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# Judge Posner, a Modern Day Chancellor in Equity: An Explanation of *Wisconsin Knife Works v. National Metal Crafters*

Robert D. Brain\*

## I. JUDGE POSNER AS CHANCELLOR

Judge Posner is commendably candid in describing how he decided cases.<sup>1</sup> His decisional philosophy gives him maximum flexibility—the flexibility to focus more on reaching a reasonable solution of the case before him than what precedent and statutory language might dictate: “I pay very little attention to legal rules, statutes, constitutional provisions. A case is just a dispute. The first thing you do is ask yourself—forget about the law—what is a sensible resolution of this dispute?”<sup>2</sup> To come up with that view, Judge Posner consciously turned his back on the more traditional common law view of a judge, i.e., one who “interprets” but does not “make” the law: “[j]udges ought to remember that their office is *jus dicere*, and not ‘*jus dare*’—to interpret law, and not to make law, or give law.”<sup>3</sup>

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\* Clinical Professor of Law, Loyola Law School, Los Angeles. I would like to thank two individuals who worked ceaselessly on this project and were of enormous help, Sidney Wright, Loyola Law School, Los Angeles, Class of 2019, and Amber Madole, one of Loyola’s tireless Research Librarians who found source material for this article time after time, and despite the persistent “rush” nature of my requests, invariably delivered the material to me with a smile. I also would like to thank Dan O’Gorman of Barry University, who allowed me to participate on the symposium panel discussing Judge Posner and Contract Law, and of course, my fascinating fellow panelists, whose different topics and approaches taught me much: Mike Malloy, from the University of the Pacific, McGeorge School of Law; Debbie Gerhardt, from the University of North Carolina School of Law, Vic Goldberg, from the Columbia School of Law; and Jeff Harrison, from the University of Florida Levin College of the Law.

1. See, e.g., RICHARD A. POSNER, REFLECTIONS ON JUDGING (2013) [hereinafter REFLECTIONS]; RICHARD A. POSNER, HOW JUDGES THINK (2008) [hereinafter THINK]; RICHARD A. POSNER, OVERCOMING LAW (1995) [hereinafter OVERCOMING]; and Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B. U. L. REV. 1049 (2006) [hereinafter *Role*].

2. Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html?mcubz=0> [hereinafter *Posner Interview*] (on file with *The University of the Pacific Law Review*).

3. RICHARD WHATELY, BACON’S ESSAYS WITH ANNOTATIONS 511 (3d ed. 1857). For others of long-standing who took a similar view to Bacon, see, e.g., THE FEDERALIST NO. 78, at 412 (Alexander Hamilton) (J.R. Pole ed., 2005) (“The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . .”), and 1 WILLIAM BLACKSTONE, COMMENTARIES \*69 (noting judges are “the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land”).

Judge Posner is a self-defined legal “pragmatist,”<sup>4</sup> which he tells us is one who “bas[es] a judicial decision on the effects the decision is likely to have, rather than on the language of a statute or of a case, or more generally on a preexisting rule.”<sup>5</sup> This judicial “pragmatist” view of decision-making was perhaps even more aptly summarized by Professor Dworkin when he said, “The pragmatist thinks judges should always do the best they can for the future, in the circumstances, unchecked by any need to respect or secure consistency in principle with what other officials have done or will do.”<sup>6</sup>

Indeed, Judge Posner has mocked any decisional philosophy that looks for inspiration in the dictates of traditional sources, such as statutes, the law, and precedent, rather than in clever and “sensible” resolution of the dispute before him. For example, in response to Chief Justice Roberts who enunciated the view that a judge should be an “umpire” who doesn’t “make the rules [but rather] app[lies] them,”<sup>7</sup> Judge Posner retorted that judges, in fact, create the rules:

No serious person thinks that the rules that the judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires. *The rules are created by the judges themselves.* They are created out of materials that include constitutional and statutory language and previous cases, but these conventional materials of judicial decision making quickly run out when an interesting case arises; in those cases, *the conventional materials may influence, but they do not determine, the outcome.*<sup>8</sup>

Given his predilection for installing a resolution of his own making rather than deferring to precedential supremacy, it is not surprising that Judge Posner sees

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4. In an interview shortly after his retirement, Judge Posner said, “I am proud to have promoted a pragmatic approach to judging during my time on the Court . . .” Patricia Manson, *Richard Posner Announces Retirement*, CHI. DAILY L. BULL. (Sept. 6, 2017), <https://www.chicagolawbulletin.com/archives/2017/09/01/retirement-9-1-17> (on file with *The University of the Pacific Law Review*). He has also said that the adjective “pragmatic” “seems to me the most descriptive of American appellate judges.” *Role*, *supra* note 1, at 1053.

5. See THINK, *supra* note 1, at 40.

6. RONALD DWORIN, *LAW’S EMPIRE* 161 (1986).

7. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (on file with *The University of the Pacific Law Review*) (statement of John G. Roberts, Jr.).

8. *Role*, *supra* note 1, at 1051 (emphasis added). In another forum, he explained further his disagreement with Chief Justice Roberts’ “umpireal” view:

Against Roberts’s umpireal analogy, therefore, I set the story of the three umpires asked to explain the epistemology of balls and strikes. The first umpire explains that he calls them as they are, the second that he calls them as he sees them, and with the third that there are no balls or strikes until he calls them. The first umpire is the legalist. The second umpire is the pragmatic trial judge . . . The third is the appellate judge deciding cases in the open area. His activity is creation rather than discovery.

THINK, *supra* note 1, at 81.

himself as much as a legislator as a judge; “judges in our system are legislators as well as adjudicators.”<sup>9</sup> Indeed, as a “realist” he endorses the view that judges do “not draw a sharp line between law and policy, between judging and legislating, and between legal reasoning and common sense.”<sup>10</sup> In continuing his disagreement with Chief Justice Roberts and those who look for the law to decide the case rather than the other way around, he says:

But even legal thinkers who believe passionately that judges should be rules appliers and unbiased fact finders and nothing more do not believe that that’s how all or even most American judges behave all the time. Our judges have and exercise discretion. Especially if they are appellate judges, even intermediate ones, they are “occasional legislators.”<sup>11</sup>

Judge Posner scolds those judges who do not acknowledge their legislative role. It is evident he considers that at best they lack self-awareness, and at worst, are liars:

Judges tend not to be candid about how they decide cases. They like to say they just apply the law – given to them, not created by them – to the facts. They say this to deflect criticism and hostility on the part of losing parties and others who will be displeased with the result, and to reassure the other branches of government that they are not competing with them – that they are not legislating and thus encroaching on legislators’ prerogatives, or usurping executive-branch powers. They want to be thought of not as politicians in robes but as technicians, as experts.<sup>12</sup>

Judge Posner also disapproves of judges who say they “do not legislate, do not exercise discretion other than in ministerial matters (such as scheduling), have no truck with policy, and do not look outside conventional legal texts—mainly statutes, constitutional provisions, and precedents (authoritative judicial decisions)—for guidance in deciding new cases.”<sup>13</sup> Instead, he champions the view that traditional legal sources should not unduly obstruct his sensible or proper resolution of a case.<sup>14</sup>

It is hard to argue a goal of achieving a “sensible resolution” of a dispute is not a judicial virtue, even if one might not view it as the central one. If Judge Posner had confined this philosophy to purely common law decision-making, it would not

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9. THINK, *supra* note 1, at 118.

10. REFLECTIONS, *supra* note 1, at 120.

11. THINK, *supra* note 1, at 5.

12. REFLECTIONS, *supra* note 1, at 106. He has also written, “Judges’ belief that they don’t make law dulls their critical faculties.” *Id.* at 122.

13. THINK, *supra* note 1, at 7–8.

14. Posner Interview, *supra* note 2.

be as controversial for someone from the antimajoritarian branch to espouse it. After all, the common law was, by definition, developed decision-by-decision by different judges.<sup>15</sup> As Professor Johnson observed, “common law questions give judges broad license to expand or contract ‘the law’ in countless ways.”<sup>16</sup> In this regard, Judge Posner reminds us that “[t]he original precedent in a line of precedents could not have been based on precedent,”<sup>17</sup> and that it is simply not possible for an ever-changing common law to have dealt with every case, policy, and exception before the next case surfaces. Previous case law sometimes fails to provide the answer to a new case and it is hard to argue with Judge Posner’s direction that the result in the new case be “sensible.”<sup>18</sup> Judge Posner seems to recognize the fertile ground for the seeds of his philosophy in common law decision-making when he acknowledges, “[j]udges’ legislative power is usually thought to reach its zenith in common law fields.”<sup>19</sup>

The question posed by this article, however, is whether Judge Posner’s result-oriented philosophy changes at all when he confronts a question governed by a statutory scheme like the UCC. There, he is not dealing with common law’s *tabula rasa*, but rather with a legislative agenda with language and policies which the majoritarian branch of government has established.<sup>20</sup> For some, the idea that statutory language acts as a constraint to what a judge might envision as a rational outcome of a case is easy: “There is no dispute that courts operate under different constraints and obligations when engaging [in] statutory versus common law questions. The core principle of statutory interpretation is ‘legislative supremacy.’”<sup>21</sup>

The answer to the question posed in the preceding paragraph is that, *sometimes*, Judge Posner *says* the language of, and policies behind, a statute act as constraints on his judicial decision-making, making him more of a “constrained legislator,”<sup>22</sup> than an unfettered one. For example, as a “legal realist” he has said he was “a ‘loose constructionist,’ which means he believes that interpretation

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15. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 103 (1949).

