there is a plausible source for an “all things considered” judgment, other than some highly formal legal rule that specifies entitlements. Where would the “all things considered” judgment look for guidance, if not to the very customs that purportedly are no longer appropriately

¹⁸ More precisely, traders may seek a price adjustment to compensate them for the risk of opportunism. In a market where some traders are opportunistic and some are honest, but where these traits cannot be identified prior to transacting, the resulting adverse selection problem may prevent transactions from going forward.

¹⁹ Omri Ben-Shahar’s contribution to this Symposium demonstrates that, in a broad range of circumstances, parties are indifferent to whether the law permits modification of an express contract or a default rule through course of dealing. Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U Chi L Rev 781 (1999). Ben-Shahar’s result, though of fundamental importance, does not resolve the issues here. As Ben-Shahar observes, for example, the indifference result no longer holds when the contractual flexibility permitted by reliance on course of dealing enhances the value of the contract for the party—say, by enabling a contract revision that would be costly to implement expressly. *Id.* at 817-18. The indifference result also assumes that all deviations from the express contract are costly to the promisee; in the opportunism story, in contrast, the promisee is insisting on the express contract term to get out of a bad deal, not to get compensation for an injurious breach.

taken as the standard of conduct for the relationship? But the relationship norm would at least be relevant to tell one whether the purported ground for ending the relationship is in fact valid. Moreover, there are sources for an antiformalist, "all things considered" approach, aside from the record of the parties' prior dealings: general norms of fairness (say, the restitutionary norm that one pays for benefits that one took or a norm of equal sharing of some jointly incurred accident costs); bans on certain types of intentional advantage-taking;²⁰ or, more dubiously in this context, considerations of need—a sort of "failing business" defense.²¹

Ironically, the anti-antiformalist account might be taken to point to a reason—on substantive grounds—to disregard these further factors for endgame situations, in favor of formal norms: that the very punitive character of formal rules makes them seem objectionable. The punitive character could serve an important deterrent function. It would induce parties to exert care in their choice of trading partners, in their drafting of contract terms, and in their use of nonlegal mechanisms to control performance; and it would encourage parties to adhere faithfully to their relational obligations to avoid the disasters that await with the endgame invocation of formal legal entitlements. The horrors of dealing with the legal system would have a powerful *in terrorem* effect. Again, though, this view would require conclusions substantially beyond what is justified by our current understanding of the "endgame." The view requires the formalist to conclude that the more situationally oriented view of fault or appropriate punishment is simply impossible to implement or too costly to be worth the effort. Moreover, it assumes that the punitive effects of formalism are at least roughly calculated to achieve an optimal level of deterrence—a calculation that, if accurate, would be so only randomly. Without further evidence on these points, the cases for and against formalism remain in equipoise.

Stuck in this conceptual gridlock, the contract theorist legitimately asks after the causes and sources of the formalist impulse—after what one might call the "will to formality." An apparent source is expressed in the delightful doggerel that Bern-

²⁰ But see David A. Weisbach, *Formalism in the Tax Law*, 66 U Chi L Rev 860 (1999) (suggesting that anti-abuse provisions in the tax code may be designed merely to reduce the code's complexity).

²¹ Compare Judge Posner's discussion in *Vande Zande v Wisconsin*, 44 F3d 538, 543 (7th Cir 1995) (explaining the "failing company" defense in antitrust law and comparing it to "undue hardship" under the Americans with Disabilities Act). Of course, the rationale for this type of defense in the business context is a bit of a puzzle; perhaps such defenses are efficient because saving the failing business avoids bankruptcy and reorganization costs.

stein quotes: "If I knew you and you knew me/'Tis seldom we would disagree;/But never having yet clasped hands,/Both often fail to understand."²² Bad verse is often a symptom that some deep social impulse is at work. Here there is pretty clearly the yearning for the days when one transacted with one's neighbors—the days before the emergence of the national markets that in turn gave rise, at least if one may draw the inference from the sequence in Bernstein's historical account, to the trade associations' codification project. Codification here, as elsewhere in the law itself, responds to the perception of the diffuseness and heterogeneity of local rules that develop in the common law style, case-by-case or situation-by-situation. Such development was, as Bernstein describes it—and as the poem nicely captures—plausible in settings in which transactors were part of a small community in which they really did know each other. Codification and bureaucratization are responses to the loss of that local communal bond and the mutual understanding and sense of cooperativeness that comes with it. In addition, as in the codification movement in the common law (for example, the work of the commissions on uniform laws), the imposition of uniformity suppresses the ongoing political conflict that would arise if one continued to try to formulate rules on a case-by-case basis.

