

## **“You don’t have to be Ludwig Wittgenstein”: How Llewellyn’s Concept of Agreement Should Change the Law of Open-quantity Contracts**

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### ABSTRACT

In this article, Professor Allen Blair examines the preeminent role of exclusivity in open-quantity contracts under the Uniform Commercial Code (“UCC”). Although the text of the UCC does not mandate that open-quantity contracts be exclusive, the vast majority of courts considering the issue have held that exclusivity is necessary to prevent such contracts from failing for lack of mutuality of obligation. The Article traces the historic development of open-quantity agreements, focusing on pre-Code cases recognizing the commercial utility of such agreements but struggling with how to accommodate them under a classical model of contract formation. It was in this historic context that courts forged the requirement of exclusivity. Despite the fact that the UCC was intended to supplant rigid notions of contract formation, thus expanding the range of legally enforceable commercial agreements, post-Code courts have remained constrained by classic contract law and still require exclusivity. This Article argues that by demanding exclusivity in open-quantity agreements, the majority of courts have relied on an outmoded conception of contract formation, which unduly restricts commercial dealmaking and ignores the relational benefits at the heart of the UCC and Karl Llewellyn’s concept of agreement.

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#### INTRODUCTION

"The real voyage of discovery consists not in seeking new landscapes but in having new eyes."<sup>1</sup>

In all of the hubbub over the recent revisions to Article 2 of the Uniform Commercial Code ("UCC" or "Code"),<sup>2</sup> a seemingly in-

<sup>1</sup> MARCEL PROUST, REMEMBRANCE OF THINGS PAST 29 (C.K. Scott Moncrieff & Terence Kilmartin trans., Vintage Books 1st ed. 1982) (1934).

<sup>2</sup> Over a decade ago, the National Conference of Commissioners on Uniform State Laws ("NCCUSL") decided to do a major overhaul and update of Article 2 to "meet the demands of modern commerce." Gregory E. Maggs, *The Waning Importance of Revisions to U.C.C. Article 2*, 78 NOTRE DAME L. REV. 595, 596 (2003). After a number of detailed drafts and significant controversy, the final amendments to the Article were approved by NCCUSL on August 5, 2002. *Id.* The revisions have occasioned the drafting of dozens of articles on a number of topics, including the reasons why

nocuous change to Official Comment 1 to section 2-201,<sup>3</sup> the statute of frauds provision of the UCC,<sup>4</sup> has escaped critical attention. This

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the revision process was undertaken, *see, e.g., id.* (discussing the dynamics of the revision process); Linda J. Rusch, *Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What NCCUSL Finally Approved*, 6 DEL. L. REV. 41 (2003); Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607 (2001); Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683 (1999) (discussing the impact that the revisions have on particular substantive areas); Juanda Lowder Daniel, *Electronic Contracting Under the 2003 Revisions of the Uniform Commercial Code: Clarification or Chaos?*, 20 SANTA CLARA COMPUTER & HIGH TECH. L.J. 319 (2004) (discussing the impact of the revisions on electronic commerce); Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009 (2002) (discussing early revisions to Article 2 and their relationship to other consumer laws); Patricia A. Tauchert, *A Survey of Part 5 of Revised Article 2*, 54 SMU L. REV. 971 (2001) (asserting that the strongest concerns about the revisions include the application of Article 2 to software, the relationship to the Uniform Electronic Transactions Act, federal legislation on electronic contracting, and warranty rights); James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315 (1997) (criticizing proposed revision requiring sellers to disclose all terms and obtain informed consent on form contracts).

<sup>3</sup> Compare U.C.C. § 2-201 cmt. 1 (2003) with U.C.C. § 2-201 cmt. 1 (2000). In relevant part, comment 1 to the 2000 version of section 2-201 stated that:

The required writing need not contain all the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which is the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted . . . .

In contrast, new comment 1 to the 2003 version of section 2-201 states in relevant part that:

The record required by subsection (1) need not contain all of the material terms of the contract, and the material terms that are stated need not be precise or accurate. All that is required is that the record afford a reasonable basis to determine that the offered oral evidence rests on a real transaction. The record may be written on a piece of paper or entered into a computer. It need not indicate which party is the buyer and which party is the seller. The only term which must appear is the quantity term. A term indicating the manner by which the quantity is determined is sufficient. Thus, for example, a term indicating that the quantity is based on the output of the seller or the requirements of the buyer satisfies the requirement. *See, e.g., Advent Systems v. Unisys*, 925 F.2d 670 (3d Cir. 1991); *Gestetner Corp. v. Case Equip. Co.*, 815 F.2d 806 (1st Cir. 1987). The same reasoning can be extended to a term that indicates that the contract is similar to, but does not qualify as, an output or requirement contract. *See, e.g., PMC Corp. v. Houston Wire and Cable Co.*, 797 A.2d 125 (N.H. 2002).

<sup>4</sup> Amended section 2-201(1) provides that a contract for the sale of goods of \$5000 or more is not enforceable unless in writing: “[A] contract . . . is not enforceable . . . unless there is some record sufficient to indicate that a contract for sale has

change, however, warrants a closer look.<sup>5</sup> With the change, Official Comment 1 to amended section 2-201 now acknowledges, albeit somewhat covertly, the existence and potential enforceability of a category of contracts that most courts and commentators have declared unenforceable: non-exclusive open-quantity contracts.<sup>6</sup>

New Official Comment 1 provides that “a term indicating that the quantity is based on the output of the seller or the requirements of the buyer satisfies [the quantity requirement of section 2-201].”<sup>7</sup> To this point, the Comment merely recognizes a growing trend among courts.<sup>8</sup> The new Comment goes on, however, to add that “[t]he same reasoning can be extended to a term that indicates that the contract is similar to, but does not qualify as, an output or requirement contract.”<sup>9</sup> This reference to quasi-requirement or output contracts is puzzling. What exactly would a contract that is similar to, but not qualifying as, a requirement or output contract look like?

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been made. . . . A record is not insufficient because it omits . . . a term agreed upon but the contract is not enforceable . . . beyond the quantity of goods shown in the record.” U.C.C. § 2-201(1) (2003).

<sup>5</sup> While the official comments to the UCC are not part of the Code, they are customarily looked at by courts and commentators as if they were and are thus persuasive authority on the meaning and effect of Code provisions. See John C. Weistart, *Requirements & Output Contracts: Quantity Variation Under the UCC*, 1973 DUKE L.J. 599, 606–07 n.17 (1973).

<sup>6</sup> Open-quantity contracts are, in the parlance of the UCC, requirement and output contracts under section 2-306. See JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 3–9 101–02 (5th ed. 2000). In requirements and output contracts, the quantity is determined by the buyer’s requirements for, or by the seller’s output or production of, a certain commodity. See *id.*

<sup>7</sup> U.C.C. § 2-201 cmt. 1 (2003).

<sup>8</sup> See *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991) (“[T]he salient factor is that exclusive requirements contracts satisfy the quantity requirements of the statute of frauds, albeit no specific amount is stated.” (citing *Zayre Corp. v. S.M. & R. Co.*, 882 F.2d 1145, 1154 (7th Cir. 1989); *Gestetner Corp. v. Case Equip. Co.*, 815 F.2d 806, 811 (1st Cir. 1987); *O.N. Jonas Co. v. Badische Corp.*, 706 F.2d 1161, 1165 (11th Cir. 1983); *Am. Original Corp. v. Legend, Inc.*, 652 F. Supp. 962, 967–68 (D. Del. 1986); JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE § 3-8 164 (3d ed. 1988))). This trend, however, is relatively recent. In fact, in 1983, Professor Caroline N. Brown (formerly Caroline N. Bruckel) declared that:

Although the Code’s substantive provisions are capable of accommodating all the . . . substance of open quantity contracts, the Statute of Frauds stands directly in the way. When it has been raised, section 2-201 has consistently produced problems, sometimes even for the simplest and most traditional rudimentary requirement and output contracts.

Caroline N. Bruckel, *The Weed and the Web: Section 2-201’s Corruption of the U.C.C.’s Substantive Provisions—The Quantity Problem*, 1983 U. ILL. L. REV. 811, 818 (1983) (analyzing how courts had applied 2-201 and describing that application as “manifestly alien to the dynamic character of Article 2”).

<sup>9</sup> U.C.C. § 2-201 cmt. 1 (2003).

A lone citation to *PMC Corp. v. Houston Wire & Cable Co.*,<sup>10</sup> which follows this oblique reference, provides the answer. Like the new Official Comment 1 to section 2-201 of the UCC, however, *PMC Corp.* has received little critical attention. The fact that *PMC Corp.* has not been, to date, cited by other courts and has only been generally cited by a few commentators<sup>11</sup> is not too surprising if one merely skims the opinion of the New Hampshire Supreme Court. Indeed, the court's discussion of the statute of frauds appears, on the surface, to be rather pedestrian, merely recapping a well-developed body of scholarship and case law on what constitutes a sufficient quantity term to satisfy section 2-201.<sup>12</sup> But *PMC Corp.* is not being cited in new Official Comment 1 for its analysis of the statute of frauds. New Official Comment 1 instead cites *PMC Corp.* as an example of a case about a contract resembling, but not quite qualifying as, a requirement or output contract. The quasi-requirement contract at issue in *PMC Corp.* is a non-exclusive open-quantity contract.<sup>13</sup>

The decision in *PMC Corp.* is remarkable (and thus its citation in new Official Comment to section 2-201 is remarkable) because the New Hampshire Supreme Court enforced a non-exclusive open-quantity contract when a vast majority of courts and commentators would not.<sup>14</sup> Grounded on pre-Code case law, the general rule espoused by courts and commentators requires that open-quantity contracts be "exclusive."<sup>15</sup> In other words, to be enforceable, open-quantity contracts must, according to the general rule, obligate the party with discretion over quantity—the quantity-determining party—to deal in the goods that are the subject of the contract exclusively with the other contracting party.

Given the prominence of this generally-accepted rule, it is a fair question to ask whether the favorable citation to *PMC Corp.* in new commentary to Article 2 has, or should have, any significance to the law of open-quantity agreements. This Article endeavors to answer

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<sup>10</sup> 797 A.2d 125 (N.H. 2002).

<sup>11</sup> See 2 LARRY LAWRENCE, ANDERSON ON THE UNIFORM COMMERCIAL CODE §§ 2-201:200, 2-204:150, 2-306:39 (3d ed. Supp. 2005); 1 WILLIAM D. HAWKLAND, HAWKLAND'S UNIFORM COMMERCIAL CODE SERIES §§ 2-201:4, 2-306:1 (Supp. 2005); 10 RICHARD A. LORD, WILLISTON ON CONTRACTS § 29:16 (4th ed. Supp. 2005).

<sup>12</sup> 797 A.2d at 128–29.

<sup>13</sup> *Id.*

<sup>14</sup> As is discussed in greater detail in Part II of this article, some might argue that the result in *PMC Corp.* is unobjectionable because the case falls into an exception to the general rule requiring exclusivity in open-quantity contracts. Part II, however, contends that any exception that might apply to the contract at issue in *PMC Corp.* is so expansive that it eclipses entirely the general rule.

<sup>15</sup> See *infra* Part I(D).

that question. I contend that the result in *PMC Corp.* (though not the entirety of the court's reasoning) is completely appropriate and, in fact, comports with the underlying jurisprudence of the UCC.<sup>16</sup> Rather than working a revolutionary change in the law of open-quantity agreements, the court in *PMC Corp.* merely recognized and enforced the serious business commitments of two sophisticated commercial parties and thus did precisely what the Code was meant to do.<sup>17</sup> That a majority of courts and commentators would find the outcome in *PMC Corp.* unorthodox means only that the time has come to take a fresh look at the UCC's full potential to validate open-quantity contracts.<sup>18</sup> The majority rule requiring exclusivity as a prerequisite to the enforceability of open-quantity contracts not only stands at odds to the UCC's fundamental goal of respecting actual

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<sup>16</sup> See *infra* Part III.

<sup>17</sup> Importantly, this Article presumes that open-quantity agreements are normally only entered into by commercial entities or business persons. This presumption seems to be confirmed by the overwhelming majority of case law dealing with open-quantity agreements, which invariably involves disputes between two (or more) commercial actors. Nevertheless, it is worth noting that the presumption runs the risk of obfuscating important policy differences that might exist between enforcement of open-quantity agreements in purely commercial transactions and private transactions between unsophisticated individuals. See, e.g., Michael M. Greenfield & Linda J. Rusch, *Limits on Standard-Form Contracting in Revised Article 2*, 32 UCC L.J. 115, 116–21 (1999) (discussing the historic tension between the UCC's treatment of private individuals and commercial actors). As Martha Minnow points out, "we make a mistake when we assume that the categories we use for analysis just exist . . . ." MARTHA MINNOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 3* (Cornell Univ. Press 1991 ed.) (1990). This Article does not endeavor to consider what, if any, differences should exist in the treatment of open-quantity contracts based on the relative levels of sophistication of the parties.

<sup>18</sup> More than twenty-five years ago, Professor Caroline Brown advocated for the validation of all open-quantity contracts, both exclusive and non-exclusive. See Caroline N. Bruckel, *Consideration in Exclusive and Nonexclusive Open Quantity Contracts Under the U.C.C.: a Proposal for a New System of Validation*, 68 MINN. L. REV. 117 (1983) ("This Article is concerned solely with these validating principles which, it is contended, are extendible to all open quantity contracts, including nonexclusive ones."). Professor Brown was the first scholar expressly to urge courts and commentators to recognize the broad validating force of section 2-306 of the UCC. At the time that she wrote her ground-breaking article, she attributed the lack of scholarly debate about the proper scope of section 2-306, in part, to "the lack of careful examination ordinarily spurred by controversy." *Id.* at 155. While most courts and commentators continue to overlook or ignore the validating potential of section 2-306, the citation of *PMC Corp.* in the new Official Comment, coupled with the continued expansion by courts, in the years since Professor Brown's article was published, of exceptions to the orthodox requirement of exclusivity in open-quantity contacts, should be sufficient to spark some controversy.

commercial practices, but it overlooks Karl Llewellyn's concept of agreement,<sup>19</sup> a concept at the core of the UCC.

This Article is divided into three parts. Part I begins by tracing the legal history of open-quantity agreements. It starts by considering some of the earliest cases recognizing the commercial utility of such agreements but struggling with how to validate them. Part I shows that courts initially refused to enforce open-quantity agreements, hewing closely to strict classic contract theory. Eventually, however, consistent with the realist turn in American jurisprudence taking place at the end of the nineteenth century,<sup>20</sup> courts began acknowledging that businesses had legitimate reasons for entering open-quantity agreements, and courts thus strove to fashion an exception to the dictates of classic contract doctrine. Ultimately, that exception took the form of the exclusivity requirement. After tracing this pre-Code history, Part I then briefly discusses the UCC's provisions governing open-quantity agreements, highlighting the fact that no provision in the Code conditions enforceability of open-quantity agreements on exclusivity. Part I closes with an analysis of several post-Code cases, exposing the jurisprudential underpinnings of the modern rule requiring that open-quantity agreements be exclusive.

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<sup>19</sup> The UCC was drafted by many individuals, but more than any other person, Llewellyn was responsible for the creation of the UCC. See Arthur Linton Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821, 821 (1950) (noting that “[w]ithout question, the leading spirit in the whole undertaking was the reporter, K.N. Llewellyn”); Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962) (“Make no mistake: this Code was Llewellyn’s Code; there is not a section, there is hardly a line, which does not bear his stamp and impress; from beginning to end he inspired, directed and controlled it.”); Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 542 (2000) (noting that the UCC has acquired nicknames like “Karl’s Kode” and “Lex Llewellyn” (citing Eugene F. Mooney, *Old Kontract Principles and Karl’s New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213 (1966) and Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 330–34 (1951))); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 271 (Univ. of Okla. Press 1973) (pointing out that “there is no doubt that Llewellyn was easily the most important single figure” involved in the drafting of the UCC). More specifically, Llewellyn served as the principal drafter or “reporter” for both Articles 1 and 2 of the UCC. See WHITE & SUMMERS, *supra* note 8, at 3–4.

<sup>20</sup> The American legal realist movement, although principally centered at Yale Law School during the period 1920 to 1940, emerged in the later part of the nineteenth century as a reaction to legal formalism. See, e.g., Morton J. Horwitz, *Justice, Democracy, and Humanity: A Celebration of the Work of Mark Tushnet*, 90 GEO. L.J. 131, 131 (2001) (describing Yale Law School as a center of legal realism in the 1920s and 1930s); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 34 (1992) (arguing that Roscoe Pound, in *Liberty of Contract*, 18 YALE L.J. 454 (1909), anticipated the legal realist movement that mounted a critique of the nineteenth century classical formalist doctrines of contract).

Part II starts a critique of the majority rule governing open-quantity agreements. It demonstrates some of the theoretical and practical weaknesses with the majority rule. Part II then looks at the seminal work of Professor Caroline Brown, who is one of the few scholars that has advocated for validation of open-quantity contracts.<sup>21</sup> Part II surveys the key arguments Professor Brown advances to support her claims, but discusses why these arguments fall short of providing a complete basis for validation of open-quantity contracts. Part II closes with a brief evaluation of *PMC Corp.*, which serves as an example of decisions rendered by a small minority of courts either rejecting the majority rule of exclusivity outright or radically expanding exceptions to the majority rule. Part II concludes that the small, but potentially growing, number of courts challenging the rule that open-quantity agreements must be exclusive are on the right track but have not yet articulated a rationale that fully comports with the underlying jurisprudence of the UCC.

Building on the work started by Professor Brown and embraced by courts like the New Hampshire Supreme Court in *PMC Corp.*, Part III provides a theoretical basis for validating all open-quantity agreements. Part III starts by recalling the legal-realist foundations of the UCC, with the aim of showing how the UCC was intended by its drafters to accommodate, flexibly and liberally, the actual practices of commercial parties, displacing the rigid formalities that were hallmarks of classic contract law. Part III then discusses the fundamental mechanism through which this flexibility is realized: Karl Llewellyn's concept of agreement. Part III contends that Llewellyn believed that the Code's concept of agreement would replace the common law's rigid offer-consideration-acceptance model of contracting with a pragmatic approach to commercial deal making. The Code concept of agreement looks to the understanding, in fact, between the parties, which is discovered through consideration of not only the language of the parties' contract but also the circumstances surrounding their encounter. In so doing, the Code concept of agreement eschews rigid formalities, focusing instead on evaluation of the aggregate relations and commercially reasonable expectations of contracting parties. Full recognition by courts of the flexible character of agreements under the Code leads inexorably to the conclusion that the serious commercial undertakings of sophisticated business entities should be enforced, even if the parties have entered into a nonexclusive open-quantity agreement.

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<sup>21</sup> See generally Bruckel, *supra* note 18, at 117.



