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### The Statutory UCC: Interpretative License and Duty Under Article 2

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# THE STATUTORY UCC: INTERPRETATIVE LICENSE AND DUTY UNDER ARTICLE 2

*Nicholas J. Johnson*<sup>+</sup>

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There is no dispute that courts operate under different constraints and obligations when engaging statutory versus common law questions. The core principle of statutory interpretation is “legislative supremacy.” It directs judges to enforce plain legislative commands. Common law rules, on the other hand, are quite literally judge-made. So common law questions give judges broad license to expand or contract “the law” in countless ways.<sup>1</sup>

Common law, made case-by-case and accessible only through the study of and prediction of outcomes from precedent, is mysterious to the uninitiated. Karl Llewellyn’s classic introduction to the common law method dubbed it “The Bramble Bush.”<sup>2</sup> In many ways, classical contract law reflects the common law at its most mysterious. The reason is that contract law is about facilitation rather than prohibition.<sup>3</sup> Much of the law involves prohibiting particular conduct and properly attempts to describe prohibited conduct relatively clearly.<sup>4</sup> In contrast, the basic message of contract law is: go out and trade, essentially however you want, and here are some default rules for those things you do not handle yourselves. Because trading is so incredibly diverse, the default rules must be extremely broad.<sup>5</sup> Consequently, judges have crafted a multitude of variations and exceptions to “black letter” contract law in order to accommodate particular circumstances and do justice in particular cases.<sup>6</sup> It is then quite normal in contract law for courts to adjust or sometimes entirely reject some general default rule, because in context, the opposite result is

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1. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 886–87 (2006).

2. Steve Shepard, *Introduction* to KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* x, xi (Oxford University Press 2008) (1930).

3. See Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 858–59 (1999) (noting that the allowance of free choice and individual pursuit of self-interests inhibited by prohibitions maximize wealth and the efficiency of market resources).

4. Edward Rubin summarizes that, “[a]ccording to [Jeremy] Bentham, everything that is called a law in ordinary speech is actually two laws: a principal law, which imposes an obligation on a defined group of people, and a punitive law, which requires a governmental agent to punish any member of that group who fails to fulfill the obligation.” Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 374 (1989).

5. See Leslie M. Bock, *Sales in the Information Age: Reconsidering the Scope of Article 2*, 27 IDAHO L. REV. 463, 473 (1991) (stating that the code system sought to “encompass as much of the commercial world as possible”).

6. LLEWELLYN, *supra* note 2, at 47–48. Llewellyn characterizes the harmonizing of similar cases that have different results as the “case system game.” *Id.* at 47. Although the rules posited by the courts may seem to be inconsistent, a determination of the differences in fact and procedural set-up may provide the means to reconcile the inconsistency and give logic to what is the reasonable adjustment to a basic rule. *Id.*

“better.”<sup>7</sup> This is as it should be; after all, courts are the source of these common law rules.

There is, of course, another part to this story. Contracts for the sale of goods implicate Article 2 of the Uniform Commercial Code (UCC), and the UCC is decidedly statutory.<sup>8</sup> It was conceived as a coherent system and adopted as public law by state legislatures.<sup>9</sup> It is clearly contract law, which makes us think “common law.” And yet it is quite explicitly statutory. These dual impulses generate conflicting signals about the license and duty that governs interpretation of Article 2.

There are countless places where courts must weave alternately between the Code text and the common law<sup>10</sup> and many cases where the text of the Code is a puzzle whose solution invites common law style analysis. So an impulse toward a free, open, common law style of interpreting Article 2 is easy to understand.<sup>11</sup> But many times, in circumstances governed by clear and explicit statutory commands, cases are decided contrary to statute, however, often with acknowledgement by the court that the text requires the opposite outcome.<sup>12</sup> Indeed, on some of the most basic instructions about contract formation and

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7. One such default rule of contracts is that courts will not evaluate the adequacy of consideration. *See* *Eyre v. Potter*, 56 U.S. 42, 59–60 (1854); *see also* *Phil Bramsen Distrib., Inc. v. Mastroni*, 726 P.2d 610, 615 (Ariz. Ct. App. 1986). The presumption is that the traders’ valuations of the consideration should control. *Eyre*, 56 U.S. at 60. However, in cases of alleged bad behavior, undue influence, or unconscionability, the inadequacy of the consideration, objectively viewed, can be determinative. *See, e.g.*, *Davis v. Kolb*, 563 S.W.2d 438, 438–39 (Ark. 1978); *Ryan v. Weiner*, 610 A.2d 1377, 1378, 1387 (Del. Ch. 1992); *Ahem v. Knecht*, 563 N.E.2d 787, 788, 792 (Ill. App. Ct. 1990); *see also* UNIF. CONSUMER CREDIT CODE 1974 § 5.108(4)(c); RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. c (1981).

8. *See* Fred H. Miller, *Writing Your Own Rules: Contracting Out of (and into) the Uniform Commercial Code; Intrastate Choice of Law*, 40 LOY. L.A. L. REV. 217, 219 (2006) (describing prior acts leading up to the UCC).

9. *Id.* The UCC was borrowed from the Commission on Uniform State Laws and permits traders to opt out of the UCC by agreement. U.C.C. § 1-302 (2011). For purposes of this Article, citations will refer to the Revised Article 1 of the UCC and the current, pre-revised Article 2 unless noted otherwise.

10. In various places the Code employs and does not separately define traditional common law terms. *See, e.g.*, U.C.C. § 2-403 (2011) (governing title and right to transfer goods). Operation of this section depends on the difference between “void” and “voidable” title and courts must go to the common law to make that determination. Note, *U.C.C. Section 2-403: A Reform in Need of Reform*, 20 WM. & MARY L. REV. 513, 539 (1974).

11. *See* John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 346–53 (1988) (citing examples of common law methods in statutory interpretation and noting that these common law habits resist change). Gedid further notes that judges may be “particularly uncomfortable with problems involving statutory interpretation because of their heavy orientation toward case analysis. Before enactment of the Code, several commentators recognized these prejudices and attachments to the common law methodology as serious hurdles that could obstruct successful application of the Code.” *Id.* at 346.

12. *See infra* Part III.

administration under the Code, there is a sizable, even dominant, body of case law and commentary asserting that while the statute says “up,” the actual outcome should and will be “down.” The question is whether this is justifiable under some accepted principle of statutory interpretation,<sup>13</sup> or whether it is a usurpation of the legislative prerogative and therefore illegitimate.<sup>14</sup>

Statutory interpretation is complicated. No statute is perfect. Nearly every legislative effort eventually requires the exercise of judicial discretion to adjust for circumstances not precisely anticipated. Moreover, the Code’s general provisions explicitly invite judges to construe the text liberally to provide the flexibility necessary for administering rules of facilitation in a constantly changing marketplace.<sup>15</sup> So the Code, more so than many statutes, anticipates and invites judicial creativity. But the question is whether this or any such invitation can justify interpretations that ignore the statutory text entirely and repudiate the political and constitutional principles that coalesce in separation of powers and legislative supremacy. These institutional principles define the core license and duty that constrains every judge who interprets any statute.<sup>16</sup> They transcend concerns about particular results under particular statutes. The challenge, and it is particularly acute under Article 2, is to reconcile these institutional principles with the impulses that press for broad interpretative license under the Code.

The UCC is much more than Article 2 of course. But because of its fundamental grounding in common law of contracts, Article 2 especially

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13. See Sarah Howard Jenkins, *Preemption & Supplementation Under Revised 1-103: The Role of Common Law & Equity in the New U.C.C.*, 54 SMU L. REV. 495, 498 (2001) (speculating on whether the U.C.C. is “a hybrid, an attempt to formulate a preemptive regimen of rules and norms for commercial transactions, accommodating our common law tradition and injecting the conscience of the Chancellor into commercial transactions through Section 1-103”).

14. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (recognizing legislative authority to formulate our nation’s laws and the responsibility of the courts to enforce them).

15. See *infra* Part II.A.

16. Because I make only the modest claim that various explicitly counter-textual interpretations of the Code are illegitimate, I do not engage the abundant theoretical approaches to statutory interpretation that tackle its countless harder questions. Methods and theories of interpretation include “textualism,” “intentionalism,” “purposivism,” “legal process,” “pragmatism,” and “integrity.” KENT GREENAWALT, *LEGISLATION: STATUTORY INTERPRETATION* 5 (1999). The one principle that all theories of interpretation agree on is that legislative supremacy is the starting point. Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 281 (1989) (“It is a commonplace that, apart from constitutional issues, judges are subordinate to legislatures in the making of public policy.”); see also *infra* Part III (discussing the judicial approach to Article 2). Hart and Sacks warn that, in regard to generally applicable theories, none are truly accepted and consistently applied within courts. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

tempts courts to stretch the license granted by the Code.<sup>17</sup> It is as if courts are operating under a sort of common law inertia, a habit of mind that presumes the freedom to adjust, renovate, or flatly repudiate plain statutory commands if necessary to generate “better” results.<sup>18</sup> Resisting this inertia imposes tedious cognitive demands, requiring judges to turn the statutory filter on and off as Article 2 questions oscillate between textual commands and common law gap-filling.<sup>19</sup> And while this might explain some counter-textual interpretations of Article 2, explanation is different from justification. Some cases are so blatantly at odds with the statutory text that one cannot escape the conclusion that courts have usurped the policy-making function of the legislature. These decisions fail to appreciate that the goals of the Code are not the only thing at stake; that the Code, like every statute, is a subpart of the broader constitutional and political arrangement between the branches of government reflecting their respective obligations to the people, and; that those arrangements generate institutional principles, and constitutional mandates that dictate far greater fidelity to the text than many courts have paid.<sup>20</sup> This Article contends that interpretation of Article 2 must take greater account of, and ultimately must be reconciled with, the institutional principles that undergird all legislation.

Part I of this Article will plot the landscape, summarizing a spectrum of scenarios where case law flouts the text of Article 2. Part II presents and evaluates the arguments for broad interpretative license on the one hand and fidelity to the text on the other. Part III distills from the discussion in Part II, a minimum duty of textual fidelity demanded by the Code’s statutory character<sup>21</sup> and evaluates the examples summarized in Part I against that duty.

### I. SANDPAPER OR CHAINSAWS? JUDICIAL RENOVATIONS OF ARTICLE 2

In a variety of contexts, case law interpreting Article 2 has repudiated straightforward legislative commands.<sup>22</sup> This section will summarize

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17. See *infra* Part II.A (referring to this license in the discussion of Article 1).

18. See Gedid, *supra* note 11, at 346–53; see also Jenkins, *supra* note 13, at 506 (“Early judicial hostility to derogating the common law, such as the courts’ continued reliance on common law devices or analysis that implemented common law policy or values . . . led to non-uniform construction of [Article 1].”).

19. GREENAWALT, *supra* note 16, at 16 (“[J]udges, like others, do not find it easy to change their behavior . . . . The desirable inertia of practices of legal interpretation influences how one should conceive any proposals for radical change.”).

20. Because judges ultimately are self-policing on this point, when we get to the end of the line, it is only dissenters or critical outsiders who press the point of overbroad interpretative license. And so it is here.

21. Essentially this will require fidelity to statutory commands that present no textual or circumstantial ambiguity. See *infra* Part III.

22. All of these “adjustments” might be proper responses to the circumstances in the purely common law context, but judges charged with administering statutes have a different obligation.

examples of that enterprise in sequence.<sup>23</sup> Some of these textual departures are dramatic. Others are more subtle. Although not addressed in Part I of this Article, those differences are central to the discussion of interpretative license and duty presented in Part III.

*The Statute of Frauds* - The common law statute of frauds,<sup>24</sup> which requires certain contracts to be evidenced by writing, is often deemed to include a promissory estoppel exception. This approach is reflected generally in the Restatement of Contracts (Second) section 139.<sup>25</sup> So even oral promises nominally within the statute are sometimes enforceable when relied upon. The Statute of Frauds rule under section 2-201 of the Code contains no such promissory estoppel exception and no explicit reference to one. Only a minority of courts enforce the plain text and refuse to graft a reliance exception onto section 2-201.<sup>26</sup>

*Parol Evidence* - Section 2-202 codifies the Parol Evidence Rule for sale of goods, declaring that the meaning of a fully integrated written agreement cannot be contradicted by prior or contemporaneous oral or written statements. It incorporates by reference general administrative provision 1-205 (defining

23. This is not an exhaustive list. *See, e.g.*, U.C.C. § 2-403 (2003) (requiring reference to common law definitions of void and voidable title). But it does illustrate the spectrum of cases from plain counter-textual interpretations to those that demand creative solutions to textual or circumstantial ambiguity.

24. The common law Statute of Frauds truly is statutory in nature. CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 303 (6th ed. 2007). Courts have taken broad liberties, however, in elaborating its details and exceptions through a liberally applied common law methodology. *Id.* at 304. In this sense, the “common law” Statute of Frauds poses similar questions of textual fidelity and interpretive license and duty that occur under the Code, with the Restatement filling the role that the Comments play under the Code—i.e., a powerful remote influence on interpretation entirely external to the legislative process. *Id.* Professor Knapp’s summary is illustrative:

Despite their statutory character, the original sections of the English statute have been so commonly reproduced and so frequently given judicial construction that they have acquired a distinct common law flavor. It is therefore possible to generalize in common law fashion about the construction of the statute of frauds – indeed, not merely possible, but necessary. The statute of frauds as a living rule of law cannot now be understood from statutory language alone; the body of court decisions applying the statute form an essential part of its substance. (This is why the Restatement (Second) of Contracts, which ordinarily confines itself to restating the rules of common law devotes a whole chapter (§§ 110-150) to explicating the application of the various traditional provisions of the statute of frauds. . . .)

*Id.*

25. RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

26. KNAPP ET AL., *supra* note 24, at 343 (“The majority view is that promissory estoppel can operate as an exception to § 2-201 by virtue of § 1-103); *see also* Vitauts M. Gulbis, Annotation, *Promissory Estoppel as Basis for Avoidance of UCC Statute of Frauds (UCC § 2-201)*, 29 A.L.R. 4th 1006, 1019 (1984 & Supp. 1984) (listing decisions applying the minority rule).

and summarizing the operation of “course of dealing and usage of trade”) to affirm that where express terms cannot be reconciled with course of dealing or usage of trade, “express terms control.” Although there is nothing ambiguous about this provision, courts are split on the point, with substantial case law holding that course of dealing and trade usage are admissible, even to negate the express terms.<sup>27</sup> Prominent commentators also counsel defiance of the text. Professors James J. White and Roger S. Summers write that trade usage and course dealing evidence may, in appropriate circumstances, even *override* express terms.<sup>28</sup>

*Firm Offers* - At common law, an offer may be revoked any time before acceptance. Even an explicit promise to keep the offer open is unenforceable, unless supported by consideration. The Article 2 counterpart to this rule, section 2-205 makes “firm offers” irrevocable for a reasonable period, not to exceed thirty days, even absent consideration.<sup>29</sup>

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27. Compare *Trent Partners & Assocs., Inc., v. Digital Equip. Corp.*, 120 F. Supp. 2d 84, 99 (D. Mass. 1999) (stating that express terms control inconsistent trade usage), and *S. Concrete Servs., Inc. v. Mableton Contractors, Inc.*, 407 F. Supp. 581, 584–85 (N.D. Ga. 1975) (refusing to admit evidence of trade usage showing that a quantity term was not binding on either party and proposing an approach where unilateral rights to depart from quantity and price should be expressly agreed to in the contract), *aff'd per curiam*, 569 F.2d 1154 (5th Cir. 1978), with *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 363 (3d Cir. 1987) (stating that a contract between parties is not interpreted by its express words alone, but includes trade usage and course of dealing whenever reasonable), and *Chase Manhattan Bank v. First Marion Bank*, 437 F.2d 1040, 1046 (5th Cir. 1971) (admitting usage of trade to contradict express duration term), and *Hayter Trucking, Inc., v. Shell W. E&P, Inc.*, 22 Cal. Rptr. 2d 229, 238–40 (Cal. Ct. App. 1993) (allowing trade usage to contradict express termination provision). Scholars have also noted this divergence. See Roger W. Kirst, *Usage of Trade and Course of Dealing: Subversion of the UCC Theory*, 1977 U. ILL. L.F. 811, 863–68 (noting that even standard merger clauses, which reduce the possibility that trade usage will be admitted as evidence to contradict express terms, will not wholly prevent their introduction because trade usage is not excluded by section 2-202). See generally Amy H. Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage, “Express Terms,” and Consistency Under Section 1-205 of the Uniform Commercial Code*, 64 N.C. L. REV. 777 (1986) (reviewing trade usage in practice and proposing that trade usage take precedent in the case of conflicting terms unless the parties expressly agreed to follow the contractual terms).

28. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 101 (Hornbook Series 2d ed. 1980) (“[T]he provision that express terms control inconsistent course of dealing [and usages and performance evidence] really cannot be taken at face value.”). Their latest articulation is a bit more reserved: “the provision that express terms control inconsistent course of dealing and its cohorts really cannot be taken at face value, at least in some courts.” JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 119 (Practitioner Treatise Series 5th ed. 2006) [hereinafter PRACTITIONER TREATISE SERIES].

29. U.C.C. § 2-205 (2011) (“An offer by a merchant to buy or sell goods in a signed record that by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may the period of irrevocability exceed three months.”)



The requirements of the firm offer are uncomplicated. A principle requirement is the firm offer must be written. Despite straightforward language, in a broad category of cases, the instructions of 2-205 have been “almost completely ignored.”<sup>30</sup> In cases involving “*Drennan*-style”<sup>31</sup> promissory estoppel claims, courts have held offers governed by the Code to be irrevocable based on reliance even where they are oral or otherwise fail to meet the requirements of section 2-205.<sup>32</sup>

*Offer and Acceptance Under 2-207* - There are two notable circumstances where courts have embellished section 2-207. The first set of cases has developed to avoid what has been called the first shot problem. The second set has addressed the application of section 2-207 to the “shrink wrap” transactions.<sup>33</sup> These two situations land at very different places on the spectrum of legitimacy.

In its basic operation, section 2-207 repudiates the common law “mirror image rule” and its constituent part, the “last shot rule.”<sup>34</sup> At common law, one implication of the mirror image rule is that where parties exchange forms containing different terms (the “battle of the forms”) the last form transmitted controls the transaction. The presumption is that parties exchanged the forms during negotiation and the trade was finally settled on the terms of the last transmitted document. Physically consummating the trade is deemed the final

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30. Michael T. Gibson, *Promissory Estoppel, Article 2 of the UCC and the Restatement (Third) of Contracts*, 73 IOWA L. REV. 659, 705 (1988).