16. Nicholas J. Johnson, *The Statutory UCC: Interpretative License and Duty Under Article 2*, 61 *CATH. U. L. REV.* 1073, 1074 (2012).

17. THINK, *supra* note 1, at 44.

18. A completely common law question with no previous case dealing with the issue is what Professor Calabresi had in mind when he said, “[T]here will remain situations in which courts can make law.” GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 163 (1982).

19. THINK, *supra* note 1, at 82.

20. Obviously the UCC itself is not a statute passed by any legislature. However, it serves as the basis for the commercial codes of all states and some territories. When a case governed by Article 2 came before Judge Posner, it was, of course, decided under a commercial code of a state, which was passed by the relevant legislature. In the case which is the focus of the second part of this article, *Wis. Knife Works v. Nat’l Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986), Judge Posner consistently cites to the UCC, even though the case was decided under the Wisconsin commercial code. *Id.* at 1288. Hence, when the UCC is referenced in this article, it will be treated as if it were “the law” and its drafters were “legislators.”

21. Johnson, *supra* note 16, at 1074.

22. Judge Posner called American appellate judges “constrained legislators.” *Role*, *supra* note 1, at 1055.

should be guided by a sense of the purpose of the text (contract, statute, regulation, constitutional provision) being interpreted, if the purpose is discernable . . .”<sup>23</sup> He has also said that, as a realist, he was guided by the purpose of the statute when the exact language of the statute was ambiguous, “if the statute is clear, fine; if it’s not clear, let’s try to figure out what the legislature’s general aim or thinking was and interpret the statute to advance that aim.”<sup>24</sup>

But despite this “restrained” language, his writings make manifest that deference to the legislative scheme was not his highest value. He starts his defense of this philosophy by pointing out deficiencies in the legislative process that make discovering a legislative intent difficult:

In the case of statutory provisions, common sense tells us to pay attention to the meaning of the words, certainly, and to the importance of distinguishing between what the provision means and what the judge would like it to mean and between what a provision says and what a legislator may have said it meant. But common sense also teaches us to be realistic about the legislative process – to understand the importance of compromise and the ambiguities that compromise frequently exacts, and to understand that legislators have a short horizon (the next election) and rarely try to anticipate and specify the entire range of possible applications of a statute, and that in light of possible applications of a statute, and that in light of that understanding the judicial duty is to devise interpretations that make sense.<sup>25</sup>

Judge Posner does not fault legislators for ambiguous drafting and gaps in coverage. Indeed, in a sense of benign *paterfamilias*, he acknowledges the impossibility for a drafter to deal with all potential applications of the law, and tells us that to expect such omniscience:

[W]ould place an unbearable information load on our legislatures. It would require them to be able to anticipate not only every quirky case that might arise to exploit ambiguities in statutory language but also every future

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23. REFLECTIONS, *supra* note 1, at 120. He reiterated this idea elsewhere: “The realist tries to dispel ambiguity by digging beneath the semantic surface of the applicable rule for the practical considerations that motivated its adoption, and then by restating the rule in a modern idiom and with a clear indication of the rule’s limits as derived from its purpose.” *Id.* at 121.

24. REFLECTIONS, *supra* note 1, at 234–35.

25. *Id.* at 232. He described a similar sentiment:

When legislative purpose (including the purposes behind constitutional provisions, a form of legislation) is discernable, the realist judge is an interpreter or perhaps a helper. But often it is not discernable, and then the judge is the legislator and has to base decision on his conception of sound public policy within the limits the legislators have set. And when that is the case the judge must, like other legislators, consider among other things the likely consequences of a decision one way or the other.

*Id.* at 121.

change in society (such as the advent of the telephone or the Internet) that might make a statute or constitutional provision drafted without awareness of the change fail to achieve the provision's aim.<sup>26</sup>

With that foundation laid, he argues that there are legislative gaps in most, if not all, statutes, “There are too many vague statutes and even vaguer constitutional provisions, statutory gaps and inconsistencies, professedly discretionary domains, obsolete and conflicting precedents, and factual aporias.”<sup>27</sup> But it is within those gaps that he justifies his propensity to ignore precedent and statutory policy to find a reasonable resolution of the case, just as with common law decision-making. Indeed, he calls judges “postenactment” legislators and touts their contribution to the legislative milieu:

Loose construction, in contrast, shares out the information burden between legislators and judges. Vague constitutional and statutory provisions are . . . fine-tuned by the lower courts. Not only are more “legislators” brought into the picture, but the postenactment legislators – the judges – contribute to the revisionary process information to which the original legislators, lacking the gift of prevision, had no access.<sup>28</sup>

Eliminating any ambiguity on this issue, Judge Posner lauds those judges who treat ambiguous or gap-filled “statutes . . . with the same freedom as they treat common law precedents . . . .”<sup>29</sup> He continues, “On the view I’m expounding, appellate judges when deciding cases in the open area are political actors – legislators operating under certain constraints that do not bind the official legislators, but also, depending on tenure and other factors, enjoying certain leeways that official legislators don’t.”<sup>30</sup>

In finding the complete freedom to legislate when he finds a statutory ambiguity or a lack of clear statutory direction, Judge Posner is not only in disagreement with the originalists and the textualists.<sup>31</sup> For example, Justice Kennedy has cautioned that, “[i]t is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.”<sup>32</sup> Likewise Justice Thurgood Marshall once opined:

But the fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort

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26. THINK, *supra* note 1, at 198.

27. *Id.* at 47.

28. *Id.* at 198–99.

29. *Id.* at 48.

30. *Role*, *supra* note 1, at 1054.

31. See, e.g., *Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 126 (1989) (quoting Justice Scalia, “Our task is to apply the text, not to improve upon it.”).

32. *U.S. v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring).

to achieve that which Congress is perceived to have failed to do . . . Nor is the Judiciary licensed to attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result.<sup>33</sup>

Even if we grant Judge Posner that when there are truly gaps in even a carefully drafted statute like the UCC, there is nothing more a judge can do but fill that gap with a reasonable decision under the circumstances,<sup>34</sup> an issue remains. Namely, the same judge who has come up with a sensible resolution of the case is the one who decides whether the "gap" exists. And while one might expect that the natural order of things is for a judge to exhaust all normative means of deciding whether some sort of controlling statutory language, policy, or directive exists before declaring a "gap," Judge Posner takes it the other way around:

In suggesting that American appellate judges are constrained legislators, I do not embrace the view of H.L.A. Hart and others that judges legislate only after they have tried and failed to decide the case by reference to the orthodox legal materials of (mainly) text and precedent. No doubt many do proceed in this way, but many others reverse the sequence. They start by making the "legislative" judgment as to what decision would have good consequences – would be, in other words, good policy – and then see whether that judgment is blocked by the orthodox materials. Indeed, this corresponds better than Hart's view to how judge's think of their job . . .

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Judge Posner also tells us that the review of when his "legislative . . . judgment" is "blocked" does not often come up with a reason to defer imposition of his own solution to a case before him: "The next thing, he said, was to see if a

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33. *U.S. v. Locke*, 471 U.S. 84, 95 (1985).

34. There are, of course, many others who adopt the view of judges as "legislators" within statutory gaps, *see, e.g.*, CARDOZO, *supra* note 15, at 113 ("He [a judge] legislates only between gaps. He fills the open spaces of the law."), and JULIUS STONE, *THE PROVINCE AND FUNCTION OF LAW, LOGIC, JUSTICE AND SOCIAL CONTROL: A STUDY OF JURISPRUDENCE* 500 (2d ed. 1950) ("[T]he principle . . . that where the law is silent or unclear the judge must decide the case as if he were a legislator, still sounds strange to us even after a century of demonstration . . . that this is what happens daily in our courts.").

35. *Role*, *supra* note 1, at 1055. The quote above sounds a recurring theme in Justice Posner's explanation in how he discovers legislative "gaps." In another book, he notes:

It might seem that judges would legislate only after they had tried and failed to decide a case by reference to the orthodox materials of legislative text and precedent. Some judges do proceed in that way. But others reverse the sequence. They start by making the legislative judgment, that is, by asking themselves what outcome—not just who wins and who loses, but what rule or standard or principle enunciated in their judicial opinion—would have the best consequences. Only then do they consider whether that outcome is blocked by the orthodox materials of legal decision making, or, more precisely, whether the benefits of that outcome are offset by the costs that it would impose in impairing legalist values such as legal stability. . . .