I. THE SELF-ADJUSTMENT OF SOCIETY TO THE PROBABLE: THE  
LEGAL HISTORY OF OPEN-QUANTITY AGREEMENTS

Most of modern contract law, the law of open-quantity agreements included, can be seen as developing from a need, arising in the late nineteenth and early twentieth centuries, to address contingencies occasioned by new forms of commerce and industry.<sup>22</sup> The history of open-quantity contracts, however, is punctuated by jurisprudential contradictions and confusion.<sup>23</sup> As discussed in the following sections, although commercial parties began entering into open-quantity agreements at the turn of the century, courts initially refused to enforce these contracts because they failed to satisfy rigid contract formalities. Even when courts began enforcing some of these contracts, enforcement was substantially limited, in an effort to maintain fealty to classic contract law, to agreements that were deemed to be

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<sup>22</sup> See, e.g., Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 415 (1988) ("During the past century, contract law, along with most of American society, has undergone a 'major transformation.'").

<sup>23</sup> It is, perhaps, not surprising that the development of open-quantity contracts was plagued by the same uncertainties that haunted new commercial practices generally. Karl Llewellyn summed up this tumultuous period as follows:

The first struggle to unhorse Sales law, and to make conscious a proper merchants' law of wares moving to and through a merchants' market, is . . . typical of American history; it is typical peculiarly of American legal history. Of our history, because, without too much planning and with considerable cross-purposing, some rather adequate adjustments were worked out—only to find themselves superseded, then misunderstood or forgotten before their full unfolding. Such is our 19th century economic history. Which of us, for instance, would know the extraordinary institutional perfection won by the Mississippi pilots, if Mark Twain had not written? How many of us still recall that each time a practice in moving fatted beef to the Eastern city consumer grew firm enough to warrant heavy investment in the stages of the process, either grazing ground further West or new transportation promptly disrupted the scheme and bankrupted the men? So here: by the time the law of merchant-to-merchant factorage had come to approach adequate analytical adjustment, and get its legal issues focused and almost solved, direct dealings by contract and commitment flooded in to swamp courts' attention, to obscure the fact-picture, to shift the issues, and to throw the whole back into confusion. And the result is then typical of our legal as distinct from our more material history, because legal history is so largely ideological. A newer technology displacing or shouldering out its predecessor under such conditions has a good chance of setting its own premises, and of going on from there; or of salvaging what there is to salvage of the technical false-work it displaces. Not so in law. To be carried forward, emerging legal ideas need first to be shaped, then to be fixed in doctrine before the facts which call them forth lose sway. To be fixed in doctrine, amid our tens and scores of highest courts, they must have persuasion-time, adoption-time.

Karl Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 883–84 (1939).

exclusive. By the early 1940s, Llewellyn and others were recognizing that the classic contract paradigm needed to be replaced, at least in commercial deal making, with rules and standards designed to accommodate actual business practices. Accordingly, the UCC was drafted. The UCC includes section 2-306, which, in the spirit of respecting the real world of commercial deal making, appears to validate all open-quantity agreements without recourse to exclusivity. Despite the UCC's aim to uphold actual commercial practices without formalistic limitations, however, post-Code courts have remained constrained by the shackles of classic contract doctrine, and, for the most part, require exclusivity as a prerequisite for validating open-quantity contracts. The upshot is that, despite the liberalizing intent of the drafters of the UCC, the modern rules governing the validity of open-quantity agreements have remained virtually unchanged since the early part of the twentieth century.

A. *The Development and Use of Open-Quantity Agreements*

Open-quantity agreements are a relatively recent commercial phenomena. Parties first employed open-quantity agreements, or what we now refer to as "requirements" and "output" contracts, in the mid-nineteenth century.<sup>24</sup> Such contracts were, it seems, developed in direct response to the complexities associated with twentieth century commerce.<sup>25</sup> Instead of being localized and discrete as they had been prior to the turn of the century, commercial transactions tended to be more complex and regional as well as national.<sup>26</sup>

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<sup>24</sup> See Harold C. Havighurst & Sidney M. Berman, *Requirement and Output Contracts*, 27 U. ILL. L. REV. 1, 1 n.1 (1932) (finding only one United States open-quantity contract before the mid-nineteenth century, *Mason v. Cowan's Admin.*, 40 Ky. (1 B. Mon.) 7 (1840)). *But see* *Cherry v. Smith*, 22 Tenn. (3 Hum.) 19 (1842) (enforcing an agreement to ship up to 150 barrels of salt "when called on").

<sup>25</sup> According to Harold C. Havighurst and Sidney M. Berman:

Large-scale production and expanding markets create[d] greater uncertainties and more business hazards. There has arisen a demand for a more complex allocation of these new risks. . . . To meet this demand many types of contracts have come into use containing various provisions for the fixing of terms with reference to future events. Among these we find contracts . . . in which the quantity term is subject to variation according to the needs of the buyer's business.

Havighurst & Berman, *supra* note 24, at 1; *see also, e.g.,* *Mantell v. Int'l Plastic Harmonica Corp.*, 55 A.2d 250 (N.J. 1947) ("This type of contract [an output contract] is a comparatively [sic] recent device to meet modern needs in the marketing and distribution of goods on a nation-wide or regional scale.").

<sup>26</sup> In his article on the history of commercial law in the United States, Professor Walter F. Pratt, Jr. explains that:

Contracting, like conversation, had in earlier times been rooted in the past. People who knew one another and who knew the local market, in-

As Justice Holmes remarked at the opening of the twentieth century:

[I]n a modern market contracts are not confined to sales for immediate delivery. People will endeavor to forecast the future and to make agreements according to their prophecy. Speculation of this kind by competent men is the self-adjustment of society to the probable. Its value is well known as a means of avoiding or mitigating catastrophes, equalizing prices and providing for periods of want.<sup>27</sup>

Indeed, “[c]ritical origins of [a] transformation of contract doctrine lie in the period between 1870 and 1920.”<sup>28</sup> During that period, the United States economy went from being primarily rooted in agrarian exchanges, characterized by localism and face-to-face communications, to being based on a system of modern, industrialized practices, characterized by cosmopolitanism.<sup>29</sup> The sort of long-range planning and commercial commitments necessary to support the new mass-production economy required a less rigid commercial law.

Chronicling the development of such a commercial law, Karl Llewellyn noted the evolution in the late eighteenth and early nineteenth centuries of a flexible type of contractual relationship “which deals with contract less as an arm’s-length single deal than as a getting together on a type of joint venture; an approach which greatly modifies the pattern of sharp, whole-hog risk-placing which underlies most of our legal doctrine of contract.”<sup>30</sup> As the new century began, commercial parties faced growing demand for new products. “Railways had opened vast markets for merchants and manufacturers; enterprises were growing in size . . . . At the same time the risks of enterprise were much greater. Producers were selling to large numbers

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sulated as it was from dramatic shifts in the economy, faced little likelihood of changes in circumstances that would require elaborate agreements or provoke complex disputes. Railroads and cities, however, seemed to disrupt that past by bringing economic uncertainty into the local markets. Parties thus faced the tiring prospect of writing detail upon detail into each agreement if they were to account for every potential event.

Pratt, *supra* note 22, at 428–29; *see also, e.g.*, Bruckel, *supra* note 18, at 126 n.36 (identifying “the growing potential for regional and even nationwide marketing” as the most significant factor in reshaping commercial transactions at the turn of the century).

<sup>27</sup> *Bd. of Trade v. Christie Grain & Stock Co.*, 198 U.S. 236, 247 (1905).

<sup>28</sup> Pratt, *supra* note 22, at 416.

<sup>29</sup> *See id.*; *see also* RICHARD D. BROWN, *MODERNIZATION: THE TRANSFORMATION OF AMERICAN LIFE, 1600-1865* 9–13 (Eric Foner ed., Hill and Wang (1976)).

<sup>30</sup> Rule 13.6: The Revised Uniform Sales Act, Report and Second Draft, *reprinted in* 1 *UNIFORM COMMERCIAL CODE DRAFTS* 286, 462 (Elizabeth S. Kelly ed., 1984).

of consumers they did not know and had never seen.”<sup>31</sup> In addition to the variability injected into commercial deals by growing and shifting markets, merchants and manufacturers were only just becoming acquainted with the capabilities of new modes of production that supplied the growing demand.<sup>32</sup> The combination of these factors resulted in commercial transactions becoming less stable and predictable than they had been—the conditions of contracting became uncertain<sup>33</sup>—and parties began searching for methods to allocate risks and mitigate uncertainty.<sup>34</sup>

Open-quantity contracts were one such method.<sup>35</sup> Open-quantity contracts provided business parties with some measure of security and flexibility. Burgeoning industries, still uncertain about their production capabilities, could enter into deals with buyers who were willing to purchase whatever the industry could produce.<sup>36</sup> Similarly, buyers who were uncertain about the stability of suppliers or of

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<sup>31</sup> ISAAC LIPPINCOTT, *ECONOMIC DEVELOPMENT OF THE UNITED STATES* 471 (1922) (explaining the need for and development of corporations).

<sup>32</sup> Pratt, *supra* note 22, at 434–45 (“The techniques of production that emerged during the years of rapid economic expansion after the Civil War left the new industries with uncertainties about their productive capacity.”).

<sup>33</sup> From a purely economic perspective, “uncertainty” in contracts may be said to exist when the probability or value of alternative outcomes under the contract is sufficiently unclear that people with the same information might value the contract differently. Uncertainty exists, in other words, when “there is no scientific basis on which to form any calculable probability whatever.” John M. Keynes, *The General Theory of Employment*, 51 Q. J. ECON. 209, 214 (1937). Uncertainty can then be distinguished from risk, which involves contingent outcomes of known probability and value. *See id.*

Of course, it is possible to view commercial uncertainty from perspectives other than those provided by law and economics scholarship. Economics assumes that contracting parties, given full information, will act in ways that maximize their utilities. This assumption may be flawed. *See, e.g.,* MARTHA NUSSBAUM, *LOVE’S KNOWLEDGE* 54–68 (Oxford University Press 1990) (providing a neoclassical philosophical response to the notion that rational choice is rooted in maximization of utilities). Moral, religious, altruistic, and philosophical values may complicate decision making. Uncertainty, then, may exist not only because of the inability to “calculate” risk but because of the inability to weigh or measure the importance of incommensurable values.

<sup>34</sup> Pratt, *supra* note 22, at 434–45 (“To compensate for the new problems and to reduce uncertainty, parties turned to new forms of contractual arrangements with increasing frequency.”).

<sup>35</sup> *See* Note, *Requirement Contracts and the Doctrine of Mutuality—Proposed Approach of the Uniform Commercial Code*, 26 IND. L.J. 111, 113 (1950) (“Requirements agreements are a direct consequence of the actual inability of many businesses, both producing and selling, to determine their future needs for commodities.”).

<sup>36</sup> Pratt, *supra* note 22, at 435.

the market demand for products could enter into deals with sellers who were willing to sell only what the buyer would order.<sup>37</sup>

These sorts of open-quantity contracts benefited both buyers and sellers.<sup>38</sup> Under a requirements contract a buyer, of course, is assured of a source for the product it wishes to purchase. But a seller benefits too because the seller is offered a market for its products and the enhanced likelihood of a sale. Similarly, an output seller is assured a constant demand for its product, while the output buyer is offered a supply of that product. Finally, both parties are allowed to negotiate and enter into long-term arrangements without being locked into fixed-quantity deals, which require a foresight few commercial actors possess and which few commercial actors can afford to purchase. This flexibility permits the quantity-determining party to expand or contract its business as needed to achieve an efficient and profitable operation. In short, open-quantity agreements give the parties the ability to adapt their relationship to changed circumstances as new information becomes available.<sup>39</sup>

Moreover, open-quantity terms in contracts reduce the need to haggle over the effect of every possible contingency, thus reducing the price of entering into a deal.<sup>40</sup> Many reasonable commercial par-

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<sup>37</sup> *Id.*

<sup>38</sup> The Supreme Court explained the utility of requirements contracts like this:

Requirements contracts, on the other hand, may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, they may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and—of particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified—offer the possibility of a predictable market.

Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 306–07 (1949).

The commercial utility of open-quantity agreements has not waned, and, in fact, contemporary arguments in favor of liberal recognition of open-quantity contracts have much the same character as arguments favoring recognition of open-quantity agreements had at the turn of the twentieth century. *See, e.g., Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 678 (3d Cir. 1991) (“The purchasing party, perhaps unable to anticipate its precise needs, nevertheless wishes to have assurances of supply and fixed price. The seller, on the other hand, finds an advantage in having a steady customer. Such arrangements have commercial value.”).

<sup>39</sup> *See* Stacy A. Silkworth, *Quantity Variation in Open Quantity Contracts*, 51 U. PITT. L. REV. 235, 238–39 (1990) (discussing the advantages offered by open-quantity contracts to both contracting parties).

<sup>40</sup> Numerous scholars have focused on the savings in transaction costs associated with the use of open-terms generally in contracts, including open-quantity terms. *See*,

ties at the turn of the century faced with uncertain contracting conditions, but a pressing need to continue with their respective businesses, found open-quantity agreements a practical way of making deals.<sup>41</sup>

In short, as the twentieth century progressed, commercial parties negotiated and entered into more and more open-quantity agreements<sup>42</sup> as they struggled to balance the exigencies of increasingly complicated business relationships, new and more expansive markets, greater demands for products, and a greater capacity to produce products. Perhaps the Ohio Superior Court, in one of the earliest cases enforcing an open-quantity agreement, *Cincinnati, Sandusky & Cleveland Railroad v. Consolidated Coal & Mining Co.*,<sup>43</sup> summed up the new need for, and use of, open-quantity contracts best: "It is difficult to see how parties could make contracts for the supply of quantities uncertain at the time of the contract, but entirely capable of being made perfectly certain during the time it is to run, in any other way than that adopted here [a requirements contract]."<sup>44</sup> As discussed in the following section, however, the fact that parties were beginning to incorporate on a regular basis open-quantity terms in their agreements did not mean that courts would necessarily enforce such agreements.

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*e.g.*, Keith J. Crocker & Scott E. Masten, *Pretia ex Machina? Prices and Process in Long-Term Contracts*, 34 J.L. & ECON. 69, 72–73 (1991); Victor P. Goldberg, *Price Adjustment in Long-Term Contracts*, 1985 WIS. L. REV. 527, 531–33; Victor P. Goldberg & John R. Erickson, *Quantity and Price Adjustment in Long-Term Contracts: A Case Study of Petroleum Coke*, 30 J.L. & ECON. 369, 370 (1987); Paul L. Joskow, *Asset Specificity and the Structure of Vertical Relationships: Empirical Evidence*, 4 J.L. ECON. & ORG. 95, 101 (1988); Paul L. Joskow, *Commercial Impossibility, the Uranium Market and the Westinghouse Case*, 6 J. LEGAL STUD. 119, 154–55 (1977).

<sup>41</sup> Such commercial parties may be said to have chosen satisfactory contracts rather than perfectly complete contracts that identify all possible future states of the world. This choice might result from bounded rationality or satisficing. Essentially, actors might choose to set process limits on their search for and deliberation of various options, either to avoid additional costs or to simplify decision making. See HERBERT SIMON, *MODELS OF THOUGHT* 3 (1979) (defining "satisficing" as "aiming for the good when the best is incalculable" and arguing that satisficing provides a method of weighing essentially infinite alternatives until a "good-enough alternative is found"); Herbert A. Simon, *Rational Choice and the Structure of the Environment*, 63 PSYCHOL. REV. 129, 266 (1956); Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. ECON. 99, 112–13 (1955) (characterizing the bounded rationality model as one of "limited rationality").

<sup>42</sup> See, *e.g.*, Note, *Business Practices and the Flexibility of Long-Term Contracts*, 36 VA. L. REV. 627, 634 (1950) (discussing the growing use of open-quantity contracts in the early part of the century).

<sup>43</sup> 8 Ohio Dec. Reprint 365, 367–68 (Ohio Super. Ct. 1882).

<sup>44</sup> *Id.*

B. *Early Reticence of Courts to Enforce Open-Quantity Agreements*

Most courts were not as prescient as the Ohio Superior Court in *Cincinnati, S. & C. Railroad*.<sup>45</sup> Instead, for the bulk of the nineteenth century, the majority of courts that considered open-quantity contracts refused to enforce them on the ground that the contracts lacked mutuality of obligation and therefore failed for want of consideration.<sup>46</sup> Because the quantity-determining party had what these courts considered to be the unfettered discretion to order goods or not, and thus perform or not, open-quantity agreements did not impose any detriment on the quantity-determining party and thus could not be valid bilateral contracts.<sup>47</sup> In other words, when construing a contract where the consideration on the one side is an offer or an agreement to sell, and on the other side is an offer or an agreement to buy, the obligation of the parties to sell and buy, courts reasoned, must be mutual.<sup>48</sup> If one of the parties could escape future liability

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<sup>45</sup> In fact, the decision in *Cincinnati, Sandusky & Cleveland Railroad* was, itself, eventually overturned for reasons unrelated to the open-quantity term in the contract. See 9 Ohio Dec. Reprint 15 (Ohio Dist. Ct. 1883), *aff'd*, at 15 n.1a (Ohio 1887).

<sup>46</sup> See L.S. Tellier, Annotation, *Mutuality and Enforceability of Contract to Furnish Another With His Needs, Wants, Desires, Requirements and the Like, of Certain Commodities*, 26 A.L.R.2d 1139 (1952); see also Havighurst & Berman, *supra* note 24, at 23–25 (noting that at one time requirements contracts were not enforced because they were thought illusory); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 434 (S.D. Fla. 1975) (briefly reviewing early authorities and concluding that “[i]n early cases, requirements contracts were found invalid for want of the requisite definiteness, or on the grounds of lack of mutuality”).

<sup>47</sup> The greatest difficulty that courts of this era encountered when struggling to decide if obligations on both sides of a bilateral contract were mutual was finding detriment in promissory commitments. Bruckel, *supra* note 18, at 131. It can be persuasively argued that “[t]he pivotal role of ‘mutuality of obligation’ in determining questions of enforceability of open quantity contracts [was] merely a byproduct of the general quandary regarding consideration in all bilateral contracts.” *Id.* at 132; see also, e.g., Christopher Langdell, *Mutual Promises as Consideration for Each Other*, 14 HARV. L. REV. 496, 500 (1900) (stating that consideration in bilateral agreements could only be found in the mutual obligation to perform promises); Samuel Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503, 527 (1914) (stating that a legal detriment and therefore consideration in bilateral contracts could be found, in theory, in mutual promises to perform); Samuel Williston, *The Effect of One Void Promise in a Bilateral Agreement*, 25 COLUM. L. REV. 857, 862 (1925) (asserting that mutuality of obligation was necessary to solve the theoretical difficulties associated with finding a legal detriment in an unperformed promise).