31. *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958). This case involves the standard competitive bidding scenario where a general contractor is obliged to rely on the bids of subcontractors in preparing his own proposal to the prime contractor. Workarounds, such as making the use of the bid consideration for an irrevocable offer, or actually forming a contract contingent on winning the bid, are awkward. So the reliance imbedded in this scenario makes promissory estoppel a compelling claim.

32. See, e.g., *E.A. Coronis Assocs. v. M. Gordon Constr. Co.*, 216 A.2d 246, 249, 251 (N.J. Super. Ct. App. Div. 1966) (explaining that plaintiff’s writing did not constitute a 2-205 offer, but that promissory estoppel could still apply); see also Gibson, *supra* note 30, at 704–06 (explaining that the advent of *Drennan* has caused courts to ignore 2-205).

33. See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan. 2000). The court in *ProCD* explains that the term shrinkwrap emanates “from the fact that retail software packages are covered in plastic or cellophane ‘shrinkwrap’ and some vendors . . . have written licenses that become effective as soon as the customer tears the wrapping from the package.” *ProCD*, 86 F.3d at 1449.

34. Section 2-207(1) permits parties to form an agreement even where the acceptance includes new or different terms that prevent the agreement from matching up precisely with the offer, thereby rejecting the mirror-image rule. U.C.C. § 2-207(1) (2011). Section 2-207(2) refuses to automatically incorporate the terms of the last sent document. *Id.* § 2-207(2).

assent to the last transmitted terms—the “last shot.”<sup>35</sup> Article 2 rejects this characterization.<sup>36</sup>

A substantial body of case law has developed to resolve a problem created by the structure of section 2-207.<sup>37</sup> Although characterized as the Code’s solution to the “battle of the forms,” the section specifically applies to new or different terms in either *acceptances or confirmations*.<sup>38</sup> Where the parties make an oral agreement and later trade confirmations containing new or different terms, courts have employed the “knockout rule” to administer conflicting terms.<sup>39</sup> The terms cancel each other out and, if necessary, the gaps are filled per 2-207(3).<sup>40</sup>

A similar yet distinct problem arises where different terms (i.e., conflicting versus just new) are introduced in an acceptance rather than in conflicting confirmations. This is a different case because it raises the question of whether the terms of the offer should be privileged under 2-207. Stated differently, should we allow the offeree to put conflicting terms in his acceptance and use the knockout rule to eliminate undesirable terms in the offer, while still binding the offeror.<sup>41</sup>

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35. Section 2-207 rejected this construction and presumed instead that commercial traders were not negotiating terms in this “battle of the forms.” Indeed, they were not even reading them. See PRACTITIONER TREATISE SERIES, *supra* note 28, at 54 (explaining that many sales contracts are not understandingly signed). Traders were using them as a convenient vehicle to transmit a few core dickered terms. *Id.* In this context, the common law last-shot rule was just a snare and section 2-207 defused this trap. See *id.* at 55–56.

36. See E. ALLAN FARNSWORTH, CONTRACTS 163–64 (4th ed. 2004) (describing how 2-207 reshaped the battle of the forms).

37. John E. Murray, Jr., *The Definitive “Battle of the Forms”*: *Chaos Revisited*, 20 J.L. & COM. 1, 5 (2000).

38. Comment 1 to § 2-207 explains that  
[t]his section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed.

U.C.C. § 2-207 cmt. 1 (2011).

39. See, e.g., *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579 (10th Cir. 1984); *Owens-Corning Fiberglas Corp. v. Sonic Dev. Corp.*, 546 F. Supp. 533, 538 (D. Kan. 1982).

40. U.C.C. § 2-207 cmt. 6; see also *Daitom*, 741 F.2d at 1579 (noting that gap-filler approaches find support in Comment 6 to section 2-207).

41. Answering the question requires appreciation of an important distinction. It is one thing to permit the offeree to bind the deal with an assent that adds minor additional terms. It is significantly different to bind the offeror where some of his explicitly drafted terms have been canceled out by conflicting terms in the acceptance.

The majority of cases apply the knockout rule uniformly to both scenarios<sup>42</sup> even though the textual and policy justifications for applying it to acceptances are qualitatively weaker than the justification for applying it to confirmations.<sup>43</sup>

The shrinkwrap cases are a more drastic example of counter-textual interpretations. These are cases where the trade occurred over the Internet, or the telephone, with the customer ordering the product, paying by credit card, and the seller shipping the item. *ProCD Inc. v. Zeidenberg*<sup>44</sup> and *Hill v. Gateway 2000*<sup>45</sup> are prominent illustrations of the category. Judge Frank Easterbrook wrote both opinions,<sup>46</sup> responding to the argument that section 2-207 prevents the enforcement of the fine print contract that comes in the box with a new computer. When the item arrives there is a long contract with many terms that the buyer sees for the first time. The two Easterbrook opinions involve contracts with a term requiring arbitration of disputes (which denies buyers with small grievances the advantages of class action litigation). Under a traditional application of section 2-207, the terms in the box would be considered new terms in a subsequent written confirmation and would fall out of the agreement because it is a consumer transaction.<sup>47</sup>

*ProCD* and *Hill* take the opposite view. Judge Easterbrook's approach to the problem is a model of common law creativity. First he plays rough in characterizing the transaction. Most people would say,<sup>48</sup> and affiliated legal rules would presume,<sup>49</sup> that the buyer is making an offer to

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42. See *Daitom*, 741 F.2d at 1579–80. The “vast majority” of jurisdictions follow the *Daitom* approach. See, e.g., *Reilly Foam Corp. v. Rubbermaid Corp.*, 206 F. Supp. 2d 643, 655 (E.D. Pa. 2002).

43. Comment 6 to section 2-207 refers only to confirmations and prescribes the knockout rule where parties follow an oral agreement by trading confirmations that contain conflicting terms. U.C.C. § 2-207 cmt. 6; see also Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893, 941–42 (1991) (arguing that section 2-207 privileges the terms of the offer and that the knockout rule should be limited to confirmations due to a difference in the relationship of the parties exchanging confirmations as opposed to the offeror-offeree relationship).

44. 105 F.3d 1147 (7th Cir. 1997).

45. 86 F.3d 1447 (7th Cir. 1996).

46. *Hill*, 105 F.3d at 1148; *ProCD*, 86 F.3d at 1448.

47. See U.C.C. § 2-207(2) (2011) (stating that new terms fall out of the contract except where both parties are merchants). Even there, the new terms will fall out if they constitute material alterations, if the offeror objects to them, or if the offeror has objected to any new terms in his offer. *Id.* § 2-207(2)(a)–(c).

48. *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340 (D. Kan. 2000) (“In typical consumer transactions, the purchaser is the offeror, and the vendor is the offeree.”).

49. For example, because of the rule that advertisements typically are not deemed to be offers, it follows that it is the buyer who is making an offer to purchase. See, e.g., *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*, 86 N.W.2d 689, 690–91 (Minn. 1957). In that context, the advertisement is defined as a solicitation of offers. *Id.* at 690.

purchase.<sup>50</sup> Judge Easterbrook rejects this construction.<sup>51</sup> Instead, he says that the seller is the offeror and, as the master of its offer, can condition the buyer's acceptance however it likes.<sup>52</sup> This includes the stipulation that the buyer's retention of the machine for a specified period constitutes acceptance of the list of written terms that come in the box.<sup>53</sup>

This interpretation flatly mischaracterizes 2-207. Judge Easterbrook glibly dismisses it as applicable only to the "battle of the forms"<sup>54</sup> even though the text clearly applies to written confirmations that follow an oral agreement, and countless cases affirm this plain meaning.<sup>55</sup> Judge Easterbrook's approach has earned a wide following.<sup>56</sup>

*Modification* - Section 2-209 governs contract modifications.<sup>57</sup> It fundamentally departs from the common law by eliminating the requirement that modifications be supported by consideration—essentially repudiating the pre-existing duty rule.<sup>58</sup> Interpretations of section 2-209 establish an anchor point for our spectrum of examples because they are less evidently repudiations of the text and are fair efforts to resolve a puzzle inherent in the text. The puzzle is in the oscillating message of 2-209. Section 2-209(1) liberalizes the methodology for modifying a contract for the sale of goods by

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50. The district court understandably concluded in *ProCD* that a contract is formed when the consumer pays for the software. *ProCD*, 86 F.3d at 1450.

51. See *Hill*, 105 F.3d at 1149 (citing *ProCD* and explaining that the vendor may solicit acceptance by conduct and that, therefore, *ProCD* applied to computer shrinkwrap licenses).

52. *Id.*

53. See *ProCD*, 86 F.3d at 1452. Judge Easterbrook adds to this what may be the better explanation for his efforts. As a matter of policy, he believes that applying 2-207 would introduce tremendous inefficiencies. *Hill*, 105 F.3d at 1149 ("Practical considerations support allowing vendors to enclose the full terms with their products.").

54. *Hill*, 105 F.3d at 1150 (explaining that, "when there is only one form, 'Section 2-207 is irrelevant'" (quoting *ProCD*, 86 F.3d at 1452)).

55. U.C.C. § 2-207(1) (2011). The first sentence to Comment 1 to 2-207 explains that [t]his section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed.

*Id.* at cmt. 1.

56. See, e.g., *I.Lan Systems, Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 337–38 (D. Mass. 2002); *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571–72 (N.Y. App. Div. 1998); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 312–13 (Wash. 2000).

57. U.C.C. § 2-209.

58. *Id.* § 2-209(1). The pre-existing duty rule states that "a promise to pay a party an additional amount to do that which he already has prior contractual or other legal duty to do is not binding and is unenforceable for want of consideration." Corneill A. Stephens, *Abandoning the Pre-Existing Duty Rule: Eliminating the Unnecessary*, 8 HOUS. BUS. & TAX L.J. 355, 356 (2008).

eliminating the consideration requirement.<sup>59</sup> Paragraph (2), reinforced by the reference to the statute of frauds in paragraph (3), cuts back against the liberal modification standard of paragraph (1) by making a no oral modification (NOM) clause enforceable. This reverses the common law rule that permits traders to orally rescind a NOM clause even the very instant after they execute it. Paragraph (4) cuts back again toward greater freedom to modify, with the declaration that a failed modification—i.e., an oral modification in the face of a NOM clause—still might be enforceable as a “waiver.”<sup>60</sup>

So after a zig and a zag, the resulting textual puzzle is what to make of the final zig—i.e., what is the character of the 2-209(4) “waiver” that has the potential to nullify the writing requirement of 2-209(2) and (3). The dominant answer is important for our purposes, because it is a counter-textual construction in classic common law style. It is the eminently sensible insertion of a reliance filter, famously employed by Judge Posner in *Wisconsin Knife Works v. National Metal Crafters*.<sup>61</sup> To the question, what is the nature of this waiver that essentially validates an otherwise failed modification (i.e., an oral modification following a NOM clause), Judge Posner answers that only those failed modifications on which the claimant has *relied* shall qualify as waivers.<sup>62</sup> Intuitively this seems like a quite effective filter against false assertions of modification. The only problem is there is absolutely nothing in the text that supports it.<sup>63</sup> The alternative view, advanced in Judge Easterbrook’s dissent, solves the puzzle by employing traditional definitions of modification and waiver, and thus hews more closely to the interpretative instructions in the Code’s general administrative provisions.<sup>64</sup> Both of these approaches respond to textual ambiguity.<sup>65</sup> The differences between them help map legitimate—or illegitimate—responses to textual ambiguity.

*Requirements and Output Contracts* - Section 2-306, governing requirements and output contracts, explicitly states that no amount unreasonably disproportionate to any stated estimate or to any normal or otherwise comparable output or requirements may be tendered or demanded.<sup>66</sup>

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59. Compare U.C.C. § 2-209(1), with *Alaska Packers’ Ass’n v. Domenico*, 117 F. 99, 102 (9th Cir. 1902) (highlighting the common law requirement of additional consideration in order to modify an existing contract).

60. U.C.C. § 2-209(4).

61. 781 F.2d 1280, 1287 (7th Cir. 1986) (discussing section 2-209 waivers and oral modifications).

62. *Id.*

63. See U.C.C. § 2-209 (omitting reliance as a factor to consider).

64. *Wis. Knife Works*, 781 F.2d at 1290–91 (Easterbrook, J., dissenting) (“At common law ‘waiver’ means an intentional relinquishment of a known right. A person may relinquish a right by engaging in conduct inconsistent with the right or by a verbal or written declaration.”).

65. *Id.* at 1284.

66. U.C.C. § 2-306(1).

For what may turn out to be very good reasons, courts and prominent commentators have rejected this plain statutory command and advanced instead the view that, while 2-306 is good and correct policy for disproportionate increases, disproportionate decreases, even to zero, are broadly allowable.<sup>67</sup>

*Adequate Assurances* - Section 2-609 administers the right to adequate assurances of performance. This gives the promisee, with grounds for insecurity about the promisor's capacity or willingness to perform later, a response short of suspending performance<sup>68</sup> or charging the promisor with anticipatory breach—which if mishandled, might allow the charge that the promisee himself has repudiated.<sup>69</sup> Where reasonable grounds for insecurity arise, section 2-609 allows the promisee to “in writing demand adequate assurance of due performance.”<sup>70</sup> Notwithstanding this plain requirement, courts have dispensed with the writing requirement in a variety of cases.<sup>71</sup>

## II. WARRING IMPULSES AND CONSTRUCTION OF ARTICLE 2

Interpretation of Article 2 is confounded by the conflicting impulses at its core. Structurally, it is statutory. But substantively, it is intertwined with the common law of contract.<sup>72</sup> It is no wonder then that judges extend the familiar habits of mind and modes of analysis that serve so well in the purely common law context to the very similar questions that emerge under Article 2.<sup>73</sup> While some cases do in fact turn on deference to the Code as statute,<sup>74</sup> often the institutional principles and policies that generally guide statutory interpretation are treated as subordinate or go entirely unmentioned.

This Part will elaborate on the competing claims for constraint and license in interpreting the Code and will argue that minimum respect for the institutional principles of public law-making requires fidelity to statutory commands that are textually and circumstantially unambiguous. Section A evaluates the case for liberal, common law style interpretation of the Code. Section B shows why the Code and particularly Article 2 must be taken seriously as statute and elaborates the minimum requirements of that enterprise.

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67. KNAPP ET AL., *supra* note 24, at 464 (citing various cases where disproportionate decreases were allowed so long as they were made in good faith).

68. U.C.C. § 2-609.

69. *Id.* at cmt. 2.

70. *Id.*

71. *Id.* § 2-609(1).

72. *See* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997) (dealing with the complications that arise in applying Article 2 against *ProCD*'s precedent).

73. *See, e.g.,* GREENAWALT, *supra* note 16, at 16 (discussing common law inertia).

74. *See, e.g.,* Wright v. Bank of Cal., 276 Cal. App. 2d 485, 490 (Cal. Ct. App. 1989) (stating “[t]he plain language of the statute cannot be varied by reference to the [C]omments”).

### A. *The Textual Invitation to Liberal Interpretation*

Statutory construction requires judgments about textual meaning and adjustments for problems not precisely anticipated by the text.<sup>75</sup> It is widely acknowledged that something might be within the letter but outside the spirit of the statute.<sup>76</sup> Moreover, some statutes explicitly anticipate that courts and agencies will do the real work of law-making.<sup>77</sup> On the other hand, judicial decisions that explicitly repudiate plain textual instructions are highly suspect and difficult to justify under any theory of interpretation.<sup>78</sup>

Perhaps the best justifications for the interpretations of Article 2 lie within the nature of the Code itself. The general administrative provisions of the Code—detailed in Article 1—seem to encourage the idea that this statutory system should be administered with special flexibility. The principally relevant sections are 1-102 and 1-103. These are treated below in sections 1 and 2. The impact of these two sections is complicated by recent revisions of Article 1, which has been adopted in varying forms in thirty-seven states.<sup>79</sup>

#### 1. *The Statutory UCC? Interpretative License Under Section 1-102*

In section 1-102(1), judges are invited to construe the Code liberally and to apply the Code so as to “promote its underlying purposes and policies.”<sup>80</sup> Explicitly those policies are:

- (a) to simplify, clarify and modernize the law governing commercial transactions;
- (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
- (c) to make uniform the law among the various jurisdictions.<sup>81</sup>

These instructions contain some ambiguity. There is an evident conflict between the simplicity, clarity, and uniformity goals of subsections (a) and (c),

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75. Gedid, *supra* note 11, at 347–49.

76. *Id.*

77. Statutes like the Resource Conservation and Recovery Act direct agencies to create entire regulatory programs that are the principle source of controlling legal rules. See 42 U.S.C. § 9601 (2006).

78. See *infra* Part II.B.1. Whether broad commands in the Comments indicate that courts should take more liberty with the Code than with statutes that manifestly grant less interpretative discretion is a separate issue. Within the boundaries of the delegation doctrine, it is entirely appropriate for courts to operate creatively within the range set by the legislature. See generally Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323 (1987).

79. Keith A. Rowley, *U.C.C. Legislative Update*, COMMERCIAL LAW (March 2, 2010, 5:00 PM) <http://ucclaw.blogspot.com/2010/03/ucc-legislative-update.html>.

80. U.C.C. § 1-102 (2006). White and Summers explain that section 1-106, which states that Code remedies should be liberally construed, “is in the same spirit as 1-102.” WHITE & SUMMERS, *supra* note 28, at 18.

81. U.C.C. § 1-102.

and the expansion of commercial practices through custom and usage aims of subsection (b).<sup>82</sup> Still, section 1-102 seems like a fair license for courts looking to employ common law methodologies and improve upon the results dictated by the text. Subsection (b) particularly frames the Code as an ongoing collaboration between courts and the legislature to incorporate changes in commercial practices and expectations.<sup>83</sup> Moreover, the illustrations of this—the interpretative enterprise elaborated in the comments—read very much like common law law-making.<sup>84</sup>

But can every counter-textual adjustment of Article 2 be explained as a response to the invitation of 1-102?<sup>85</sup> One stated goal of 1-102 is simplification and clarification of commercial law.<sup>86</sup> It is difficult to argue that common law adjustments repudiating statutory text simplify things. In some ways, especially for uncounseled and undercounseled traders, it promises exactly the opposite. The text is still nominally the law. So it is principally members of the lawyers club and their clients who will appreciate the implicit asterisk at the end of the text signaling that the real result is actually opposite of what the words say.