THINK, *supra* note 1, at 84.



recent Supreme Court precedent or some other legal obstacle stood in the way of ruling in favor of that sensible resolution. And the answer is that's actually rarely the case . . . When you have a Supreme Court case or something similar, they're often extremely easy to get around."<sup>36</sup> No wonder he says, "I pay very little attention to legal rules, statutes, [and] constitutional provisions . . . ."<sup>37</sup>

Judge Posner lets us know that this ability and seniority allow him more discretion than is generally accorded a newer and less able judge to "find" a legislative gap and to use his power as a judicial-legislator to come up with a sensible solution to a case:

A judge does not reach a point in a difficult case at which he says, "The law has run out and now I must do some legislating" . . . The amount of legislating that a judge does depends on the breadth of his "zone of reasonableness" – the area in which he has discretion to decide a case either way without disgracing himself. The zone varies from judiciary to judiciary and from judge to judge. Among institutional factors that influence the breadth of the zone is the judge's rank in the judicial hierarchy. The higher it is, the greater his discretionary authority is likely, though not certain, to be.

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A judge's zone of reasonableness is likely to widen with experience, as he becomes more knowledgeable and more realistic about the judicial process. But I conjecture that it has a U-shaped relation to intellectual ability. Both the most able and the least able appellate judges are likely to stretch the zone – the most able because they will be quick to see, behind the general statement of the rule, the rule's purpose and context, which limit the extent to which the general statement should control a new case; the least able because of the difficulty in understanding orthodox materials and a resulting susceptibility to emotional appeals by counsel, or, what is closely related, difficulty in grasping the abstract virtues of the systematic considerations that limit idiosyncratic judging, such as the value of the law's being predictable.<sup>38</sup>

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36. *Posner Interview*, *supra* note 2.

37. *Id.* This is not to say that Judge Posner never found precedent to "block" a differing judicial view, only that he did so infrequently and found ways around traditional constraints on decision-making easily. But for an example of when he applied such a constraint, see *Moore v. Madigan*, 702 F.3d 922 (7th Cir. 2012). There, Judge Posner overturned an Illinois statute that, among other things, made it unlawful to carry certain guns in public, in large part based on *D.C. v. Heller*, 554 U.S. 1035 (2007). This was after his sharp criticism of the decision, see *REFLECTIONS supra* note 1, at 186–96, which ended with his conclusion that, "Properly interpreted, the Second Amendment allows private ownership of guns only if required for militia duty." *Id.* at 189.

38. *THINK, supra* note 1, at 85, 86–87.

Although the point hardly needs to be made any more clear, Judge Posner admits, “[T]he more experienced the judge, the more confidence he is apt to repose in his intuitive reactions.”<sup>39</sup>

Judge Posner was aware that a judge who has a solution in mind could find legislative ambiguity where none exists to justify his or her decision: “Two things fatally undermined legal realism . . . The first was that the realists exaggerated the open area, sometimes implying that all cases are indeterminate.”<sup>40</sup> However, he also gives us a clue why the attraction to find the gap is particularly strong: “The cases in which judges play a legislative role yield decisions that shape the law. They are not only the more important and most interesting cases but also the most challenging ones.”<sup>41</sup> Again, he tells us that the more interesting the case, the more statutes are apt to be disregarded, “conventional materials of judicial decision making quickly run out when an interesting case arises; in those cases the conventional materials may influence, but they do not determine, the outcome.”<sup>42</sup> In fact, he defines “interesting cases” as “the ones in which the conventional materials of judicial decision making just won’t do the trick,”<sup>43</sup> and tells us, “[t]he judicial mentality would be of little interest if judges did nothing more than apply clear rules of law created by legislators, administrative agencies, the framers of constitutions, and other extrajudicial sources.”<sup>44</sup>

This risk that a gap will be easily found is compounded by the fact that rarely does a case get to the Seventh Circuit without there being some ambiguity in the law, a fact that not only Judge Posner realizes, but uses as justification for unleashing his “legislative” power. “Many appellate cases, one might even say the typical such case, involve a dispute over the scope or application of a rule . . . The scope or application is likely to be uncertain; otherwise the case would probably not have been brought, or if brought probably would not have reached the appellate level.”<sup>45</sup>

Our symposium panel was formed to talk about Judge Posner’s contract law jurisprudence, and so it is fair to ask whether he has said anything special about how he approaches contracts cases. He has, emphasizing that decisions in contract law must favor stability and predictability:

[T]he importance of stability in contract law is obvious and widely

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39. *Id.* at 108.

40. *Id.* at 112.

41. REFLECTIONS, *supra* note 1, at 108.

42. *Role*, *supra* note 1, at 1051.

43. *Id.* at 1053.

44. THINK, *supra* note 1, at 5.

45. *Id.* at 245. Similarly, Judge Posner has noted, “Rarely is it effective advocacy to try and convince the judge that the case law compels them to rule in one’s favor. For if that were so, the case probably would not have gotten to the appellate stage . . . .” *Id.* at 220, and “Legalist methods fail in many cases that reach appellate courts, and those are precisely the cases that most influence the further development of the law.” *Id.* at 47.

recognized. Most contract rules are default rules, that is, rules the parties can contract around, so it is important that they know what the rules are so that can draft accordingly. Thus, another factor tending to narrow the zone is realization that legal stability is a paramount factor in some fields of law.<sup>46</sup>

All of contract law is not based on the common law. The UCC is a mix of common law contracts principles and statutory dictates, and it poses special risks for those who interpret it. The risk of “gap-finding,” thereby opening up the license to insert one’s own resolution, is particularly strong when dealing with the UCC. As Professor Johnson notes:

Contracts for the sale of goods implicate Article 2 of the Uniform Commercial Code (UCC), and the UCC is decidedly statutory. It was conceived as a coherent system and adopted as public law by state legislatures. 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 the interpretation of Article 2.

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[B]ecause of its fundamental grounding in common law contracts, Article 2 especially tempts courts to stretch the license granted by the Code. 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 . . . There are countless places where courts must weave alternately between the Code text and the common law and many cases where the text of the Code is a puzzle whose solution invites common law style analysis . . . [T]he 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. So the Code, more so than many statutes, anticipates and invites judicial creativity.<sup>47</sup>

While the temptation may be strong to treat the UCC with the same flexibility as a common law decision, Professor Johnson warns of another risk when the legislative policy of the statute is too cavalierly disregarded:

Resisting this inertia [towards treating the Code as common law decision-making] imposes tedious cognitive demands, requiring judges to turn the statutory filter on and off as Article 2 questions oscillate between textual

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46. *Role*, *supra* note 1, at 1066.

47. Johnson, *supra* note 16, at 1075–77.

commands and common law gap-filling. 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>48</sup>

And against Judge Posner's predilection to come up with a sensible solution by finding a gap and "forgetting" about the statutory interpretive restraints imposed by the regulatory scheme of the Code, Professor Johnson warns:

[T]he question is whether this or any such invitation [to invite judges to construe the text of the UCC liberally] 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. They transcend concerns about particular results under particular statutes.<sup>49</sup>

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48. *Id.*

49. *Id.* at 1076. This is where Justice Cardozo parts ways with Judge Posner. As noted above in *supra* note 34, Justice Cardozo acknowledges the role of a judge as a sometime legislator. But, he is much more limited on the latitude of judicial legislation than Judge Posner, even with the dual common law and statutory status of Article 2. Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, but not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. Nonetheless, by that abuse of power, they violate the law.

If you ask him [a judge] how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his. The choice of methods, the appraisal of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces of the law. How far he may go without travelling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art. *Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.*

CARDOZO, *supra* note 15, at 113–14 (emphasis added).