<sup>48</sup> See, e.g., *McMichael v. Price*, 58 P.2d 549, 551–52 (Okla. 1936)

The general rule is that in construing a contract where the consideration on the one side is an offer or an agreement to sell, and on the other side an offer or agreement to buy, the obligation of the parties to sell and buy must be mutual, to render the contract binding on either party, or, as it is sometimes stated, if one of the parties, not having suffered any previous detriment, can escape future liability under the con-

under the contract, the contract lacked mutuality. The Minnesota Supreme Court's decision in *Bailey v. Austrian*,<sup>49</sup> a leading case at the time, is illustrative of the logic underpinning courts' initial reticence to validate any open-quantity agreements under the doctrine of mutuality of obligation.

The plaintiff in *Bailey* had entered into an agreement in 1871 for the supply of all the Lake Superior pig iron that it might "want" for its foundry in St. Paul at fixed prices for a specified period of time.<sup>50</sup> Though seeming to recognize that the parties had, in fact, exchanged promises with serious intent to be bound, the Minnesota Supreme Court denied enforcement of the agreement.<sup>51</sup> The court's analysis is terse: there can be no mutuality of obligation, the court declared, unless "each party has the right *at once* to hold the other to a positive agreement."<sup>52</sup> The contract at issue lacked mutuality, the court reasoned, because the plaintiff had not promised that it would "want" any pig iron.<sup>53</sup> "The quantity plaintiffs might need would be entirely left to their arbitrament."<sup>54</sup> There was, therefore, no definite promise by the plaintiff to perform and the contract failed for lack of mutuality—it failed because there was, simply put, no consideration.<sup>55</sup>

Favorably citing to *Bailey*, the Georgia Supreme Court, in *McCaw Manufacturing Co. v. Felder & Rountree*,<sup>56</sup> went even further in articulating just how unyielding the classic doctrine of mutuality could be in the context of an open-quantity contract. In *McCaw*, the plaintiff "offered to furnish the defendant, at specified prices, all of the boxes of a certain character that it might want for a period of one year. The defendant accepted this offer."<sup>57</sup> Significantly, this bargain was reached only after the plaintiff "applied to the defendant to manufacture for it all the boxes it might need" and the parties exchanged

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tract, that party may be said to have a 'free way out' and the contract lacks mutuality.

(citing *Consol. Pipeline Co. v. British Am. Oil Co.*, 21 P.2d 762 (Okla. 1933))

<sup>49</sup> 19 Minn. 535 (1873), *overruled by* *House of Gurney, Inc. v. Ronan*, 245 N.W. 30 (Minn. 1932).

<sup>50</sup> *Bailey*, 19 Minn. at 535.

<sup>51</sup> *Id.*; see also Thomas Claffey Lavery, *The Doctrine of Bailey v. Austrian*, 10 MINN. L. REV. 584, 585 (1926) ("[F]or some time the parties in *Bailey v. Austrian* thought they had made a binding contract—some pig-iron was actually delivered under the terms of the supposed agreement.").

<sup>52</sup> *Bailey*, 19 Minn. at 535 (emphasis added).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 41 S.E. 664 (Ga. 1902).

<sup>57</sup> *Id.* at 666.



“some correspondence,” negotiating over details of the deal, including price.<sup>58</sup> Notwithstanding the fact that the plaintiff had sought out the contract and then carefully negotiated it with the defendant, and despite the fact that at least one order for boxes under the contract had been placed and fulfilled,<sup>59</sup> the court refused to enforce the contract.<sup>60</sup>

In the court's view, this contract lacked consideration because of the “almost axiomatic” classic contract rule requiring mutuality of obligation.<sup>61</sup> Following the uncompromising logic of the *Bailey* court, the Georgia Supreme Court reasoned, “the defendant [did] not agree to purchase a single box. It [did] not agree to want any boxes.”<sup>62</sup> The theoretical freedom of the defendant to avoid its obligations prevented the contract from becoming enforceable, the court believed, even though “the defendant was in a business which required the use of a large number of boxes of the kind specified in the letter of the [plaintiff] company, [and] the reasonable supposition was that it would want a number of such boxes during the year.”<sup>63</sup> The business realities of the deal were not, under the “almost axiomatic” rule of mutuality of obligation, “the criterion by which the validity of the contract is to be determined.”<sup>64</sup>

The rationale of the *Bailey* and *McCaw* courts, rooted firmly in classic contract law, was either expressly followed, or analogous reasoning was used, by other courts to deny enforcement of open-quantity contracts.<sup>65</sup> By denying enforcement of open-quantity con-

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<sup>58</sup> *Id.* at 665.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 666–67.

<sup>61</sup> *Id.* at 666 (“The subject of mutuality of agreements of this character has been many times learnedly and elaborately discussed both by courts and text-writers—so much so that little remains to be said, except to apply well-settled rules to the facts of the particular case.”).

<sup>62</sup> *McCaw*, 41 S.E. at 666.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *See, e.g.*, *Tarbox v. Gotzian*, 20 Minn. 139, 141 (1873) (citing *Bailey* and refusing to enforce a contract “to furnish, sell, and deliver” to defendant “all of the boot and shoe packs which the defendant should require of . . . in his business”); *Lehigh Valley Coal Co. v. S.W. Curtis*, 22 Ill. App. 394, 394 (Ill. App. Ct. 1886) (citing *Bailey* and finding that a requirements contract for coal was invalid); *Crane v. C. Crane & Co.*, 105 F. 869 (7th Cir. 1901) (holding a contract to furnish all supplies as may be needed void for want of mutuality); *Campbell v. Am. Handle Co.*, 945 S.W. 815, 815–16 (Mo. Ct. App. 1906) (citing *Bailey* and refusing to enforce an output contract for timber cut from a particular tract of land during a four-month period even though there was no dispute that the parties both understood and bargained for the deal and performed under the terms of the deal for nearly two months); *A. Santaella & Co. v. Otto F. Lange Co.*, 155 F. 719, 723 (8th Cir. 1907) (following *Bailey* and stating

tracts, however, courts failed to pay heed to commercial needs and practices. Accordingly, courts were widening a gap, which had always existed under classic models of contract, between the law and the real world of contracting parties.

C. *Growing Recognition of the Commercial Value of Open-Quantity Contracts and a Concomitant Need to Enforce At Least Some Such Contracts*

In the late ninetieth and early twentieth centuries, a few courts began trying to bridge the gap between the needs and practices of businesses and the rarified world of abstract contract theory. In fact, less than ten years after the Minnesota Supreme Court's rejection of an open-quantity contract in *Bailey*, the Illinois Supreme Court, considering virtually identical facts, enforced an open-quantity contract in *National Furnace Co. v. Keystone Manufacturing Co.*<sup>66</sup> Like the contract at issue in *Bailey*, the contract in *National Furnace* involved the supply by the defendant of the plaintiff's need for pig iron for the 1879 season at a specified price.<sup>67</sup> Ostensibly relying on the reasoning used in cases like *Bailey*, the defendant asked for the following jury instruction:

If the jury believe, from the evidence, that the defendant did contract, through Cox, to sell the plaintiff all the National iron which the plaintiff might need for its season's supply for the year or season of 1879, they are instructed that such a contract is void for want of certainty and for want of mutuality, and they will find their verdict for the defendant.<sup>68</sup>

The lower court refused to give this instruction, finding instead that the agreement, if actually entered into by the parties, would constitute a binding contract.<sup>69</sup> A jury eventually found that the parties entered into an agreement, and the lower court entered judgment for

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that "an accepted offer to sell or deliver, or to buy at specified prices, during a limited time, in such quantities as the buyer may need or desire in his business, without any specification as to the quantity or amount, is without consideration, for the palpable reason that the buyer placed himself under no obligation to need or desire any quantity at any given time or during any given period"); *Eldorado Ice & Planing Mill Co. v. Kinard*, 131 S.W. 460, 461 (Ark. 1910) (finding an output contract unenforceable because of lack of mutuality).

<sup>66</sup> 110 Ill. 427, 434-35 (Ill. 1884).

<sup>67</sup> *Id.* at 429-30.

<sup>68</sup> *Id.* at 432.

<sup>69</sup> *Id.*

the plaintiff.<sup>70</sup> The Illinois Supreme Court agreed with the lower court.<sup>71</sup>

A careful examination of the analysis of the decisions in *Bailey* and *National Furnace* reveals the basis for the difference in the outcomes. Specifically, the courts in *Bailey* and *National Furnace* reached diametrically opposed decisions because of their respective views of the commercial significance of open-quantity agreements.<sup>72</sup> The *Bailey* court, subscribing to the pure abstraction of classic contract theory, did not consider, at any point in its decision, the utility or practical value of an open-quantity agreement to the parties. It did not matter that the parties had reached a bargain with one another, and it did not matter that the bargain was useful.<sup>73</sup> Instead, the court clung to the notion that all of the terms of the parties' deal must be expressed definitively so that "each party has the right at once to hold the other to a positive agreement."<sup>74</sup>

Unlike the *Bailey* court, the court in *National Furnace* expressly acknowledged the commercial utility of open-quantity agreements.

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> The court in *National Furnace* offered another basis for the difference in outcomes. According to the *National Furnace* court, the contract in *Bailey* "provided that defendant should supply plaintiffs with what iron they should want, and the [Minnesota Supreme Court based its] decision of the case on the construction placed upon the word *want*." *Nat'l Furnace*, 110 Ill. at 434. Thus, according to the *National Furnace* court, the contract in *Bailey* did not bind the plaintiff in that case to purchase all of its business "needs" from the defendant, and the contract therefore gave the plaintiff too much discretion. See also *Higbie v. Rust*, 71 N.E. 1010, 1011 (Ill. 1904) (finding that a contract for the sale by defendant of all the pails that the plaintiff might want was unenforceable for lack of mutuality even though the plaintiff was an extensive dealer in pails).

The *National Furnace* court's emphasis on the term "want" in *Bailey* is, however, unjustified. The contract at issue in *Bailey* actually provided that the defendant would supply the plaintiff with "all the Lake Superior pig iron wanted [by the plaintiff] in [its] said business." *Bailey v. Austrian*, 19 Minn. 535, 535 (1873), *overruled by* *House of Gurney, Inc. v. Ronan*, 245 N.W. 30 (Minn. 1932) (emphasis added). There is nothing in the *Bailey* court's decision to suggest that the plaintiff had any less business need for pig iron than the plaintiff had in *National Furnace*. The presence of the term "want," then, in the *Bailey* court's explanation of the contract at issue, does not imply any additional discretion was given to the plaintiff in *Bailey*. To the contrary, the term "want" is synonymous, in the context of *Bailey*, with the term "might need" in the context of *National Furnace*. See also *McCaw Manufacturing Co. v. Felder & Rountree*, 41 S.E. 664, 665 (Ga. 1902) (using the terms "want" and "need" interchangeably to describe the requirements contract that the court ultimately found unenforceable).

<sup>73</sup> In the words of the *McCaw* court, such business realities formed no part of "the criterion by which the validity of the contract is to be determined." *McCaw*, 41 S.E. at 665.

<sup>74</sup> *Bailey*, 19 Minn. at 535.

First, the court noted that the contract at issue made business sense when considered against the backdrop of the customs in the trade: “it was the custom in Chicago for iron brokers to employ salesmen to travel on the road and make contracts with manufacturers, like appellee, for the year’s supply of iron, to be delivered as ordered.”<sup>75</sup> In fact, the court pointed out, the defendant “had furnished iron sold to others the same year this contract was made . . . according to such custom.”<sup>76</sup> Second, the court went on to explain that open-quantity agreements were not a fluke of the pig iron industry. To the contrary, the court said,

[s]uch contracts are not unusual. A foundry may purchase its supply of coal for the season, of the coal dealer. A hotel may do the same. A city, for the use of the public schools, may engage its supply of coal for the winter, at a specified price. Such contracts are not uncommon . . . .<sup>77</sup>

Given the reality that open-quantity agreements are a part of business life, the court found that “a reasonable construction must be placed upon . . . the contract, in view of the situation of the parties.”<sup>78</sup> This “reasonable construction” amounted to a construction that allowed the *National Furnace* court to avoid the strictures of the classic doctrine of mutuality of obligation as expressed by the court in *Bailey*.

The *National Furnace* court was not alone in its recognition that open-quantity agreements were becoming a regular part of commercial dealing. Although the rationale of the court in *Bailey* still held sway, as the new century unfurled, a vocal minority of courts began acknowledging that the law needed to account for the use by businesses of open-quantity agreements.<sup>79</sup> Indeed, in what would eventually be hailed as a “leading case in support of the validity of” open-

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<sup>75</sup> *Nat'l Furnace*, 110 Ill. at 434.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 433.

<sup>79</sup> *See, e.g.*, *Minn. Lumber Co. v. Whitebreast Coal Co.*, 43 N.E. 774, 776–77 (Ill. 1895) (finding that “practical business men” had entered into a requirements contract and that the contract should be “enforced according to the sense in which they mutually understood it at the time it was made”); *Crane v. C. Crane & Co.*, 105 F. 869, 871 (7th Cir. 1901) (refusing to enforce the particular requirements contract at issue, but stating that “[r]easonable prevision in business requires that such contracts, though more or less indefinite, should be upheld”); *Walker Mfg. Co. v. Swift & Co.*, 200 F. 529, 531 (5th Cir. 1912) (“Business necessities require contracts of this class [open-quantity contracts], though more or less definite, to be upheld.”).

quantity contracts,<sup>80</sup> *Wells v. Alexandre*, the New York Court of Appeals did just that.<sup>81</sup>

At issue in *Wells* was a contract under which the plaintiff promised to furnish the defendants' steamers "with strictly free-burning pea [coal] . . . for the year 1888."<sup>82</sup> The defendants bought coal from the plaintiff, pursuant to this contract, for six months, but then decided to sell their steamships.<sup>83</sup> After selling the ships, the defendants maintained that they had no further requirements for coal.<sup>84</sup> Like the Illinois Supreme Court had done in *National Furnace*, the New York Court of Appeals distinguished its reasoning from that of the *Bailey* court by recognizing the commercial significance of the open-quantity agreement at issue: the defendants' steamships, which ran between New York and Cuba or Mexico, required large, but uncertain, quantities of coal.<sup>85</sup> "It is very clear," the court explained, "that the language employed by plaintiff in the light of surrounding circumstances was intended to make *as definite as possible*, the quantity of coal which the defendants would be required to take."<sup>86</sup> Although, under the pure form of the mutuality doctrine, this contract did not allow the plaintiff to immediately hold the defendants to a definite obligation, the New York Court of Appeals was not willing to undermine what it perceived to be bargain of the parties, a bargain that endeavored to make the obligations of the parties "as definite as possible" while still allowing defendants reasonable business flexibility. The court therefore enforced this open-quantity agreement against the defendants.<sup>87</sup>

Decisions like those of the courts in *National Furnace* and *Wells* are not, of course, particularly important today for their precedential or even persuasive effect, but they are meaningful because they presaged the coming of a legal-realist logic in the next century. These courts had begun to recognize that the indefiniteness associated with

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<sup>80</sup> Note, *Contracts—'Requirements' Contracts—Mutuality of Obligation*, 11 NOTRE DAME L. REV. 227, 227 (1936).

<sup>81</sup> *Wells v. Alexandre*, 29 N.E. 142 (N.Y. 1891).

<sup>82</sup> *Id.* at 142.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 143.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* (emphasis added).

<sup>87</sup> *Wells*, 29 N.E. at 143. It is worth noting that the outcome of *Wells* might be different if it were decided under the UCC. See, e.g., *Empire Gas Corp. v. American Bakeries Co.*, 840 F.2d 1333, 1337–38 (7th Cir. 1988) (stating that a buyer in a requirements contract under the UCC may have a good faith basis for reducing its requirements to zero); *Tigg Corp. v. Dow Corning Corp.*, 962 F.2d 1119, 1126 (3d Cir. 1992) (same).

an open-quantity term in an agreement might be a reflection of market uncertainties beyond the parties' control and not a failure of the parties to reach an agreement to deal with one another. Having acknowledged the need for open-quantity agreements, it was time for courts to reexamine the legal mechanisms for enforcing such agreements.

*D. Pre-Code Consensus About Enforcing Open-Quantity Agreements*

Ultimately, by the 1920s, following in the wake of a few decisions like *National Furnace* and *Wells*, a majority of courts came to the conclusion that it was better to tolerate "some indefiniteness and uncertainty in contracts than to tell the parties that, unless they are able accurately to foretell what nature holds in store, they cannot safely make contracts which will in some degree be dependent upon future events."<sup>88</sup> Most courts, in other words, would eventually uphold open-quantity agreements, at least in some circumstances. But, before reaching this consensus, courts had to find a way to justify enforcement of open-quantity contracts even though such contracts did not immediately and reciprocally bind the parties to definitive obligations. Courts at the turn of the century were thus faced with a dilemma: although the widespread use of open-quantity meant that if courts adhered to precedent they would impede a needed contractual practice, the traditional rules of contract created what could be seen as an insuperable barrier to enforcement of such contracts.

Courts found a way out of this dilemma by relying on the adage *id certum est quod certum reddi potest* (that is certain which can be made certain).<sup>89</sup> Essentially, courts departed from the strict requirement,

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<sup>88</sup> Cal. Prune & Apricot Growers, Inc. v. Wood & Selick, Inc., 2 F.2d 88, 90 (S.D.N.Y. 1924); see also, Havighurst & Berman, *supra* note 24, at n.5 (1932) (describing the ultimate rejection by courts of the rationale of *Bailey* and enforcing open-quantity agreements). Interestingly, Grant Gilmore would later describe the period when courts refused enforcement of open-quantity agreements as one of the "least creditable episodes in our legal history." GRANT GILMORE, *THE DEATH OF CONTRACT* 34 (Ohio State Univ. Press ed., 1974).

<sup>89</sup> See, e.g., Cold Blast Transp. Co. v. Kan. City Bolt & Nut Co., 114 F. 77, 79 (8th Cir. 1902) ("Contracts for the future supply during a limited time of articles which shall be required or needed or consumed by an established business, or used in the operation of certain steamships or other machinery are no exceptions to [the general requirement of mutuality of obligation], because they fall under the rule, *id certum est quod certum reddi potest*."); Phillips v. M.B. Farrin Lumber Co., 8 Ohio N.P. (n.s.) 274, 275 (1909) (applying the rule *id certum est quod certum reddi potest* and recognizing that a contract whereby a party would buy all that it required for use in a particular manufacturing business for a certain time, was valid because, though the quantity bought and sold was indefinite, it was ascertainable since the quantity of a certain article that a manufacturing plant can use in a given time was easily suscepti-

espoused in cases like *Bailey*, that both parties be bound “at once” under a contract to a definite performance, and found that open-quantity agreements were enforceable so long as a quantity term could be, at some point, reasonably calculated based on the needs or wants of the quantity-determining party.

