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CREDITORS' IMAGINED COMMUNITIES AND THE UNFETTERED EXPANSION OF SECURED LENDING

HEATHER LAUREN HUGHES†

ABSTRACT

While scholars debate the fairness and efficiency of full priority secured lending and asset securitization, lawmakers pass statutes that only expand these types of financing. Lawmakers seem compelled to err in favor of sophisticated secured creditors and against creditors in weak bargaining positions. This article addresses why non-adjusting creditors remain on the sidelines as lawmakers embrace legislation encouraging asset securitization and expanding UCC Article 9. It argues that non-adjusting creditors' positions must be understood in relation to a socio-political climate steeped in deference to the needs of institutional creditors. Contemporary media on finance and business evidence this socio-political climate. There is an acute lack of critical distance from financing activities that pervades journalism in the United States. This lack of critical distance in public discourse on finance is a form of disregard of economic inequality among Americans. This article hypothesizes that disregard of inequality in business reporting indicates an imagined community of investors with which even disadvantaged creditors identify. Widespread identification with an imagined community of investors enables secured creditors to present unfettered expansion of business credit as consonant with public interest both within the UCC drafting process and before the state legislatures. Legal scholars have failed to take issues of broad socio-political climate into account in analyses of how and why the law continues to expand secured creditors' domain.

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INTRODUCTION

The major overhaul of Article 9 of the Uniform Commercial Code ("UCC")[1] that concluded in 2002 went unreported in the mainstream media. Lawmakers, reporters and UCC scholars seem to regard Article 9 as a technical statute inappropriate for widespread public debate.[2] In addition, many scholars find that Article 9 is drafted in an insular process[3] dominated by secured creditors that disregards third party effects of secured transactions.[4] This article presents an alternative view of the politics[5] that enable secured creditors' control over current laws governing secured transactions. This article rejects the notion that secured creditors' control results primarily from the insularity of the UCC drafting process or the obscurity or technical complexity of the code.

A range of scholars have voiced fairness, efficiency, and moral hazard concerns surrounding central features of Article 9.[6] These scholars

1. Article 9 of the UCC governs debt financing that is secured by personal property. U.C.C. § 9-101, cmt. 1 (2002). It has revolutionized finance by providing clear rules under which lenders can take security interests in an unprecedented range of collateral. The UCC was originally promulgated in 1951. The Permanent Editorial Board approved revisions to Article 9 in 1971 and again in 1999. Citations herein to the UCC are to the 2002 official text.

2. *See* Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, U. ILL. L. F. 321, 327 (1962), *quoted in* Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 632 (1998).

3. The UCC is produced by joint efforts of the American Law Institute (ALI) and the National Conference of Commissioners of Uniform State Laws (NCCUSL). The ALI, generally, creates restatements of law. The NCCUSL drafts uniform laws in various fields. To revise the UCC, the ALI and NCCUSL agree to prepare a report on the article of the code in question. The report is prepared by a study group appointed by the ALI. The study group sends its report to the ALI and NCCUSL. The NCCUSL then appoints a drafting committee to reformulate the report into statutory language. *See, e.g.*, Robert E. Scott, *The Politics of Article 9*, 80 VA. L. REV. 1783, 1804-06 (1994) [hereinafter *Politics*].

4. *See infra* note 6.

5. This article defines politics broadly, in terms of the dominant values and socio-political climate that drive public policy.

6. These scholars argue that Article 9 disadvantages unsecured creditors and other third parties affected by secured transactions. Although they arguably consent to be creditors, employees

lament that Article 9 allows a secured creditor to recover all of the property of a debtor when the debtor becomes insolvent, while non-adjusting creditors like employees or tort claimants can be left with nothing.[7] On the other hand, proponents of full priority secured credit[8] argue that Article 9 produces efficiencies and facilitates access to essential sources of capital for businesses.[9] Neither group can establish whether or not full priority secured lending is efficient. Both concede that only empirical study can answer this question and that a conclusive empirical study is unlikely.[10] Article 9 dissenters state that even if full priority were proven efficient it would continue to raise serious fairness and distributive jus-

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generally cannot adjust their compensation to reflect the risk that a secured creditor will be paid before them – they are "non-adjusting creditors." Tort claimants, on the other hand, do not choose to be creditors at all – they are "non-consenting creditors." Since they are non-consenting creditors, they also, of course, are non-adjusting creditors. *See* Lynn M. LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1953-54 (1994); Elizabeth Warren, *Making Policy with Imperfect Information: The Article 9 Full Priority Debates*, 82 CORNELL L. REV. 1373, 1374-76 (1997); Lucian Arye Bebchuck & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Credit in Bankruptcy*, 105 YALE L. J. 857, 865 (1996) (analyzing economic costs of full priority secured credit to show that full priority can result in inefficient contracting between borrowers and lenders and other efficiency costs); *see also* Lucian Arye Bebchuck & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*, 82 CORNELL L. REV. 1279, 1287-89 (1997); *see* Part I *infra* for a summary of the current state of the relationship between Article 9 and unsecured creditors. The unsecured creditors on which this article focuses are those who do not consent to, or adjust expected returns in response to, the creation of a secured credit facility.