So, after all this analysis, how should we view Judge Posner when he decides commercial cases under the UCC – how should we view him as (with apologies to Professor Calabresi)<sup>50</sup> a common law judge in the age of commercial statutes? His predisposition to legislate makes him a judicial-activist as he himself defines it, i.e. a judge who is engaged in, “enlarging judicial power at the expense of the power of the other branches of government.”<sup>51</sup> He can feed that predisposition by finding “gaps” in the drafter’s work product, and he is encouraged to do so because he tells us those are the more interesting cases. He can better “make his mark” on the law when he does not have to pay attention to the statutory and precedential restraints that constrain other judges and affect his “sensible solutions” to the cases before him. Because he is the one who decides whether a legislative gap exists, the urge to be fair and ignore (or overlook) the statutory scheme is great, especially when dealing with the mixture of common law questions and statutory limits in Article 2. Indeed, perhaps I asked the wrong question to start this paragraph, for Judge Posner acts less as a common law judge, and more of a Chancellor in Equity, a “judge” who had no concern of precedent and instead simply sought equitable resolution of the cases before him.<sup>52</sup> As Professor Morley tells us, “The Court of Chancery was not bound by strict notions of precedent; indeed, throughout Chancery’s early history, written rulings were not even published or widely available.”<sup>53</sup> Indeed, it is not hard to imagine Judge Posner adopting a Chancellor’s mantle, as described by Justice Cardozo:

Modern juristic thought, turning in upon itself, subjecting the judicial process to introspective scrutiny, may have given us a new terminology and a new emphasis. But in truth its method is not new. It is the method of the great chancellors, who without sacrificing uniformity and certainty built up the system of equity with constant appeal to the teachings of right reason and conscience. It is the method by which the common law has renewed its life at the hands of great masters – the method of Mansfield and Marshall and Kent and Holmes.<sup>54</sup>

It is against this backdrop that we examine one of Judge Posner’s most famous Article 2 decisions, *Wisconsin Knife Works v. National Metal Crafters*, along with Judge Easterbrook’s dissent.<sup>55</sup>

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50. Cf. CALABRESI, *supra* note 18.

51. THINK, *supra* note 1, at 287.

52. See, e.g., Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 LAW & HIST. REV. 245, 268–69 (1996).

53. Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 228 (2018), citing John R. Kroger, *Supreme Court Equity, 1789–1835 and the History of American Judging*, 34 HOUS. L. REV. 1425, 1435 (1998).

54. CARDOZO, *supra* note 15, at 137–38.

55. 781 F.2d 1280 (7th Cir. 1986).

II. THE WISCONSIN KNIFE WORKS CASE

Wisconsin Knife Works (“Wisconsin”) was a subsidiary of Black & Decker<sup>56</sup> and a decision was made to have Wisconsin make spade bits for use in electric drills.<sup>57</sup> A spade bit is an attachment for a drill which has a long shaft, a center tip, and cutting edges on either side.<sup>58</sup> Spade bits are carved from something known as a spade bit blank, and Wisconsin found a supplier for these blanks in National Metal Crafters (“National”).<sup>59</sup>

After some negotiation, Wisconsin sent a series of purchase orders to National for the spade bit blanks, each of which curiously had no delivery date, i.e., the delivery date line in the purchase orders were blank. Each purchase order also had an identical series of terms printed on the back.<sup>60</sup> The preamble to the terms on the back provided, “Acceptance of this Order, either by acknowledgement or performance, constitutes an unqualified agreement to the following:” and one of those “following” terms was a special kind of “unilateral” no oral modification or “NOM” clause.<sup>61</sup> It was unilateral because the clause prohibited the seller, National, from changing any agreement between the parties absent a writing signed Wisconsin, but it did not prohibit Wisconsin from single-handedly changing the contract.<sup>62</sup> Indeed, another term on the back of the purchase orders provided that, “the Buyer [Wisconsin] shall have the right to make changes in the Order, by a notice, in writing, to the Seller [National].”<sup>63</sup>

The first two purchase orders were sent by Wisconsin on the same day in September 1981, and National accepted them in a writing that provided, “Please accept this as our acknowledgement covering the above subject order.”<sup>64</sup> The letter also contained a series of delivery dates that National believed it could meet.<sup>65</sup> Wisconsin thereafter “filled . . . in” the delivery date blanks in the purchase orders

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56. *Id.* at 1283.

57. *Id.*

58. *Spade Bit*, FREE DICTIONARY, <https://www.thefreedictionary.com/spade+bit> (last visited Mar. 19, 2018) (on file with *The University of the Pacific Law Review*).

59. *Wis. Knife Works*, 781 F.2d at 1283.

60. *Id.*

61. *Id.*

62. *Id.* (“No modification of this contract, shall be binding upon Buyer unless made in writing and signed by Buyer’s authorized representative.”).

63. *Id.* A clause, which allows one party to modify an agreement without restriction upon simply notice to the other, might well render the “contract” illusory. However, an examination of the briefs reveals this issue was never raised in the appellate court, never discussed by Judge Posner, and not raised in the trial court briefs. Professor Murray raises a similar issue in his criticism of the decision. He poses the question of what would have happened had Wisconsin used (misused?) its ability to unilaterally change the agreement to increase the difficulty in making the spade bits, but then refused to accept new delivery dates caused by its changes. John E. Murray, Jr., *The Modification Mystery: Section 2-209 of the Uniform Commercial Code*, 32 VILL. L. REV. 1, 46 (1987).

64. *Wis. Knife Works*, 781 F.2d at 1283.

65. *Id.*

with the dates suggested by National.<sup>66</sup>

The other four purchase orders were also issued together, about a month later. National orally accepted these last four in a telephone call during which National also supplied (different) delivery dates for this series of orders.<sup>67</sup> Once again, Wisconsin “wrote in” these orally-conveyed dates on the blanks for the delivery dates on the four purchase orders.<sup>68</sup> When all was said and done, Wisconsin had ordered about 281,000 spade blanks, and National had promised their delivery in October and November of 1981.<sup>69</sup>

National had trouble meeting the delivery dates it originally proposed.<sup>70</sup> At first, it claimed that Wisconsin’s specifications were too hard for it to meet.<sup>71</sup> However, Wisconsin modified the specifications in light of National’s complaints.<sup>72</sup> Those modifications apparently still did not do the trick, and National thereafter submitted a series of “pert charts”—charts that reexamined the entire process by which production and delivery of the spade blanks were to be made and delivered.<sup>73</sup> The pert charts contained later, and in National’s view, more realistic, delivery dates for specified quantities of spade blanks covered by the six purchase orders.<sup>74</sup> The pert charts were never signed by Wisconsin,<sup>75</sup> although “people at Wisconsin Knife Works said that these dates and quantities were acceptable.”<sup>76</sup> Because they were not signed by Wisconsin, however, the pert charts and their new delivery dates did not meet the test for an effective

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66. *Id.* The idea that Wisconsin “filled in” the purchase orders with National’s delivery dates does not make literal sense. At the time of National’s acceptance letter, the original purchase orders were in National’s possession. Wisconsin couldn’t “fill them in.” Apparently, Wisconsin used National’s dates to fill in the blank dates of delivery on some copy of the purchase orders Wisconsin retained. Appellant’s Reply Brief at 18, *Wis. Knife Works v. Nat’l Metal Crafters*, 781 F.2d 1280, 1283 (No. 85-1801). However, there is no explanation as to how National became aware of that fact. It is perhaps best to think that Judge Posner was using shorthand to communicate that Wisconsin had accepted National’s delivery dates for the first two purchase orders as part of the deal, and communicated that in some way to National.

67. *Wis. Knife Works*, 781 F.2d at 1283.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1284.

72. *Wis. Knife Works*, 781 F.2d at 1284. While not specifically saying so, Judge Posner strongly suggests that Wisconsin’s modifications lessened the burden on National and made it easier for National to meet its deadlines. *Id.* Whether they became binding on National because they constituted a mutual modification to the contracts, signed by Wisconsin, as required in the purchase orders, or became binding via Wisconsin’s ability to impose unilateral changes to the contract, is unclear. *Id.*

73. Margaret Rouse, *PERT Chart (Program Evaluation Review Technique)*, TECHTARGET, <http://searchsoftwarequality.techtarget.com/definition/PERT-chart> (last visited Mar. 22, 2018) (on file with *The University of the Pacific Law Review*) (“A PERT chart is a project management tool used to schedule, organize, and coordinate tasks within a project. PERT stands for Program Evaluation Review Technique, a methodology developed by the U.S. Navy in the 1950s to manage the Polaris submarine missile program.”).

74. *Wis. Knife Works*, 781 F.2d at 1284.

75. *Id.* at 1284–85.

76. *Id.* at 1293 (Easterbrook, J., dissenting). We are not told in the opinion what the delivery dates suggested in the pert charts were.

modification under the NOM clause.