In one of the clearest cases announcing this new principle, the Wisconsin Supreme Court, in *Excelsior Wrapper Co. v. Messinger*,<sup>90</sup> found that a contract obligating the defendant to furnish, at the price specified, as much roll rag paper as the plaintiff would need in its business from September 1, 1899, to September 1, 1900, was enforceable. In the court’s view, the terms “need” and “want”—terms which had been insufficient to create a binding obligation under the *Bailey* and *McCaw* courts’ formalistic view of the mutuality of obligation doctrine<sup>91</sup>—served two interrelated but different functions that sufficed to make the contract mutually binding. First, “[t]he exact quantity of paper [that the plaintiff] would want or need . . . while uncertain at the time of the making of the contract, was sure to become reasonably certain in the course of the year.”<sup>92</sup> Accordingly, a quantity term that was definite would eventually be imported into the agreement. Second, the terms “need” or “want” demonstrated that “the contract was not merely an optional one with the plaintiff.”<sup>93</sup> To the extent that the plaintiff was going to need or want roll paper, it was going to have to purchase it from the defendant. The plaintiff was, therefore, sufficiently encumbered to prevent the agreement from being illusory or failing for lack of mutuality.

The Wisconsin Supreme Court reached its conclusion to enforce the agreement in *Wrapper* even though “earlier . . . [cases] tend[ed] generally to the view that, where the agreement of one party was to furnish only that which the other party should desire or order or need, there was entire freedom from obligation on the part of the lat-

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ble of calculation); *Am. Trading Co. v. Nat'l Fibre & Insulation Co.*, 111 A. 290, 299–300 (Del. Super. Ct. 1920) (citing earlier cases applying the doctrine of *id certum est quod certum reddi potest* and concluding that a requirement contract for certain fibre was enforceable because the plaintiff’s amount of consumption could be reasonably approximated); *Contrell v. Knight*, 72 S.W.2d 196, 200 (Mo. Ct. App. 1934) (finding a requirement contract for gasoline and petroleum products enforceable under the doctrine of *id certum est quod certum reddi potest* because the quantity of products needed could be reasonably approximated by reference to past quantities ordered); *City of Owatonna v. Interstate Power Co.*, 18 F. Supp. 6, 13 (D. Minn. 1936) (same).

<sup>90</sup> 93 N.W. 459, 461 (Wis. 1903).

<sup>91</sup> See *supra* section I(B).

<sup>92</sup> *Wrapper*, 93 N.W. at 461.

<sup>93</sup> *Id.*

ter, and therefore no mutuality.”<sup>94</sup> Though bold in reaching the result that it did, the court was more restrained in providing a justification for that result. Perhaps wanting to modestly underplay its own cutting edge role, or perhaps wanting to create the illusion of fidelity to well established law, the court merely justified its decision by exaggerating, without much citation, the spare precedent:

[i]n later times courts have fully recognized . . . that when the discretion, want, or needs of a party are referred to an existing situation, such as an established business or a known enterprise, and intended to be controlled thereby, there becomes added a *measure of certainty sufficient* to give to the contract mutuality.<sup>95</sup>

Despite its tentativeness, the *Wrapper* court’s decision heralded a new justification for upholding certain open-quantity agreements. So long as the quantity-determining party was engaged in an existing business and agreed to sell all of the goods it produced or buy all of the goods that it required from the other party to the contract, the *Wrapper* court believed that the contract, while not being perfectly mutual, was close enough.<sup>96</sup>

During the first quarter of the century, other courts around the country were coming to the same conclusion.<sup>97</sup> As one court stated:

We think that, having in view reasonable business necessities, a contract for all of certain articles, at a certain price, that may be needed or required in a certain business, is a mutual obligation;

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (emphasis added).

<sup>96</sup> *Id.*

[A]n agreement to carry all coal which the other party might desire to have carried in a given period, while wholly uncertain if the other party has no coal and is engaged in no business or enterprise to regulate his desire to ship, is reasonably certain in the case of a mine owner, the product of whose mines will regulate the quantity which he will need, and therefore be likely to desire, to ship, if the construction be adopted that his option is to be controlled by the course of such business.

*Id.*

<sup>97</sup> See, e.g., *Central States Power & Light Corp. v. United States Zinc Co.*, 60 F.2d 832, 834 (10th Cir. 1932); *Diamond Alkali Co. v. P.C. Tomson & Co.*, 35 F.2d 117, 119–20 (3d Cir. 1929); *Wakem & McLaughlin v. Culver*, 28 F.2d 942, 944 (6th Cir. 1928); *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 296 F. 693 (5th Cir. 1924); *T.B. Walker Mfg. Co. v. Swift & Co.*, 200 F. 529, 531 (5th Cir. 1912); *Northern Iowa Gas & Elec. Co. v. Luverne*, 257 F. 818, 821 (D. Iowa 1919); *Nassau Supply Co. v. Ice Serv. Co.*, 169 N.E. 383 (N.Y. 1929); *Am. Trading Co. v. Nat’l Fibre & Insulation Co.*, 114 A. 67, 73 (Del. Super. Ct. 1921); *Bernstein v. W.B. Mfg. Co.*, 131 N.E. 200 (Mass. 1921); *Miami Coca-Cola Bottling Co. v. Farmer’s Lumber Co.*, 179 N.W. 417 (Iowa 1920); *Hickey v. O’Brien*, 82 N.W. 241, 243 (Mich. 1900); *Dawson Cotton Oil Co. v. Kenan, McKay & Speir*, 94 S.E. 1037, 1039 (Ga. Ct. App. 1918).



one to furnish and the other to buy, the quantity being reasonably approximated. "*Id certum est quod certum reddi potest.*"<sup>98</sup>

Another court writing at about the same time as the *Wrapper* court stated that:

It is true that a contract for the future delivery of personal property may be void because there is no consideration or mutuality, if the contract or any material part of it is wholly conditioned by the will, wish, or want of only one of the parties; but an accepted offer to furnish or deliver such articles as may be needed or consumed by a person in a given business, during a limited time, is binding, because it contains the accepted offer to purchase all the articles thus required during this time, and from the party who invokes the offer, but a mere offer to furnish such as a party might want or desire would be void.<sup>99</sup>

Even the Minnesota Supreme Court began retreating from the rigidity of the mutuality of obligation doctrine it had adopted in *Bailey* and began flirting with some version of the "it's-close-enough" reasoning embodied by the adage *id certum est quod certum reddi potest*. The first step away from *Bailey* came in the 1889 case of *Minneapolis Mill Co. v. Goodnow*.<sup>100</sup> There, the court, following a growing trend of courts around the country, recognized that something less than perfect mutuality, as had been required in *Bailey*, could suffice to create an enforceable contract. In *Minneapolis Mill*, the court found that an agreement for the sawing of "six-million feet or more of pine logs" as

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<sup>98</sup> *Royal Brewing Co. v. Uncle Sam Oil Co.*, 226 S.W. 656, 658 (Mo. Ct. App. 1920) (upholding a requirements contract for all the oil that would be necessary for a brewery plant owned by the plaintiff).

<sup>99</sup> *McIntyre Lumber & Export Co. v. Jackson Lumber Co.*, 51 So. 767, 769 (Ala. 1910); *see also Loudenback Fertilizer Co. v. Tenn. Phosphate Co.*, 121 F. 298, 300 (6th Cir. 1903)

A contract to buy all that one shall require for one's own use in a particular manufacturing business is a very different thing from a promise to buy all that one may desire, or all that one may order. The promise to take all that one can consume would be broken by buying from another, and it is this obligation to take the entire supply of an established business which saves the mutual character of the promise.

*Id.* *Manhattan Oil Co. v. Richardson Lubricating Co.*, 113 F. 923, 924 (2d Cir. 1902)

[I]n consideration of the defendant's promise to sell, the plaintiff promised to buy all the oil it should require for its own use for a specified period of time. Read in the light of the previous business relations of the parties, it is plain that by this was meant that it should buy what oil it should require for its use in its manufacturing business. This is a very different promise from one to buy what it might desire, or from a mere option to buy.

*Id.*  
<sup>100</sup> 42 N.W. 356 (Minn. 1889).

directed by the plaintiff was enforceable notwithstanding the fact that there was no definite quantity term in the agreement.<sup>101</sup> According to the court, although there was no express promise by the plaintiff to supply any pine logs, let alone the approximately six million feet of pine logs referenced, to the defendant for sawing, something close enough to such a promise could be inferred from the business context in which the agreement was reached.<sup>102</sup> There was, therefore, a reasonably ascertainable quantity term, and the contract was enforceable.

In 1901, the Minnesota Supreme Court took another step away from *Bailey* in *Ames-Brooks Co. v. Aetna Insurance Co.*<sup>103</sup> by formally acknowledging the commercial importance of open-quantity agreements. In that case, the court found that the defendant insurance companies were obligated to provide insurance on an open number of grain shipments during 1899. The defendants had previously provided similar insurance in such a manner, but when market rates for insurance increased, the defendants tried to avoid any obligation by pointing to the rule stated in *Bailey*.<sup>104</sup> According to the defendants, the plaintiff had not agreed to have any shipments during the 1899 season and the agreement to provide insurance was therefore void for lack of mutuality of obligation.<sup>105</sup>

The Minnesota Supreme Court disagreed, explaining that the contract must be interpreted “from the standpoint of the practical business men who made it.”<sup>106</sup> The agreement was enforceable because “the plaintiff was engaged in an established business . . . and the plaintiff, as the evidence tends to show, absolutely promised the defendants that they should have such insurance for the year 1899 on all of its cargoes to Buffalo and lower lake ports.”<sup>107</sup> This promise, the court said, “presupposes the continuance of the plaintiff in the business for the year 1899, and included by necessary intendment a promise on its part not to give such insurance to any other party.”<sup>108</sup> Accordingly, there was mutuality of obligation, and the contract was enforceable.<sup>109</sup>

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<sup>101</sup> *Id.* at 357.

<sup>102</sup> *Id.*

<sup>103</sup> 86 N.W. 344, 346 (Minn. 1901).

<sup>104</sup> *Id.* at 345–46.

<sup>105</sup> *Id.* at 345.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 346.

<sup>108</sup> *Id.*

<sup>109</sup> *Ames-Brooks Co.*, 86 N.W. at 346. The Minnesota Supreme Court took yet another step away from its reasoning in *Bailey* in 1915 in *Scott v. T. W. Stevenson Co.*,

In short, courts, including courts like the Minnesota Supreme Court, that had initially been the most intractable, had recognized, at least by the early part of the twentieth century, the pragmatic need for open-quantity agreements, but they were hesitant to abandon entirely classic contract principles. They, therefore, forged the exclusivity rule, which tempered the rigid formalism of the classic mutuality of obligation doctrine. If a quantity-determining party promised to sell all of the output of a certain good to a buyer or purchase all of its needs or wants for a good from a seller, something “close enough” to mutuality of obligation existed, allowing courts to feel that they were maintaining coherence with classic contract norms.<sup>110</sup> With exclusivity, a quantity term could be approximated, at some point during the life of the contract, based on the actual needs or wants of the quantity-determining party. Perhaps most importantly, courts reasoned that the quantity-determining party could not capriciously avoid its obligations under an exclusive open-quantity contract without abandonment or radical modification of its business and thus there was some detriment to the quantity-determining party.<sup>111</sup> By the time that

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153 N.W. 316 (Minn. 1915). In that case, without expressly overruling *Bailey*, the court put as much distance between itself and its earlier ruling as possible:

In many lines of business it has become common in late years for those engaged therein to contract in advance, at specified prices, for such quantity of materials or of goods as may be needed in such business during a specified period of time. Where such contracts are supported by a consideration other than the mutual promises of the parties, their validity is beyond question. Where the only consideration for the promise to sell is the promise of the buyer to purchase such quantity as he may need, the authorities are not unanimous, but the decided weight of authority is to the effect that, if the buyer has an established business whose requirements may be estimated approximately, the contract is not void either for uncertainty or want of mutuality, but is valid and may be enforced to the extent of the ordinary requirements of such business when carried on and conducted in the manner contemplated by the parties at the time of making such contract.

*Scott*, 153 N.W. at 319. See also *City of Marshall v. Kalman*, 190 N.W. 597, 599 (Minn. 1922)

This court has often considered . . . *Bailey v. Austin*. . . . No exception can be taken to the statement of the abstract legal principles set forth in the opinion. But it is not a legal formula to be blindly applied to every contract which seems on its face to lack mutuality of obligation.

*Id.*

<sup>110</sup> See, e.g., 1 ARTHUR CORBIN, CORBIN ON CONTRACTS § 156 (1963); 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 104A (3d ed. 1957).

<sup>111</sup> See, e.g., *Excelsior Wrapper Co. v. Messinger*, 93 N.W. 459, 461 (Wis. 1903) (“The plaintiff had an established business, of character and magnitude well known to the defendant. It could not, with profit to itself, seriously modify the volume of that business for the mere purpose of increasing or diminishing the amount of any given class of supplies.”); *Texas Co. v. Pensacola Mar. Corp.*, 279 F. 19, 23 (5th Cir.

the UCC was drafted and enacted, courts had, for the most part, accepted the exclusivity rule, even though it limited enforcement to only a portion of all open-quantity agreements.

*E The Code's Standard For Enforcing Open-Quantity Agreements*

The drafting<sup>112</sup> and eventual enactment of Article 2 of the UCC<sup>113</sup> put an end to any lingering doubt about the general validity of open-quantity agreements.<sup>114</sup> Section 2-306<sup>115</sup> unequivocally establishes the enforceability of open-quantity agreements. Section 2-306(1) defines a “requirements” contract as a contract that measures quantity by the “requirements” of the buyer, defined to mean such

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1922) (“It was not a mere undertaking to buy what plaintiff might desire, but an undertaking to take all of its needs from defendant alone, within the quantities stated.”).

<sup>112</sup> The story behind the drafting of the UCC is perhaps one of the most interesting in legal history.

It is an epic in which a radical professor—a fan of folk music, a poet, a supporter of the New Deal, a devotee of anthropologists and Veblen and Commons, the radical institutional economists, a despiser of pallid intellectuals who instead preferred “action-direction thinking,” and a decorated veteran of the German Army of World War I who was about to divorce his second wife and marry one of his former students—sought to realize his radical, reformist programs for sales law.

Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940–49*, 51 S.M.U. L. REV. 275, 277 (1998). Although a detailed account of this history is well beyond the scope of this Article, there are a number of other wonderful historical accounts of this period in legal history. See, e.g., Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987); LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986); TWINING, *supra* note 19, at 270-76 (1973); Edward A. Purcell, Jr., *American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969); William Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1 (1967); Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813 (1962); Frederick K. Beutel, *The Proposed Uniform Commercial Code as a Problem in Codification*, 16 LAW & CONTEMP. PROBS. 141 (1951); Allison Dunham, *The New Commercial Code*, 55 COM. L.J. 197 (1950); William L. Beers, *The New Commercial Code*, 2 BUS. LAW 14 (1947).

<sup>113</sup> Fifty-two jurisdictions have adopted Article 2 of the UCC, including Guam, the Virgin Islands, and the District of Columbia. See HAWKLAND, *supra* note 11 at § 1-101:1 (2002).

<sup>114</sup> See Bruckel, *supra* note 8, at 817 (“The Code’s drafters recognized the growing commercial significance of [open-quantity] agreements and sought to end the threat to enforcement by giving them sanction under section 2-306.”).

<sup>115</sup> See U.C.C. § 2-306(1) (2003). The current version of section 2-306 has not been significantly changed since it appeared as section 30 of the *Proposed Final Draft No. 1* of the *Uniform Revised Sales Act*. Compare U.C.C. § 2-306 (2003), with U.C.C. § 2-306 (2000). See also UNIFORM REVISED SALES ACT § 30 (Proposed Final Draft No. 1, 1944); Bruckel, *supra* note 18, at 170 n.199.

actual requirements as may occur in good faith.<sup>116</sup> Similarly, section 2-306(1) defines an “output” contract as the actual production of a seller as may occur in good faith.<sup>117</sup> Importantly, section 2-306(1) envisions a reasonable elasticity in the buyer’s requirements or a seller’s output but requires that the quantity-determining party meet a test of good faith and commercial fair dealing in determining the quantity of goods that will ultimately be demanded or tendered under the contract.<sup>118</sup> In other words, section 2-306 requires that a quantity-determining party conduct its business so that its requirements or its output will approximate a reasonably foreseeable figure.

Section 2-306, however, makes no reference to, and certainly does not require, exclusivity as a prerequisite to the validation of open-quantity agreements. Indeed, section 2-306 is plain in stating that open-quantity contracts are not to be deemed unenforceable on grounds of either indefiniteness or lack of mutuality of obligation.<sup>119</sup> And the performance standard of good faith performance attaches, under the plain language of section 2-306, without regard to exclusivity.<sup>120</sup> In fact, under the Code, a contract for the sale of goods will not fail for indefiniteness if one or more terms in the contract, including the quantity term, are left open so long as the parties intended to make a contract and there exists a reasonably certain basis for giving an appropriate remedy.<sup>121</sup> All that is necessary is that a contract for the sale of goods be made in a “manner sufficient to show agreement.”<sup>122</sup>

On its face, then, section 2-306 seems to provide for the liberal validation of all open-quantity agreements, regardless of exclusivity. This section, like the rest of the UCC, was drafted largely to empower commercial actors and acknowledge the existence and utility of flexible business arrangements.<sup>123</sup> As Grant Gilmore once pointed out,

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<sup>116</sup> U.C.C. § 2-306(1) (2000).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> U.C.C. § 2-306 cmt. 2 (2000); *see also* Bruckel, *supra* note 18, at 163 (“The statute was regarded as a source of validation: no intention to *invalidate* any open quantity contract can be gleaned from its history.”).

<sup>120</sup> *See supra* section II(B).

<sup>121</sup> U.C.C. § 2-204(3) (2000).

<sup>122</sup> *Id.* § 2-204(1).

<sup>123</sup> *See, e.g.*, U.C.C. § 1-102(1) (2000) (“This Act shall be liberally construed and applied to promote its underlying purposes and policies.”); U.C.C. § 1-102 cmt. 1 (“This Act is drawn to provide flexibility . . . it will provide its own machinery for expansion of commercial practices.”); U.C.C. § 1-102(2)(b) (stating that one of the purposes of the Act is “to permit the continued expansion of commercial practices through custom, usage and agreement of the parties”).

one of the fundamental tenets underlying the UCC is that commercial legislation ought “to clarify the law about business transactions rather than to change the habits of the business community.”<sup>124</sup> Accordingly, the UCC was meant to supplant a large portion of earlier contract law, sweeping “statute and case law debris from the field so that commercial law could follow the natural flow of commerce.”<sup>125</sup> The UCC’s flexible standards were, at least in theory, designed to allow judges “to reduce the gap between law and practice and to insure that decisions are practical and responsive to the needs, proven in the particular case, of the parties and the relevant business commu-

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<sup>124</sup> Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1341 (1948). The UCC, in other words, was not intended to provide judges with a set of rigid rules but instead directs them to develop law through “directed exploration of the ‘factpattern of common life.’” Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 626 (1975) (linking the antiformalist views of Karl Llewellyn to the interpretive philosophy embodied in the text of Article 2 of the UCC); see also Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L. F. 321, 330–32 (1962) (noting that the UCC’s focus on commercial reasonableness was viewed as a triumph of realism over formalism). Additional scholarly discussions of the Code’s legal-realistic underpinnings are numerous. See, e.g., Eugene F. Mooney, *Old Contract Principles and Karl’s New Code: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213 (1966); Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 12 (Jody S. Kraus & Steven D. Walt eds., 2000); James J. White, *The Influence of American Legal Realism on Article 2 of the Uniform Commercial Code*, in PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS: Festschrift for Robert S. Summers 401 (Werner Krawietz et al. eds., 1994).