7. *See* Lynn M. LoPucki, *The Politics of Article 9: The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1899 (1994) (stating that "security is an agreement between A and B that C take nothing.") Arguments that full priority is justified under freedom of contract principles fail to explain why two parties – a debtor and secured creditor – should be permitted to contract away the rights of third parties such as unsecured creditors with no chance to consent or adjust their return. Also, the UCC explicitly overrides contractual restrictions on assignment contained in certain accounts receivable, in franchise rights, licenses, and in permits. Contractual restrictions on assignment do not preclude Article 9 security interests. However, secured parties may not enforce their security interests in intangibles that contain a prohibition on assignment in a way that compromises the interests of other parties to the intangibles. Note that I am not sure how the UCC committee envisions determining "compromise of interest." It seems that if a party contracted to prohibit assignment, then that party had an interest in prohibiting assignment which is compromised by an Article 9 secured creditor's disregard of the clause. The fact that Article 9 overrides restrictions on assignment indicates a policy decision to facilitate secured credit despite concerns of third parties.

8. "Full priority secured credit" refers to debt financing in which the lender takes as collateral a "floating lien" – an assignment of all of the business's present and future assets – and has priority over other parties with claims to those assets for the full value of its loan to the business. If a secured creditor follows the prescribed steps for perfection of its security interest set forth in Article 9, then it can recover its collateral before all subsequent lien creditors, including a bankruptcy trustee. "Floating lien" is a short hand name in UCC parlance for a series of Article 9 provisions, the most important of which are: § 9-204(c) permitting future advances in financing, § 9-323 giving security for future advances priority as of the date of the original financing, § 9-204(a) permitting security interests in collateral acquired after completion of a financing, and § 9-205 validating arrangements under which the debtor has the right to transfer collateral. *See infra* Part I.A for a summary of how the 1999 revisions to Article 9 expand full priority secured credit.

9. *See, e.g.*, James J. White, *Work and Play in Revising Article 9*, 80 VA. L. REV. 2089, 2089-90 (1994).

10. *See, e.g.*, Warren, *supra* note 6, at 1373-74.

tice concerns.[11] Supporters of full priority respond by treating such dissents as futile attempts to muck the course of an unstoppable train.[12]

In the midst of this vigorous and inconclusive debate over the value and efficiency of full priority, the revised version of Article 9 recently adopted in all fifty states only expands secured creditors' domain.[13] In addition, recent legislative initiatives encourage asset securitizations – a type of transaction that can amplify the efficiency, distributive justice and fairness concerns that drive the debate about Article 9.[14] In other words, in the face of uncertainty regarding the social value, fairness and efficiency of Article 9 secured lending and asset securitization, lawmakers consistently err in favor of capital and against non-adjusting creditors.

This article does not advocate any particular reform to Article 9 or the laws enabling securitization.[15] It does not focus on solutions to the problem that the law continues to encourage inequitable financing practices without pause and without any safeguards should these practices

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11. *See, e.g.*, Janger, *supra* note 2, at 573.

12. Note that other scholars have focused on the issue of why secured credit exists at all. When Article 9 was introduced in 1951, people thought that secured credit served to lower interest rates available to debtors that issue collateral. But in the late 1950s, Modigliani & Miller argued that altering the capital structure of a corporate entity should not change its value, because creditors will simply adjust the interest rate charged for debt and the amount they will pay for an equity interest to reflect the riskiness of the investment. *See* Franco Modigliani & Merton Miller, *The Cost of Capital, Corporation Finance, and the Theory of Investment*, 48 AM. ECON. REV. 261, 276 (1958). Therefore, debtors have no interest rate based reason to offer security to lenders. Since then, a wealth of scholarship has addressed what is known as the "Puzzle of Secured Credit." The puzzle is: If an entity cannot change its average costs of capital by altering its capital structure, then why do secured creditors and debtors take on the transaction costs associated with secured transactions? To explain the puzzle of secured credit, scholars have focused on two general possibilities: (1) secured credit produces efficiencies, or (2) it imposes on or transfers costs to third parties. *See generally* Alan Schwartz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051 (1984).

13. Many legal scholars attribute the expansion of Article 9's full priority structure to the nature of the UCC drafting process. Observers and participants tend to report that the UCC drafting process focuses on technical issues in finance and law that exceed the comprehension of most citizens. Secured creditors are reputed to dominate the process, driving the drafting committee to focus only on expanding secured credit. *See, e.g.*, Janger, *supra* note 2, at 631-32.

14. *See infra* Part I.A for a discussion of asset securitization, including the asset backed securities or "ABS" statutes recently enacted in several states.