National did not supply spade blanks in any appreciable quantity until December 1982, over a year after it had promised to do so when it had first accepted the purchase orders.<sup>77</sup> Shortly thereafter, in January 1983, Wisconsin notified National that the contract was terminated, due to what it claimed was National's material breach. At that point, National had delivered some 144,000 of the total 281,000 spade blanks ordered.<sup>78</sup>

Wisconsin brought suit in August 1985.<sup>79</sup> National both answered and counterclaimed.<sup>80</sup> In its answer, it claimed the original delivery dates it had provided (in writing for the first two purchase orders and orally for the latter four) were only suggested delivery dates, that the parties could and did change later on as part of the PERT chart process. In its counterclaim, National sued for the breach of an oral promise it claimed Wisconsin had made to pay for certain expenses of maintaining certain machinery.<sup>81</sup>

The trial court ruled that the exchange of purchase orders and the written and oral acceptances constituted contracts as a matter of law, but left to the jury the question whether the contract had been validly modified and, if so, whether it had been breached.<sup>82</sup> The jury, apparently believing that the new delivery dates in the PERT charts had validly modified the contract, and that National was in compliance with those modified dates, returned a defense verdict on the complaint, and awarded National \$30,000 on its counterclaim for the machinery maintenance expenses.<sup>83</sup>

Judge Posner decided, correctly, that resolution of the case depended on analysis of UCC § 2-209, the UCC's provision on Modification, Rescission, and Waiver. Specifically, he decided that the case turned on the interpretation of UCC § 2-209(4),<sup>84</sup> the provision which deals with "waivers" of contractual terms. An examination of the briefs reveals that the possibility the case would turn on an analysis under UCC § 2-209(4) must have come as a surprise to the parties and their counsel, since neither cited to the provision in their Trial Briefs, and there was but one scant reference to the provision in the three appellate briefs filed in

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77. *Id.* at 1283. It is interesting, if not necessarily significant, that in July 1982, about halfway through the period between November 1981 (when the first blanks were due) and December 1982 (when delivery of the blanks in appreciable quantities was back on track), Wisconsin sent purchase orders for even more blanks. *Id.* The July orders were subsequently rescinded by Wisconsin. *Id.*

78. *Id.* at 1283.

79. Docket Sheet at 1, *Wis. Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986) (No. 85-1801).

80. *Id.*

81. The parties eventually stipulated that these maintenance costs were \$30,000. *Wis. Knife Works*, 781 F.2d at 1283.

82. *Id.*

83. *Id.*

84. U.C.C. § 2-209(4) (AM. LAW INST. & UNIF. LAW COMM'N 1977) ("Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.").



the Seventh Circuit.<sup>85</sup>

Judge Posner built to his interpretation of UCC § 2-209(4), starting with an explanation of UCC § 2-209(1), which provides, “(1) An agreement modifying a contract within this Article needs no consideration to be binding.”<sup>86</sup> He explained that in UCC § 2-209(1), the UCC’s drafters had consciously chosen to exclude common law’s pre-existing duty rule from the UCC, and to allow enforceable modifications even without fresh consideration.<sup>87</sup> Judge Posner applauds this innovation, explaining that requiring new consideration to enforce a modification is both overinclusive and underinclusive.<sup>88</sup> It was the former because most parties performed modifications made without consideration anyway, and it was the latter because the common law only examined the existence, but not the adequacy of consideration, so a \$1 payment could suffice as consideration for a multi-million dollar modification.

Judge Posner went on to describe the benefits that common law’s requirement of new consideration provided. The first benefit was a new consideration element eliminated modifications made under duress. As an example, he cited the venerable case *Alaska Packers’ Ass’n v. Domenico*<sup>89</sup> where some sailors, about halfway through a trip from Alaska to San Francisco, threatened to mutiny unless they were paid extra. The owner of the vessel who was on board the ship agreed to pay the seamen what they demanded,<sup>90</sup> but when they got to port, the owner withheld the modification payments. In the subsequent litigation, the modified payment term under the contract was held unenforceable because there was no new consideration to support its enforceability. Judge Posner told us, however, that despite elimination of the pre-existing duty rule, *Alaska Packers* would turn out the same way under the UCC because the principle of avoiding agreements made under duress was incorporated into the UCC under § 1-103(b).<sup>91</sup>

The second benefit of the common law rule is that it solved the issue of the “bad faith” actor. He describes a situation in which the buyer of an idiosyncratic

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85. Even that reference was devoid of analysis and very conclusory. At the end of a discussion on the meaning of “signed agreement,” Appellee’s brief stated, “Finally, it should be noted that Sec. 2:209(4) of the [UCC] provides that ‘although an attempt at modification . . . does not satisfy the requirements of (2), . . . it can operate as a waiver.’ In the case at bar, Wisconsin Knife Works’ conduct, at the very least, waived enforcement of the delivery dates.” Brief for Defendant-Appellee at 19, *Wis. Knife Works v. Nat’l Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986) (No. 85-1801).

86. U.C.C. § 2-209(1) (AM. LAW INST. & UNIF. LAW COMM’N 1977).

87. *Wis. Knife Works v. Nat’l Metal Crafters*, 781 F.2d 1280, 1285 (7th Cir. 1986). The classic common law case establishing the requirement of consideration is *Foakes v. Beer* (1884) 9 App. Cas. 605.

88. *Wis. Knife Works*, 781 F.2d at 1285.

89. 117 F. 99 (9th Cir. 1902).

90. *Alaska Packers’ Ass’n v. Domenico*, 117 F. 99, 101 (9th Cir. 1902).

91. U.C.C. § 1-103(b) (AM. LAW INST. & UNIF. LAW COMM’N 1977) (“Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.”); *Wis. Knife Works*, 781 F.2d at 1286.

good which requires special manufacturing tells the builder-seller that unless the seller agreed to a reduction in price, the buyer will put the seller to the expense of a lawsuit for the price by making up some reason to reject it. After attorneys' fees, the time value of money, and the hassle of a lawsuit, the seller would be better off taking the offered reduced price. With common law's requirement of new consideration necessary to support a modification, the seller could agree to the reduced price, and then successfully sue for the difference between the original and reduced price.<sup>92</sup> Judge Posner concluded that the Code's requirement of good faith<sup>93</sup> could be used to achieve the same common law result with the "bad faith" actor.<sup>94</sup>

The third benefit of common law's requirement of consideration was evidentiary. That is, when one existing contracting party gives something of value to the other, probably a modification has taken place.<sup>95</sup> Here, Judge Posner recognized that the drafters replaced the evidentiary benefits of common law's new consideration requirement with UCC § 2-209(2) and (3),<sup>96</sup> which require a writing to enforce a modification, either because there is a valid NOM clause (UCC § 2-209(2))<sup>97</sup> or because the contract as modified must satisfy the statute of frauds (UCC § 2-209(3)).<sup>98</sup>

Judge Posner spends little time discussing the effect of UCC § 2-209(3),<sup>99</sup> since the focus of the parties, and what he calls the "principal issue" of the case, was the enforceability of the NOM clause.<sup>100</sup>

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92. *Id.* at 1285.

93. U.C.C. § 1-201(20) (AM. LAW INST. & UNIF. LAW COMM'N 1977) ("'Good faith,' except as otherwise provided in Article 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing."); U.C.C. § 2-103(b) (AM. LAW INST. & UNIF. LAW COMM'N 1977) ("'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.").

94. *Wis. Knife Works*, 781 F.2d at 1286.

95. For example, in *Foakes v. Beer* (1884) 9 App. Cas. 605, if Dr. Foakes gave free medical care to Ms. Beer for a year, there is at least some evidence that they modified their agreement.

96. *Wis. Knife Works*, 781 F.2d at 1286.

97. U.C.C. § 2-209(2) (AM. LAW INST. & UNIF. LAW COMM'N 1977) ("A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.").

98. U.C.C. § 2-209(3) (AM. LAW INST. & UNIF. LAW COMM'N 1977) ("The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.").

99. There is a dispute among scholars as to whether that provision requires that there be a separate written agreement reflecting the modified agreement, or whether the original agreement can be used to satisfy the contract as modified. *See, e.g.,* Beth A. Eisler, *Modification of Sales Contracts Under the Uniform Commercial Code: Section 2-209 Reconsidered*, 57 TENN. L. REV. 401, 421-30 (1990) [hereinafter *2-209 Reconsidered*]. If the latter view were adopted, and the only provision regarding the enforceability of the modification was § 2-209(3), the trier of fact's finding that the pert charts modified the agreement could have been upheld.

100. *Wis. Knife Works*, 781 F.2d at 1283.

Judge Posner notes the common law did not favor such a clause.<sup>101</sup> Indeed, the typical common law court viewed an attempted oral modification of a contract with a NOM clause as an implied waiver of the NOM clause by the parties, rendering the modification enforceable.<sup>102</sup> However, he also noted that the drafters of the UCC specifically intended to validate such clauses.<sup>103</sup> As such, he ruled that the NOM clauses were valid and binding on National.<sup>104</sup> Since the new delivery dates in the pert charts were never agreed to in a signed writing by Wisconsin, any

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101. *Id.* at 1286.