It is worth noting, in fact, that many criticisms of the UCC rest on the assertion that its antiformalist aspirations destabilize contract law. See, e.g., Robert E. Scott, *The Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 149, 150–51 (Jody S. Kraus & Steven D. Walt eds., 2000) (criticizing Article 2’s “functionalist strategy” on the grounds that it has neither encouraged the production of standardized default rules for contracting nor enhanced the predictability of contractual interpretation). Additionally, the UCC’s goal of being responsive to commercial realities has been criticized as ineffective or less effective than possible alternatives. See, e.g., Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1995); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Value Creation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Lisa Bernstein, *Formalism in Commercial Law: The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999).

<sup>125</sup> Danzig, *supra* note 124, at 631. In drafting the UCC, Karl Llewellyn, in other words, wanted to avoid the “damaging unrealistic nature” of classic contract law, at least with respect to commercial transactions. Mooney, *supra* note 123, at 218–19 (describing the Code’s effect on classic contract law as “iconoclastic”).

nity.”<sup>126</sup> The new Code, Llewellyn explained, “must encourage development by the courts [and incorporate] . . . language which is clear as to direction, but does not undertake too nicely to mark off the outer edges of its application. The language of principle, not that of rule drawn in derogation, is called for.”<sup>127</sup>

Given the context in which the Code was drafted, and considering that section 2-306 makes no mention of exclusivity as a requirement for a valid open-quantity agreement, it would seem, at first blush, as though the UCC not only resolved any remaining dispute about the general enforceability of exclusive open-quantity agreements, but it also clarified that non-exclusive open-quantity agreements were similarly enforceable. The Code, in short, removed remaining formalistic constraints from the law of open-quantity agreements, thus finishing the slide that had started with cases like *National Furnace* and *Wells* away from abstract classic contract theory to a practice of contract law aimed at being responsive to real-world business needs. As the next section explains, however, post-Code courts have failed to see the UCC's full potential to validate open-quantity agreements.

#### F. Post-Code Consensus About Enforcing Open-Quantity Agreements

Post-Code courts have recognized that, pursuant to UCC section 2-306(1), a contract for sale of goods may define the quantity of goods, not in terms of a fixed quantity, but through reference to a buyer's requirements for the goods in question or a seller's production of the goods in question.<sup>128</sup> The majority of commentators, however, state that exclusivity is still a prerequisite to enforcement of open-quantity agreements.<sup>129</sup> A vast majority of courts likewise have

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<sup>126</sup> PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2: PRELIMINARY REPORT 9 (American Law Inst. ed., 1990) (footnote omitted); see also *infra* Part III(A).

<sup>127</sup> Karl Llewellyn, *Memorandum to Executive Committee on Scope and Program of the NCC Section of Uniform Acts, "Possible Uniform Commercial Code"* (1940), reprinted in TWING, *supra* note 19, at 526. When arguing for the enactment of the UCC, in fact, Llewellyn maintained that prior efforts to codify commercial law, like the Uniform Sales Act, had “become outmoded as the nature of business, technology, and financing [had] changed.” GRANT GILMORE, *THE AGES OF AMERICAN LAW* 71 (1977).

<sup>128</sup> James Lockhart, Annotation, *Establishment and Construction of Requirements Contracts Under § 2-306(1) of Uniform Commercial Code*, 94 A.L.R. 5th 247, 270 (Supp. 2005).

<sup>129</sup> See, e.g., 2 LAWRENCE, *supra* note 11, at § 2-306:39; 1 HAWKLAND, *supra* note 11, at § 2-306:1; 10 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 29:16 (4th ed. Supp. 2005); JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* § 3-9, 119 (4th ed. 1995).

followed in the footsteps of pre-Code cases and find that a valid open-quantity contract requires that the quantity-determining party, either implicitly or explicitly, evidence that it will deal exclusively with the other party to the contract with respect to the goods at issue.<sup>130</sup>

Although modern courts have overwhelmingly subscribed to the pre-Code notion that exclusivity is necessary to save open-quantity agreements from want of mutuality of obligation, few courts provide a thoroughgoing explanation for their choice. In fact, many modern courts, in analyzing the enforceability of open-quantity contracts, gloss over the UCC, ignoring or merely paying lip service to the significant reforms that it was intended to make to commercial law.

In *Mid-South Packers, Inc. v. Shoney's, Inc.*, for instance, the Fifth Circuit was faced with a plaintiff meat packer who had brought a breach of contract action against the defendant, a purchaser of pork products, alleging that the defendant had not paid all that it owed for products that it had ordered from the plaintiff.<sup>131</sup> The defendant contended that a requirements contract existed, which prevented plaintiff from raising its prices without forty-five days notice.<sup>132</sup> Based on this construction, the defendant had deducted several thousand dollars from the amount that it paid to the plaintiff so that it was paying the price that it contended was contemplated in the parties' requirements contract.<sup>133</sup>

In analyzing the defendant's contention, the court in *Mid-South Packers* maintained that "an essential element of a requirements con-

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<sup>130</sup> See, e.g., *Propulsion Techs., Inc. v. Attwood Corp.*, 369 F.3d 896, 904 (5th Cir. 2004) (citing *Mid-South Packers, Inc. v. Shoney's, Inc.*, 761 F.2d 1117, 1120–21 (5th Cir. 1985)); *Simmons Foods, Inc. v. Hill's Pet Nutrition, Inc.*, 270 F.3d 723 (8th Cir. 2001); *Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Prods., Inc.*, 212 F.3d 373 (7th Cir. 2000); *Merritt-Campbell, Inc. v. RxP Prods., Inc.*, 164 F.3d 957 (5th Cir. 1999); *Advanced Plastics Corp. v. White Consol. Indus., Inc.*, 47 F.3d 1167 (6th Cir. 1995); *Zayre Corp. v. S.M. & R. Co.*, 882 F.2d 1145 (7th Cir. 1989); *Roger Edwards, LLC v. Fiddes & Son, Ltd.*, 245 F. Supp. 2d 251 (D. Me. 2003); *Sea Link Int'l, Inc. v. Osram Sylvania, Inc.*, 969 F. Supp. 781 (S.D. Ga. 1997); *Indus. Specialty Chems., Inc. v. Cummins Engine Co.*, 902 F. Supp. 805 (N.D. Ill. 1995); *Pepsi-Cola Co. v. Steak 'N Shake, Inc.*, 981 F. Supp. 1149 (S.D. Ind. 1997); *Upsher-Smith Labs., Inc. v. Mylan Labs., Inc.*, 944 F. Supp. 1411 (D. Minn. 1996); *Rosenthal v. Nat'l Produce Co., Inc.*, 573 A.2d 365 (D.C. 1990); *Embedded Moments, Inc. v. Int'l Silver Co.*, 648 F. Supp. 187 (E.D.N.Y. 1986); *Rangen, Inc. v. Valley Trout Farms, Inc.*, 658 P.2d 955, (Idaho 1983); *Propane Indus., Inc. v. Gen. Motors Corp.*, 429 F. Supp. 214 (W.D. Mo. 1977); *United Servs. Auto Ass'n v. Schlang*, 894 P.2d 967 (Nev. 1995); *Canteen Corp. v. Former Foods, Inc.*, 606 N.E.2d 174 (Ill. App. Ct. 1992); *Kirkwood-Easton Tire Co. v. St. Louis County*, 568 S.W.2d 267 (Mo. 1978); *Wilsonville Concrete Prods v. Todd Bldg. Co.*, 574 P.2d 1112 (Or. 1978).

<sup>131</sup> 761 F.2d 1117, 1120–21 (5th Cir. 1985).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*



tract is the promise of the buyer to purchase exclusively from the seller either the buyer's entire requirements or up to a specified amount."<sup>134</sup> Because the defendant had the right to purchase goods from suppliers other than the plaintiff, and the only commitments to purchase any quantity of products arose from particular purchase orders, the court found that no requirements contract existed and that the parties had entered into a series of individual contracts evidenced by each purchase order and acceptance.<sup>135</sup>

The court reached the conclusion that the open-quantity agreements must be exclusive after barely saying a word about—indeed with only a general reference to—section 2-306 of the UCC or the underlying goals of the UCC.<sup>136</sup> Instead, the extent of the court's UCC analysis was that "[r]equirements contracts are recognized in Mississippi and are not void for indefiniteness."<sup>137</sup> The court then relied on general citations to pre-Code case law to justify its assertion that only exclusive open-quantity agreements are enforceable.<sup>138</sup> Presumably, the court was implicitly arguing that pre-Code common law had not been displaced by the provisions of the UCC and thus under section 1-103 was relevant to its decision.<sup>139</sup> The *Mid-South Packers* court, however, made absolutely no attempt to square the Code's express proclamation that requirements contracts are not void for indefiniteness with the court's insistence that requirements contracts be exclusive to avoid failing for want of mutuality of obligation.

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<sup>134</sup> *Id.* at 1120.

<sup>135</sup> *Id.*

<sup>136</sup> See, e.g., *Propulsion Techs., Inc. v. Attwood Corp.*, 369 F.3d 896, 899 (5th Cir. 2004) (only generally citing to section 2-306 for the proposition that requirements contracts are not invalid because of indefiniteness); *Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Prods., Inc.*, 212 F.3d 373, 379 n.5 (7th Cir. 2000) (only mentioning that section 2-306 "functions as a primary gap-filler for open quantity terms" but discussing the section no further).

<sup>137</sup> *Mid-South Packers, Inc.*, 761 F.2d at 1120.

<sup>138</sup> The court specifically cited to *Willard, Sutherland & Co. v. United States*, 262 U.S. 489, 493 (1923) (finding that a contract for the sale of coal to the United States was unenforceable for lack of mutuality of obligation because "[t]here [was] nothing in the writing which required the government to take, or limited its demand to, any ascertainable quantity") and *Hutchinson Gas & Fuel Co. v. Wichita Natural Gas Co.*, 267 F. 35, 39, 42 (8th Cir. 1920) (finding a contract for the sale of as much natural gas as desired unenforceable for want of consideration and lack of mutuality of obligation).

<sup>139</sup> U.C.C. § 1-103 (2000) ("Unless displaced by the particular provisions of this Act, 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 or other validating or invalidating cause shall supplement its provisions.").

Unfortunately, the inadequate reasoning of the court in *Mid-South Packers* has become a hallmark of recent open-quantity contract case law, which rests precariously on generalizations and assumptions. Even the Seventh Circuit, frequently praiseworthy because of the perspicuity of its analyses, held, in *In re Modern Dairy of Champaign, Inc.*,<sup>140</sup> that an open-quantity agreement was invalid because it was not exclusive, without ever even mentioning the UCC, let alone section 2-306.<sup>141</sup> In that case, two school districts contracted with Modern Dairy for the supply of milk during the school year.<sup>142</sup> Specifically, the districts contracted with Modern Dairy “for milk products for the 1996/97 year as per [Modern Dairy’s] bid [and] for milk to be ordered throughout the 1996-97 school year . . . as per . . . [Modern Dairy’s] bid quotation.”<sup>143</sup> The districts explained that their demands would be determined in the future, although the districts provided some estimates of the demands.<sup>144</sup> Modern Dairy subsequently fell into bankruptcy and was unable to fill the necessary milk orders.<sup>145</sup> The trustee tried to recoup payments for deliveries previously made to the districts, and the districts, in turn, sought to offset those amounts from alleged damages caused by the dairy’s failure to continue deliveries.<sup>146</sup> The trustee responded by asserting that the contracts were not requirements contracts and therefore did not obligate Modern Dairy to continue supplying milk to the districts.<sup>147</sup>

The Seventh Circuit recognized that the districts’ case for damages hinged on whether or not a valid requirements contract existed between the parties.<sup>148</sup> The court, however, never mentioning section 2-306, framed the issue in the case as being whether “the [districts] obligated themselves to buy their milk requirements [exclusively] from the Modern Dairy,”<sup>149</sup> thus adopting the pre-Code view of open-quantity agreements. Because the districts were not “obligated to buy all their milk requirements from Modern Dairy,” the court found the contract unenforceable.<sup>150</sup> The court bolstered its conclusion with

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<sup>140</sup> 171 F.3d 1106 (7th Cir. 1999).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1107.

<sup>143</sup> *Id.* at 1108.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 1107.

<sup>146</sup> *In re Modern Dairy*, 171 F.3d at 1107.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 1108.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

the unremarkable fact “that when [Modern Dairy] stopped supplying milk the [districts] turned to other [sellers] . . . .”<sup>151</sup>

The scant reasoning of cases like *Mid-South Packers* and *Modern Dairy* epitomize the norm in the jurisprudence of validation of open-quantity agreements under section 2-306 of the UCC. Post-Code courts have applied pre-Code reasoning to open-quantity contracts without compunction. The result is that post-Code courts have, in mass, failed to consider the full potential of the UCC to validate open-quantity agreements, and they have often ignored or perverted the serious intentions of commercial parties. As discussed in the following section, however, a growing number of courts and at least one commentator have paved the way for rethinking the modern law governing open-quantity agreements.

## II. A CRITIQUE OF THE MAJORITY RULE: ARGUMENTS IN FAVOR OF A MORE LIBERAL VALIDATION PRINCIPLE FOR OPEN-QUANTITY CONTRACTS

The majority rule requiring that open-quantity contracts be exclusive to be enforceable yields an attractive degree of certainty. This certainty, however, comes with a price. There are a number of jurisprudential and practical weaknesses that, as Caroline Brown argued nearly twenty-five years ago in her seminal article on enforcement of open-quantity contracts under the UCC,<sup>152</sup> argue persuasively for replacement of this majority rule with a more realistic and flexible validation principle. This section begins by highlighting some of the theoretical and practical weaknesses of the majority rule, considering an example of a case in which a court ignored the serious commercial intentions of sophisticated business parties and thus unwittingly perpetuated the sort of abstract formalism at the core of old cases like *Bailey*. The section then reviews Caroline Brown's proposal for a new validation device: good faith. Professor Brown's proposal, it is argued, serves as a compelling call to re-inspect the role of exclusivity in open-quantity agreements, but her proposal itself falls short of providing a complete justification for enforcing all open-quantity agreements. This section ends by briefly analyzing the court's decision in *PMC Corp.*, the case favorably cited by the commentary to the most recent revisions of Article 2. This decision, and others like it, demonstrate that some courts have lost faith in the orthodoxy of the exclusivity rule. Although the need still exists for a validation principle for

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<sup>151</sup> *Id.* at 1109.

<sup>152</sup> Bruckel, *supra* note 18, at 140.

open-quantity contracts that squares with the underlying jurisprudence of the UCC, there is hope that, once found, such a principle will find a receptive audience.

A. *Practical and Theoretical Problems With the Majority Rule*

The majority rule requiring exclusivity in open-quantity contracts rests, as the prior sections have discussed, on the pre-Code notion that, without exclusivity, open-quantity contracts fail for lack of mutuality of obligation or, in simpler terms, they fail because they lack consideration. The objection that a contract fails for lack of mutuality of obligation really amounts to an objection that a “counterpromise is not sufficiently ‘valuable’ to suffice as consideration because it fails in some way to bind the counterpromisor . . . to any definite performance.”<sup>153</sup> Such an objection in the context of open-quantity agreements is problematic both practically and theoretically.

From a practical viewpoint, the problem with the objection that a contract fails for lack of mutuality of obligation is that people do not always acknowledge or tell the truth about the value they place on things.<sup>154</sup> Thus, contracting parties, especially when their motivations for entering into a deal are altered for whatever reason, may view the value of a contract when a dispute arises quite differently from how they did when they entered into it.

This is why, although the precise meaning and rationale of the consideration concept has been debated by countless scholars, most agree that the key component of the concept is the element of bargain—that is, promises should generally be enforceable if they are made as part of a deliberate and arm’s-length exchange.<sup>155</sup> This focus

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<sup>153</sup> *Id.* at 133.

<sup>154</sup> See, e.g., KENNETH J. ARROW, *The Property Rights Doctrine and Demand Revelation Under Incomplete Information*, in *ECONOMICS AND HUMAN WELFARE* 23, 24–25 (Michael J. Boskin ed., 1979) (explaining how unknown reservation prices can impede the bargaining process); Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement To Facilitate Coasean Trade*, 104 *YALE L.J.* 1027, 1030 (1995) (noting that “self-interested bargainers have a strong incentive to misrepresent their private valuations so as to capture a larger share of the bargaining ‘pie’”); Richard R.W. Brooks, *The Relative Burden of Determining Property Rules and Liability Rules: Broken Elevators in the Cathedral*, 97 *NW. U. L. REV.* 267, 281 (2002) (discussing how parties’ litigation incentives can interfere with a judge’s ability to assess relative pre-suit valuations parties placed on entitlements); Joseph Farrell, *Information and the Coase Theorem*, 1 *J. ECON. PERSP.* 113, 117 (1987) (observing that where private valuations are involved, “[u]nless everyone shares the same goals, people typically have incentives to lie”).

<sup>155</sup> See Avery Wiener Katz, *The Option Element in Contracting*, 90 *VA. L. REV.* 2187, 2192 (2004); see also Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 *HARV. L. REV.* 741, 749 (1982) (stating that bargains between capable and informed contracting parties should generally be enforced according to their terms). The Re-

on enforcing seriously bargained for exchanges makes sense because it is virtually impossible, after the fact, to determine whether parties exchanged what they reasonably believed to be valuable promises, although, presumptively, parties would not agree to a deal if they did not believe that they were getting something valuable out of it.<sup>156</sup> The principle that the serious bargains of parties should be enforced, in other words, “rests in large part on the premises that bargains produce gains through trade, that capable and informed actors are normally the best judges of their own utilities, and that those utilities are revealed in the terms of the parties’ bargain.”<sup>157</sup>

This logic is no less persuasive in the context of open-quantity agreements. In such agreements, the party without discretion over the quantity can be seen as bargaining for an increase in the probability that an exchange will occur.<sup>158</sup> Taking the parties to an open-quantity agreement at their word, the party without discretion over the quantity believes, when it enters into such a contract, that the benefit it gains—the increased likelihood that the quantity-determining party will have needs or output—is sufficiently valuable

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statement (Second) of Contracts defines consideration in pertinent part as “a performance or a return promise” that is “bargained for.” RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981). If consideration exists—in other words if there is a bargained for exchange of performances or promises—there is no additional requirement of “(a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) ‘mutuality of obligation.’” *Id.* § 79.