The goal of expansion of commercial practices through custom and usage and agreement of the parties poses different burdens for activist courts. The primary burden is a question of fact. Do courts that advance counter-textual interpretations actually consider whether their departures from the statute are facilitating the expansion of commercial practices through custom and usage, or are they just employing the free-sweeping modalities of the common law out of habit? As a threshold matter the first justification is sound, the second is not.<sup>87</sup>

Because counter-textual adjustments develop case-by-case, common law style, they ultimately conflict with the goal of uniformity in section 1-102(c).<sup>88</sup> Departures from the text are the classic fodder for jurisdictional splits and academic disputes over whether some measure or another is an improvement of already settled legislative text and policy. So broad judicial license taken

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82. *Id.* Simplicity and clarity are consistent with the statutory enterprise of democratization, while the expansion of custom and usage requires the insiders' view, the common law process.

83. *Id.* § 1-102(2)(b).

84. *See supra* text accompanying notes 48–65.

85. WHITE & SUMMERS, *supra* note 28, at 18 n.87 (suggesting that some cases have given section 1-102 a “life of its own”).

86. U.C.C. § 1-102(2)(a); *see also* WHITE & SUMMERS, *supra* note 28, at 19 (explaining that courts and lawyers will interpret the Code according to its “underlying rationales,” which will lead to uniformity and predictability).

87. Note, *Custom and Trade Usage: Its Application to Commercial Dealings and the Common Law*, 55 COLUM. L. REV. 1192, 1206 (1955) (noting that deviations from the common law through custom and usage are permitted, but blind adherence to common practices contrary to statute are not).

88. WHITE & SUMMERS, *supra* note 28, at 16, 18–19.



with the Code recreates a problem that the Code, and before that the “Uniform Acts,” were aimed to fix.<sup>89</sup> Under the Uniform Acts, as the case law grew, so developed “gaps and uncertainties . . . in direct proportion to the number of published opinions and this caused a breakdown of our commercial case-law system.”<sup>90</sup>

The drafters of the Code have attempted to aid the interpretative enterprise with “Official Comments.”<sup>91</sup> Although “the enacting jurisdictions did not enact these [C]omments,”<sup>92</sup> if credited, the Comments to section 1-102 offer broad support for aggressive, text-altering interpretations.<sup>93</sup> One of the most expansive invitations is in Comment 1, which counsels that as a “semi-permanent piece of legislation,” the Code is designed to evolve with changes in commercial practices.<sup>94</sup> The engines for that change are courts, lawyers, and litigants who will press the Code to evolve in response to new circumstances.<sup>95</sup>

According to Comment 1, courts are authorized to apply provisions of the Code to “subject matter which was not expressly included in the language of the act,”<sup>96</sup> to impose provisions of the Code “even where the subject-matter had been intentionally excluded from the act in general [to] implement a statutory policy with liberal and useful remedies not provided in the statutory text.”<sup>97</sup> The interpretative license granted by these examples, if fully credited,<sup>98</sup> exceeds anything that can be fairly drawn purely from the text of 1-102. The Comments plausibly endorse, “not x” interpretations of statutory

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89. See, e.g., Robyn L. Meadows, *Code Arrogance and Displacement of Common Law and Equity: A Defense of Section 1-103 of the Uniform Commercial Code*, 54 SMU L. REV. 535, 535 nn.2-3 (2001) (indicating that, although the UCC’s aim was clarity and certainty, jurisdictions and scholars have differing opinions on its predictability).

90. William D. Hawkland, *Uniform Commercial “Code” Methodology*, 1962 U. ILL. L. REV. 291, 296 (1962) (discussing the case law system at the end of the nineteenth century); see also Karl Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 370-71 (1957) (describing similar problems with the Uniform Acts).

91. See Hawkland, *supra* note 90, at 375.

92. See WHITE & SUMMERS, *supra* note 28, at 2.

93. *Id.* at 18-19.

94. U.C.C. § 1-102 cmt. 1 (2001) (stating that the Act was drawn to provide flexibility to adjust to emerging and unanticipated practices and circumstances).

95. *Id.*

96. *Id.* (citing *Commercial Nat’l Bank of New Orleans v. Canal-Louisiana Bank & Trust Co.*, 239 U.S. 520, 528-29 (1916)).

97. *Id.* (citing *Agar v. Orda*, 190 N.E. 479, 481 (N.Y. 1934)).

98. See *supra* notes 91-97 and accompanying text (discussing the relevance and the nature of the Comments).

term “x,” making a strong case for nearly unlimited interpretative discretion.<sup>99</sup> As prominent commentators explain, “most courts follow the [C]omments.”<sup>100</sup>

There is, however, a problem. Taking too much interpretative license from the Comments is not only at odds with fidelity to the text, it is also problematic purely within the parameters of the Code itself.<sup>101</sup> It is widely acknowledged that the Comments can depart sharply from the text, either expanding or contracting it.<sup>102</sup> The reason is troubling. White and Summers explain, “[t]he explanation for this is partly political. When opponents of a draft section prevailed against the drafters, the drafters would sometimes revise the draft accordingly, but seek to preserve the old draft in the Comments.”<sup>103</sup>

It should be no surprise that political and policy disagreements afflict the Comments. This is a pervasive problem in the development of formal legislative history.<sup>104</sup> Kent Greenawalt notes that “everyone has long since discovered that the history is now important . . . . This creates a powerful incentive to stack the legislative history. If one wants a particular result, it is much easier to insert language in a committee report than to alter the language of the statute.”<sup>105</sup>

The idea of the Comments as quasi-legislative history invites strong normative criticism. John Manning argues that the use of legislative history in statutory interpretation offends the separation of powers by *delegating to one part of the legislature* authority over what the statute means.<sup>106</sup> Manning’s objection to using legislative history, even where it reflects honest efforts by legislators to communicate with one another about developing laws, has been criticized.<sup>107</sup> But even critics concede that Manning’s objection has “special force when legislators self-consciously employ legislative history to resolve statutory meaning for the executive branch and the judiciary.”<sup>108</sup>

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99. NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 52:5 (7th ed. 2008).

100. See WHITE & SUMMERS, *supra* note 28, at 14.

101. See, e.g., *id.* at 13; see also *supra* notes 80–81 and accompanying text.

102. WHITE & SUMMERS, *supra* note 28, at 13 (citing Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 621–27 (1966)).

103. *Id.* (citing Karl N. Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 782 (1953)).

104. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 641–44 (1990) (expounding upon different issues that pervade legislative histories and the reliability of statutory interpretation based on comments and committee reports).

105. GREENAWALT, *supra* note 16, at 181.

106. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM L. REV. 673, 675 (1997) (arguing that this process bypasses the requirements of bicameral enactment and presentment to the President).

107. GREENAWALT, *supra* note 16, at 184.

108. *Id.*

Within Manning's critique, elevation of the Official Code Comments is an even more offensive case of illegitimate delegation.<sup>109</sup> Use of the Comments to justify counter-textual interpretations is far worse than delegating to one part of the legislature power to say what the statute means.<sup>110</sup> The Comments generally have not been adopted by legislatures, often were not even presented to lawmakers<sup>111</sup> and, in some cases, did not even exist when the states enacted the Code into law.<sup>112</sup> Also, the Comment drafters, unlike legislative staffers, are remote in time and venue, and they are totally unaffiliated with the legislature. So the entire enterprise is far worse than the delegation of law-making to some privileged legislative clique that Manning complains about.<sup>113</sup>

All this notwithstanding, White and Summers report that it is only the "exceptional" case where a court has refused to follow a comment at variance with the text.<sup>114</sup> A summary by one of Manning's critics provides context:

[n]either Congress as a whole nor the courts could allow a committee to write authoritative statutory language that was not adopted by Congress and the President. It follows that no one can authorize committees to determine the meaning in committee reports that are not adopted by Congress as a whole.<sup>115</sup>

It is a giant step further to trump statutory text with commentary from people with no connection at all to the legislature and whose views are sometimes not even presented to lawmakers.<sup>116</sup>

## 2. Interpretative License Under Section 1-103

One argument for counter-textual interpretations is that the UCC is not a traditional statute. True, it is not purely the work of the legislature. With the hard work of drafting done by others, arguably legislatures are doing little more than rubber-stamping. Indeed, questions of Code meaning are widely

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109. *Id.* at 185.

110. *Id.* at 184–85.

111. WHITE & SUMMERS, *supra* note 28, at 14. White and Summers' response to this shortcoming is dismissive, claiming that the Code is "highly technical 'lawyers law'" and that, if a voting legislator did not understand a provision when it was enacted, it is unlikely that he would understand its comments. *Id.*

112. *Id.* at 14. There have been fifteen "post-enactment" commentaries on the Code drafted by the Permanent Editorial Board for the Code. *Id.* at 14–15.

113. See GREENAWALT, *supra* note 16, at 185–86 (declaring, "Manning's argument is at its most powerful when courts rely on a committee report or the deliberations of one chamber.>").

114. See WHITE & SUMMERS, *supra* note 28, at 14.

115. See GREENAWALT, *supra* note 16, at 188.

116. See Manning, *supra* note 106, at 673.

addressed by reference to remote drafters. We still ask, what was Llewellyn's view and attach real importance to the answer.<sup>117</sup>

As a uniform law, the Code is unsuited to random, customized amendments that require legislative policymaking. This hints that something different from traditional legislation is happening; that the Code is not expected to evolve in the traditional way of textual amendment and, therefore, that strict fidelity to the text is an unsuitable methodology.<sup>118</sup> White and Summers tell us that strict fidelity to the text is essentially a novel theory, and certainly not reflected in the interpretative work of courts.

Some theorists believe the Code is a "true Code" and therefore would hold that every case must be resolved in light of the text itself, prior interpretations to the contrary notwithstanding. We find no evidence that courts are generally departing from the notion of *stare decisis* in this way.<sup>119</sup>

Stepping back, this is quite a remarkable observation because there is a total absence of any formal institutional or constitutional authorization for treating the Code as some type of hybrid, non-statutory statute. Still, it is easy to understand how judges, engaging questions that oscillate between statutory and common law modes, would gravitate toward the relative freedom of analysis available under the common law. Indeed, there are structural aspects of the Code that seem to compel this approach.<sup>120</sup> One issue is that the Code does not even purport to cover all aspects of transactions that are generally within its reach. White and Summers note that the Code "includes several innovative provisions on the formation of sales contracts, but it still leaves most issues of contract formation to general contract law."<sup>121</sup>

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117. See Symposium, *Origins and Evolution: Drafters Reflect Upon the Uniform Commercial Code*, 43 OHIO ST. L.J. 535, 603–05 (1982).

118. See, e.g., Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 622–23, 632 (1975); Symposium, *supra* note 117, at 606.

119. See WHITE & SUMMERS, *supra* note 28, at 11 (citing Hawkland, *supra* note 90, at 291–93). The reference to a "true Code" here refers explicitly to William Hawkland's distinction between ordinary legislation and a broadly preemptive civil Code. Hawkland, *supra* note 90, at 292. The term "true Code" symbolizes the developed treatment of the UCC as a hybrid statute that is broadly susceptible to common law style interpretation. *Id.*; see also Robert A. Hillman, *Construction of the Uniform Commercial Code: UCC Section 1-103 and "Code" Methodology*, 18 B.C. INDUS. & COM. L. REV. 655, 657 (1977) (stating that under the "true Code" approach, the Code's "purposes and policies should dictate the result even where there is no express language on the point"); Jenkins, *supra* note 13, at 498–99 (describing the Code as a hybrid).

120. See Danzig, *supra* note 118, at 626–27, 632–33.

121. See WHITE & SUMMERS, *supra* note 28, at 7. One example is section 2-403, governing title and right to transfer goods. U.C.C. § 2-403 (2011). Operation of this section depends on the difference between void and voidable title, forcing courts to turn to the common law to make that determination. Note, *supra* note 10, at 539. Other examples include section 2-302. See U.C.C. § 2-302 (permitting invalidation of contracts for unconscionability, but evidently invoking the common law definition of unconscionability).

A broader endorsement of the same point is general administrative section 1-103. It confirms Grant Gilmore's assessment that the Code "derives from the common law [and] assumes the continuing existence of a large body of pre-Code and non-Code law on which it rests for support [without which the Code] could not survive."<sup>122</sup> White and Summers call section 1-103 "probably the most important single provision in the Code."<sup>123</sup> Section 1-103 confirms that courts interpreting the Code are operating in a constellation of conflicting prompts. The Code supplants common law instructions where indicated.<sup>124</sup> Otherwise, courts are instructed to refer back to the common law toolkit.<sup>125</sup> It is a difficult recipe in the sense that substantively these are very similar enterprises, but procedurally they are vastly different.<sup>126</sup> The cognitive burden of shifting back and forth between textual fidelity and common law free reign as Code questions oscillate from statutory to common law is manifestly tedious.<sup>127</sup> This may provide an *explanation* for the liberties courts and commentators take with the statutory text.<sup>128</sup>

But whether it is a complete and satisfactory *justification* for these liberties is another question. Any interpretative guidance in the Code is entirely trumped by the constitutional principles that constrain statutory interpretation.<sup>129</sup> There is no basis for claiming that the legislature has ceded its constitutionally mandated function and powers to the Commissioners on Uniform State Laws and the American Law Institute.<sup>130</sup> Nor can the Code be classified as some peculiar hybrid or low-level legislative rubber-stamping of the policy judgments of remote drafters.

Enactment of the Code always has meant traditional exercise of legislative power and policy-making. Procedurally there is no basis for any claim to the

122. See WHITE & SUMMERS, *supra* note 28, at 8 (quoting Grant Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285, 285–86 (1966)).

123. *Id.*

124. *Id.* at 495–96, 507.

125. *Id.* at 506. This prompts the argument that the Code is special and that common law approaches to Code interpretation are justified. Section 1-103 underscores the fact that courts interpreting the Code are operating in a world of dual impulses and thus will take great liberties with the statutory language. *Id.* at 505–06.

126. Judges have far more discretion on common law questions than in statutory interpretation. See Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 341–47 (2008).

127. See WHITE & SUMMERS, *supra* note 28, at 9.

128. *But see* Hawkland, *supra* note 90, at 312. Hawkland makes an important distinction when emphasizing that section 1-103 explicitly anticipates that principles of law and equity shall only "supplement" the Code. *Id.* This is consistent, says Hawkland, with a view of the Code as a classically preemptive codification, covering the entire field, such that "outside law has only mere supplementary force." *Id.* at 313.

129. See Scott, *supra* note 126, at 347 n.25.

130. Indeed, in the UCC's history, all state legislatures enacted the Code through legitimate legislative processes. See WHITE & SUMMERS, *supra* note 28, at 4.

contrary. Even as a purely practical matter, there is broad evidence that legislatures engaged the policy changes advanced by the proffered text in the traditional fashion.<sup>131</sup> The initial enactment of the Code, after nearly a decade of work by the drafters, generated intense scrutiny by states and a variety of policy responses.<sup>132</sup> New York, for example, submitted the 1952 Official Text to the New York State Law Revision Commission for policy evaluation.<sup>133</sup> The Commission studied it for two years and recommended against adopting the Code unless it was substantially revised.<sup>134</sup> In response to this and other commentary, revised versions of the Code appeared in 1958 and 1962.<sup>135</sup> As the Code worked its way through legislatures, states made hundreds of amendments to it,<sup>136</sup> rewriting and deleting substantial portions and undercutting in various ways the goal of uniformity.<sup>137</sup>

Another example of legislative engagement is in the text of the Code itself.<sup>138</sup> The text provides optional sections in many contexts that require legislatures to choose between competing approaches or create new ones.

A more striking illustration of legislative policy engagement appears in the response to Revised Article 2. Far from rubber-stamping it as with other sections,<sup>139</sup> states have refused to adopt it.<sup>140</sup> The reasons are complex but undoubtedly include substantial policy objections to parts of Article 2.<sup>141</sup> During the drafting process, various powerful interests complained about parts of the text and comments,<sup>142</sup> arguing that the Revised Article 2 embodied flawed policy choices.<sup>143</sup> That these concerns have become obstacles to enactment illustrates that legislatures are engaging policy questions here in the familiar way. This shows legislatures operating in traditional fashion, rendering judgments about policy and text that cannot be diminished on the view that the Code is merely a rubber-stamped uniform law or is otherwise unworthy of the deference that statutory text generally commands.

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131. *See id.* at 3–5, 8–9.

132. *See id.* at 8 (indicating that fifteen years after the “1952 Official Text” had been published, approximately 775 separate amendments to the Code had been passed).

133. *Id.* at 3–4.

134. *Id.* at 4.

135. *Id.*

136. *Id.* at 8. Article 9 was a particular concern for most states with 47 out of 54 of its sections being amended within fifteen years after the Code’s publication. *Id.* at 8–9.

137. *Id.* at 9.

138. *See id.* at 8–9.

139. *See supra* note 117 and accompanying text.

140. PRACTITIONER TREATISE SERIES, *supra* note 28, § 1-1, at 43 n.1.

141. *See Symposium, supra* note 117, at 606.

142. WHITE & SUMMERS, *supra* note 28, at 7. These interest groups included automobile manufacturers, advertisers, and computer companies. *Id.*

143. *Id.*

Code drafters and commentators may be forgiven for their forgetfulness. Their agenda renders state constitutional principles a secondary consideration. But that agenda is not and cannot be the agenda that governs the duties of judges interpreting legislation. Judges have superseding obligations that reflect explicit institutional obligations within the scheme of separation of powers.<sup>144</sup> While the policies that drive the Code are important components of the commercial world, the duties and prerogatives of the three branches of government go to the foundation of our social contract.<sup>145</sup>

Finally, as a purely textual matter, one must recognize that section 1-103 allows only that non-displaced principles of common law and equity shall “supplement” the provisions of the Code.<sup>146</sup> William Hawkland commented early on that this constrains interpretation of the Code.<sup>147</sup> Arguably, it permits a quite different and more limited methodology than we have now. Counter-textual interpretations proceed as if section 1-103 invites courts to supplant—rather than supplement—the Code with common law policy-making.<sup>148</sup> Commentary during the revision of Article 1 speaks to the same point.

### 3. Revised Section 1-103 and Comment 2

The official text of Revised Article 1 was approved in 2001<sup>149</sup> and, so far, thirty-seven states have adopted it.<sup>150</sup> In the revision, original section 1-102 became section 1-103(a),<sup>151</sup> and original section 1-103 became section 1-103(b).<sup>152</sup> This consolidation moved toward resolution of a core conflict that confounded questions of interpretation under the Code when applying original section 1-102 in conjunction with original section 1-103.<sup>153</sup> While original section 1-102 suggested that the meaning of explicit Code provisions should be

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144. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); THE FEDERALIST NO. 78, at 524–25 (Alexander Hamilton) (Jacob E. Cooke, ed., 1961); see also Scott, *supra* note 126, at 410 n.364.