102. *Id.* Judge Posner cites *Wagner v. Graziano Const. Co.*, 136 A.2d 82 (Pa. 1957) as support for such a proposition, along with its oft-quoted sentence, “The most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof.” *Id.* at 83–84. But he could have picked any number of cases that upheld oral modifications even in light of NOM clauses. *See, e.g.*, *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 387–88 (N.Y. 1919) (“Those who make a contract may unmake it. The clause which forbids a change may be changed like any other. The prohibition of oral waiver may itself be waived . . . no limitation self-imposed can destroy their power to contract again”); *Knight v. Gulf Refining Co.*, 311 Pa. 357, 360 (1933) (“Parties may, by subsequent oral agreement, modify a written contract which they previously have entered into. The new contract thus agreed upon is a substitute for the original one in so far as it alters, modifies, or changes it”); *Achenbach, v. Stoddard*, 253 Pa. 338, 343 (1916) (“It is always competent for the parties to a written contract to show that it was subsequently abandoned in whole or in part, modified, changed, or a new one substituted. And this may be shown by parol, by showing either an express agreement or actions necessarily involving the alterations”); *Prudden-Winslow Co. v. Stipp*, 76 Pa. Super. 530, 532 (1921) (stating, in light of a NOM clause providing “no verbal understanding or agreement not contained in writing on the face of the order (and these conditions) shall be considered of any force whatever” that “[n]otwithstanding the written contract, the parties were still free agents. They could change it if they so desired”); *Wiener v. Compagnie Generale Transatlantique*, 61 F.2d 893, 895 (2d Cir. 1932) (“Even a provision that there shall be no modification of an existing contract may be revoked by a new agreement between the parties which contradicts it”); *Can. v. Allstate Ins. Co.*, 411 F.2d 517 (5th Cir. 1969) (finding an oral modification of a written contract when there was detrimental reliance was permissible even though the contract contained a no-oral-modification clause); *J.T. Majors & Son, Inc. v. Lippert Bros., Inc.*, 263 F.2d 650, 654 (10th Cir. 1958) (“Such a [NOM] provision is valid but in the absence of the applicability of any statute of frauds it may be waived, modified, or rescinded by a subsequent oral contract.”); *Bailey v. Norton*, 178 Kan. 104, 108 (1955) (“[T]he terms of a written contract may be varied, modified, waived, annulled, or wholly set aside, by any subsequently executed contract, whether such subsequently executed contract be [oral or written]”); *Freeman v. Stanbern Const. Co.*, 106 A.2d 50, 55 (Md. 1954) (“[I]f the written contract provides that it shall not be varied except by an agreement in writing, it must appear that the parties understood that this clause was waived. However, such a clause may be waived by implication as well as by express agreement.”); *Ogg v. Herman*, 227 P. 476, 479 (Mont. 1924) (“The right of the parties to an executory contract to terminate it by mutual consent exists independently of any provision in the contract permitting them so to do; and [i]t is immaterial whether the termination be characterized as abandonment, cancellation, mutual rescission, or waiver.”); *Barbo v. Norris*, 245 P. 414, 417 (Wash. 1926) (recognizing binding “oral variance” after execution of written contract which “provides that no part of the contract can be sublet without the written consent” of the parties); *Alexander Hamilton Inst. v. Hart*, 192 N.W. 481, 483 (Wis. 1923) (“An executory contract in writing may be rescinded by an oral contract, and such rescission may be by express agreement of the parties, or may be inferred from the acts of the parties.”). *See generally* Eisler, *supra* note 100, at 412, and 6 ARTHUR CORBIN, CORBIN ON CONTRACTS, §§ 1294, 1295 (West Publishing Co. ed., 1962).

103. *Wis. Knife Works v. Nat’l Metal Crafters*, 781 F.2d 1280, 1286 (7th Cir. 1986). *See also* *Valspar Refinish Inc. v. Gaylord’s Inc.*, 764 N.W.2d 359, 366 (Minn. 2009); *South Hampton Co. v. Stinnes Corp.*, 733 F.2d 1108, 1117–18 (5th Cir. 1984); *U.S. Fibres, Inc. v. Proctor & Schwartz, Inc.*, 358 F. Supp. 449, 460 (E.D. Mich. 1972), *aff’d*, 509 F.2d 1043 (6th Cir. 1975); 1 JAMES WHITE & ROBERT SUMMERS, UCC PRACTITIONER TREATISE SERIES § 2.39 (7th ed. 2016).

104. *Wis. Knife Works*, 781 F.2d at 1285.

modification based on their submission by National was therefore unenforceable. Because the trial court left it to the jury to determine whether the agreement was validly *modified*, and the jury found that it was, the verdict could not stand.<sup>105</sup>

What Judge Posner realized, even if the parties and the trial judge did not,<sup>106</sup> is that if an attempted modification is not enforceable due to its oral nature, there is another route to its enforceability under the Code, namely as a waiver under UCC § 2-209(4). That section provides, “Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.” Thus, the real “principal issue” of the case was whether the attempted modifications via the pert charts, which were unenforceable as modifications because they were oral and did not meet the requirements of UCC § 2-209(2), could be enforced as waivers under UCC § 2-209(4). To answer this question, Judge Posner focused on the word “can” in UCC § 2-209(4) and reasoned that if some attempted modifications “can” act as waivers, then there must be some that cannot,<sup>107</sup> and the search for the dividing line between the two is the fulcrum whereby Judge Posner metamorphizes into the “legislator” better described as Chancellor Posner. True to his announced jurisprudence, he first established what he saw as a “gap” in the legislative scheme that allowed him to interpose his own, sensible solution. He correctly noted there was no Wisconsin state case law discussing the issue of when an attempted modification can or cannot act as a waiver,<sup>108</sup> and it is true that there is no UCC comment to UCC § 2-209 that directly answers the question of when attempted modifications can operate as a waiver.

He then turns to the UCC drafters, and, as he has done previously, “excuses” them for not providing legislative guidance: “the draftsman were making a big break with the common law in subsections (1) and (2) and naturally failed to foresee all the ramifications of the break.”<sup>109</sup> He then goes on to give examples of situations in which others have found direction of the UCC to be lacking:

The innovations made in Article 9 of the UCC were so novel that the article had to be comprehensively revised only ten years after its promulgation. See Appendix II to the 1978 Official Text of the Uniform Commercial Code. Article 2 was less innovative, but of course its draftsmanship was not flawless—what human product is? Just a few months ago we wrestled with the mysterious and apparently inadvertent omission of key words in the middle subsection of another section of Article 2. See *Jason’s Foods, Inc. v. Peter Eckrich & Sons, Inc.*, 774 F.2d 214 (7th Cir.1985) (section 2–509(2)). Another case of gap-filling in Article 2 is discussed in *White &*

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105. *Id.*

106. See *supra* text accompanying note 84.

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

108. *Id.* at 1288.

109. *Id.* at 1287.

Summers, *supra*, at 450 (section 2–316(3)(a)). But as a matter of fact, we need go no further than section 2–209(5) to illustrate the need for filling gaps in Article 2. In holding that that section allows the retraction of a waiver of the Statute of Frauds, the Third Circuit said in *Double-E Sportswear Corp. v. Girard Trust Bank, supra*, 488 F.2d at 297 n. 7, “We have found it necessary to fill the interstices of the code,” because of “a drafting oversight.”<sup>110</sup>

This paragraph provides scant support for the question whether there was a drafting oversight in UCC § 2-209(4) and the Code’s general approach concerning waivers that permits Judge Posner to insert his own “sensible” resolution. At best, the above paragraph stands for the proposition that some judges have recognized that *other* provisions of the Code did not provide sufficient guidance for a definitive interpretation. It says nothing, however, about whether the UCC’s scheme has neglected its duty to specify how UCC § 2-209(4) should operate. That is, just because some believed Article 9 needed to be reformed a decade after its passage does not mean UCC § 2-209(4) and the accompanying Code is bereft of direction. Similarly, the reference to *Jason’s Foods*<sup>111</sup> does not provide any support for that proposition either. There, the question was over the meaning of the word “acknowledgement” in UCC § 2-509(2), where the risk of loss transfers to the buyer where goods are stored with a bailee and delivered without being moved upon “acknowledgement” by the bailee of the buyer’s right to the goods.<sup>112</sup> Section 2-509 did not specify who had to receive the notice, and Judge Posner, writing for the Seventh Circuit held that the bailee had to give notice of acknowledgement “to the buyer” (as opposed to the seller) in order to shift the risk of loss.<sup>113</sup> Whether the case correctly found the need to add the words “to the buyer” after “acknowledgment” in UCC § 2-509(2) to have the provision operate sensibly in the real world does not mean that there was a similar justification to impose a new requirement under UCC § 2-209(4) to make a waiver enforceable.

The arguments are similar for the White and Summers and *Double-E*

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110. *Id.* at 1287–88.

111. *Jason’s Foods, Inc. v. Peter Eckrich & Sons, Inc.*, 774 F.2d 214, 214 (7th Cir. 1985).

112. *Id.* at 215.