<sup>156</sup> Enforcement of voluntary exchanges also makes sense because it is “essential to the smooth functioning of the economic system.” Paul G. Mahoney, *Contract Law and Macroeconomics*, 6 VA. J. 72 (2003) (“[A] legal system that enforces contracts reliably and efficiently plays an important role in economic growth.”); see also Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 558 (2003) (explaining that “[s]ociety is . . . better off when it adopts laws that improve market functioning”); JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS § 2.9 at 8–9 (5th ed. 2003) (explaining that “contract law is based upon the needs of trade, sometimes stated in terms of the mutual advantage of the contracting parties, but more often of late in terms of a tool of the economic and social order”).

<sup>157</sup> Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005, 1010 (1998). It is also worth noting that a quantity-determining party entering into even a non-exclusive open-quantity contract makes some sort of representation about its intent to perform the contract. See IAN AYRES & GREGORY KLASS, *INSINCERE PROMISES* 4 (2005) (“[A] promisor, by the very act of promising, typically communicates that she intends to perform her promise.”). Thus, a quantity-determining party that affirmatively has no intention of performing under the contract at the time of entering into the contract can be subject to “both compensatory and punitive damages under the doctrine of promissory fraud.” *Id.* at 5.

<sup>158</sup> Eisenberg, *supra* note 157, at 1011 (“[A] requirements contract is a promissory structure designed to increase the probability of exchange. By making the agreement, the seller reveals that in his view, the value of the chance that the buyer will have requirements exceeds the cost to the seller of making his commitment.”).

to justify taking the risk that the quantity-determining party will not have any requirements or output. Seen in this way, courts that deny enforcement to open-quantity agreements because they are not exclusive may be violating the bargain principle at the center of the doctrine of consideration. Failure to enforce non-exclusive open-quantity agreements, in other words, may well undercut the actual deal struck by the parties.

The court's decision in *Propane Industrial, Inc. v. General Motors Corp.*<sup>159</sup> is a prime example of how adherence to the majority rule requiring exclusivity can blind courts to the reality of the parties' bargain. At issue in *Propane Industrial* was an agreement between the defendant, General Motors ("GM"), and the plaintiff, Propane Industrial ("Industrial"), whereby Industrial agreed to supply standby propane during the 1973–74 heating season for GM's Fairfax assembly plant in Kansas City, Missouri.<sup>160</sup> As its primary source of heat, this plant relied on natural gas supplied by a local utility company, but service from this company was occasionally interrupted.<sup>161</sup> GM thus needed to maintain a standby supply of propane fuel.<sup>162</sup> This situation was not new, and Industrial had been supplying GM since 1970.<sup>163</sup> GM, however, had never agreed, during the lifetime of the parties' dealings, to buy exclusively from Industrial.<sup>164</sup>

Industrial quoted GM a "guaranteed firm" price of \$.17 per gallon on a standby supply of 500,000 gallons of propane, and GM, pursuant to the parties' contract, issued a purchase order for a "possible requirement" of 500,000 gallons "to be used as standby fuel" during the 1973–74 heating season.<sup>165</sup> The purchase order was executed by both parties, thus evidencing that this agreement was the product of bilateral negotiations.<sup>166</sup> The purchase order provided for delivery only "as released" by GM.<sup>167</sup>

In the summer of 1973, prior to any releases, Industrial sent GM a letter repudiating the contract.<sup>168</sup> In the letter, Industrial claimed that, because of a fuel shortage, it could only obtain propane at a cost in excess of the contract price and therefore was "unable to fulfill

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<sup>159</sup> 429 F. Supp. 214 (W.D. Mo. 1977).

<sup>160</sup> *Id.* at 216.

<sup>161</sup> *Id.* at 215.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 216.

<sup>164</sup> *Id.*

<sup>165</sup> *Propane Indus.*, 429 F. Supp. at 216.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 217.

[its] contract.”<sup>169</sup> GM replied with a letter that demanded performance in accordance with the parties’ agreement.<sup>170</sup>

In September, GM issued its first “release” for a specified quantity of propane. Industrial refused to deliver, asserting that the federal government was about to enact a mandatory propane allocation program and had requested voluntary compliance prior to enactment.<sup>171</sup> The program was, in fact, enacted, and GM did not qualify as a priority user under the scheme of allocation priorities.<sup>172</sup> GM, however, in desperate need for propane, proceeded by requesting a hardship exception from federal authorities.<sup>173</sup> The request was granted, and Industrial was allowed to supply 171,000 gallons of propane to GM “on financial terms acceptable to both parties.”<sup>174</sup> Without any additional discussion of price, Industrial delivered over 75,000 gallons and billed GM at a price of more than \$.40 per gallon.<sup>175</sup> When GM would pay only the original contract price of \$.17 per gallon, Industrial sued for the difference.<sup>176</sup>

The court ultimately found that Industrial was entitled to recover.<sup>177</sup> The court’s rationale for this decision turns on its conclusion that “[a]n essential element of the valid requirements contract is the promise of the buyer to purchase exclusively from the seller.”<sup>178</sup> Because GM remained free to purchase propane from other suppliers—in fact, GM had a similar standby supply contract with another supplier<sup>179</sup>—the initial open-quantity contract between the parties failed for lack of consideration.<sup>180</sup>

With the actual written agreement of the parties out of the way, the rest of the court’s decision was easy. The shipment and acceptance of propane amounted to conduct reflecting an intent to con-

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Propane Indus.*, 429 F. Supp. at 217.

<sup>172</sup> *Id.* at 218.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Propane Indus.*, 429 F. Supp. at 222.

<sup>178</sup> *Id.* at 219. It is worth pointing out that, like the court in *Mid-South Packers*, discussed *supra* in Part I(E), the court in *Propane Industrial* determined that open-quantity agreements must be exclusive by relying primarily on pre-Code cases and barely citing section 2-306 of the UCC. Specifically, the court cited to *Hutchinson Gas & Fuel Co. v. Wichita Natural Gas Co.*, 267 F. 35 (8th Cir. 1920) and *Cold Blast Transp. Co. v. Kan. City Bolt & Nut Co.*, 114 F. 77 (8th Cir. 1902).

<sup>179</sup> *Propane Indus.*, 429 F. Supp. at 218.

<sup>180</sup> *Id.*

tract with an open price term within the meaning of UCC Section 2-305.<sup>181</sup> Accordingly, in the absence of an express agreement on price, the court was free to imply a “reasonable price at the time for delivery.”<sup>182</sup> Because the price demanded by Industrial was the market rate, Industrial was allowed to charge that rate.<sup>183</sup>

The *Propane Industrial* court’s holding is noteworthy because of its complete disavowal of the deal struck by the parties and the actual commercial benefits that Industrial had enjoyed as a result of its relationship with GM for years. Although the court’s opinion reflects that GM had purchased propane from three suppliers the preceding year,<sup>184</sup> the court paid no attention to the fact that one of those suppliers was Industrial.<sup>185</sup> Industrial bargained for the chance to supply GM with propane should GM wind up needing propane, and that bargain had paid off in the past. To say that Industrial did not gain from its agreement with GM is to ignore history.

The court’s myopic focus on exclusivity not only prevented it from recognizing the commercial utility and significance of the parties’ agreement, but it also prevented the court from seeing the issue that should have been at the heart of the dispute. The concern with the contract in *Propane Industrial* was not that it failed to evidence a genuine exchange. To the contrary, when viewed in context, it is exceedingly clear that both GM and Industrial had engaged in arm’s-length negotiations and reached what they deemed to be a mutually beneficial arrangement. The real concern was that the exchange, through no apparent fault of either party, had suddenly become burdensome to Industrial. The outcome of the case should have turned on whether Industrial’s performance was commercially impracticable or whether there were any other justifications for Industrial’s unwillingness to perform its obligations. But the court’s preoccupation with classic contract formalities prevented it from addressing the practical issues at the heart of the dispute.<sup>186</sup>

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<sup>181</sup> *Id.* at 221; *see also* U.C.C. § 2-305 (2000) (stating that if the parties do not agree on price, a reasonable price at the time of delivery can be charged).

<sup>182</sup> *Propane Indus.*, 429 F. Supp. at 221.

<sup>183</sup> *Id.* at 222.

<sup>184</sup> *Propane Indus.*, 429 F. Supp. at 218.

<sup>185</sup> *Id.*

<sup>186</sup> Other courts, like the court in *Propane Industrial*, have similarly disregarded the clear intent of contracting parties in favor of rigid formalism reminiscent of *Bailey*. *See, e.g.*, *Orchard Group, Inc. v. Konica Med. Group*, 135 F.3d 421, 427–28 (6th Cir. 1998) (finding a nonexclusive requirements contract invalid despite the fact that the parties had negotiated, at arms’ length, such a contract and the plaintiff had detrimentally relied on the contract); *Zayre Corp. v. S.M. & R. Co.*, 882 F.2d 1145, 1154–55 (7th Cir. 1989) (same).



The majority rule requiring exclusivity not only has a blinding effect, as demonstrated by cases like *Propane Industrial*,<sup>187</sup> which prevents courts from analyzing the reality of the parties' deal and the circumstances surrounding performance of their respective obligations, but it also lacks theoretical credibility.

The requirement of exclusivity provides no additional meaningful check on the discretion of a quantity-determining party in light of the UCC's performance standards for open-quantity agreements. The UCC states that quantity variation in open-quantity contracts may not be unreasonably disproportionate to estimates stated in the contract or to quantities established through prior dealings.<sup>188</sup> The UCC, in other words, requires that a quantity-determining party act in good faith—a buyer's requirements or a seller's output under an open-quantity agreement must reflect honesty in fact and the idea of reasonable fair dealing.<sup>189</sup> This said, however, courts have reasoned that, under a requirement contract, a buyer may take a disproportionately small amount of goods, even zero, so long as it is acting in good faith.<sup>190</sup> Thus, in an open-quantity contract under the UCC, there is no guarantee or requirement that a quantity-determining party will do business with the other party to the contract. *Industrial*, for instance, in *Propane Industrial* may never have received an order from GM even if GM had agreed to purchase standby fuel exclusively from *Industrial*. Under the reasoning of pre-Code courts, then, open-quantity agreements under the UCC, even if exclusive, could really be lacking in mutuality of obligation.

*B. Caroline Brown's Proposal for Validating Open-Quantity Agreements*

Over twenty years ago, Professor Caroline Brown recognized the practical and theoretical limitations of the requirement of exclusivity. Accordingly, she wrote the seminal article regarding the enforcement

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<sup>187</sup> See also *Brooklyn Bagel Boys, Inc. v. Earthgrains Refrigerated Dough Prods., Inc.*, No. 98 C 4421, 1999 WL 528499, at \*6 (N.D. Ill. July 19, 1999) (finding the bargained-for agreement of the parties was unenforceable because it did not require the purchaser to buy exclusively from the buyer even though both parties had, for some time, performed their respective obligations and treated the contract as binding), *aff'd*, 212 F.3d 373 (7th Cir. 2000); *Seaside Petroleum Co. v. Steve E. Rawls, Inc.*, 339 S.E.2d 601, 602–03 (Ga. 1985) (permitting a requirements buyer to walk away from the contract it negotiated and purchase his requirements elsewhere because court found that buyer never promised to do anything under the contract).

<sup>188</sup> U.C.C. § 2-306(1) (2000).

<sup>189</sup> See *id.* § 1-201(b) (20).

<sup>190</sup> See, e.g., *Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333, 1339 (7th Cir. 1988).

of contracts under section 2-306 of the UCC.<sup>191</sup> Professor Brown asserted that, under section 2-306(1) of the UCC, good faith replaced exclusivity as the primary validation device in requirements contracts.<sup>192</sup> According to Professor Brown,

[t]he good faith obligation is already generally recognized as a measure of the limitations upon permissible tender or demand when ascertaining whether a breach of contract has occurred [in open-quantity contracts]. But the good faith standard's potential as the source of an affirmative obligation of the quantity-determining party makes it a useful vehicle for validating as well as policing.<sup>193</sup>

In her view, good faith serves a dual role in open-quantity agreements: it is a performance standard and it is a validation device.<sup>194</sup>

“In its role as a validating mechanism . . . the good faith obligation . . . giv[es] affirmative substance to the obligation of the [buyer].”<sup>195</sup> In essence, in Professor Brown's view, the promise of a quantity-determining party to conform to the good faith performance standards of section 2-306(1) of the UCC serves as an obligation sufficient to validate the contract. A lack of exclusivity, in other words, does not necessarily show a lack of serious and binding intent by the quantity-determining party to purchase or sell a part of that party's total requirements or output, and there is therefore “no logical or semantic necessity to refuse to include nonexclusive agreements in ‘requirements’ and ‘output’ contracts.”<sup>196</sup> The good faith obligation can, at least in theory, function to hold a quantity-determining party to some reasonably foreseeable requirement or output even if the quantity-determining party has some freedom to deal with others who are not parties to the contract.

Professor Brown explains that utilizing good faith as a validation device is advantageous, not only because it allows for recognition of nonexclusive open-quantity agreements and thus respects the actual bargains of commercial actors, but also because it is efficient. “[G]ood faith provides an obligation sufficiently cognizable in most

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<sup>191</sup> See Bruckel, *supra* note 18, at 117.

<sup>192</sup> *Id.* at 119–21.

<sup>193</sup> *Id.* at 121.

<sup>194</sup> *Id.* at 123–24 (noting that other scholars and courts have regularly employed good faith as a performance standard and are therefore well versed in its application).

<sup>195</sup> *Id.* at 205.

<sup>196</sup> *Id.* at 166–67.

cases to allow validation without too costly an inquiry into the theoretical scope of freedom of the quantity-determining party.”<sup>197</sup> In other words, according to Professor Brown, courts that use good faith as a validation device need not try to guess at the “value” that each party saw in a deal before a dispute arose. Instead, “[n]o inquiry into good faith’s presence is necessary, [since] it is implied by law.... [and t]he inquiry into enforceability is reduced to whether section 2-204(3) of the Code applies.”<sup>198</sup>

It is evident that Professor Brown’s proposed system for validating open-quantity agreements would have a tremendous liberalizing effect. Using Professor Brown’s approach, for instance, the contract in *Propane Industrial* would have been valid. Good faith, in the context of open-quantity agreements, means reasonable proportionality to any stated estimate or to prior experience.<sup>199</sup> In *Propane Industrial*, there was arguably enough prior experience to construct, using Professor Brown’s model, an enforceable obligation on the part of GM and thus to avoid a finding of lack of mutuality. The court could have found that good faith required that the overall proportion of orders that GM allocated between Industrial and its other nonexclusive suppliers remain roughly constant from year to year. Under the facts presented in *Propane Industrial*, because there was a course of dealing between the parties, the court’s task would have been easy. Estimating the proportion of GM’s requirements that should have been allocated to Industrial would not have been difficult since Industrial had been getting a proportion of GM’s business for years.

Although Professor Brown’s approach is certainly better suited to deal with the practical realities of real-world deal making, it suffers from three theoretical limitations. First, and most importantly, her argument for using good faith as the means to validate open-quantity agreements tacitly affirms the classic jurisprudential notion that contracts must impose mutual obligations on the parties. Professor Brown aptly explains why exclusivity is, at best, a clumsy and imprecise tool for determining whether there are mutual obligations in an open-quantity agreement.<sup>200</sup> She, however, never quite challenges the

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<sup>197</sup> Bruckel, *supra* note 18, at 153.

<sup>198</sup> *Id.* at 120. Section 2-204(3) states in relevant part that “[a] contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. . . . Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.” U.C.C. § 2-204(1), (3) (2000).

<sup>199</sup> See U.C.C. § 2-306(1).

<sup>200</sup> See Bruckel, *supra* note 18, at 133–38.

underlying orthodoxy of the mutuality doctrine. As argued in Part III of this Article, the mutuality of obligation doctrine should be considered inapplicable to contracts formed under the UCC. The doctrine of mutuality of obligation imposes an abstract barrier to the formation of contracts that is antithetical to the underlying jurisprudence of the UCC.

Second, Professor Brown's suggestion that good faith serves both a validation principle and a performance standard runs afoul of well-established law stating that the implied obligation of good faith is a tool of interpretation<sup>201</sup> and does not establish any independent basis for a claim.<sup>202</sup> Indeed, the commentary to section 1-304 of the UCC explains that the implied obligation of good faith "does not support an independent cause of action for failure to perform or enforce in good faith."<sup>203</sup> In the face of this law and the express commentary of the UCC, it is difficult to maintain conceptually that good faith can serve both as a validating device and as a performance standard.

Finally, the obligation of good faith attaches, as section 1-203 of the UCC points out, only to contracts.<sup>204</sup> Contracts are defined in the UCC as "the total legal obligation that results from the parties' agreement as determined by [the Uniform Commercial Code] as supplemented by any other applicable laws."<sup>205</sup> The obligation of good faith, therefore, only attaches to an existing, enforceable agreement. Professor Brown's view that good faith can also operate to help rescue open-quantity contracts from the objection that they lack mutuality of obligation puts the proverbial cart before the horse.

The limitations of Professor Brown's article in no way undermine the groundbreaking work that she has done in the area of law governing open-quantity agreements. These limitations, however, may help explain why her proposal, and the attendant pragmatic

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<sup>201</sup> See U.C.C. § 1-304 cmt. 1 (2000).

<sup>202</sup> See, e.g., *Baxter Healthcare Corp. v. O.R. Concepts, Inc.*, 69 F.3d 785, 792 (7th Cir. 1995).

<sup>203</sup> U.C.C. § 1-203 cmt. 1 (2000); see also *Medtronic, Inc. v. ConvaCare, Inc.*, 17 F.3d 252 (8th Cir. 1994) ("Minnesota law does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing separate from the underlying breach of contract claim."); *Mgmt. Assistance, Inc. v. Computer Dimensions, Inc.*, 546 F. Supp. 666 (N.D. Ga. 1982) (finding that, under Georgia law, there is no independent claim for a breach of the duty of good faith under the UCC), *aff'd*, 747 F.2d 708 (11th Cir. 1984); *Echo, Inc. v. Whitson Co.*, 121 F.3d 1099 (7th Cir. 1997) (citing *Baxter Healthcare Corp. v. O.R. Concepts, Inc.*, 69 F.3d 785, 792 (7th Cir. 1995) ("This duty, however, only guides the construction of contracts and does not create independent duties of the contracting parties.")).

<sup>204</sup> See U.C.C. § 1-203 (2000).

<sup>205</sup> U.C.C. § 1-201(12) (2000).

benefits that would be gained through recognition of the enforceability of nonexclusive open-quantity contracts, has not yet gained the traction it deserves. Still, as discussed in the next section, there is hope that Professor Brown's article has inspired at least a small but potentially growing number of courts to challenge the orthodoxy of the exclusivity rule.