145. See, e.g., Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61, 85–86 (2002) (describing the balance of power between the three branches of the federal government and their evolution from the Social Contract).

146. U.C.C. § 1-103 (2011).

147. See Hawkland, *supra* note 90, at 312–15.

148. See *supra* note 124 and accompanying text.

149. U.C.C. Art. I.

150. Rowley, *supra* note 79.

151. U.C.C. § 1-103. This section gives general interpretative guidance that the Code should be construed to promote its underlying policies. *Id.* § 1-103(a).

152. *Id.* § 1-103. This section states that non-displaced principles of common law and equity shall supplement the Code. *Id.* § 1-103(b).

153. Kathleen Patchel & Boris Auerbach, *The Article 1 Revision Process*, 54 SMU L. REV. 603, 605–06 (2001) (“The Revision combines the purposes and policies provisions of Section 1-102 and the supplemental principles of law provision of Section 1-103 in Revised Section 1-103 to reflect the interrelationship between these principles of construction.”).

determined in light of the purposes and policies of that particular section and those underlying the entire UCC,<sup>154</sup> original section 1-103 invited supplementation of the Code with other law that was not “displaced” by the Code.<sup>155</sup> Determining what law was displaced by the Code and what law should supplement the Code continued to challenge courts.<sup>156</sup> Revised Article 1 suggested a resolution. The Chair of the Article 1 Revision Committee explained:

the little guidance given by the comments as to what is meant by other law being “displaced” by the Code seems to create an inconsistency between [Section 1-102 and Section 1-103]. While Comment 1 to current Section 1-102 states that Code provisions must be applied in light of their underlying purposes and policies, Comment 1 to current Section 1-103 states that supplemental bodies of law continue to apply “except insofar as they are explicitly displaced by this Act.” The addition of the qualifier “explicitly” in the comment could be read to suggest that other law is not displaced unless the text of the Code expressly says so. That reading, however, would create a rigid rule at odds with [Section 1-102]. . . .

The Drafting Committee considered several reformulations of the text of current Section 1-103 . . . . Ultimately, however, the Committee decided that the problem could best be resolved, not by changing the text, but by combining the relevant parts of the two sections and providing a new comment to give better guidance as to circumstances under which other law is displaced. Comment 2 to revised Section 1-103 sets out the basic principle that other law is displaced if that other law is inconsistent with either the text or the underlying purposes and policies of the relevant Code provisions.<sup>157</sup>

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154. *Id.* at 605.

155. *Id.* at 605–06.

156. *Id.* at 606–07.

157. *Id.* Sara Jenkins, Chair of the ABA Subcommittee on UCC Article 1, puts it this way: [p]lacement of current Section 1-103 within current Section 1-102 supports a conclusion that supplementation by other law no longer stands on an equal footing with the purposes and policies delineated in Section 1-102, but rather, continued viability of supplemental law is now one of several policy goals that must be balanced rather than separately accommodated.

Jenkins, *supra* note 13, at 507; *see also* Robyn L. Meadows, *Code Arrogance and Displacement of Common Law and Equity*, 54 SMU L. REV. 535, 541 (2001) (stating that the intent of combining sections 1-102 and 1-103 into revised section 1-103 was “to strengthen the preemptive reach of the Code and reduce courts’ reliance on common law and equity.” (citing U.C.C. § 1-102 (Tentative Draft Apr. 1997))). Jenkins summarized the boundaries of license and duty that an interpretive methodology of Code construction establishes for judges.

[A] court confronted with an asserted unforeseen issue or context must ascertain, by reviewing the relevant article, whether the express language addresses the issue raised



This seems like a quite explicit constriction of any license for counter-textual interpretation that courts might draw explicitly from section 1-103, its comments or implications. It privileges the text and avoids counter-textual interpretations grounded in “other law” that conflict with the text of individual sections of the Code or with its broad principles and policies.

Recall however, that in search of interpretative license, one of the most explicit endorsements of counter-textual interpretation appeared not in connection with section 1-103, but rather in the comments to section 1-102.<sup>158</sup> Comment 1 to original section 1-102 says:

[Courts] have recognized the policies embodied in an act as applicable in reason to subject-matter which was not expressly included in the language of the act . . . . They have done the same where reason and policy so required, even where the subject matter had been intentionally excluded from the act in general. . . . Nothing in this Act stands in the way of the continuance of such action by the courts.<sup>159</sup>

This statement, which narratively and by citation seems to endorse counter-textual interpretations of the Code, continues on into revised section 1-103 as Comment 1.<sup>160</sup> So it is difficult to say that the question of counter-textual interpretations is decisively resolved by revised Article 1. Of course Article 1 is far from the last word on this point.

for resolution. If so, the express language is not supplanted by consistent or inconsistent supplementary law. The text governs; supplementation is unwarranted. Resorting to supplementary principles would be impermissible unless some broader, general public policy or fundamental value necessitates policing the transaction or adjusting the equities between the parties.

Jenkins, *supra* note 13, at 507–08.

As an example of the interpretative methodology demanded by Revised Article 1, Jenkins cites *In re Hoover*, which applies Article 9 to determine priority of creditors claims to crops growing on leased land, but also permits lessor recovery in restitution for the uncompensated time the crops matured on his or her land. *Id.* at 508 (citing 35 B.R. 432 (S.D. Ohio 1983)). This example along with the broad guidance she describes seems to preclude direct counter-textual interpretations.

The question is essentially where we should err in identifying counter-textual interpretations. Tipping that balance are principles of democratization and the influences of the information age. For several of the borderline questions, those influences push in the same direction as the Code’s explicit instructions. Counter-textual interpretations complicating, for example, firm offers, statute of frauds, and parol evidence, confound the stated goals of the Code reflected in section 1-103. U.C.C. § 1-103. Additionally, while making the Code a snare for the undercounseled, counter-textual interpretations amplify the role of lawyers even where the structure of contract counseling makes it cost prohibitive for many people to obtain counsel. *See supra* notes 85–90 and accompanying text.

158. *Compare* U.C.C. § 1-103 (2000) (identifying broad areas of law that supplement the provisions of the Code), *with* U.C.C. § 1-102 cmt.1 (2000) (discussing the specific rules of construction applicable to the Code).

159. U.C.C. § 1-102 cmt.1 (citations omitted).

160. *Compare id.*, *with* U.C.C. § 1-103 cmt. 1 (2011) (utilizing nearly identical language).

### *B. Public Law Principles and Article 2 as Statute*

Interpretation of the Code and particularly Article 2 poses a range of interpretative questions. In some contexts, the decision to privilege the views and commentary of the drafters or the Permanent Editorial Committee may be compelling.<sup>161</sup> Like most legislation, the Code contains gaps and textual puzzles that may require external elaboration.<sup>162</sup> Drawing it from sources that reflect thousands of hours of thought about the matter is imminently sensible. But many Code questions present no such gaps or puzzles and, although courts almost uniformly follow the comments, that decision is sometimes very problematic.<sup>163</sup>

Courts typically follow the comments even where they run counter to the text, were not considered by the enacting legislature, or were created long after the legislature enacted the Code.<sup>164</sup> White and Summers answer this criticism by observing that much of the Code is highly technical “lawyer’s law.”<sup>165</sup> They reason: “If the average legislator who voted to enact the Code in a given state did not understand the intricacies of Article 4 or Article 9 at the time of enactment, it is likely he did not grasp the relevant comments either.”<sup>166</sup> Although this is not an empirical finding, one suspects it is largely true. But even if legislators do vote for and against things that they do not understand and perhaps have not even read, the fiction that they operate at a higher level is an important, indeed vital, one. One extension of that fiction is the fidelity that judges owe to the text that emerges from those legislative efforts. This section will elaborate that obligation, emphasizing the institutional principles that make particular counter-textual interpretations of Article 2 very difficult to justify.<sup>167</sup>

The explicit focus on Article 2 is purposeful. The justifications for broad interpretative license are especially weak for Article 2, which has broader general application than other more specialized sections of the Code.<sup>168</sup>

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161. See Skilton, *supra* note 102, at 602–03. Skilton identifies multiple reasons for using the Comments, including views that they are the legislative history of the Code, that they express the opinions of the Code’s drafters, and that they form a treatise that could stand on its own merits. *Id.*

162. See WHITE & SUMMERS, *supra* note 28, at 13–14.

163. *Id.* at 14.

164. *Id.*

165. *Id.* Compare this with Llewellyn’s view that ignorance of commercial law was widespread and many “expert” commercial lawyers’ knowledge consisted of “smug flat ignorance.” Statement of Karl N. Llewellyn to New York Law Revision Commission (1954), reprinted in WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 537 (1973); see also *supra* note 111.

166. See WHITE & SUMMERS, *supra* note 28, at 14.

167. See *Corley v. United States*, 556 U.S. 303, 315 (2009) (demonstrating that courts look to statutory text and legislative history when interpreting statutes).

168. See WHITE & SUMMERS, *supra* note 28, at 14.

Article 2 admits the strongest argument for democratization. It is the Article that ordinary traders most often encounter.<sup>169</sup> Many parts of it are not “highly technical ‘lawyer’s law.’”<sup>170</sup> Many of its commands are basic commercial traffic signals that are easily accessed and understandable by the countless small traders who generally proceed uncounseled. So especially for these common and plainly stated rules of the commercial road, interests of democratization and transparency reinforce the constitutional case against counter-textual interpretation.

Subsection 1 will elaborate the state constitutional principles that demand fidelity to plain textual commands. Subsection 2 will present the policy argument that fidelity to plainly stated commercial rules of the road is especially important in the Internet age. Subsection 3 makes the normative case against counter-textual interpretations, arguing that they are antidemocratic and strain boundaries of legitimacy.

*1. Statutory Construction, Legislative Supremacy, and Institutional Limits on Interpretative License*

Legislative supremacy is the core principle of statutory interpretation.<sup>171</sup> Professor Daniel Farber asserts that “[v]iolations of the supremacy principle are particularly serious because they impair the basic social norm of democratic self government.”<sup>172</sup> It is tantamount and “a staple of democratic ideas that an elected legislature has priority in determining what shall be law, within any domains not removed from it according to a constitution.”<sup>173</sup> This is such an accepted axiom that “the general contemporary view of statutory interpretation is that there is not a great deal to say about the subject.”<sup>174</sup> The principle is so broadly accepted that “nothing else in law so important receives such little attention.”<sup>175</sup> Of course, what actually constitutes a violation of legislative supremacy and what, on the other hand, constitutes proper interpretative license defies consensus. But some basic things can be said for

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169. See *What Is Article 2 of the U.C.C.?*, LAWINFO, <http://resources.lawinfo.com/en/Legal-FAQs/ucc-and-warranties/Federal/What-is-article-2-of-the-UCC.html> (last visited Jun. 17, 2012).

170. Yvonne W. Rosmarin, *Consumers-R-Us: A Reality in the U.C.C. Article 2 Revision Process*, 35 WM & MARY L. REV. 1593, 1593–95 (1994).

171. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) (“Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end.”).

172. Farber, *supra* note 16, at 293.

173. GREENAWALT, *supra* note 16, at 23.

174. Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213 (1983).

175. *Id.* at 233–34.

certain, and those things are enough to highlight the problem with counter-textual interpretations of Article 2.

The “ultimate question” in statutory interpretation, says Daniel Farber, whose assessment is reprinted in Sutherland’s classic treatise *Statutory Construction*, is whether genuine doubt exists about the meaning of the text.<sup>176</sup> There are a variety of theoretical models for evaluating how judges should administer incomplete or ambiguous text.<sup>177</sup> But if the legislative command is not in doubt “courts may not take action to the contrary . . . the court must give way, even if its own view of public policy is quite different.”<sup>178</sup>

The principles underlying this basic idea are worth elaborating because they reveal an important question about judicial treatments of the Code. There are two reasons why courts should follow the supremacy principle. First, it is a basic and traditional part of judging in our legal culture,<sup>179</sup> and “violations of the principle defeat justified expectations and impair legal stability.”<sup>180</sup> Second, by breaching the supremacy principle courts are refusing to implement the decisions of the democratic branches of government. Because the legislature is entitled to have its way, so long as the statute is constitutional, judicial refusal “to implement the statutory command is *simply lawless* . . . [is] a minor assault on the constitutional structure itself . . . [and impairs] the basic social norm of democratic self government.”<sup>181</sup>

This critique seems to have caused Code drafters and commentators little worry. The Comments to original Code section 1-102 explicitly endorse counter-textual interpretations of the Code.<sup>182</sup> Karl Llewellyn even claimed that fealty to the text is a danger.<sup>183</sup> He urged broad interpretative license for judges and worried about courts “eviscerating” commercial statutes through a “wooden and literal reading.”<sup>184</sup> These views focus on the need for the UCC to evolve along with changes in commercial practices, but they ignore the broader institutional concerns that coalesce in the principle of legislative supremacy. It

176. Farber, *supra* note 16, at 291.

177. *Id.* at 292–93.

178. *Id.* at 292.

179. *Id.*

180. *Id.*

181. *Id.* (emphasis added).

182. U.C.C. § 1-102 (2000). Some argue that all statutory text is merely “advisory.” Heidi M. Hurd, *Sovereignty in Silence*, 99 *YALE L.J.* 945, 990–1028 (1990). Kent Greenawalt responds, commenting that

[t]he idea that statutes are merely advisory, in the strong sense of not binding courts, breaks radically with concepts of liberal democracy and modern traditions of all common law countries. A plausible defense of the position requires a frontal attack on those concepts and traditions.

GREENAWALT, *supra* note 16, at 25.

183. See Gedid, *supra* note 11, at 372–73.

184. *Id.* at 373.

is as if Code advocates tacitly endorsed what the cynical characterizations of the “statutory” nature of the Code have intimated: that the UCC is not a “true Code,”<sup>185</sup> that legislators were not interested or able enough to understand the rules handed to them by the drafters,<sup>186</sup> and that traditional legislation is an inadequate methodology for administering uniform commercial laws.<sup>187</sup>

But is anyone really willing to ground the avowed methodology for interpreting the Code on a fundamental repudiation of its statutory character? It is difficult to imagine Karl Llewellyn or anyone else consciously endorsing a “lawless” methodology of Code interpretation.<sup>188</sup> It is just as difficult to think about even the most aggressive counter-textual interpretation of the Code as overtly lawless.

Counter-textual interpretations of Article 2 seem more like errors of focus, a kind of cognitive oversight. The gravitational pull of the common law on contract questions is powerful. It makes the impulse to treat Article 2 as a subordinate, extension of common law contract understandable. A variety of commentators acknowledge this kind of inertia in the law, and the

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185. See WHITE & SUMMERS, *supra* note 28, at 11. White and Summers reference William Hawkland’s argument that the UCC deserves greater judicial fidelity than the supremacy principle would demand of a simple statute. Hawkland, *supra* note 90, at 292 (“There is a wide difference between . . . a statute and a true Code. A ‘code’ is a pre-emptive, systematic, and comprehensive enactment of a whole field of law.”). Hawkland cites Grant Gilmore’s summary to elaborate the higher interpretative demands of a Code:

A “code,” let us say, is a legislative enactment which entirely pre-empts the field and which is assumed to carry within it the answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law; the pre-Code common law is no longer available as an authoritative source.

*Id.* The claim of this Article, that counter-textual interpretations of plainly stated rules cannot be sustained as a matter of constitutional principles or practical commercial policy, is modest in comparison.

186. See WHITE & SUMMERS, *supra* note 28, at 14.

187. See *id.* (discussing how the Comments to the UCC are not given as much weight as ordinary legislative history). Even acknowledging this, says Kent Greenawalt, does not diminish the fidelity judges owe to the text. See GREENAWALT, *supra* note 16, at 37. Another response to this is Justice Breyer’s recognition that legislatures have become increasingly bureaucratized, with staffers doing most of the close work of statutory drafting and assessment. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 858 (1992). Justice Breyer states that this argues for incorporating the intentions of staffers and drafters into the interpretative enterprise under a theory of delegation. *Id.* It does not, however, invalidate the legislative process. *Id.* The views of people who are not in government should not have independent weight because their role is less formalized than staffers and they have been neither elected nor appointed. See GREENAWALT, *supra* note 16, at 156.

188. Some claim that the quest for legislative intent is a “transparent and absurd fiction.” Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869–70 (1930).

phenomenon is amplified here.<sup>189</sup> Analytically it is tedious to keep Code and common law variables in their proper realms. Even the attempt, some will say, requires artificial rigidity of thought; a sort of formalistic pigeonholing at odds with good decision-making.<sup>190</sup>

Even crediting these explanations, the question remains, does the Code require that we abandon the principle of legislative supremacy and all of the political, institutional, and constitutional concerns it embodies? Can the Code continue to evolve consistent with proper respect for these institutional principles? Fortunately, while the “imperative of the supremacy principle is quite strong, its scope is limited”<sup>191</sup>—“[i]t has decisive impact only when the text and statutory history preclude genuine doubt about the statute’s meaning.”<sup>192</sup>

Under this modest standard, the important interpretative work necessary to evolve the Code consistent with changes in commercial practices can continue virtually unencumbered. What it does restrict are overt counter-textual interpretations.<sup>193</sup> It imposes a straightforward duty to determine whether there is genuine doubt about the meaning of the text in the particular context. This fairly includes not just a scan for linguistic mystery but also ambiguity in implementation caused by unanticipated facts or new circumstances.<sup>194</sup> Some will object that this still fails to account for the explicit license in the text—viz., original sections 1-102 and 1-103—that arguably invites breach of even these minimum boundaries.<sup>195</sup> There are two responses to this argument. They are presented in subsections *a.* and *b.* below.

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189. A number of commentators acknowledge this kind of inertia in the law and the phenomenon is amplified here. GREENAWALT, *supra* note 16, at 16; LLEWELLYN, *supra* note 2, at 66 (“What one has been doing becomes the ‘right’ thing to do.”).

190. See GREENAWALT, *supra* note 16, at 16 (noting that the approach is more effective if it is gradual).

191. Farber, *supra* note 16, at 293.

192. *Id.* (“[The supremacy principle] has decisive impact only when the text and statutory history preclude genuine doubt about the statute’s meaning.”).