113. *Id.* at 218–19. The case involved some frozen pork ribs stored at a warehouse where both the seller and buyer had accounts. The seller sold some of the ribs to the buyer and called the warehouse to tell it so. The warehouse acknowledged the transfer on the phone, and made an administrative adjustment that the ribs were now owned by the buyer. However, a few days passed before the warehouse got around to sending via snail mail the acknowledgement to the buyer that the transfer had been made. By the time the buyer got the acknowledgement, the warehouse had burned and the ribs destroyed. The seller sued for the price. *Id.* at 215. The court found that while the warehouse had “acknowledged” the transfer on the phone with the seller, and thus there was an “acknowledgment by the bailee of the buyer’s right to possession of the goods” as required by UCC § 2-509(2)(b) to shift the risk of loss, such acknowledgement would not be effective until it was made to the buyer. An acknowledgement only to the seller also would be insufficient to trigger the transfer of the risk of loss. *Id.* at 217–18.

*Sportswear*<sup>114</sup> citations in the above quote. Whether there may have been a mistake in drafting in UCC § 2-316 or in UCC § 2-209(5) is irrelevant, except for the proposition that sometimes the drafters of a comprehensive code cannot foresee and provide for all possible future scenarios.<sup>115</sup> But again it does not mean that one specific statute—UCC § 2-209(4)—and the general statutory approach of the Code do not provide directions on how to deal with waivers. *Double E* dealt with the question of whether the parties could waive the effect of the statute of frauds when they made an oral modification of a UCC contract for the price of \$500 or more. Neither the comments nor the Code answered either way, and so the court concluded that in the absence of anything prohibiting it, the term “waiver” in § 2-209(5) should be interpreted broadly to include the waiver of the Statute.<sup>116</sup> *Double E* could be viewed as an interpretation of what waiver encompasses in UCC § 2-209(5), or, possibly as a case which “fill[ed in] the interstices of the code” by adding “including the Statute of Frauds” after waiver.<sup>117</sup> Either way, the case does not provide a carte blanche to Judge Posner to make his mark in interpreting UCC § 2-209(4).

However weakly supported, upon “establishing” his “gap,” Judge Posner marched in and announced his sensible resolution to the question of when an attempted modification “can” act as a waiver and when it cannot is . . . et voilà . . . “reliance.” That is, when the party benefitted by the unenforceable modification can show reliance on it, it “can” act as a waiver. If no reliance is shown, it cannot act as a waiver,<sup>118</sup> explaining:

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114. *Double-E Sportswear Corp. v. Girard Trust Bank*, 488 F.2d 292 (3d Cir. 1973).

115. *Wis. Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280, 1291 (7th Cir. 1986) (Easterbrook, J., dissenting) (acknowledging that “[r]epair work [on the Code] sometimes is necessary”).

116. *Double-E Sportswear Corp.*, 488 F.2d at 297–98.

117. *Id.* at 297–98 n.7.

118. Judge Posner attempted to deflect the idea that linking waiver with reliance was entirely his idea: “[W]e find support for our proposed reconciliation of subsections (2) and (4) in the secondary literature.” See Beth A. Eisler, *Oral Modification of Sales Contracts Under the Uniform Commercial Code: The Statute of Frauds Problem*, 58 WASH. U. L. Q. 277, 298–302 (1980) [hereinafter *Statute Problem*]; E. ALLAN FARNSWORTH, *CONTRACTS* § 7.6 (1982); CORBIN, *supra* note 103, § 211; See also *Wis. Knife Works*, 781 F.2d at 1287. However, once again a careful examination of these sources reveals they do not provide the direct support for the enforce-the-waiver-only-when-there-is-reliance position he claims. In the cited article, Professor Eisler advocates a complete change to UCC § 2-209 by reinstating the pre-existing duty rule under UCC §2-209(1): “At the outset, an oral agreement unsupported by consideration is unenforceable.” *Statute Problem*, *supra* note 120, at 300. She went on to opine that if there was no consideration to support the modification, the evidentiary purpose of the consideration requirement could be supplied by reliance. *Id.* at 300–01. That does not equate with an interpretation that a failed modification can be enforced as a waiver under UCC §2-209(4) and indeed, Professor Eisler clarified her position in a subsequent article, published after *Wisconsin Knife Works* was decided. See *2-209 Reconsidered*, *supra* note 100. In the later article, she acknowledged there was no legislative “gap” on the waiver question and that Judge Easterbrook in dissent in *Wisconsin Knife Works* was correct in concluding the system of the Code affirmatively rejects the idea of linking reliance with waiver:

I previously proposed an interpretation of subsections (3), (4), and (5) [to UCC § 2-209] concerning which I thought would dispel “some of the confusion concerning oral modification of written sales contracts.” Judge Posner agreed with my interpretation. Others did not. Now, like Professor Wormser, I have repented—at least with respect to some of my prior propositions.

Reliance, if reasonably induced and reasonable in extent, is a common substitute for consideration in making a promise legally enforceable, in part because it adds something in the way of credibility to the mere say-so of one party. The main purpose of forbidding oral modifications is to prevent the promisor from fabricating a modification that will let him escape his obligations under the contract; and the danger of successful fabrication is less if the promisor has actually incurred a cost, has relied.<sup>119</sup>

So to recap, Judge Posner believes there are three advantages to the common law's requirement of fresh consideration to enforce a modification: (1) to make unenforceable modifications made under duress; (2) to make unenforceable modifications made by the "bad faith" actor; and (3) to provide evidentiary support for attempted modifications which might be enforceable as "waivers" under UCC § 2-209(4). He says these issues are resolved in the UCC by: (1) the Code's

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*Id.* at 403–04 (internal citations omitted). In the end, she took the position that the drafters of the UCC should *amend* UCC § 2-209(4) to provide that if there was material reliance on the attempted modification, it should be enforced as equity demanded the other party be estopped from denying it. *Id.* But the point is, she recognized that the Code does not allow that now, and that it would require a change to link waiver and reliance. (Note her comment about Professor Wormser refers to the latter's change of position as to the famous "Brooklyn Bridge" hypothetical he authored. *Id.*) Professor Farnsworth in the cited portion of his book does not state that reliance is necessary to establish an unenforceable modification, but rather that only when there is reliance should a NOM clause be given effect:

A New York statute gives effect to provisions in written agreements that prohibit oral modification or termination and the Uniform Commercial Code follows New York in this respect. Under UCC § 2-209(2), "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded . . ." Such complete reversal of the common law rule would be severely tested in a case where one party had relied on the oral modification. The drafters therefore softened the reversal by adding that, "an attempt at modification or rescission . . . can operate as a waiver" even though it is not in writing as required by the clause, but "a waiver affecting an executory part of the contract" may be retracted "unless the retraction would be unjust in light of a material change of position in reliance on the waiver." It would be possible to give an expansive term *waiver* in these provisions and thereby reach results similar to those reached in cases decided under the common law rule. The clause, then would only be effective if there had been no reliance.

FARNSWORTH, *supra* note 120 (internal citations omitted; italics in original; underlining added). The above statement could be read as providing some support for an interpretation that using waiver as the vehicle for overriding an otherwise enforceable NOM clause, but Professor Farnsworth, like Professor Eisler, clarified his thinking in a later article in which he provided that Judge Posner's position in *Wisconsin Knife Works* was "somewhat confused":

The expansion of the role of reliance, and the simultaneous erosion of the role of formalities, did not continue into the 1980s. Indeed, with the notable but single exception of the somewhat confused Seventh Circuit case of *Wisconsin Knife Works v. National Metal Crafters*, the trend appears in the other direction.

E. Allan Farnsworth, *Developments in Contract Law During the 1980's: The Top Ten*, 41 CASE W. L. REV. 203, 219 (1990). Finally, Professor Corbin discusses waiver, reliance, and UCC §2-209(2) in the section cited, but it is not in a way that supports Judge Posner's position. Professor Corbin laments the passage of UCC §2-209(2) as an infringement on freedom of contract, and discusses reliance and waiver as they appear in UCC §2-209(5). For another criticism of Judge Posner's attempt to amass academic support for his linking of waiver and reliance in UCC §2-209(4), see Judge Easterbrook's dissent in the case, *Wis. Knife Works*, 781 F.2d at 1294 n.1.

119. *Wis. Knife Works*, 781 F.2d at 1287.

incorporation of common law's voidability of agreements entered into under duress in UCC § 1-103(b); (2) the Code's good faith requirements in UCC §§ 1-201(1) and 2-103(b); and (3) imposing a reliance requirement for enforceable waivers under UCC § 2-209(4). In the first two points, Judge Posner looked at the overall design of the Code and searched for a Code-based resolution of the issue. In the third, failed even to look for a solution provided by the Code, perhaps because he thought the linking of reliance and waiver "sensible." However, that solution not only has no support in the UCC, but it actually is contrary to how the UCC directs that the issue of waiver be applied.