*C. A Small Minority of Courts' Approach to Open-Quantity Agreements*

This Article began by pointing out that the most recent revisions to Article 2 of the UCC have included a favorable citation to a case upholding a nonexclusive open-quantity contract. This case, *PMC Corp. v. Houston Wire & Cable Co.*,<sup>206</sup> is one of a handful of recent cases demonstrating that some courts are losing faith in the received orthodox view that exclusivity is necessary to create enforceable open-quantity contracts. It is, for that reason, worthwhile to take a closer look at the decision.

In *PMC Corp.*, the plaintiff, a supplier of thermocouple wire and cable, and the defendant, a distributor of wire and cable products, had been conducting business for several years.<sup>207</sup> The plaintiff eventually requested that the defendant agree to buy at least \$800,000 per year of products over a three-year period and that the defendant agree that the plaintiff would be defendant's primary supplier for wire and cable products.<sup>208</sup> The defendant could not agree to a definitive commitment to buy \$800,000 of products a year for three years, and the defendant was unwilling to limit itself to purchasing products only from the plaintiff.<sup>209</sup> Nevertheless, the defendant revised the parties' agreement to provide that:

[The defendant] expects to purchase in excess of \$2,000,000 of thermocouple products in 1995. [The defendant] recognizes [the plaintiff] as a major thermocouple manufacturer and preferred supplier for this thermocouple business. While [the defendant] cannot commit to exclusive purchase of this total from [the plaintiff], [the defendant] recognizes [the plaintiff] as a preferred supplier. As such, with competitive pricing, service, delivery, and the above rebate schedule [the plaintiff] can expect to receive a major share of the total thermocouple business. It is not unrealistic to project total purchases by [the defendant] from

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<sup>206</sup> 797 A.2d 125 (N.H. 2002).

<sup>207</sup> *Id.* at 126.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

[the plaintiff] to be in the \$2,000,000 range in 1995 . . . .

With the commitment that [the plaintiff] has made to help [the defendant] grow its thermocouple business [the defendant] is projecting future thermocouple business as follows:

1996 \$3,000,000  
1997 \$4,000,000

It is also [the defendant's] intent to purchase the major portion of this product from [the plaintiff].<sup>210</sup>

Based on this language, the New Hampshire Supreme Court found that the terms "major share" or "major portion" were sufficient to afford "a basis for believing that the offered evidence rest[ed] on a real transaction" and thus satisfied the statute of frauds.<sup>211</sup>

The court was still faced, however, with a nonexclusive requirements contract. The mere fact that this contract satisfied the statute of frauds did not mean that it was enforceable, as the court correctly noted.<sup>212</sup> After pointing out the majority rule requiring exclusivity, the court went on to provide a rather amorphous exception to this rule: "[d]espite the presence of another supplier, [a] contract may be sufficiently 'exclusive' [to constitute a requirements contract]. This may occur where a purchaser agrees to purchase exclusively from a seller up to a certain quantity."<sup>213</sup> Under the particular circumstances, the *PMC Corp.* court determined that there was sufficient evidence from which a jury could reasonably find that the defendant had intended to purchase exclusively from PMC up to a certain portion of its requirements.<sup>214</sup>

Rather than dismissing the requirement of exclusivity altogether, the New Hampshire Supreme Court fashioned an exception to the exclusivity rule. In this regard, the New Hampshire Supreme Court is not alone. Other courts, feeling the constraint of the exclusivity rule, have similarly tried to fashion exceptions to the rule so that they can enforce particular agreements.<sup>215</sup> A close look at the exception pro-

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<sup>210</sup> *Id.* at 127.

<sup>211</sup> *Id.* at 129.

<sup>212</sup> *PMC Corp.*, 797 A.2d at 129.

<sup>213</sup> *Id.* at 130.

<sup>214</sup> *Id.*

<sup>215</sup> *See, e.g.*, *Cyril Bath Co. v. Winters Indus.*, 892 F.2d 465, 467 (6th Cir. 1989) (finding that a contract to furnish only part of the buyer's requirements for automobile manifold assembly components, along with an approximate number of the iden-

posed by the New Hampshire Supreme Court, however, reveals that it is either so ill-defined as to be useless as a normative standard or it is so expansive that it subsumes the general rule.

In the New Hampshire Supreme Court's estimation, a requirements contract can be "sufficiently exclusive"—even if not entirely exclusive—to avoid being illusory.<sup>216</sup> In other words, there is some sort of sliding scale of exclusivity. But recall that the exclusivity rule itself was created to liberalize the pure mutuality of obligation doctrine, as articulated in decisions like *Bailey*. Thus the exclusivity rule was already a "slide" away from pure mutuality. The *PMC Corp.* court seems to be advocating for a continuation of that slide, but the court provides no real mechanism for deciding when to stop.

In fact, the only example that the *PMC Corp.* court provides of a situation in which a contract is "sufficiently exclusive" to pass muster is not the situation that is presented in the case.<sup>217</sup> The example exists when the contract provides that the requirements buyer will purchase up to a certain amount of product from the seller. The contract at issue in *PMC Corp.*, however, did not provide that the defendant would purchase any specific (or even estimated) amount of product from the plaintiff. To the contrary, the agreement expressly states that "[the defendant] cannot commit to exclusive purchase of [its] total [needs] from [the plaintiff]."<sup>218</sup> There is, in short, no evidence that the defendant promised to purchase any of its requirements, let alone up to a specific portion of its requirements, from the plaintiff.<sup>219</sup> Despite its explanation, the court in *PMC Corp.* could not have rendered its decision on the basis of the exception that it articulated.

The court in *PMC Corp.* was either stretching the exception well past its breaking point or simply couching its determination that exclusivity is a poor validating principle in terms that it thought necessary to harmonize its decision with past precedent. In any event,

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tified goods, was sufficient to be a requirements contract); *City of Louisville v. Rockwell Mfg. Co.*, 482 F.2d 159 (6th Cir. 1973) (finding that an agreement stating that seller would furnish part of the buyer's requirements for parking meters for one year and listing a quantity of approximately 7650 parking meters is a requirements contract).

<sup>216</sup> *PMC Corp.*, 797 A.2d at 130

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 127.

<sup>219</sup> The agreement states only that, presuming pricing, delivery, rebates and service are good, the plaintiff could "expect to receive a major share" of the defendant's business. *Id.* The term "major share," however, is not defined, and given the conditions placed on this expectation, it is evident that the parties anticipated that the defendant would retain its discretion to do business with other parties.

however, the *PMC Corp.* court was clearly unwilling to invalidate an agreement that had been negotiated and bargained for by the parties. A few other courts around the country have, likewise, decided that exclusivity is not a prerequisite to the enforceability of open-quantity agreements.<sup>220</sup> These courts, following in the path paved by Professor Brown, have recognized the common-sense wisdom of delinking exclusivity and enforceability in open-quantity contracts. Nevertheless, like Professor Brown and the court in *PMC Corp.*, these courts have not yet articulated a completely theoretically satisfactory basis for their decisions. The next part aims to fill in that hole.

### III. A FRESH LOOK IS ALWAYS A FRESH HOPE: A PROPOSAL FOR VALIDATING ALL OPEN-QUANTITY AGREEMENTS

Karl Llewellyn once said, when explaining what might be considered the fundamental tenant of his jurisprudential ethos, that a “fresh look is always [a] fresh hope.”<sup>221</sup> Professor Caroline Brown’s proposal for validating open-quantity agreements and the decisions discussed in the previous section are such a fresh look at the law of open-quantity agreements. Professor Brown’s work and these cases compellingly suggest that courts should be willing to validate all open-quantity agreements, not merely exclusive open-quantity agreements. Unfortunately, to date, this suggestion has not been heeded by the majority of courts and commentators.

What is necessary to complete the work started by Professor Brown and the few courts who have escaped the rigidity of pre-Code case law is analysis of the role that Karl Llewellyn’s notion of agreement plays in the formation of contracts, including open-quantity contracts, under the UCC. It is my contention that Professor Brown’s fundamental thesis is correct—the obligation of good faith performance under the UCC holds a quantity-determining party to the terms

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<sup>220</sup> See, e.g., *Gen. Motors Corp. v. Paramount Metal Prods. Co.*, 90 F. Supp. 2d 861, 873–74 (E.D. Mich. 2000) (finding that Michigan’s version of section 2-306 “expresses a legislative intent to enforce both exclusive and non-exclusive requirements contracts”); *Advanced Plastics Corp. v. White Consolidated Indus.*, No. 93-2155, 1995 WL 19379, at \*3 (6th Cir. Jan. 18, 1995) (“[A] requirements contract does not necessarily compel an agreement that the buyer purchase exclusively from the seller.”); *Plastech Eng’g Prod. v. Grand Haven Plastics, Inc.*, No. 252532, 2005 WL 736519, at \*6–\*7 (Mich. Ct. App. Mar. 31, 2005) (holding that under Michigan law, section 2-306 provides for the enforceability of both exclusive and nonexclusive open-quantity agreements); *Metal One Am., Inc. v. Center Mfg., Inc.*, No. 1:04-CV-431, 2005 WL 1657128, at \*4 (W.D. Mich. July 14, 2005) (noting that under Michigan law, section 2-306 provides for the enforceability of both exclusive and nonexclusive open-quantity agreements).

<sup>221</sup> KARL LLEWELLYN: THE COMMON LAW TRADITION DECIDING APPEALS 510 (1960).



of its bargain even in nonexclusive open-quantity agreements. But, unlike Professor Brown, I do not believe that good faith operates (or perhaps more precisely, I do not believe that it needs to operate) to validate open-quantity agreements. Instead, I contend that the entire notion of mutuality of obligation is antithetical to the Code's core concept of agreement. Courts do not need to find mutuality of obligation, either through exclusivity or good faith. Instead, to validate a contract under the Code, all a court is required to do is determine whether or not an agreement has been reached by viewing the deal struck by the parties in the commercial context in which it was forged.

To understand the Code's revolutionary concept of agreement, it is necessary to recount, albeit briefly, the legal-realistic underpinnings of the Code. Following this recitation, I turn to an exegesis of the Code's conception of agreement, detailing both the theoretical structure and the specific UCC provisions regarding agreement. Finally, I provide a brief summary of how the Code concept of agreement obviates the need for analysis of mutuality of obligation and thus paves the way for validation of all open-quantity agreements, including nonexclusive open-quantity agreements, so long as they are the product of true bargaining between parties.

A. *The Legal-Realistic Foundations of the UCC*

As already briefly discussed, the UCC was drafted in large part to align contract law with contract practice.<sup>222</sup> Karl Llewellyn, the lead drafter of the UCC, said only "looking at facts closely could save [all law, including commercial law] from chaos."<sup>223</sup> Legal norms should, in Llewellyn's view, at least temporarily "divorce . . . Is and Ought."<sup>224</sup> The law, he maintained, was a "means to social ends" and as such needed "constantly to be examined for its purpose, and for its effect" to see "how far it fits the society it purports to serve."<sup>225</sup>

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<sup>222</sup> See *infra* section I(E).

<sup>223</sup> LLEWELLYN, *supra* note 221, at 751. In addition to being the principle architect of Article 2 of the UCC, see *supra* note 19, Karl Llewellyn was one of the founders of the legal-realist movement. Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN. ST. L. REV. 397, 413 (2004) ("Llewellyn was also one of the founding fathers of the Legal Realist movement of the 1930s."); Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 470 (1988); Edward A. Purcell, Jr., *American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM HIST. REV. 424, 426 (1969).

<sup>224</sup> Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

<sup>225</sup> *Id.*

This approach to law has a decidedly anthropological character.<sup>226</sup> For Llewellyn, this anthropological approach was especially appropriate in the area of commercial law.<sup>227</sup> Merchants, in his view, formed discrete groups, each with their own customs and practices. Rather than focusing on the reasons for court decisions, Llewellyn advocated an approach that focused on the “working rules”<sup>228</sup> that

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<sup>226</sup> Professor Danzig has noted how Llewellyn’s view of the lawyer’s role in society corresponded to the methods of anthropology:

For Llewellyn the flow of the attorney-client relationship is in the opposite direction. Since the correct result is imminent in a situation, the client is better placed to perceive it than the lawyer. The lawyer’s function is to learn from the client: to become informed about the situation, to cull the information he has gathered, to organize it, and to translate it into terms that will inform the court. (Note again how analogous this position is to that of the anthropologist.)

Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 626 n.16 (1975).

<sup>227</sup> See DiMatteo, *supra* note 223, at 413 (“Llewellyn saw the symbiotic nature of custom and law as especially pronounced in commercial law.”) (citing BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* 118 (1997) (“Commercial transactions are the one area where there is often a match between lived social norms (actually followed business practices) and the norms enforced by legal institutions.”)).

<sup>228</sup> Llewellyn contrasted the “working rules” of an organization, or the actual rules that the organization followed in its practices, with “paper rules,” or the rules that the organization purported to follow but that existed only on paper. “Paper” rules are what have been treated, traditionally, as rules of law: the accepted *doctrine* of the time and place—what the books there say ‘the law’ is.” Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 448 (1930).

The economist John R. Commons coined the term “working rules.” See JOHN R. COMMONS, *THE ECONOMICS OF COLLECTIVE ACTION* 125–26 (1950). His original use of the term came from his experience in the printing trade, where it was used to refer to the rules that actually governed the work and the workers on the shop floor. Commons gives the following definition of “working rules”:

Working rules are the way in which the management or administration of collective action guides the acts of subordinate individuals. There is a hierarchy of collective action, and history reveals how it came about. If economic science had started with corporations and unions instead of individuals, it might have started with the rules of action which apportion to each of the associated individuals the kind and amount of work which each should do, the kind and limits of transactions upon which each should enter, and the shares of the joint product to be apportioned to each. These apportionments are made by the working rules of the concern

*Id.* To Commons, the transaction was the fundamental unit of society. The transaction, however, did not take place in a vacuum between two wealth-maximizing individuals. Rather, it developed under the working rules of the group. According to Commons, collective action proceeds “not from the intellectual logic of philosophers and economists, but from the arguments, debates, conferences, compromises, mass meetings, agreements, disagreements, negotiations, propaganda—among ordinary

were reflected in each group's customs and practices. Llewellyn believed that searching for the patterns of working rules in specific commercial contexts provided the best source for commercial law, which should, for the most part, merely reify what business persons were actually doing.<sup>229</sup> Llewellyn, in fact, held the strong view that commercial parties, not courts, should determine the terms of their contracts. Business persons should be permitted to make "any agreement they please"<sup>230</sup> because the "animals probably know their own business better than their keeper [does]—a theory which has not only charm but virtue, most of the time."<sup>231</sup>

This notion that law should in general recognize the bargains of commercial actors through reference to their actual dealings reflects, at least in part, the historic shift from discrete and insular contractual moments to long-term commercial relationships previously discussed.<sup>232</sup> Commercial parties at the turn of the century found a

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people themselves, like businessmen, laboring men, farmers, or professional classes, when forced or persuaded to consider their common interests." *Id.* at 28–29.

It is worth noting that Llewellyn credited Commons as being one of the major intellectual influences on his work. See Karl N. Llewellyn, *The Effect of Legal Institutions upon Economics*, 15 AM. ECON. REV. 665, 665 n.1 (1925) ("The present paper makes little claim to originality in its details. Much of the synthesis, too, has been indicated by various writers from time to time. The author is particularly conscious of indebtedness to Sumner, Holmes, Veblen, Commons, and Pound; but the borrowings are legion and often unconscious.").

<sup>229</sup> See Karl Llewellyn, *Memorandum to Executive Committee on Scope and Program of the NCC Section of Uniform Acts, "Possible Uniform Commercial Code"* (1940), reprinted in TWING, *supra* note 19, at 290; GRANT GILMORE, *THE AGES OF AMERICAN LAW* 71 (1977). It is important to acknowledge, however, as Alan Schwartz points out, Llewellyn was not a rule skeptic. Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 12, 14–17 (2000). Llewellyn was, in fact, committed to *ex ante* default rules empirically grounded in industry practice. *Id.*; see also DiMatteo, *supra* note 223, at 414 ("Calling Llewellyn a rule skeptic . . . is a misconstruction of [his] moderate position[.]") He "saw law's core as rule-based but the rigidity of the rules and their application needed to be infused with flexibility. The rules themselves need to be formulated to allow for varied responses to ever-changing social reality." *Id.* at 415. Llewellyn, in essence, located rules primarily by reference to the commercial practices of business persons rather than in the rarified abstractions of classic contract theories.

<sup>230</sup> Llewellyn was not proposing, of course, complete freedom of contract. Indeed, Llewellyn supported stalwart consumer protection laws and other policing devices in contract to prevent unjust enforcement of bargains. See, e.g., Carol Swanson, *Unconscionable Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. REV. 359, 388 (2001) ("When Karl Llewellyn first pieced together the UCC half a century ago, he believed that consumers should receive heightened protections over other contracting parties.").

<sup>231</sup> Karl Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 403 (1937).

<sup>232</sup> See discussion *supra* Part I(A).

need to engage in more than the occasional discrete transactions contemplated by traditional contract law.<sup>233</sup> Instead, commercial parties began forging long-term relationships that became, in many instances, more important than the individual exchange transactions occurring at a given moment.<sup>234</sup> As a result, “the major importance of legal contract,” Llewellyn proclaimed, “is to provide a framework for well-nigh every type of group organization and for well-nigh every type of passing or permanent relation between individuals and groups.”<sup>235</sup> The task of contract law had ceased to be one of simply enforcing one-shot bargains and had become that of providing a structure for cooperative conduct.<sup>236</sup> Because actual businesspersons were no longer operating under the classic contract law paradigm of strangers transacting in a perfect market,<sup>237</sup> there was a need for a paradigmatic shift.

At least from Llewellyn’s perspective, the UCC was drafted to make that shift. The UCC operates largely under the premise that “courts should enforce private ordering arrangements.”<sup>238</sup> Aligning with its legal-realist origins, the Code was designed “to give greater

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<sup>233</sup> Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 460 (1988); see also LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 88–89 (1965) (noting that new pressures at the turn of the century encouraged businesses to enter into agreements anticipating on-going relationships with parties across the country and the world); Bruckel, *supra* note 18, at 127–28 (stating that under existing law, the only relief afforded to contracting parties for breaches was “generally all-or-nothing and resort to it deprived both parties of further advantage under the contract. Flexibility, facilitating less cataclysmic responses to unpredicted changes in circumstances, was needed.”).

<sup>234</sup> As Professor Richard Speidel has noted:

[T]he long-term supply contract is a bit more complex than the “one-shot” sale of Dobbin or Blackacre. Beyond its obvious economic importance, it complicates, and perhaps prevents, complete risk planning at the time of contracting. Complete consent is a mirage. . . . At the same time, specialized uses of the contract will increase both the cost of terminating the relationship and the likelihood that the market will be unable to provide an adequate substitute for either party.