193. See *id.* at 297 (arguing that Professor Ronald Dworkin’s advocacy of broad interpretative flexibility in the constitutional context fails “to perceive the difference between creatively interpreting a statute and rewriting it to suit one’s desires. This is the distinction that the supremacy principle respects”). Courts that fail to respect legislative supremacy “should be criticized for crossing the line between creative interpretation made necessary by statutory ambiguity and creative rewriting made possible by the judges’ ‘sly refusal’ to follow a reasonably clear statutory command.” *Id.* at 302.

194. *Id.* at 302.

195. U.C.C. §§ 1-102, 1-103 (2000).

*a. The Delegation Doctrine*

So what about the argument that by adopting the Code, the legislature itself has granted the license for counter-textual interpretations?<sup>196</sup> Superficially, it seems far more plausible to draw broad interpretative license from the enacting legislature than from some remote drafting committee or its leader. Indeed, it is common for legislatures to pass regulatory statutes, where the expectation is that a great deal of law-making will occur after the enabling statute is passed.<sup>197</sup> One arguably notorious example of this is the Resource Conservation and Recovery Act (RCRA).<sup>198</sup>

The implementing regulations of RCRA, the real law, occupy several volumes of the CFR, while the enabling legislation is less than fifty pages.<sup>199</sup> The regulations are “mind numbing” in their complexity.<sup>200</sup> One assistant administrator at the EPA attested that constant changes in the rules have resulted in only five people who understand the core regulatory definition on which the program is grounded, thereby implying that there is a good chance no one in Congress does.<sup>201</sup>

If it feels like at some point this should violate some political or constitutional principle, the sensation is well grounded. The nondelegation doctrine nominally prevents legislatures from ceding law-making powers to other branches or to non-elected decision makers.<sup>202</sup> Of course a robust nondelegation doctrine would be very hard to square with the realities of the modern regulatory state, where there is far more in-depth policy evaluation and law-making done by regulatory agencies than by Congress. Consequently, the non-delegation barrier at the federal level is a hollow shell.<sup>203</sup> But the state bureaucratic engine is far more modest, and the nondelegation doctrine at the

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196. See WHITE & SUMMERS, *supra* note 28, at 14 (noting that some legislatures never looked at the comments from which the broadest license is drawn).

197. Rubin, *supra* note 4, at 381–82.

198. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. § 6901 et. seq. (2006)).

199. See *About RCRA, Resources Conservation Recovery Act (RCRA)*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/agriculture/lrca.html> (last visited Jun. 18, 2012).

200. *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987) (describing the court’s journey through the legislative intent of RCRA).

201. *United States v. White*, 766 F. Supp. 873, 882 (E.D. Wash. 1991).

202. Rubin, *supra* note 4, at 387 (“The delegation constraint, which is derived from the separation of powers between the governmental branches, is designed to limit the transfer of the legislature’s power to another branch . . . [and] functions as both a legal doctrine and a political norm.”).

203. *Id.* at 388–89. Nondelegation “has not been used to strike down any federal statute recently, and there seems little chance it will be, despite occasional rumblings from the Supreme Court.” *Id.*; see also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 479–80 (1989) (characterizing the doctrine as “an empty exercise in judicial rhetoric”).

state level continues as a strong affirmation that the legislative prerogative is not something representatives can give away.<sup>204</sup> It is an institutional principle confirming that the power to legislate is not owned by the legislature, but is a structural support of constitutional democracies.<sup>205</sup>

The explanation for the decline of the federal delegation doctrine underscores its importance in the context of state commercial codes. Edward Rubin argues that it just recognizes the reality of the modern administrative state, where legislatures are not equipped to do more than set general goals and guidelines.<sup>206</sup> The argument that delegation is an abdication of legislative responsibility to decision-makers who are insulated from voters, he argues, is only persuasive where the implementation mechanism is courts rather than agencies.<sup>207</sup> He claims the nondelegation argument is erroneous when applied to agencies.<sup>208</sup>

The difficulty with this argument is that it engrafts premodern notions of control and accountability onto the realities of modern government. With regard to control, it assumes that articulated rules are the best, and indeed the only, method by which a legislature can control an implementation mechanism. That assumption is probably true for courts, and it is thus a general principle if courts are the only implementation mechanism available.<sup>209</sup>

Broad delegation to agencies is legitimate because legislatures have many legitimate ways of communicating details to agencies, says Rubin.<sup>210</sup> Overbroad delegation is really only a problem where the implementation mechanism is courts.<sup>211</sup>

Interpretation of the Code falls easily into the exception that Rubin credits. Indeed, the Code case is worse for several reasons. First, the delegation of power comes by implication.<sup>212</sup> It is not at all clear that legislatures make an

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204. See, e.g., *Gilligan v. Horse Racing Comm'n*, 422 A.2d 487, 489 (Pa. 1980) (resisting the erosion of constraints against the delegation of law-making power at the state level), *remanded to* 432 A.2d 275 (Pa. Commw. Ct. 1981).

205. *New York v. United States*, 505 U.S. 144, 182 (1992) (declaring that the “constitutional authority of [one branch of government] cannot be expanded by the ‘consent’ of the governmental unit whose domain is narrowed”).

206. Rubin, *supra* note 4, at 399–400 (“No legislature could possibly have time to enact more than a fraction of the statutes that it favored if it were required to draft the rules that were ultimately to be applied.”).

207. *Id.* at 388–90.

208. *Id.* at 393–94.

209. *Id.* at 393. When the implementation mechanism is an agency, Rubin contends that other legislative measures of control can be more effective. *Id.*

210. *Id.* at 381–82.

211. *Id.*

212. See Gedid, *supra* note 11, at 341 (discussing how the Code has failed to produce uniformity and created conflicting case law).



informed decision inviting courts to supplant the statutory text.<sup>213</sup> The broader interpretative license comes from the comments, which no state has codified,<sup>214</sup> and many enacting legislatures.<sup>215</sup> Furthermore, there is little evidence that the UCC drafters were thinking seriously about the broader state constitutional issues that overbroad delegation entails, and the drafters certainly had no authority to authorize delegation of legislative power or constitutional change.<sup>216</sup> So there is a strong substantive rebuttal to the argument that the legislature has explicitly licensed counter-textual interpretations. As the next section shows, there also are strong practical ones.

*b. The Dubious License of the Official Comments*

Attention to the questions of political structure and constitutionality yield a very different set of interpretative priorities from those advanced by Code drafters and commentators. Jabez G. Sutherland's classic treatment of statutory interpretation, without specific reference to the Code, takes an entirely opposite view from the National Conference of Commissioners on Uniform State Laws (NCCUSL), the American Law Institute (ALI), and most judges about the weight to be accorded "Official Comments" that invite counter-textual interpretations.<sup>217</sup> Comments to 1-102 plausibly endorse "not x" interpretations of the textual command "x."<sup>218</sup> Sutherland, on the other hand, admonishes that courts must ignore comments to uniform laws that endorse outcomes inconsistent with what the legislature actually said.<sup>219</sup>

The error of the comments and of judges who embrace them unreflectively is one of incomplete perspective—a focus on the Code's resolution of commercial law problems without consideration for the institutional principles that constrain statutory interpretation.<sup>220</sup> William Hawkland describes the problem and explains it as an unwillingness of judges to live within the options provided by the text:<sup>221</sup>

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213. See *supra* notes 11–14 and accompanying text (explaining how courts have directly gone against the language of the Code and this conflicts with their role in interpreting Article 2).

214. See WHITE & SUMMERS, *supra* note 28, at 2.

215. *Id.* § 5 at 14.

216. See *supra* note 16 and accompanying text.

217. Most courts follow the Comments. See WHITE & SUMMERS, *supra* note 28, at 14 (noting that there are a few "exceptional" cases where courts do not follow the Comments).

218. SINGER & SINGER, *supra* note 99, § 52:5.

219. *Id.* § 52:5, at 378 ("The commentary to a model statute is not entitled to much weight where the model is at odds with the legislative scheme actually adopted." (citing *Friant v. Friant*, 553 A.2d 1186 (Del. 1989))).

220. See *supra* notes 12–14 and accompanying text (questioning whether judges ignoring the Code is justifiable under any principle of statutory interpretation).

221. Hawkland, *supra* note 90, at 304–05.

It has been observed that courts, torn between the duties of staying within the law or getting a just result, frequently accommodate the latter by manipulating the former . . . . Decisions arrived at through the semi-covert techniques of manipulation and adverse construction may result in justice for the immediate parties, but they leave in their wake a twisted law . . . .<sup>222</sup>

Hawkland argues that within the text of the Code are broad areas of discretion that permit judges the flexibility to do justice, and to recognize changes or peculiarities in custom and practice.<sup>223</sup> Counter-textual interpretations (“adverse construction” in his terminology) “leave in their wake a twisted law.”<sup>224</sup> This bolsters Sutherland’s counsel against following comments that contravene the text and emphasizes the need to reconcile the institutional principles of statutory interpretation with the goals of uniform laws.<sup>225</sup> That reconciliation, he shows, requires judges to respect and enforce the plain language of the text.<sup>226</sup>

Lon Fuller’s classic treatment makes the point more philosophically, advancing criteria he says are essential to the internal morality of law.<sup>227</sup> They are drawn from a set of shared cultural beliefs and expectations.<sup>228</sup> He contends that legislation violating this morality would not be law.<sup>229</sup> Included in this list are the requirements of clarity, which insist that citizens not be subjected to rules they cannot understand nor to the uncontrolled, arbitrary power of the implementation mechanism.<sup>230</sup>

Even more apt is Fuller’s principle of congruence, requiring that the law be administered so that its application bears a reasonable resemblance to its stated form.<sup>231</sup> Counter-textual interpretations are plain and open breaches of these principles.<sup>232</sup> Rubin argues that Fuller’s principles “derive from the single

222. *Id.*

223. *Id.* at 305. Examples cited are sections 1–203, 1–204, 2–103, 2–302, 2–716(1), 3–511(1), 4–103(2), 8–406, and 9–207. *Id.*

224. *Id.*

225. *Id.*

226. SINGER & SINGER, *supra* note 99, § 56A:11, at 700 (stating that courts had interpretative control over the context of statutes, but are now “out of the loop”).

227. LON FULLER, *THE MORALITY OF LAW* 33–94 (rev. ed. 1978). Rubin contends that most people accept Fuller’s norm. Rubin, *supra* note 4, at 404.

228. *See* FULLER, *supra* note 227, at 33–69 (discussing eight types of legal excellence derived from a general relationship with people).

229. *Id.* at 39. Rubin restates Fuller’s theory by writing that Fuller’s principles “apply to every situation in which the state governs human conduct . . . situations in which state power is brought to bear on private persons.” Rubin, *supra* note 4, at 403.

230. FULLER, *supra* note 227, at 63–65.

231. *Id.* at 81–82.

232. *See id.* at 63–64 (noting that revisions of legislation by unauthorized entities, while perhaps clarifying the text’s obscure language, impair legality).

underlying norm that people should understand the legal rules that they are expected to obey.”<sup>233</sup> And while Rubin ultimately criticizes Fuller’s principles as insufficient to invalidate administrative rulemaking, even Rubin concedes that where the statutory implementation mechanism is courts, rather than agencies, Fuller’s principles capture essential requirements of legitimacy.<sup>234</sup> As such, there are strong institutional, practical, and philosophical reasons for demanding a minimum level of fidelity to the text of the Code, and particularly Article 2, as the next section shows.

## 2. Article 2 Trading Rules in the Information Age

It is not a new argument that the Internet changes the way we should think about and administer Article 2.<sup>235</sup> More than a decade ago, the Chair of the ABA Task Force on the revision of Article 2 argued that some of the problems that have burdened proposed revisions to Article 2 would be resolved or largely mooted by the Internet.<sup>236</sup> Also, it is nothing new for Article 2 to recognize the distinction between the way frequent, sophisticated traders (merchants) and sporadic, unsophisticated traders (non-merchants) engage the statutory guidance.<sup>237</sup> Similarly, it is fair to expect that uncounseled, less sophisticated traders (merchants or not) will interact with the rules differently than large enterprises with in-house legal staffs or counsel on retainer.<sup>238</sup>

Professor Kent Greenawalt argues that statutory interpretation should take into account the kind of accessibility that the “main addressees of statutes [have to information], given the time and expense one could reasonably expect them to undertake: One could expect more extensive legal research if the main addressees were large corporations than if they were ordinary, private people.”<sup>239</sup> For perhaps the bulk of traders, fidelity to plain meaning of the basic rules of Article 2 is important to an open and transparent system of

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233. Rubin, *supra* note 4, at 404.

234. *Id.* at 402–03.

235. See Daniel K. Wiig, *U.C.C. Article 2 Warranties and Internet-Based Transactions: Do the Article 2 Warranties Sufficiently Protect Internet-Based Transactions with Unprofessional Internet Merchants?*, 12 *FORDHAM J. CORP. & FIN. L.* 717, 717–19 (2007) (discussing how the Internet has revolutionized faceless transactions).

236. See Thomas J. McCarthy, *An Introduction: The Commercial Irrelevancy of the “Battle of the Forms,”* 49 *BUS. LAW.* 1019, 1025 (1994) (arguing that an increasing number of electronic transactions occur without the inclusion of boilerplate found in paper transactions).

237. See Michael M. Greenfield, Symposium, *Consumer Protection and the Uniform Commercial Code: The Role of Assent in Article 2 and Article 9*, 75 *WASH. U. L. Q.* 289, 290–92 (1997) (discussing thirteen places in Article 2 that create special rules for merchants that differ from those that apply to non-merchants).

238. See *id.* at 291 n.11 (discussing how non-merchants rarely exchange standard-form documents).

239. GREENAWALT, *supra* note 16, at 178 n.213 (citing REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 150–51 (1975)).

administration—essential to democratizing access to the commercial rules of the road. Counter-textual interpretations of core instructions, shrouded in the fog of the common law process and unlocked only by payments to the lawyer's guild, are exclusionary and anti-democratic.

The world has changed since the UCC was conceived. Before the Internet, just locating information was an arduous task. Reliable and efficient sources of nominally "public" information fetched premium value.<sup>240</sup> Push button access to the work of legislatures or agencies was science fiction. Today it is prosaic. Most any motivated businessperson (indeed most any literate citizen) can access the regulations and statutes that govern his or her industry as well as business transactions with a few clicks of a mouse.<sup>241</sup> This raises an important question about the assumptions we want them to bring to that search.

Some rules are straightforward and operate essentially like traffic signs. Common law style counter-textual interpretations of such rules disappoint reasonable expectations and upset the incentives in the legislation. A regime where one has to buy the knowledge of specialists to determine when rules that say "off" really mean "on," profoundly disadvantages unsophisticated, casual traders and introduces both uncertainty and unwarranted opportunities for gaming.

One answer is that people should always consult lawyers. But this often is not practical or cost-effective. How realistic is it to believe that most people affected by these rules will have effective access to a lawyer familiar with the Code's counter-textual traps? How much time should they spend to seek out a lawyer? Will they be able to access someone whose bill will reflect the efficient rendering of the advice they need? Or will they pay for the generalist's self-education about the places where "off" really means "on?" Even if they find the right lawyer will he or she even deign to sell them the small slice of advice they actually need? Counter-textual interpretations impose these burdens on questions that might otherwise be answered by a few mouse clicks and a plain English sentence.

The possibility of blatant counter-textual interpretations may not even occur to some people and they will end up burned by an "off" button that really means "on." Now their incentive is to overconsume the services of lawyers on the fear that these snares are everywhere. Perhaps this is good for lawyers, but

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240. James T. O'Reilly, "Access to Records" Versus "Access to Evil:" Should Disclosure Laws Consider Motives as a Barrier to Records Release, 12 KAN. J.L. & PUB. POL'Y 559, 559 (2003). Documents and materials are available today with a few mouse clicks. See, e.g., *Laws & Regulations*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/lawsregs> (last visited Jun. 19, 2012).

241. An Internet search for Article 2 of the Code generates, among other things, the website for Cornell University Law School, which provides Article 2's text. *Uniform Commercial Code - Article 2 Sales*, LEGAL INFO. INST., CORNELL UNIV. LAW SCH., <http://www.law.cornell.edu/ucc/2/overview.html> (last visited Jun. 19, 2012).

it is bad for contracting. It layers trades with costs that might be avoided if plain meaning were respected and if statutory provisions could be read and followed by traders with confidence that the lawyer's guild had not secretly turned night into day. It is fair that traders should be charged with seeking counsel where the rules are complex or ambiguous. But where the public rule says up, and the actual rule administered by a guild of legal insiders says down, the public is ill served.

### 3. *Democratizing the Commercial Rules of the Road*

Lon Fuller argued that “the inner morality of law” requires rules that are comprehensible to the regulated community,<sup>242</sup> stating: “A statute whose meaning can only be determined by reference to unpublished, unreported or unstated legislative preferences does not qualify as binding and effective legislation.”<sup>243</sup> Fuller’s point is normative—an argument about legitimacy and accessibility.<sup>244</sup> It highlights the strong policy reasons for avoiding counter-textual adjustments to plain statutory language.<sup>245</sup> True, the common law is “public” information,<sup>246</sup> but comparatively speaking, the common law is a mystery, and drawing the law from cases is a specialized skill.<sup>247</sup>

Professor Colin Diver extends Fuller’s argument: because private parties “have no authoritative interpretative power, [over the statutes that govern them], their legitimate expectations must be protected from the agencies and courts possessing such power.”<sup>248</sup> Judges might be tempted to dismiss these as merely theoretical, academic criticisms. But Justice Felix Frankfurter made the same basic point more than half a century ago: “If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its

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242. FULLER, *supra* note 227, at 42–43.

243. *Id.* at 49–51.

244. Colin S. Diver, *Statutory Interpretation in the Administration State*, 133 U. PA. L. REV. 549, 576–77 (1985).

245. *Id.*

246. Cheryl M. Scheinkopf, *Balancing Free Speech, Privacy, and Open Government: Why Government Should Not Restrict the Truthful Reporting of Public Record Information*, 49 UCLA L. REV. 1567, 1586 (1997).

247. See LLEWELLYN, *supra* note 2, at 37–54 (describing how to interpret and analyze case opinions); see also Hawkland, *supra* note 90, at 296 (“When the number of printed cases becomes like the number of grains of sand on the beach, a precedent-based case-law system does not work and cannot be made to work. A hundred years ago, a lawyer in the course of his professional career, could . . . become familiar with the entire body of case law . . . . In this country it has been a long time since even the best lawyer could make that claim, even in the narrowest field. But the effect of the multiplication of cases to infinity is not merely an accretion of intellectual anxiety among lawyers. This phenomenon strikes at the roots of the case-law system.” (citing Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1041 (1961))).