Further, this new social formation involves a power grab by the centralizing authority and its managers. Assessment of rational choice explanations here raises questions of nuance. It is apparent that at least some transactors were protecting their own interests, particularly during the private rulemaking sessions.²³ Further, when customs are uncertain or in flux, the distinction between rent seeking and honest disagreement will be unclear, making it correspondingly difficult for the social norms against self-serving bias to operate effectively during the rule-making process. In these circumstances, perceptions and self-interest have a funny but reliable way of coinciding. Most fundamentally—and quite aside from the content of specific rules—some members of the industry would benefit more than others from the process of formalization itself. The elaborate formal codes, and the machinery of dispute resolution, discipline, and indoctrination, were imposed against skepticism and strong resistance. The imposers presumably had a strong commitment to the project of imposing formal industry rules. In part, of

²² Bernstein, 66 U Chi L Rev at 765 (cited in note 3).

²³ For example, see *id.* at 736-37 nn 111-20 (discussing the silk industry).

course, one has the dynamic of large and small firms that often appears when a set of new regulations emerges.²⁴ In the present context, firms with well-developed bureaucracies and high volumes of transactions would benefit from greater formalization in dealing with smaller and less capable transactional partners. Further, these large firms might use the rules to garner rents by reducing the volume of transactions in which rivals could engage. Trade associations here are apparently serving the function of industry standard-setters—much like those associations that set technological standards—and the evidence in both types of standard-setting points to substantial reason to fear rent-seeking behavior and sheer irrationality or arbitrariness in the wielding of standard-setting power.²⁵

But one might question whether these purely calculative motives suffice to account for the project of formalizing customs in national trade standards. Perhaps we might speak here of a particular species of a will to power, a will towards formalization that transcends the direct economic interest at stake. A mindset that concludes that social rationality requires the imposition of uniform rules, highly regularized practices, and the suppression or marginalization of local variations and local inventiveness may proceed ruthlessly without consulting the particular gains to be achieved by the incremental steps towards formalization. Indeed, in many instances—and apparently here—it is impossible to speak of increments: the project must be concluded as a totality. When one considers the elaborate apparatus by which the trade associations formulate and enforce customs—including public procedures for shaming and expulsion of deviants and boot camps for inculcating new traders with the industry standard—one is reminded of nothing so much as of Foucault's image of modern disciplinary institutions, which continuously survey and monitor their members and subject them to routines of training and discipline. The point is to subject individuals to the professionally elaborated set of rules of conduct. We are at this point quite far from the world of Llewellyn and Hayek, in which the immanent practices of business persons arise inductively as they generalize

²⁴ Compare, for example, data on OSHA compliance costs, which are substantially higher for smaller firms. See, for example, Ann P. Bartel and Lacy Glenn Thomas, *Predation Through Regulation: The Wage and Profit Effects of the Occupational Safety and Health Administration and the Environmental Protection Agency*, 30 *JL & Econ* 239, 242-46 (1987).

²⁵ See, for example, Alan Schwartz and Robert E. Scott, *The Political Economy of Private Legislatures*, 143 *U Pa L Rev* 595 (1995) (concluding that rules produced by private lawmaking groups such as the ALI reflect the influence of dominant interest groups).

from their own day-to-day experience with transactions in the market. Instead, the customs come top-down, dictated by a bureaucratic apparatus centered on a private legislative body with national scope. The pervasiveness of this rationalizing mindset over diverse areas of social life in this century, and over diverse cultures, tempts one to ask whether even the most subtle of economic models can display the complete case for these complex systems of social control in terms of instrumental rationality alone.



SYMPOSIUM: FORMALISM REVISITED

COSTS OF DEPARTURES FROM FORMALISM

Formalism in the Tax Law..... *David A. Weisbach* 860
Shareholder Litigation Under
Indeterminate Corporate Law*Ehud Kamar* 887
Double Blind Lawmaking and Other
Comments on Formalism in the Tax Law*Saul Levmore* 915
The First Thing We Do,
Let's Pay All the Lawyers*Paul G. Mahoney* 922

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