Richard Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U. L. REV. 369, 375 (1981); see also Richard Speidel, *Excusable Nonperformance in Sales Contracts: Some Thoughts About Risk Management*, 32 S.C. L. REV. 241 (1980).

<sup>235</sup> Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 736–37 (1931).

<sup>236</sup> George K. Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1, 21–22 (1932).

<sup>237</sup> See Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 812 (2000) (describing classic contract law as static and based on rational-actor psychology).

<sup>238</sup> See, e.g., Michael L. Rustad, *Making UCITA More Consumer-Friendly*, 18 J. MARSHALL J. COMPUTER & INFO. L. 547, 556 (1999).

legal recognition and enforcement to sales contracts.”<sup>239</sup> In particular, Article 2 was meant to alleviate “the apparent rigidity and incompatibility [of pre-Code law] with commercial norms”<sup>240</sup> by adopting “pragmatic rules that reflect the commercial practices that business people actually employ.”<sup>241</sup> As discussed in the following section, the legal-realist goals of the UCC were primarily realized through its prioritization of enforcement of commercial contracts over the need for definite terms or other formalisms.

### B. *Llewellyn's Concept of Agreement*

Karl Llewellyn understood that meaning was inseparable from context. “No language stands alone,” he once declared, “[i]t draws life from its background.”<sup>242</sup> Although a number of Llewellyn's writings describe the importance of context, the UCC, easily Llewellyn's most lauded project, rests on the premise that the existence and meaning of an agreement are bound up with the identity of the parties to that agreement as well as the circumstances surrounding their encounter. So conceived, the UCC represents a dramatic break from the classical conception of contract, which strove for scientific precision in the deduction and application of acontextual rules.<sup>243</sup>

<sup>239</sup> *Id.* The Code, in fact, identifies one of its primary goals as being that of fostering the “continued expansion of commercial practices.” U.C.C. § 1-102(2) (b) (2000).

<sup>240</sup> Larry T. Garvin, *Credit, Information, and Trust in the Law of Sales: The Credit Seller's Right of Reclamation*, 44 UCLA L. REV. 247, 263 (1996).

<sup>241</sup> Edward L. Rubin, *The Code, the Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 18 (1997); see also Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1, 5 (“Laws opposed to [commercial] practice are unlikely to change practice, but will, when haphazardly and occasionally applied, condemn what should be encouraged.”).

<sup>242</sup> KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 79 (1951).

<sup>243</sup> Classic contract law argued that law, like science, could be deduced from theoretical postulates. See DiMatteo, *supra* note 223, at 417 (citing CHRISTOPHER C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* 12 (1871)). Various associated with Samuel Williston, Christopher Langdell, and Joseph Beale, among others the classical model of contract was “[a]bstract conceptualism or formalism.” *Id.* Melvin Eisenberg has described the classical model of contract as:

axiomatic and deductive. It was objective and standardized. It was static. It was implicitly based on a paradigm of bargains made between strangers transacting on a perfect market. It was based on a rational-actor model of psychology.

Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 805 (2000); see also Melvin A. Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005, 1008–09 (1998) (“The teachings of [the classic school] were based on the premise that contract law, like geometry, could be developed by deduction from axiomatic rules. Like geometry, classical contract law tended to be static rather than dynamic, and binary rather than continuous.”). Lawrence Friedman has described the classical model of contract this way:

Indeed, Llewellyn believed that the UCC would replace the classic offer-acceptance-consideration model of contract with a pragmatic approach<sup>244</sup> that would be rooted in the actual practices of businesspersons. For Llewellyn, “the meaning of a sales contract depend[ed] upon the commercial and historical context within which it is made and executed.”<sup>245</sup> But before a court can even get to the question of meaning, it must first decide whether a “real” contract exists. As discussed throughout this Article, it is the existence question that has historically prevented open-quantity contracts from being enforced. Courts have found that unless exclusive, an open-quantity contract lacks mutuality of obligation and thus never comes into legal existence.<sup>246</sup>

Llewellyn’s concept of agreement, however, fuses questions related to the existence and meaning of a contract. Codified in section 1-201(3) of the UCC, this concept provides that an agreement “means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance.”<sup>247</sup> The weight accorded to any one aspect of the context of the agreement is not de-

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[T]he “pure” law of contract is an area of what we can call abstract relationships. “Pure” contract doctrine is blind to details of subject matter and person. It does not ask who buys and who sells, and what is bought and sold . . . . Contract law is abstract—what is left in the law relating to agreements when all particularities of person and subject matter are removed . . . . The abstraction of classical contract law is not unrealistic; it is a deliberate renunciation of the particular, a deliberate relinquishment of the temptation to restrict untrammelled individual autonomy or the completely free market in the name of social policy.

LAWRENCE FRIEDMAN, *CONTRACT LAW IN AMERICA: SOCIAL AND ECONOMIC CASE STUDY* 20–22 (1965).

<sup>244</sup> Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 *TEX. L. REV.* 169, 170 (1989) (describing Llewellyn as “[f]undamentally a pragmatist”); accord Twining, *supra* note 19, at 423 n.130 (highlighting Llewellyn’s favorable citation to John Dewey’s philosophy).

<sup>245</sup> See John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 *LOY. L.A. L. REV.* 263, 268–69 (2000).

<sup>246</sup> See, e.g., E. ALLAN FARNSWORTH, *CONTRACTS* § 3.27 (4th ed. 2004); JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 38 (4th ed. 2001); PERILLO, CALAMARI AND PERILLO, *supra* note 156. The Restatement (Second) of Contracts adopts the indefiniteness doctrine as follows: “Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.” *RESTATEMENT (SECOND) OF CONTRACTS* §33(1) (1978). The rule is justified as “reflect[ing] the fundamental policy that contracts should be made by the parties, not by the courts.” *Id.* § 33(2) cmt. b.

<sup>247</sup> U.C.C. § 1-203(3) (2000).

terminated through any preexisting rule.<sup>248</sup> Instead, “Llewellyn’s concept of agreement . . . integrated trade usage and course of dealing with the written terms of the parties. Under the Code, a court cannot answer the question of what the parties meant by their agreement without first understanding the meaning of the commercial practice from which their agreement arose.”<sup>249</sup> The logic of the Code is, in other words, based on the notion that “if a contract can be defined by shared expectations, and if those expectations were created by trade usage, then the contract should be defined by trade usage.”<sup>250</sup>

To find whether an enforceable contract exists under the Code, a court merely needs to be assured, through a flexible weighing of the circumstances surrounding their encounter, that contracting parties intended to create a contract. If they did, then courts may find an enforceable contract, even if one or more terms that the classic common law of contract would consider crucial are omitted.<sup>251</sup> It is not necessary to identify the precise moment a contract was formed in order for it to be enforceable,<sup>252</sup> and the acceptance need not be a mirror image of the offer.<sup>253</sup> Formalities, such as mutuality of obligation, are not needed; all that is necessary is that the parties have struck a bargain.<sup>254</sup>

Distilling the question of enforceability to whether the parties entered into a bargain requires a sensitivity to context, to be sure, but it is not a purely subjective endeavor. To the contrary, the search aims to find the reasonable expectations of commercial parties. Llewellyn understood that parties develop expectations over time against the background of commercial practices and dealings.<sup>255</sup> To ignore

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<sup>248</sup> Patterson, *supra* note 244, at 191.

<sup>249</sup> *Id.* at 192.

<sup>250</sup> 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, 781 (1986).

<sup>251</sup> U.C.C. § 2-204(3). Indeed, a contract can be formed even if terms in the acknowledgement are different from or add to the terms in the purchase order. *See id.* § 2-207 (2000).

<sup>252</sup> U.C.C. § 2-204(2).

<sup>253</sup> *Id.* § 2-207.

<sup>254</sup> The Code, of course, provides mechanisms, such as unconscionability, for protecting parties against bargaining improprieties. Despite these protections, however, many courts and commentators have remained “magicked . . . [by] the logic of Wonderland,” at least with respect to open-quantity contracts. Karl Llewellyn, *On Our Case-Law of Contract: Offer and Acceptance*, 48 Yale L.J. 1, 31–32 (1938) (describing the classic contract notion of offer-acceptance-consideration as a “Rabbit-Hole down which we fell into the Law”).

<sup>255</sup> Patterson, *supra* note 244, at 199.

these practices and dealings would result in courts undermining the actual and reasonable expectations of contracting parties.<sup>256</sup>

It is noteworthy that some variation of this contextualist argument has been present in a variety of contracts literature over the last fifty years; its advocates have included such luminaries as Wigmore,<sup>257</sup> Corbin,<sup>258</sup> and Justice Traynor.<sup>259</sup> But it is perhaps the work of the sometimes legal scholar Stanley Fish that may best explicate the process of determining the existence and meaning of the parties' bargain and best explain why this process need not devolve into a purely subjective quest.<sup>260</sup>

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<sup>256</sup> *Id.*

<sup>257</sup> "The fallacy [of plain meaning] consists in assuming that there is or ever can be some one real or absolute meaning." 9 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2462(1) (1981).

<sup>258</sup> "[S]ome of the surrounding circumstances always must be known before the meaning of the words can be plain and clear; and proof of the circumstances may make a meaning plain and clear when in the absence of such proof some other meaning may also have seemed plain and clear." 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 542 (1960) (footnote omitted). Additionally, the note to the Restatement (Second) confirms Corbin's contextualist position:

It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties.

RESTATEMENT (SECOND) OF CONTRACTS § 212 cmt. b. (1981)

<sup>259</sup> "A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained." *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968) (Traynor, C.J.).

<sup>260</sup> Turning to a literary critic for help in articulating a basis for the Code's jurisprudence is not as unusual as it might seem. As Professor Dworkin has pointed out, "legal practice is an exercise in interpretation . . . . [W]e can improve our understanding of law by comparing legal interpretation with interpretation in other fields of knowledge, particularly literature." Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 527 (1982). *But see* RICHARD POSNER, LAW AND LITERATURE 209-11 (1988) (positing that the topic of interpretation has "cooled" and exhausted itself because the whole enterprise "comes down to two propositions": interpretation is always relative and governed by purpose and "interpretation is not much, and maybe not at all, improved by being made self-conscious, just as one doesn't become a better reader by studying linguistics").



In his famous book *Is There a Text in This Class?*,<sup>261</sup> Fish traced the history of his own contributions to a debate that had been raging in literary circles for years: does meaning reside in the text or is it constructed by the reader of the text?<sup>262</sup> Fish was initially convinced that the “structure of the reader’s experience” did not evolve from the meaning of the text but rather was the meaning of the text.<sup>263</sup> Fish feared, however, that by locating meaning in the response of the reader, he would be accused of essentially having given “up the possibility of saying anything that would be of general interest” because each reader could have a unique and different response to a text, and a text could therefore have as many meanings as there are readers.<sup>264</sup>

Ultimately, in his quest to avoid this criticism and explain how a postmodernist like himself who “preach[ed] the instability of the text and the unavailability of determinate meanings”<sup>265</sup> could explain how different people could find the same meaning in a given text,<sup>266</sup> Fish resorted to the concept of the “interpretive community.”<sup>267</sup> Fish later described an interpretive community as:

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<sup>261</sup> STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

<sup>262</sup> See *id.* at 1. As Fish points out, the terms of this debate had been established at least by the 1940s in a pair of highly influential articles by William K. Wimsatt and Monroe C. Beardsley, *The Intentional Fallacy* and *The Affective Fallacy*. See *id.* at 1–2 (recognizing the impact of Wimsatt and Beardsley’s concepts of intentional and affective fallacies); see also WILLIAM K. WIMSATT & MONROE C. BEARDSLEY, *THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY* (1954) (reprinting these articles). Wimsatt and Beardsley argued that the meaning of a text could only be discovered through a close reading of the text itself; recourse to anything outside of the text was at best futile and at worst distorting. On the one hand, Wimsatt and Beardsley argued that the intentions of an author were impossible to discover and thus could not provide a basis for discerning the meaning of a text (any effort to rely on authorial intent when seeking the meaning of a text constituted the “intentional fallacy.”). See generally *id.* at 3–20. On the other hand, they argued that responses of a reader were too variable and unpredictable to provide any useful basis for discovering the meaning of a text (any effort to rely on the responses of a reader when seeking the meaning of a text constituted the “affective fallacy.”). See generally *id.* at 21–40.

<sup>263</sup> FISH, *supra* note 261, at 2; see also WIMSATT & BEARDSLEY, *supra* note 262 at 29 (describing the meaning of a text as an event that “is happening between the words and the reader’s mind”).

<sup>264</sup> FISH, *supra* note 261 at 4.

<sup>265</sup> *Id.* at 305.

<sup>266</sup> *Id.* at 303–04.

<sup>267</sup> Fish was not the first to develop a theory of interpretive communities. As Andrew Goldsmith points out, “[i]n terms of intellectual pedigree, the notion of a community of interpreters can be traced to the works of Josiah Royce, Charles Peirce, . . . Ludwig Wittgenstein [and Thomas Kuhn].” Andrew Goldsmith, *Is There Any Backbone in This Fish? Interpretive Communities, Social Criticism, and Transgressive Legal Practice*, 23 LAW & SOC. INQUIRY 373, 386 (1998).

[N]ot so much a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community's enterprise, community property . . . such community-constituted interpreters would, in their turn, constitute, more or less in agreement, the same text, although the sameness would not be attributable to the self-identity of the text, but to the communal nature of the interpretive act.<sup>268</sup>

Fish's notion of interpretive communities suggests that peoples' understanding of texts, and indeed of facts,<sup>269</sup> is constructed by the communities of which they are a part. This does not mean, however, that Fish is suggesting that meaning is relegated to subjectivity or relativism. It is not relativistic because "a shared basis of agreement at once guid[es] interpretation and provid[es] a mechanism for deciding between interpretations."<sup>270</sup> It is not subjective because the interpretive strategies by which meanings are constructed are "social and conventional."<sup>271</sup>

For the purposes of this article, Fish's concept of interpretive communities lends support to the Code's contextual approach to contract formation. The Code concept of agreement expands the range of materials from which litigants can fashion arguments about the existence and meaning of their commercial practices, but as Fish notes, it does not result in subjective anarchy. "When disagreement arises over the reasonableness of expectations against the background of an ongoing practice . . . the parties offer a factfinder narrative reconstruction of the point of the practice. In short, each side tells a story to support its claim that its expectation is, under the circumstances, reasonable."<sup>272</sup>

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<sup>268</sup> STANLEY F. FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 141 (1989)

<sup>269</sup> See FISH, *supra* note 261 at 338

Disagreements cannot be resolved by reference to the facts, because the facts emerge only in the context of some point of view . . . disagreements must occur between those who hold (or are held by) different points of view, and what is at stake in a disagreement is the right to specify what the facts can hereafter be said to be. Disagreements are not settled by the facts, but are the means by which the facts are settled.

*Id.*

<sup>270</sup> *Id.* at 317.

<sup>271</sup> *Id.* at 331 ("[T]he 'you' who does the interpretive work . . . is a communal you and not an isolated individual.").

<sup>272</sup> Patterson, *supra* note 244, at 204.

Under the Code, the narratives that parties can create regarding the existence of a contract are not constrained by abstract rules like mutuality of obligation. Accordingly, nonexclusive open-quantity agreements are capable of being validated so long as there is sufficient evidence to persuade a factfinder that the parties actually bargained for such a contract.

CONCLUSION: HOPE FOR THE VALIDATION OF OPEN-QUANTITY  
AGREEMENTS UNDER THE CODE

The search for principles applicable to gap filling, including filling in quantity gaps in a contract, must start with the insight that contracts are a cooperative venture, requiring some level of collaboration between the parties so that they can reach a bargain. Contracts are not distinct legal instruments that exist independently of relations between the parties, but rather, they are the aggregate of these relations,<sup>273</sup> only some of which are articulated. Furthermore, the expectations of the parties cannot be understood except by reference to the background out of which those expectations arose.<sup>274</sup>

“You don’t have to be Ludwig Wittgenstein or Hans-Georg Gadamer”<sup>275</sup> to see that the Code’s contextualist approach to contract

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<sup>273</sup> In *Market Street Associates v. Frey*, for instance, the Seventh Circuit Court wrote: Before the contract is signed, the parties confront each other with a natural wariness. . . . Afterwards, the situation is different. The parties are now in a cooperative relationship the costs of which will be considerably reduced by a measure of trust. . . . [C]ontracts do not just allocate risk. They also . . . set in motion a cooperative enterprise.

941 F.2d 588, 594–95 (7th Cir. 1991).

<sup>274</sup> See, e.g., *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 795 (9th Cir. 1981).

<sup>275</sup> *Cont’l Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union* (Indep.) Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990) (“You don’t have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities.”). It is doubtful that the Seventh Circuit was seriously citing to Wittgenstein as a proponent of interpretive communities, although Wittgenstein demonstrated that communication is intelligible only by virtue of a community’s shared conventions for understanding words in context. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 134–42 (Gertrude Elizabeth Margaret Anscombe trans., 2d ed. 1958) (1945) (emphasizing the significance of the way words are used in linguistic interactions within a relevant community). Indeed, Wittgenstein’s later thought represents a break with the philosophical tradition starting with Descartes in that he locates meaning not within persons but outside them, in public practices. See Barry Stroud, *Mind, Meaning, and Practice*, in *THE CAMBRIDGE COMPANION TO WITTGENSTEIN* 299 (Hans Sulga & David G. Stern eds., 1996). The Seventh Circuit was, instead, likely using his name metaphorically to refer to someone with “charismatic genius.” See DAVID EDMONDS AND JOHN EIDINOW, *WITTGENSTEIN’S POKER: THE STORY OF A TEN-MINUTE ARGUMENT BETWEEN TWO GREAT PHILOSOPHERS* 18–19 (2001):

formation does away with the need to satisfy classic prerequisites to valid contracts. The narrow thinking that prevented courts from enforcing nonexclusive open-quantity agreements reflects the classic contract assumption that the bargain of the parties is less important than abstracted dogma. The narrow focus of courts relying on pre-Code case law has prevented them from realizing that the bargain of the parties is simply one species of action, deriving meaning in context of other action. The failure of courts to validate nonexclusive open-quantity agreements demonstrates the futility of pretending that uniformity can exist between pure, rarified theory and transactional realities. Contract law under the UCC should be a matter of informed and organized, but essentially practical strategies, to find, interpret, and enforce the bargains of sophisticated commercial parties.

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[Wittgenstein] might also be unique among philosophers in having become part of hard-pressed journalists' shorthand, with his name standing in for 'charismatic genius.' A nineties stylesetter was described as a 'restaurateur with the mesmeric hold of a Wittgenstein.' 'You don't have to be Wittgenstein to understand . . .' offers an alternative to 'You don't have to be a rocket scientist. . . .'

*Id.*