248. See Diver, *supra* note 244, at 577.

words to be read with the minds of ordinary men.”<sup>249</sup> So while it may be true that some parts of the Code are “technical lawyer’s law,” many of the provisions of Article 2 are basic commercial traffic signals.<sup>250</sup> Counter-textual interpretations transform them from plain rules of the road into snares.

Permitting citizens to rely on the plain meaning of public law has important practical consequences in the trading context. Ordinary people are likely to encounter the law in one of three contexts: criminal law, torts, or contracts. In the first two contexts they are essentially spectators. If they are victims or charged with a crime, the state calls the tune, citizens are responsive, and their rights are protected to one degree or another by counsel.<sup>251</sup> Where they are victims of a tort or insured tortfeasors, lawyers financed by insurance coverage or on a contingency fee will administer the conflict. But an ordinary person with a medium to low value contracts conflict generally is on his or her own. If the stakes are unusually high, he or she might hire a lawyer and pay the fees out of pocket. But for countless trades and trading disputes, any strategic planning done or justice obtained will be extracted without much assistance from counsel. People proceeding this way can fairly access and decipher many statutory provisions.<sup>252</sup> Therefore, it is especially poor public policy to surprise someone who finds a straightforward statutory rule governing his or her problem with a counter-textual interpretation reflecting some judge’s view of “better” policy.<sup>253</sup>

For the uninitiated or uncounseled, just locating counter-textual interpretations is difficult. They are not laid out like statutes and do not have a singular coherent form.<sup>254</sup> Karl Llewellyn counseled young lawyers that common law rules were inadequate predictors of outcome (and therefore planning) because they were formulated so broadly.<sup>255</sup> So even where citizens

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249. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947); see also Oliver W. Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417–18 (1898-1899) (“[Judges] ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they are used.”).

250. See *supra* note 111 and accompanying text.

251. See *Criminal Procedure*, LEGAL INFO. INST., CORNELL UNIV. LAW SCH., [http://www.law.cornell.edu/wex/Criminal\\_Procedure](http://www.law.cornell.edu/wex/Criminal_Procedure) (last visited Jun. 19, 2012) (explaining the basic stages and cornerstones of American criminal procedure).

252. See *supra* note 238 and accompanying text.

253. See John F. Manning, *Statutory Pragmatism and Constitutional Structures*, 120 HARV. L. REV. 1161, 1163–70 (2007) (discussing the costs and benefits of the judiciary’s use of counter-textual arguments).

254. See generally Larry Alexander, “*With Me, It’s All er Nuthin*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530 (1999) (describing the challenge between following the letter of the text or the moral intent behind the law).

255. Karl N. Llewellyn, *Thorough Title to Contract and a Bit Beyond*, 15 N.Y.U. L. REV. 159, 160–61 (1938).

can find the “right” cases, drawing the “law” from them requires a lawyer’s training.<sup>256</sup>

Kent Greenawalt argues that the easy availability of statutory commands is one of the central normative reasons for fidelity to statutory text.<sup>257</sup> Statutes make basic legal rules accessible to people who are not trained to decipher the common law. This is especially important in the context of trading rules, because so many traders will proceed uncounseled both before and after their deals become conflicts.<sup>258</sup>

A similar concern motivated advocacy for the Code in the first place. Karl Llewellyn argued that one reason for replacing the “Uniform Acts” with the UCC was because “the Uniform Acts were so complex that they were *useless except to specialized lawyers*.”<sup>259</sup> Under the Code, Llewellyn argued “the law of commerce and commercial finance becomes relatively quick to find, to understand and to use.”<sup>260</sup> While Llewellyn may not have anticipated the democratization of information wrought by the Internet, his advice counsels demystification of trading rules and that requires respect for plain statutory commands.<sup>261</sup>

Llewellyn also issued a warning. The failure of the law to account for the realities of commercial trading would make it irrelevant—people would ignore it and refuse to use it in planning.<sup>262</sup> While Llewellyn advanced this view in pursuit of greater incorporation of trade usage into commercial law, it is more broadly an argument about democratization.<sup>263</sup> For small, uncounseled traders, the point is stronger. Counter-textual interpretations that muddy the waters

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256. See LLEWELLYN, *supra* note 2 at 37–54.

257. See GREENAWALT, *supra* note 16, at 37 (“Statutory terms are what is most easily available to members of the public and to those who advise them. Citizens should have some idea what they are expected to do. For ordinary statutory law, the words of statutes are their best guide.”).

258. The reason is that legal counsel in many cases simply are not cost effective. Often, people will pursue the matter themselves by submitting a complaint to the Better Business Bureau or pursuing the action in a small claims court. Making law accessible in this context is particularly important. For common rules of the commercial road—text that is relatively easy to understand—it is perverse to encumber them with “common law style” counter-textual interpretations that are inaccessible to the uncounseled.

259. Gedid, *supra* note 11, at 358.

260. TWINING, *supra* note 165, at 537.

261. *Id.* (“Yet the great fact of policy remains: if American enterprise is to develop as a free economy, then the rule of the game must therefore be made readily knowable. They must be simple . . . and also as easy to know as the best legal engineering can make them.”).

262. *Id.*

263. *Id.*

around relatively plain statutory commands create the same problem that the Code attempted to alleviate.<sup>264</sup>

Pre-Code commercial law decisions were “fascinating and diverse. They were also disastrous to the commercial community, for in spite of the fact that this process developed some novel principles of great value[,] . . . it also produced a state of flux making impossible the realization of one of the highest commercial law ideals, that of predictability.”<sup>265</sup> Counter-textual interpretations of the Code pose the same problem. Creative departures from the text may indeed float new, useful principles and do better justice between litigants. But systemically, they impair predictability and create snares for the uncounseled.<sup>266</sup>

Some will object that this Article overestimates how much people truly do or will access and engage the Code; that most people, perhaps even most legislators, do not read most statutes.<sup>267</sup> This allows the argument that statutory interpretation should not credit the understanding of ordinary people, and courts should “forget about the understanding of language by anyone less expert than a lawyer likely to be consulted about a problem.”<sup>268</sup> Kent Greenawalt offers a nice theoretical response to this objection. It focuses on principles of access and criticism of assumptions about the special vocabularies and capabilities of lawyers and legislatures.<sup>269</sup> Ultimately it distills into the normative claim that “judges should concentrate on the understanding of members of the *most* relevant community.”<sup>270</sup> Under Article 2, that is the broad community of traders—most of them proceeding uncounseled, or undercounseled, without intention or capacity to engage the Code as a common-law-centric, litigation-focused rulebook.<sup>271</sup>

Greenawalt’s argument is compelling, but another response is simple irony. It is profoundly ironic to suggest 1) that citizens are charged with knowledge of public laws, 2) that access to them will be widely available, 3) that many basic Code rules will be stated in terms most traders can understand, and then on the last turn, 4) that the statutory meaning will be flipped through a process that only lawyers can access or understand.

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264. See *supra* note 259 and accompanying text. See generally Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986-87).

265. See Hawkland, *supra* note 90, at 293.

266. See *supra* note 253 and accompanying text.

267. WHITE & SUMMERS, *supra* note 28, at 14.

268. See GREENAWALT, *supra* note 16, at 79–80.

269. *Id.* at 80–81.

270. *Id.* at 82.

271. See *id.* at 35–37 (noting that judges realize that individuals subject to a law should be reasonably sure what the statute means and that they expect it to be enforced accordingly).



## III. THE ROUGH CARPENTRY OF ARTICLE 2: RECONCILIATION AND ANALYSIS

This Article has argued so far that the impulses fueling liberal construction of the Code cannot entirely trump the competing institutional principles and public policy that counsel fidelity to the text. Section A of this Part summarizes and distills those conflicting inputs into some basic principles of reconciliation. Section B applies those principles to a closer analysis of the counter-textual interpretations summarized in Section A.

No doubt the drafters of the UCC aimed to grant judges broad interpretative license.<sup>272</sup> It is equally clear that the UCC, as statute, demands fidelity to unambiguous textual commands.<sup>273</sup> We must credit both things and recognize that they are in conflict. Reconciliation requires, at a minimum, that courts enforce plain textual commands about which there is no *genuine doubt*.<sup>274</sup> This is a two-part filter because genuine doubt naturally breaks down into *linguistic doubt* (textual puzzles), and *circumstantial doubt* (puzzles created by new types of problems).<sup>275</sup>

Application of these basic principles is aided by the policy claim that parts of Article 2 are plain commercial traffic signals for which democratization and uniformity compel fidelity to the text.<sup>276</sup> This reinforces the principle of legislative supremacy and, in close cases, may tip the balance toward textual fidelity.

For an illustration of these principles at work, consider the contentious policy questions that stalled adoption of Revised Article 2. One of those questions was the treatment of the shrinkwrap question summarized in Part I.<sup>277</sup> Imagine now that a state resolves this question in favour of consumers, with the text and legislative history making this plain. It would be a high-order violation of duty for a court to reverse that policy decision.<sup>278</sup>

Not every breach of fidelity will be as plain. Consider the case where a legislature is given explicit policy choices by Code drafters and selects one. Judicial defiance of that choice would be a high-order breach of fidelity, but perhaps less so than in the shrinkwrap case, especially if the legislative choice was a perfunctory selection and many decades old.<sup>279</sup>

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272. WHITE & SUMMERS, *supra* note 28, at 17–20.

273. See *supra* note 192 and accompanying text.

274. See *supra* notes 176–81 and accompanying text.

275. See *supra* notes 193–94 and accompanying text.

276. See *supra* notes 249–50, 257 and accompanying text.

277. See WHITE & SUMMERS, *supra* note 28, at 7; see also *supra* Part I (discussing the shrinkwrap cases).

278. It is interesting to consider how much time should elapse before one can make a plausible argument that the obligation to evolve the Code in accordance with changes in commercial circumstances permits the repudiation of a “failed” legislative policy choice.

279. See *supra* note 20 and accompanying text.

Contrast these two cases with the many places where the Code quite openly requires judges to operate in essentially common law mode to develop “open-ended” provisions of the UCC.<sup>280</sup> The principles distilled here still respect the broad license arguably anticipated by the Code and commentators, fully crediting, for example, White and Summers counsel that terms like “commercial reasonableness” and “good faith” demand interpretative creativity,<sup>281</sup> the many places where the text employs undefined terms that must be understood by reference to the common law,<sup>282</sup> and the sections where the text itself is a puzzle whose solution requires invocation of common law principles.<sup>283</sup>

Sections A through H below will evaluate, within this framework, the counter-textual interpretations that were summarized in Part I. Unlike Part I, where they were ordered sequentially, this Part will treat the counter-textual interpretations in rough order of their infidelity to the text, starting with the interpretations that are most difficult to sustain within the boundaries of genuine linguistic or circumstantial doubt.

#### *A. Section 2-306: Requirements Contracts*

Although the text of section 2-306 makes no such distinction, a substantial constellation of cases treat drastic reductions from estimated or normal requirements or output entirely differently from drastic increases.<sup>284</sup> Prominent commentators take the same view.<sup>285</sup> As a matter of policy, the cases are easy to understand. Disproportionate increases are practically and conceptually a far more serious problem than disproportionate decreases.

Generally speaking, the limitation on disproportionate puts or takes anticipates the attempt by requirements buyers or output sellers to exploit

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280. Compare U.C.C. § 2-102 (2011), and *id.* § 1-103, with *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997), and *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

281. See *WHITE & SUMMERS*, *supra* note 28, at 9. White and Summers counsel that terms like “commercial reasonableness” and “good faith” demand interpretative creativity. *Id.*

282. *Id.* § 3, at 7–8 (noting the section 2-403 provision on purchaser’s title to goods, which “turns on the distinction between void and voidable title, a distinction that requires courts to invoke non-Code law”).

283. *Id.*

284. See, e.g., *MDC Corp. v. John H. Harland Co.*, 228 F. Supp. 2d 387, 395–96 (S.D.N.Y. 2002) (finding that most authorities have held that the buyer may reduce requirements to zero as long as he or she does so in good faith). *But see Simcala Inc. v. Am. Coal Trade, Inc.*, 821 So. 2d 197, 202 (Ala. 2001) (holding that principles of statutory interpretation require that decreases are not disproportionate to any estimate under the plain meaning of section 2-306(1)).

285. See *KNAPP ET AL.*, *supra* note 24, at 464; see also *WHITE & SUMMERS*, *supra* note 28, at 141–42.

changes in market price.<sup>286</sup> Where a buyer has contracted for his requirements at 1 and the market price goes to 2, he has an incentive to “require” an indefinite quantity that he can resell at an easy profit.<sup>287</sup> Similarly, where the market price declines, the output seller has an incentive to indefinitely increase his “output” by purchasing product in the market for 1 and selling at the contract price of 2.

However, where the requirements or the output of these traders declines, even to zero, the problem is less severe because the potential for abuse is finite.<sup>288</sup> The extent of abuse is precisely predictable going in and comparatively moderate. Exploitation is limited by the hard floor of zero puts or takes.<sup>289</sup> There is no similar practical cap on the exploitation through disproportionate increases.<sup>290</sup> Additionally, the disproportionate decrease is more easily policed through the claim of basic breach of contract. A trader who hopes to exploit market shifts by reducing her puts or takes must abandon her contract obligations in favor of a more profitable shadow trade in the open market—viz., she must reduce her puts or takes and then replace those trades with new transactions with other traders—a plainly evident, direct breach of agreement.<sup>291</sup>

The shadow trade in the increase case (demanding more than is truly required and reselling or “producing” through market purchases more than is truly made and dumping the output on the buyer) is less evidently a breach of

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286. WHITE & SUMMERS, *supra* note 28, at 140–44; see also Stacey A. Silkworth, *Quantity Variation in Open Quantity Contracts*, 51 U. PITT. L. REV. 235, 265–66 (1990).

287. WHITE & SUMMERS, *supra* note 28, at 140–41.

288. See, e.g., Victor P. Goldberg, *Discretion in Long-Term Open Quantity Contracts: Reining in Good Faith*, 35 U.C. DAVIS L. REV. 319, 347 (2002) (noting that a requirements buyer can only cut its requirements to zero, whereas it could increase purchases without limit absent a contractual restriction).

289. *Id.*

290. *Id.* Judge Posner also suggests that the bar on disproportionate increases is consistent with the likely intent of the drafters of a contract. *Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333, 1337 (7th Cir. 1988) (stating that “[i]f there were no ceiling . . . [the buyer] might increase his ‘requirements’ so that he could resell the good at a profit . . . . This would place him in competition with the seller—a result the parties would not have [bargained for.]”); accord *N. Ind. Pub. Serv. Co. v. Colo. Westmoreland, Inc.*, 667 F. Supp. 613, 636 (N.D. Ind. 1987), *aff’d*, 845 F.2d 1024 (7th Cir. 1988).

291. The court will rule for the seller if it finds that the buyer decreased its requirements in bad faith. See, e.g., *Am. Bakeries Co.*, 840 F.2d at 1341 (finding that the buyer acted in bad faith by repudiating without providing a reason); see also WHITE & SUMMERS, *supra* note 28, at 141–42. However, “[c]ourts place the risk of good faith variation in buyer’s requirements on seller,” and rarely rule against buyers who decrease their requirements. Comment, *And Then There Were None: Requirements Contracts and the Buyer Who Does Not Buy*, 64 WASH. L. REV. 871, 875–76 (1989).

the contract.<sup>292</sup> While the parties might explicitly contract that the requirements buyer may not resell (to anyone, or only to subsidiaries, or only under conditions of exigency), the understandable reluctance of buyers to bind themselves in this fashion helps illustrate why such terms will not be uniform and correspondingly why the 2-306 default filter exists.<sup>293</sup> Similarly, an output seller would be reluctant to make a promise not to buy the product, or parts of it or constituent materials in the open market, particularly where the product (1) consists of materials and components that may be purchased in various stages of refinement or assembly or (2) is evolving in specifications or capabilities that might require various levels of outsourcing.<sup>294</sup> Even where traders negotiated to permit specified limited reaches into the market, that freedom itself will likely be enough to enable some level of abuse. So again, the disproportionate increase presents a tougher problem, one where the need for the 2-306 filter is clearer.<sup>295</sup>

These differences help explain why courts have permitted good faith reductions to zero, even though that repudiates the statutory command of 2-306.<sup>296</sup> Under a purely common law regime, this is a laudable adjustment and improvement, but as statutory interpretation, it is highly problematic.

The difficulty is that the issue is so straightforward that it cannot be classified as something new that requires courts to adjust or grow the Code. The distinction between disproportionate increases and decreases is quite evident as a matter of practice and theory.<sup>297</sup> So much so that the plainly stated symmetrical treatment of reductions and increases in section 2-306 must be viewed as an explicit policy choice.<sup>298</sup> Perhaps it is an inferior policy choice, but that choice is privileged by the statutory nature of the Code.<sup>299</sup>

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292. In order to win relief, the seller in an increase case must prove that the buyer did not increase his demand for a legitimate business purpose. See, e.g., Silkworth, *supra* note 286, at 273–74.

293. Shelly Smith, *A New Approach to the Identification and Enforcement of Open Quantity Contracts: Reforming the Law of Exclusivity and Good Faith*, 43 VAL. U. L. REV. 871, 893 (1990).

294. See Silkworth, *supra* note 286, at 339–40.

295. Exploitation of the requirement/output contract might also constitute a violation of the general obligation of good faith and, in this sense, is technically a direct breach of the agreement. This is a fair technical point, but practically speaking, it is plain that the claim of explicit breach of dickered terms is far easier to sustain than a claim grounded on the amorphous concept of good faith. See Nicholas J. Johnson, *The Boundaries of Extracompensatory Relief for Abusive Breach of Contract*, 33 CONN. L. REV. 181, 191–93 (2000) (discussing the difficulty of infusing substance into the concept of good faith).

296. See *supra* notes 288–92 and accompanying text.

297. See *supra* notes 290–91 and accompanying text.

298. See Silkworth, *supra* note 286, at 238–40.

299. A minority of courts have indeed adopted this statutory plain meaning approach. See, e.g., *Simcala, Inc. v. Am. Coal Trade, Inc.*, 821 So. 2d 197, 202 (Ala. 2001).