The flaws in Judge Posner's UCC analysis on this issue are largely pointed out in Judge Easterbrook's dissent. There, Judge Easterbrook starts by noting that while the Code does not define "waiver," it should not be given the well-known meaning of the term as: "the intentional relinquishment of a known right."<sup>120</sup> He then points out that such relinquishment of a right by a party has always been able to be shown by a writing, a conversation, or an action.<sup>121</sup> In his majority decision, Judge Posner limits the establishment of a waiver to just the latter, and then to just reliance on the waiver by just one party—the party benefitted by the alleged modification. Judge Easterbrook points out there is no justification under the Code or the case law for such a limited reading of how to prove the relinquishment of the right that is the subject of the waiver.<sup>122</sup>

He goes on to discuss that under the benefit/detriment theory of consideration, there is some detrimental reliance necessarily shown by the promisee. But he then points out that it would be unusual for the UCC's drafters to eliminate the requirement of consideration in UCC § 2-209(1), and the detriment that went with it, only to silently resurrect (or countenance the silent resurrection) of reliance in UCC § 2-209(4).<sup>123</sup>

Further, Judge Easterbrook points out that Judge Posner's linking of reliance with an enforceable waiver makes no sense when considered alongside the word "waiver" in UCC § 2-209(5), which provides:

A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of

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120. *Id.* at 1290 (Easterbrook, J., dissenting).

121. *Id.*

122. *Id.* Indeed, he says, "So far as I can tell, no court has held that reliance is an essential element of waiver under §2-209(4). One has intimated that it is not essential. *Double-E Sportswear Corp. v. Girard Trust Bank*, 488 F.2d 292, 292–96 (3d Cir. 1973), citing 1 ANDERSON, UNIFORM COMMERCIAL CODE § 2-209:8 (2d ed). The third edition of Anderson, like the second, states that reliance is unnecessary. *Id.* at § 2-209:42 (3d ed. 1982)."

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



position in reliance on the waiver.<sup>124</sup>

Judge Posner's solution makes no sense in light of UCC § 2-209(5) for two reasons. First, because the drafters included the word "reliance" in § 2-209(5) within forty words of the end of UCC § 2-209(4), and it is highly unlikely they simply "overlooked" inclusion of "reliance" in UCC § 2-209(4) as a trigger for an enforceable waiver.<sup>125</sup> It is more likely that the absence of reliance in UCC § 2-209(4) was intentional. Moreover, if Judge Posner's solution is correct, it would negate the effect of UCC § 2-209(5) altogether. That is, if an enforceable waiver is only found when there is reliance under UCC § 2-209(4), then UCC § 2-209(5)'s provision that a waiver can be retracted so long there was no reliance does not make sense.

While not saying it directly, Judge Easterbrook chided Judge Posner for finding a "gap" as to the meaning of waiver where none existed:

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 § 2-209 was drafted and discussed as a single unit. "Waiver" in § 2-209(4) and "waiver" in § 2-209(5) are six words apart, which is not so great a gap that the mind loses track of meaning.

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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

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124. U.C.C. § 2-209(5) (AM. LAW INST. & UNIF. LAW COMM'N 1977).

125. Judge Easterbrook explains this idea as follows:

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 § 2-209 was drafted and discussed as a single unit. "Waiver" in § 2-209(4) and "waiver" in § 2-209(5) are six words apart, which is not so great a gap that the mind loses track of meaning. The subsections read well together if waiver means "intentional relinquishment of a known right" in both. Section 2-209(4) says that a failed attempt at modification may be a waiver and so relinquish a legal entitlement (such as the entitlement to timely delivery); § 2-209(5) adds that a waiver cannot affect the executory portion of the contract (the time of future deliveries, for example) if the waiving party retracts, unless there is also detrimental reliance.

*Id.* at 1291 (Easterbrook, J., dissenting).

opportunistic conduct. The drafters of the UCC chose to deal with opportunism not through a strict reading of waiver, however, but through a statutory requirement of commercial good faith. See § 2-103 and comment 2 to § 2-209. The modification-only-in-writing clause has nothing to do with opportunism. A person who has his contracting partner over a barrel, and therefore is able to obtain a concession, can get the concession in writing. The writing will be the least of his worries. In almost all of the famous cases of modification the parties reduced the new agreement to writing.<sup>126</sup>

One of the reasons Judge Posner restricted the enforceability of waivers to those instances where there was also provable reliance by the benefitted party was his fear that any breacher would claim an oral conversation took place during which the innocent party would be said to have agreed to whatever non-performance from the original deal occurred, and claim a “waiver” of that term: “[w]e know that the draftmen of section 2-209 wanted to make it possible for parties to exclude oral modifications. They did not just want to give ‘modification’ another name—‘waiver.’ Our interpretation gives effect to this purpose.”<sup>127</sup> But as Judge Easterbrook pointed out, the possibility of error in a particular case should not eliminate an entire class of defendants who entered into what they thought were enforceable oral modifications, but cannot prove reliance on the conversation. He noted that while testimony as to oral conversations were a permitted means of establishing a waiver under UCC § 2-209(4), it should not be assumed that finders of fact would believe such testimony in the absence of other proof, “It might be sensible to treat claims of oral waiver [without other proof] with suspicion . . . .”<sup>128</sup> But limiting the enforceability to just instances of reliance by the benefitted party would also foreclose waivers in another entire class of cases where the actions of the parties were just as telling as reliance by the benefitted party, namely cases in which there is a course of performance shown by the burdened party which evidences a waiver:

[A juror might] insist on waiver by course of performance—for example, accepting belated deliveries without protest, or issuing new orders (or changing the specifications of old orders) while existing ones are in default. Waiver implied from performance is less prone to manipulation. This method of protecting modification-only-in-writing clauses gives waiver the same meaning throughout the statute.<sup>129</sup>

By finding a gap in the Code, which allows him to fashion a solution linking

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126. *Id.* at 1292 (Easterbrook, J., dissenting).

127. *Id.* at 1288.

128. *Id.* at 1292 (Easterbrook, J., dissenting).

129. *Wis. Knife Works*, 781 F.2d at 1292 (Easterbrook, J., dissenting).

waiver with reliance in UCC § 2-209(4), Judge Posner also ignores one of his own dictates, namely that commercial law should be predictable and stable. In remanding the decision to discover if there was evidence of National's reliance on the different delivery dates in the pert charts, Judge Posner asked the parties to reexamine their conduct in light of a rule that did not exist as they were exchanging purchase orders and pert charts.<sup>130</sup> So far from enhancing stability and predictability, at least as between these parties and allowing them to know "the default rules" so they can draft and act "accordingly," this decision inserted a new and unknowable test which only proscriptively judged their behavior. It is of course true that any new test which might foster commercial stability in the future has to be implemented in a case which could catch the parties' unaware, but one would think that a hallmark for a judge with a "pragmatic" and "sensible" jurisprudential view would be a test that could be applied to the normative conduct of the parties even in the absence of the unknown (and unknowable) rule after the decision was made.

### III. CONCLUSION

Although I certainly have a viewpoint on the proper resolution of the "waiver" issue, the purpose of this article is not to decide which judge had the best reading of UCC § 2-209(4). Academic commentary since the case has been decided has been mixed, but more on Judge Easterbrook's side than not.<sup>131</sup> Since *Wisconsin Knife Works*, there has been but one major decision on the issue, and that favored the Easterbrook position as well.<sup>132</sup> The reason the issue has not shown up much is likely that the ease of text, email, and other electronic written forms of communication has made the decision, like telephone calls attempting to modify contracts, obsolete.

However, the point of our symposium is to give some insight into how Judge Posner decided commercial law cases. A rush to find "gaps" that allow him to come up with a "sensible" resolution of the issue before him by acting as a

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130. *Id.* at 1288.

131. Compare FARNSWORTH, *supra* note 120 (arguing Judge Posner's reasoning overlooks the possibility that the word waiver was used, as it is often in contract law, to refer only to the excuse of conditions as distinguished from the discharge of duties. It would have been perfectly consistent with recognized principles of contract law to have applied subsection (4) as written, without the court's gloss, requiring no reliance for a waiver of the condition of the buyer's duty that the seller deliver on the specified dates. This would not have affected the seller's duty to deliver on those dates and would have left the seller liable in damages for its failure to do so.), and Murray, Jr., *supra* note 63 (criticizing the majority's decision), with JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 2-7 (6th ed. 2010) (indicating support for the decision).

132. *BMC Industries, Inc. v. Barth Industries, Inc.*, 160 F.3d 1322, 1333 (11th Cir. 1998) (rejecting Judge Posner's interpretation of 2-209 and agreeing with Judge Easterbrook's assertion that "reading a detrimental reliance requirement into the UCC would eliminate the distinction between subsections (4) and (5))." However, the Seventh Circuit continues to follow Judge Posner's opinion. *See, e.g.*, *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289 (7th Cir. 2003); *Am. Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381, 1386 (7th Cir. 1995). There is a Fourth Circuit decision that does so as well, albeit in an unpublished decision, *Flowers Ginning Co. v. Arma, Inc.*, 106 F.3d 390, 1997 WL 26573 (4th Cir. 1997).

legislator and modern day Chancellor is part of that legacy.

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