*B. Section 2-609: Adequate Assurances*

Section 2-609 allows a promisee who has reasonable grounds for insecurity about the promisor's performance to seek adequate assurances of performance by making a written demand. Nonetheless, there is a significant strand of case law that dispenses with the writing requirement.<sup>300</sup> Part of this may be explained by common law inertia. In contrast to the Code, the Restatement (Second) of Contracts says that the demand for adequate assurances may be oral.<sup>301</sup> Grounded perhaps in this thinking, many courts have excused the writing requirement of 2-609.

There is a weak argument that the text is ambiguous here. The text does say the promisee "may in writing demand."<sup>302</sup> So one can imagine an argument that you may demand in writing or implicitly you may demand orally. However, fairly read, this merely shows that the opportunity to demand adequate assurances is an option that the promisee *may* exercise. The subsequent clause, "may if commercially reasonable suspend performance," operates the same way.<sup>303</sup> The word "may" connotes the option to suspend performance and to request adequate assurances. It does not make optional the *requirements* for exercising those opportunities. It does not, for example, eliminate the requirement that the suspension be commercially reasonable, nor does it eliminate the requirement that the request for assurances be in writing.

Moreover, the cases excusing the writing requirement generally have not been grounded on a claim of textual ambiguity. The candid explanation for enforcing oral requests for adequate assurances is to avoid injustice to the party seeking assurances.<sup>304</sup> This underscores the broader point that common law methodology permeates Code interpretation. Courts have employed the common law toolkit to achieve an arguably laudable result, but it is a blatant repudiation of legislative supremacy. The text is plain and circumstances are no different from what was anticipated by the text.<sup>305</sup> If we believe that the common law should trump the text in order to do justice here, there is no reason to limit that approach to just this section.

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300. The rationale for abandoning the writing requirement is to do justice between the parties. *Smyers v. Quartz Prods. Works Corp.*, 880 F. Supp. 1425, 1433 (D. Kan. 1995) (construing a request for payment on a previous shipment as a request for assurance to avoid injustice). Professor White details circumstances where justice concerns would dictate different interpretations of the right to adequate assurances. See James J. White, *Eight Cases and Section 251*, 67 CORNELL L. REV. 841, 857-59 (1982) (showing how courts use adequate assurances to achieve substantial justice where the order of material breach is in question).

301. RESTATEMENT (SECOND) OF CONTRACTS § 251 cmt. d (1981) ("The demand need not be in writing.")

302. U.C.C. § 2-609(1) (2011).

303. *Id.*

304. See, e.g., *Smyers*, 880 F. Supp. at 1433 (explaining how a request for payment of a prior shipment of goods can be construed as a written request for assurances to avoid injustice).

305. Cf. U.C.C. § 2-609; *Smyers*, 880 F. Supp. at 1433.

### C. Section 2-202: Parol Evidence Rule

Section 2-202 adopts a hierarchy of evidence that informs the meaning of a fully integrated written agreement under the Parol Evidence Rule.<sup>306</sup> Through a cross-reference to section 1-205, the text makes clear that in the case of conflict express terms trump course of dealing and usage of trade.<sup>307</sup> Judicial renovations to this section are classically counter-textual. Courts have openly rejected the hierarchy of evidence established in the text.<sup>308</sup> The open justification is that in some cases the textual hierarchy renders inferior results.<sup>309</sup> There is an active literature urging the counter-textual view of section 2-202. Professor Roger Kirst argues that even express contractual language that confirms what the Code already has said—i.e., express terms superseding any trade usage or of course of dealing—should not be conclusive if deemed boilerplate.<sup>310</sup>

One response to the charge of textual infidelity here is that the policy choice is unusual. It is plausible to say that 2-202 is less substantive law and more judicial housekeeping that involves another realm of decision-making<sup>311</sup>—that the rough handling of 2-202 is explained by judicial ambivalence about the utility of the Parol Evidence Rule.<sup>312</sup> On the other hand, section 2-202 quite explicitly implicates the planning, negotiating, and drafting decisions of ordinary traders.<sup>313</sup> So it is not purely about administering litigation,<sup>314</sup> but it is

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306. U.C.C. § 2-202.

307. *Id.* § 1-205.

308. *See* Allapattah Servs., Inc. v. Exxon Corp., 61 F. Supp. 2d 1308, 1314–16 (S.D. Fla. 1999) (holding that a merger clause does not negate course of dealing or trade usage); *see also* A & A Mech., Inc. v. Therma Equip. Sales Inc., 998 S.W.2d 505, 510–11 (Ky. Ct. App. 1999) (holding that trade usage and course of dealing can be considered despite the existence of a contrary merger clause).

309. *See* A & A Mech., 998 S.W.2d at 510–11.

310. KNAPP ET AL., *supra* note 24, at 430 (stating that this would put form over party intent (citing Kirst, *supra* note 27, at 863–68)); *see also* Kastely, *supra* note 27, at 866–68.

311. Is judicial housekeeping experience sufficient change to justify invoking the license of Article 1? Is it this type of change and experience that the Code has in mind in Article 1? Or is that license instead dependent on observed changes in the commercial world? The restrictive view is that such evidence is inadmissible if it appears to contradict the terms of the written agreement. *See supra* note 27 (citing cases that exemplify both the restrictive and counter-textual view).

312. *See* Zell v. Am. Seating Co., 138 F.2d 641, 644 (2d Cir. 1943) (finding the Parol Evidence Rule is not “so beneficent, so promotive of the administration of justice, and so necessary to business stability, that it should be given the widest possible application.”), *rev’d*, 322 U.S. 709 (1944); *see also* Susan J. Martin-Davidson, *Yes, Judge Kozinski, There Is a Parol Evidence Rule in California—The Lessons of a Pyrrhic Victory*, 25 SW. U. L. REV. 1, 2–5 (1995).

313. U.C.C. § 2-202 (2011).

314. As a general matter, the Parol Evidence Rule is considered substantive law. Federal courts, obliged to follow state substantive law by federal procedural law, are therefore bound to

substantially about the kind of steps necessary to minimize the risk of litigation.<sup>315</sup>

Moreover, even if the rule is considered just a housekeeping item about which judges should have the best information, the Code makes an explicit judgment about the importance of express terms versus course of dealing and trade usage.<sup>316</sup> It makes extensive policy judgments extending the influence of the latter two under the Code. Within these broader judgments, the legislative decision to elevate the express terms is not just an incidental point. It appears in section 1-205, which establishes the hierarchy of course of dealing and usage of trade across the board.<sup>317</sup> Even subsection 1-204(4), cross-referenced into section 2-202, has a broader purpose.<sup>318</sup> Not only do express terms trump both course of dealing and usage of trade, but course of dealing explicitly trumps usage of trade. Judicial departure from the text here is plain defiance of a decision about which the legislature is entitled to have its way.

#### D. 2-205: Firm Offers

Section 2-205 makes written firm offers irrevocable within certain limits. The common view is that the writing requirement of 2-205 may be excused where the promisee relies on an oral promise to keep an offer open.<sup>319</sup> In large part, this counter-textual interpretation of 2-205 can be attributed to the inertial power of “*Drennan*-style” promissory estoppel cases.<sup>320</sup> Those claims arise in the competitive bidding context, where a general contractor relies on bids from subcontractors to prepare his own bid to a prime contractor.<sup>321</sup> A degree of reliance risk by the general contractor is inherent in the transaction and is awkward to work around. Courts consistently employ promissory estoppel to render subcontractors’ offers irrevocable even though the general contractor paid no consideration to bind the offer.<sup>322</sup>

In contrast to many types of promissory estoppel claims, *Drennan*-style promissory estoppel is a highly compelling and generally successful claim.<sup>323</sup>

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state law on parol evidence questions. See, e.g., *AM Int’l, Inc. v. Graphic Mgmt. Assocs., Inc.*, 44 F.3d 572 (7th Cir. 1995).

315. U.C.C. § 2-202.

316. See *supra* notes 26–27 and accompanying text.

317. U.C.C. § 1-205.

318. *Id.* § 1-205(4); *id.* § 2-202.

319. *Id.* § 2-205; Ingrid Michelson Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn’s Attempt to Achieve the Good, the True, and the Beautiful in Commercial Law*, 73 GEO. L.J. 1141, 1152 (1984).

320. See KNAPP ET AL., *supra* note 24, at 140 (citing *E. A. Coronis Assoc. v. M. Gordon Constr. Co.*, 216 A.2d 246 (N.J. Sup. Ct. App. Div. 1966)).

321. See *Drennan v. Star Paving Co.*, 333 P.2d 757, 759 (Cal. 1958).

322. See KNAPP ET AL., *supra* note 24, at 117 (noting that the “overwhelming majority” of courts have followed *Drennan*).

323. *Id.*

The gravitational pull of the *Drennan*-style cases has been so strong that even in subcontractor bidding cases primarily involving goods—where 2-205 firm offer requirements should control—courts tend to rule that oral offers unbound by consideration are made irrevocable by the offeree's reliance.<sup>324</sup> Prominent commentators agree.

These views are counter-textual because they impose the duties of a firm offer in cases where the statutory requirements are not satisfied.<sup>325</sup> However, this is not as pure a case as we observed, for example, under section 2-306—i.e., a flat “not x” interpretation of “x.” Here, there is a plausible argument that courts are not exactly repudiating the explicit writing requirement of 2-205; instead, they are just grafting onto the firm offer, a common law appendage drawn from an influential strain of cases.<sup>326</sup> The argument for this approach is aided by the explicit textual endorsement in section 1-103 that traditional principles of law and equity survive the Code unless displaced by particular provisions.<sup>327</sup> Since section 2-205 does not expressly prohibit the use of promissory estoppel to make promises irrevocable, the license of section 1-103 plausibly supports the enforcement of oral “firm offers.”<sup>328</sup>

This argument is diminished by a fuller understanding of the license granted by section 1-103. As William Hawkland emphasized early on, section 1-103 permits non-displaced provisions of common law and equity to *supplement* the provisions of the Code, but does not allow the common law and equity to *supplant* them.<sup>329</sup> This difference, Hawkland argues, is vital.<sup>330</sup> Respect for the Code qua Code demands that courts, where possible, answer questions from within the Code.<sup>331</sup> Understanding supplementation in this context helps to answer whether section 1-103 is an invitation to graft promissory estoppel onto 2-205. The example of section 2-403 provides the illustration.

Operation of section 2-403, governing the power to transfer goods, depends on the distinction between void and voidable title. The Code does not define void or voidable.<sup>332</sup> Understanding the section requires supplementation with

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324. White and Summers suggest that even when “Section 2-205 is not met, this should not be taken to prevent offerees from invoking promissory estoppel.” WHITE & SUMMERS, *supra* note 28, at 49. Robert Nordstrom’s sales treatise takes the same view. ROBERT J. NORDSTROM, HANDBOOK OF THE LAW OF SALES § 33, at 86 (1970).

325. See *supra* note 324 and accompanying text.

326. See KNAPP ET AL., *supra* note 24, at 140.

327. Jenkins, *supra* note 13, at 496.

328. Cf. KNAPP ET AL., *supra* note 24, at 139–40; U.C.C. § 2-205 (2011).

329. Hawkland, *supra* note 90, at 313; see also *supra* notes 146–47 and accompanying text.

330. See Hawkland, *supra* note 90, at 313.

331. See *id.*

332. See U.C.C. § 2-403 (2011).



common law definitions of these terms.<sup>333</sup> Commentators like Hawkland cannot fairly object to this supplementation because it is invited by the text. Contrast section 2-205:<sup>334</sup> unlike section 2-403, which includes the common law terms “void” and “voidable” in the text, section 2-205 makes no reference to promissory estoppel.<sup>335</sup> This omission does not make the text linguistically ambiguous. Also, because the concept of promissory estoppel was evident at the time the Code was drafted, debated and adopted, the section 2-205 omission should not be considered mere happenstance.<sup>336</sup>

The principle under which promissory estoppel is injected into 2-205 must be that *it is applicable any place that it is not expressly excluded*. But that approach gives promissory estoppel pervasive influence. The question is whether that is consistent with section 1-103.<sup>337</sup> In the context of 2-205, does promissory estoppel supplement or supplant? Professor Gibson argues that these cases are largely a consequence of the gravitational pull of the *Drennan* analysis.<sup>338</sup> The *Drennan* scenario defies the norm wherein promissory estoppel is an argument often made, but rarely successful.<sup>339</sup> In the *Drennan* scenario, promissory estoppel is an especially compelling and generally successful argument, and the appeal carries over into cases explicitly governed by Article 2.<sup>340</sup>

On this view, promissory estoppel applies not because of some particular need within the Code for supplementation, but rather because it is a common law/equity impulse, and its primary force is simply inertia. So while the Code anticipates supplementation by equitable principles, Article 1 demands a stronger rationale than *we do this here because it is a familiar and comfortable extension of what we do outside the Code*. Article 1 is not a license to integrate principles of common law and equity into the Code indiscriminately.<sup>341</sup> Cases

333. See *supra* note 10 and accompanying text.

334. See *supra* note 10 and accompanying text.

335. Compare U.C.C. § 2-205, with *id.* § 2-403.

336. See Gibson, *supra* note 30, at 666.

337. Section 1-103 commands that, “unless displaced by particular provisions,” principles of common law and estoppel should supplement the Code. U.C.C. § 2-103.

338. Gibson, *supra* note 30, at 704–06.

339. See Robert A. Hillman, *Questioning the “New Consensus” on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 589 (1998) (providing tables analyzing the success rate of promissory estoppel claims).

340. See Gibson, *supra* note 30, at 704–06 (noting that this includes Article 2’s domain over bids involving goods).

341. Another more explicitly Code-based approach to the problem is drawn from Sarah Jenkins’ reporting of the implications of revised Article 1. See Jenkins, *supra* note 13, at 507–15. As an example of the interpretative methodology demanded by revised Article 1, Jenkins cites *In re Hoover*, which applied Article 9 to determine priority of creditors claims to crops growing on leased land, but also permitted lessor recovery in restitution for the uncompensated time the crops matured on her land. *Id.* at 508 (citing 35 B.R. 432 (S.D. Ohio 1983)). Although this example,

that graft promissory estoppel onto section 2-205 are just adopting a policy option that the text does not provide. And that is difficult to square with the principle of legislative supremacy.<sup>342</sup>

There is still the worry of undercrediting the importance of equity as a leveling influence on and within the Code. Professor Robyn Meadows makes a strong claim for liberal supplementation of the Code with equitable principles.<sup>343</sup> She argues that section 1-103 is a continuation of the policy under the Uniform Revised Sales Act, which endorsed the application of equitable principles to sales transactions.<sup>344</sup> Meadows presses her claim in the context of Article 9, with two powerful examples of secured creditors basically defrauding other secured creditors in a way that Article 9 would not redress without incorporation of equitable principles of estoppel and unjust enrichment.<sup>345</sup> She acknowledges that injecting these equitable doctrines diminishes predictability in order to do justice.<sup>346</sup> This captures the general conflict between predictability and fairness that this Article has argued requires particular attention under Article 2 and especially on the question of supplementation through promissory estoppel.

In Part II, this Article proffered that counter-textual interpretations of Article 2 are particularly problematic because those rules are more broadly applicable—the general rules of the commercial road. Within Article 2, some rules are more basic than others. These ubiquitous commercial traffic signals must be interpreted in a fashion consistent with the textual form in which ordinary traders will engage them.

Within the conflict between predictability and justice posed by the injection of promissory estoppel, this argument yields a similar hierarchy. Whether to “supplement” Article 2 with promissory estoppel requires close attention to the function of the particular section. Where promissory estoppel confounds the plain and accessible meaning of basic commercial traffic signals, the price of justice is very high. That is the case with section 2-205, where injecting promissory estoppel changes entirely the straightforward meaning of the

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along with the broad guidance she describes, seems to preclude direct counter-textual interpretations, the example of Hoover raises a fair question about whether “supplementation” of provisions like section 2-205 and section 2-201 would be proper even under this constricted version of section 1-103.

342. *See id.* at 505–06; *see also* Gibson, *supra* note 30, at 697.

343. *See* Meadows, *supra* note 157, at 537–38.

344. *Id.* at 538 (noting that certain principles, which are not addressed in the Code, are important in the commercial arena and should not be eliminated).

345. *Id.* at 545–51.

346. *Id.* at 550–51. Article 9’s formalist priority scheme generally disregards knowledge and culpability. *Id.* at 550.

text.<sup>347</sup> Even if technically we call this supplementation,<sup>348</sup> in operation it repudiates the rule that only some written offers are irrevocable.

The policy interests of clarity, accessibility, and predictability argue against disappointing the reasonable expectations of ordinary traders and counsel fidelity to the text of 2-205.<sup>349</sup>

*E. Section 2-201: Promissory Estoppel and the Statute of Frauds*

Section 2-201 describes when a contract for the sale of goods must be in writing.<sup>350</sup> Unlike the common law rule, reflected in section 139 of the Restatement (Second) of Contracts, it does not include a promissory estoppel exception.<sup>351</sup> Some courts exercise restraint, concluding that exceptions to section 2-201 are limited to those stated in the text.<sup>352</sup> But the decisions are split, with some cases employing a promissory estoppel exception even though it is not mentioned in the text.<sup>353</sup>

As a threshold matter, section 2-201 is easily characterized as a fundamental rule of the commercial road. It treats a basic question about which traders, consumers, and small merchants generally have instincts and questions. The text makes plain the variables that affect whether a contract must be in writing.<sup>354</sup> In jurisdictions where courts supplement 2-201 with a promissory estoppel-type exception, the uncounseled trader who makes the small effort to educate himself is rewarded with an unpleasant surprise.

Promissory estoppel is the ultimate common law puzzle. It requires that we wrestle with the nebulous principles of equity to predict outcomes. Although not technically complex, it is quintessentially lawyer's law because its flexibility defies lay expectations about how the law operates. Counter-textual interpretations that shroud the plain signals of section 2-201 in the fog of a pseudo-promissory estoppel exception undercut transparency and predictability.

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347. See Gibson, *supra* note 30, at 703.

348. "Supplementation" might fit because section 2-205 does not expressly preclude the use of promissory estoppel. *Id.* at 675.

349. See Meadows, *supra* note 157, at 542-45.

350. U.C.C. § 2-201 (2011).

351. RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

352. See Gulbis, *supra* note 26, at 1019-20.

353. KNAPP ET AL., *supra* note 24, at 343. This is a good example of the central dilemma inherent in the Code, where it is plainly a statute, but it also invites liberal interpretation. In this context, the text explicitly verifies in section 1-103 that residual principles of law and equity shall supplement the Code, unless displaced by particular provisions. U.C.C. § 1-103. Promissory estoppel is fairly within those principles of equity. *Id.* Because section 2-201 does not explicitly mention promissory estoppel, it is plausible to argue that it does not "displace" it. KNAPP ET AL., *supra* note 24, at 345. There is nothing in the Code to dictate whether the result should privilege the text or supplement it.

354. See U.C.C. § 2-201.

The idea of a promissory estoppel exception to 2-201 adds another data point to our spectrum of interpretative license and duty. Primarily this article has used the term “counter-textual interpretation” to identify worrisome textual departures. But a promissory estoppel exception to 2-201 is less counter-textual than *extra-textual* in that section 2-201 does not explicitly bar a promissory estoppel exception.<sup>355</sup> Moreover, the Code does indeed endorse incorporation of principles of common law and equity to fill gaps or resolve ambiguities.<sup>356</sup> So layering section 2-201 with a reliance exception seems less offensive to the text than the “not x” holding in the face of an explicit statutory command “x.”

Still it is harder to justify than, say, Judge Posner’s creative solution to the textual puzzle of 2-209(4).<sup>357</sup> Courts that fold Restatement section 139 principles into section 2-201 are not, strictly speaking, filling gaps or resolving textual or circumstantial ambiguities.<sup>358</sup> The language of section 2-201 does not pose the kind of puzzle we find in section 2-209 and the idea of a reliance exception to the Statute of Frauds is not new.<sup>359</sup>

The cases that graft a promissory estoppel exception onto section 2-201 simply embellish the policy decision imbedded in the text.<sup>360</sup> They weaken the UCC Statute of Frauds by broadening the range of excuses for noncompliance. While this may reflect the judgment that the Statute of Frauds underperforms its assigned tasks,<sup>361</sup> that judgment produces a substantively different rule and range of outcomes than the text creates and replaces legislative policy choices with judicial ones.<sup>362</sup>

The policy arguments for privileging plain meaning in the case of clear commercial traffic signals like section 2-201 are important tiebreakers. The statutory rule of 2-201 describing what contracts must be written is fundamental to planning, negotiation, and resolution of trading disputes.<sup>363</sup> Its

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355. KNAPP ET AL., *supra* note 24, at 343.

356. *See* U.C.C. §§ 1-102, 1-103.

357. *See supra* notes 61–62 and accompanying text.

358. KNAPP ET AL., *supra* note 24, at 343 (stating that this is the majority view).

359. *See* RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981).

360. *See* Gibson, *supra* note 30, at 690–96.

361. The criticism that the Statute of Frauds causes more mischief than it prevents is longstanding. *See* Michael Braunstein, *Remedy, Reason and the Statute of Frauds: A Critical Economic Analysis*, 1989 UTAH L. REV. 383, 422–31 (1989) (stating that the Statute of Frauds creates an incentive to lie). *See generally* Hugh E. Willis, *The Statute of Frauds – A Legal Anachronism*, 3 IND. L.J. 427 (1928) (asserting that the Statute of Frauds causes more fraud than it prevents).

362. Also, the degree to which we incorporate promissory estoppel is an important policy decision, because it threatens so much mischief in its unintended consequences and its essential incompatibility with much of classical contract law. *See* KNAPP ET AL., *supra* note 24, at 250–53.

363. *See* Gibson, *supra* note 30, at 690.

instructions are plain. Injecting promissory estoppel makes this plain language a trap for the uncounseled.

*F. Section 2-209: Modification*

Section 2-209 is a puzzle. There is a mystery imbedded in the text itself. What is the character of the failed (oral) modification that nonetheless may operate as a waiver (with the identical effect as a modification) under 2-209(4)? The leading case on the question is *National Metal Crafters v. Wisconsin Knife Works*.<sup>364</sup> It is notable for the division between Judges Richard Posner and Frank Easterbrook over how to resolve the puzzle. Judge Posner's offering is a pure common law production.<sup>365</sup> Unbound by the text of 2-209, Judge Posner adopts a put your money where your claim is standard. The driving aim, he reasons, is to discern whether the oral modification claim is fabricated.<sup>366</sup> Therefore, reasons Judge Posner, the only failed modifications (i.e., oral modifications in the face of a NOM clause) that qualify as waivers are those upon which the claimant relies.<sup>367</sup> Reliance, he argues, is a better vouchsafe for legitimacy than either consideration (which might be just a peppercorn and easy to concoct) or a writing (which might or might not have been read and understood and truly consented to).<sup>368</sup> It is a powerfully reasoned solution and utterly without support in the text—a wholly common law mode of judging.

Judge Easterbrook's dissent engages the same problem in a more reserved fashion that is more easily reconciled with the general administrative instructions of Article 1.<sup>369</sup> Section 2-209(4), says Judge Easterbrook, is really not much of a mystery. Channeling the instructions of sections 1-102 and 1-103, he looks to the common law to understand the terms "waiver" and "modification."<sup>370</sup> Judge Easterbrook shows that the waiver at common law was the surrender of a known right—a subtraction from the document.<sup>371</sup> Modification on the other hand, connotes the addition of new terms and obligations.<sup>372</sup> Only traditional waivers will qualify under 2-209(4), indeed, only the subset extracted in good faith.<sup>373</sup>

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364. 781 F.2d 1280, 1285 (7th Cir. 1986).

365. This seems consistent with Judge Posner's articulated view that judges should try to imaginatively reconstruct what the enacting legislature would have wanted. *See* Posner, *supra* note 264, at 186–90.

366. *Wis. Knife Works*, 781 F.2d at 1286–87.

367. *Id.* at 1287.

368. *Id.*

369. *See infra* note 376.

370. *Wis. Knife Works*, 781 F.2d at 1290 (Easterbrook, J., dissenting).

371. *Id.*

372. *Id.* at 1291.

373. *Id.* at 1291–92.

So neither Judge Posner's renovations nor their collateral damage is needed says Judge Easterbrook. His analysis is quoted at length here because, considering the upcoming discussion of Judge Easterbrook's own repair work on section 2-207, it is so ironic.

"Waiver" therefore ought to mean the same in subsections (4) and (5). Unsuccessful attempts at modification may be waivers under Sec. 2-209(4). Then Sec. 2-209(5) deals with a subset of these "waivers," the subset that affects the executory portion of the contract. Waivers affecting executory provisions are enforceable or not depending on reliance. We know from the language and structure of Sec. 2-209 that there is a difference between waivers that affect the executory portions of contracts and waivers that do not. Under the majority's reading, however, there is no difference. No waiver is effective without detrimental reliance. It is as if the majority has eliminated Sec. 2-209(4) from the UCC and rewritten Sec. 2-209(5) to begin: "A party who has made [an ineffectual attempt at modification] affecting [any] portion of the contract may retract . . . ."

*Repair work of this kind sometimes is necessary. A legislature has many minds, and as years pass these different people may use the same word in different ways; so, too, the shifting coalitions that create a complex statute may contribute to it multiple meanings of a single word, the more so because amendments may be added to a statute after other portions have been bargained out. Section 2-209 of the UCC is not a slapdash production or the work of competing committees unaware of each other's words, however. The UCC is one of the most carefully assembled statutes in American history. It was written under the guidance of a few people, all careful drafters, debated for a decade by the American Law Institute and committees of commercial practitioners, and adopted en bloc by the states. Vague and uncertain in places the Code is; no one could see all of the problems that would come within its terms, and in some cases foreseen problems were finessed rather than solved. But "waiver" did not call for finesses, and Sec. 2-209 was drafted and discussed as a single unit. "Waiver" in Sec. 2-209(4) and "waiver" in Sec. 2-209(5) are six words apart, which is not so great a gap that the mind loses track of meaning . . . .*<sup>374</sup>

The majority makes reliance an ingredient of waiver not because the structure of the UCC demands this reading, but because it believes that otherwise the UCC would not deal adequately with the threat of opportunistic conduct. The drafters of the UCC chose to deal with

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374. *Id.* (emphasis added).

opportunism not through a strict reading of waiver, however, but through a statutory requirement of commercial good faith.”<sup>375</sup>

In the context of this critique of Judge Posner, Judge Easterbrook illustrates something important. While Judge Posner takes more interpretative license than Judge Easterbrook, both approaches are legitimate, because the demands of legislative supremacy are modest. Judge Posner’s aggressive, common law approach is a plausible response to true textual ambiguity. Judge Easterbrook’s approach might be better, hewing more closely to the instructions of Article 1, but Judge Posner’s approach is not such a departure that it is facially illegitimate.<sup>376</sup>

### G. Section 2-207: Offer and Acceptance

Section 2-207 is the subject of two important common law style renovations of the text. The first is the general extension of the “knockout rule” from the easier case of conflicting confirmations to the harder case of conflicting terms in the offer and the acceptance. The second is the treatment of shrinkwrap cases and Internet sales generally. There are substantial differences between the two scenarios that help illuminate the spectrum of interpretative license and duty under Article 2.

#### 1. Extending the Knockout Rule to Conflicts Between Offer and Acceptance

The knockout rule was initially devised to resolve the problem of oral promises followed by confirmations that contained conflicting terms. To combat a perceived first shot problem under 2-207, the case law has extended the knockout rule to cases of conflicting terms in the offer and acceptance. Professor Knapp acknowledges that this may not be the most reasonable construction of 2-207. Caroline Brown observes that section 2-207 explicitly privileges the offer, thus the knockout rule, therefore, should not be extended to the case of different terms in the acceptance.<sup>377</sup> Despite these criticisms,

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375. *Id.* at 1292.

376. Under William Hawkland’s more demanding claim that we interpret the UCC as a true Code, Judge Easterbrook’s methodology has a stronger claim to legitimacy because Judge Easterbrook operates more strictly within the text, noting the distinction between “modification” and “waiver,” whose common-law definitions section 1-103 fairly permits him to invoke. See Hawkland, *supra* note 90, at 292–93. The UCC is a true, preemptive Code, says Hawkland, so courts construing it should “use analogy rather than ‘outside’ law to fill Code gaps, rely more on the decisions of other Code states, and give their own decisions somewhat less permanent precedential value.” *Id.* at 313. As a practical matter, free resort to “outside” law, he says, drastically reduces the chances for uniformity. *Id.* at 314.

377. See Brown, *supra* note 43, at 941–42.

most courts apply the knockout rule to different terms in the offer and acceptance.<sup>378</sup>

On the spectrum of counter-textual interpretations, this embellishment of 2-207 is minor and evaluation of it shows that the demands of fidelity and the policy claims of this Article are relatively modest. Generally speaking, section 2-207 goes beyond the claim that judges simply should defer to the text. It is not a plain language command, as countless law students will attest.<sup>379</sup> Even though it treats a matter as basic as offer and acceptance, it is difficult to characterize as a plain commercial traffic signal. This illustrates that the policy claim for fidelity to plainly stated rules of the commercial road touches down randomly because the components of trading under Article 2 are not all presented in plain language.<sup>380</sup>

The first shot problem is obscure. Administering it plausibly demands the attention of specialists. The knockout rule in its most defensible application (confirmations following an oral agreement) adjusts to a problem created by the text but is not plainly evident in the text. The decision to extend the rule to acceptances containing conflicting terms seems fairly within the range of linguistic and circumstantial doubt.

## 2. *The Shrinkwrap Cases and Judge Easterbrook's Blowtorch*

Comparing the knockout rule problem with the shrinkwrap cases exemplified by *ProCD* and *Hill* illustrates how the same provision of the UCC can generate fair responses to textual ambiguity and illegitimate counter-textual interpretation. Judge Easterbrook's work in the shrinkwrap cases blatantly repudiates the text of 2-207 and addresses no circumstantial ambiguity.

Even as a practical matter, it generates absurd results. Judge Easterbrook's insistence that the request to purchase, which we cannot call an offer, takes on some nebulous form that is difficult to label is highly problematic.<sup>381</sup> If the seller is making the offer on terms sent in the box, then the buyer is permitted to make a counteroffer.<sup>382</sup> If the seller, as we might expect, declines that counteroffer, the absurd result is that both parties have fully performed (payment and delivery are complete), but Judge Easterbrook must say that

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378. See *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1580 (10th Cir. 1984). The vast majority of jurisdictions follow the *Daitom* approach. *Reilly Foam Corp. v. Rubbermaid Corp.*, 206 F. Supp. 643, 654 (E.D. Pa. 2002).

379. See *supra* Part II.B.1.

380. See *supra* Part II.B.1.

381. See *supra* notes 48–51 and accompanying text.

382. See RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981) (discussing contract requirements of “a bargain in which there is a manifestation of mutual assent to the exchange”).



there is no contract.<sup>383</sup> The seller of course could reclaim his goods, but on a theory of restitution, not contract.<sup>384</sup>

Judge Easterbrook does not even engage this possibility. His analysis is policy driven within a narrow set of assumptions.<sup>385</sup> To avoid what he sees as inefficient results in electronic trading, he implausibly labels the offeror and offeree and then defies the legislative command.<sup>386</sup> Section 2-207, he says, only applies to the “battle of the forms.”<sup>387</sup> First-year law students know on the first pass that this is false. Judge Easterbrook just excises “confirmations” from the text of 2-207(1).<sup>388</sup>

Still, as we have said, ambiguity may be circumstantial as well as textual. So one possible justification for Judge Easterbrook’s repudiation of the text is that *ProCD* presents a new type of problem that demands adjustment to our understanding of section 2-207.<sup>389</sup> It is plain that the Code is expected to

383. *Id.*

384. See U.C.C. § 2-206 (2011) (anticipating that an offer may be accepted by prompt shipment of goods); see also William H. Lawrence, *Rolling Contracts Rolling over Contract Law*, 41 SAN DIEGO L. REV. 1099, 1102–03 (2004).

385. “Practical considerations support allowing vendors to enclose the full legal terms with their products . . . . If the staff at the other end of the phone for direct-sales operations such as Gateway’s had to read the four-page statement of terms before taking the buyer’s credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage . . . . Customers as a group are better off when vendors skip costly and ineffectual steps . . . and use instead a simple approve-or-return device.” *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997).

386. “The district court concluded in *Pro CD* that the contract is formed when the consumer pays for the software . . . . Although this is one way a contract could be formed, it is not the only way: ‘A vendor as master of the offer may invite acceptance by conduct and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.’” *Id.* at 1148–49 (quoting *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996)).

387. *ProCD*, 86 F.3d at 1452 (“Our case has only one form: U.C.C. § 2-207 is irrelevant.”).

388. Judge Easterbrook’s approach seems generally consistent with his published view that while judges should follow the text, if legislation authorized courts to develop flexible statutory terms in light of changing values, the courts should do so through primarily a common law methodology. Frank Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 544 (1983) (“[U]nless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process.”). This assumes that Judge Easterbrook draws broad license from the text of Article 1. However, to the degree he extracts this broader license from the Comments rather than the text, there is a question whether he has seriously evaluated the legitimacy of the comments as text.

389. Judge Easterbrook’s idea of good policy is a plain diminution of the position of the typical purchaser. He reasons that this diminution of isolated interests translates into general benefits for the broader class of consumers (in the form of lower computer prices). See *Hill*, 105 F.3d at 1149. This assumes empirical work that has not yet been done. As a policy matter, this belief runs counter to our general assumptions about the virtues of loss spreading. David J. Molnar, *Should Loss-Spreading Be the Paramount Public Policy Rationale for the Imposition of*

evolve as commerce evolves and equally plain that the Internet has caused unprecedented changes in the way we trade.<sup>390</sup> On this view, Judge Easterbrook's innovation might be precisely the kind of adjustment the Code anticipates. The problem with this is that Judge Easterbrook's policy arguments apply just as readily (perhaps more so) to telephone transactions as to Internet transactions although there is nothing novel about trading by telephone. Indeed, the Internet actually facilitates the communication of detailed terms and requirements of assent that Judge Easterbrook says is inefficient. Judge Easterbrook's approach has been widely criticized by academics,<sup>391</sup> but none of these criticisms have prevented it from garnering a wide following.

This following might be motivated by two things. The first, and more defensible, possibility is that courts have unreflectively embraced the rationalization that these cases are purely about electronic trading, presenting novel problems that justify rough play with the text.<sup>392</sup> The second, and far more worrisome, possibility is that courts have simply adopted Judge Easterbrook's policy choice.<sup>393</sup> This second possibility reminds us that judges ultimately are self-policing; that respect for legislative supremacy and thus legitimacy in statutory interpretation depends less on articulated boundaries of power and more on plain self-discipline. The final admonition comes from Judge Easterbrook himself. Just change the subject from 2-209 to 2-207 and the point is evident.<sup>394</sup>

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*Strict Products Liability and Landlord-Tenant Law*, 22 J. CORP. L. 93, 102 (1996) (describing loss-spreading as a toll for making the business incur the cost and then redistributing that cost among all consumers). Judge Easterbrook's policy critique is essentially that the claims of a relatively small number of dissatisfied buyers will impose unwarranted costs on trading. This is difficult to credit.

390. See U.C.C. § 1-103 cmt. 1 (noting that the UCC is drawn to provide "flexibility").

391. See, e.g., Lawrence, *supra* note 384, at 1099 n.51 (noting the heavy criticism Judge Easterbrook has received for misappropriating contract formation principles).

392. See *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 571-72 (1998) ("The *Hill* decision . . . takes note of the realities of conducting business in today's world.").

393. See *I.Lan Systems, Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) ("First and foremost, the Court agrees with those cases embracing the theory of *ProCD*. . . . 'Money now terms later' is a practical way to form contracts, especially with purchases of software.").

394. See *supra* text accompanying note 375.

*Repair work of this kind sometimes is necessary. A legislature has many minds, and as years pass these different people may use the same word in different ways; so, too, the shifting coalitions that create a complex statute may contribute to it multiple meanings of a single word, the more so because amendments may be added to a statute after other portions have been bargained out. . . . [T]he UCC is not a slapdash production or the work of competing committees unaware of each other's words, however. The UCC is one of the most carefully assembled statutes in American history.*

*The majority makes reliance an ingredient of waiver [read ignores the application of 2-207 to "confirmations"] not because the structure of the UCC demands this reading but because it believes that otherwise the UCC would not deal adequately with [the problem].<sup>395</sup>*

#### IV. CONCLUSION

From issue to issue, the Code imposes the burden of gauging the proper scope of interpretative license and duty. This burden is deceptive because it is so easy to settle into the permissive common law mode and forget that the obligations of statutory interpretation are preeminent. The challenge is one of temperament. Where the text and circumstances are plain, lawyers can and should argue vigorously for fidelity. Ultimately, it is judges themselves who must apply the reins.

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395. *Wis. Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280, 1291-92 (7th Cir. 1986) (Easterbrook, J., dissenting) (emphasis added).