15. Such a project, the likes of which has been undertaken by others, might include proposals: (i) to preserve some percentage of debtors' assets for unsecured creditors, (ii) to enact a federal law of secured transactions, (iii) to reform of the bankruptcy code to mitigate Article 9's effects, or (iv) to advocate for creditors' insurance coupled with partial priority. A federal law of secured transactions might be more accommodating of non-adjusting creditors since the drafters would not have to worry about uniformity in the law's enactment and secured creditors' ability to undercut that uniformity by lobbying individual state legislatures to eliminate provisions that erode their priority. *Cf.* Janger, *supra* note 2, at 578-80. However, it is unlikely that a federal law would be any less susceptible to the same influence of secured creditors and social context that affect Article 9. Regarding reform of the bankruptcy code, *see infra* text accompanying notes 47-54. The idea behind creditors' insurance is that Article 9 secured creditors could carry insurance to cover the risk that unsecured claimants take before the secured creditors when creditors are receiving less than 100 cents on the dollar. The costs of this insurance, however, would be passed on to borrowers, which would increase costs of capital. Increased costs of capital are associated with credit constriction. The threat of credit constriction is used as a debate stopper to block proposed reforms to Article 9. *See infra* Part III.C.

ultimately prove inefficient.[16] Rather, this article excavates the nature of this problem and proposes an explanation for its persistence. It presents a certain political efficiency of Article 9 and asset securitization that seems to overwhelm questions both of equity and of economic efficiency. Specifically, this article critiques contemporary public discourse on business and finance and presents the concept of an imagined community of investors. It does so in order to facilitate strategic thinking about the hegemony of capitalist values[17] that permits UCC drafters and state legislatures to treat Article 9 as a non-political, technical statute.

Critics such as Robert E. Scott, Elizabeth Warren, and Edward J. Janger suggest that if non-adjusting creditors could understand Article 9's effects and could organize opposition, the law on secured credit would not favor secured creditors so heavily. They seem to just conclude – without direct analysis – that diversity of interests among unsecured creditors, coupled with the nature of the UCC drafting process, makes the costs of educating these creditors to oppose Article 9 prohibitively high.

This article addresses directly the issue of why the costs of informing certain classes of unsecured creditors seem prohibitively high. Building on the concept of imagined communities, originally developed by Benedict Anderson,[18] this article proposes that the costs of informing unsecured creditors about Article 9 are explained neither by the code's technical complexity, nor by secured creditors' alleged domination of the UCC drafting process. Rather, these costs can be understood in relation to a socio-political climate in which deference to the needs of capital[19] –

16. The analysis in *infra* Parts II & III suggests that perhaps a grassroots effort to generate public awareness and controversy over commercial secured loans could prompt reform. Elizabeth Warren has taken this approach in her involvement with bankruptcy reform. She makes an explicit call for greater public awareness of commercial law in her article entitled *What is a Women's Issue?* on how bankruptcy law affects women. *See* Warren, *infra* note 219, at 56. This article does not follow Warren's prescriptive stance. Such a prescriptive project would need to account for the descriptive reality that this article presents. Within this descriptive reality the lack of critical distance in public discourse on finance and the myth of an imagined community of investors to which Americans belong would severely complicate any effort at consciousness-raising about commercial secured transactions. *See infra* note 167 and text accompanying notes 183-84. *See also* Heather Lauren Hughes, *Contradictions, Open Secrets, and Feminist Faith in Enlightenment*, 13 HASTINGS WOMEN'S L. J. 187 (2002) (challenging the efficacy of conscious-raising as a strategy for common law reform).

17. Hegemony is domination by ideas; it compels people to take initiative in their own subjugation by subscribing to certain values. *See generally* ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS, (Quentin Hoare & Geoffrey Nowell Smith, eds., ElecBook London 1999) (transcribed from the edition published by Lawrence & Wishart, London 1971). The hegemony of capitalist values refers to the psychic, social and political dominance of the ideas that (i) maximizing material wealth is the best social objective, and (ii) inciting individuals to pursue material wealth is the best way to maximize collective wealth. The hegemony of these views in the United States stunts discourse in the aesthetic, social, cultural, spiritual, environmental and other consequences of capitalism.

18. *See infra* text accompanying notes 162-63.

19. This article uses the term "capital" to mean monetary resources and the social and political currency associated with access to or control of monetary resources.

driven by hopes of wealth and fear of poverty – facilitates belonging in an imagined community of investors with which even disadvantaged creditors identify.

Contemporary media on finance and business evidence this socio-political climate. There is an acute lack of critical distance from businesses' financing practices that pervades journalism in the United States.[20] This lack of critical distance in public discourse on finance is a form of disregard of the severe socio-economic inequalities among Americans. This article proposes that the disregard of inequality in contemporary business reporting indicates an imagined community of capitalists or investors. This community of investors is imagined because its members assume commonalities with one another despite the fact that they may never meet or even have any contact with one another. It is a community because those who identify with its values share a unified field of exchange that generates comradeship despite vast differences and inequalities among members.[21] The myth of this community is that everyone belongs. Media on business and finance further the myth of opportunity – of an open playing field – for financial gain.[22] This myth fuels imaginings that encourage even those who struggle financially to identify as members.

This article intends to explore to the greatest extent possible how it is that Article 9 manages to seem apolitical. Though the absence of one thing – critical distance in reporting on finance – cannot in a formal sense prove the existence of another – an imagined community of investors – it is very important to more fully excavate how and why secured lending continues to expand despite serious, unresolved policy concerns.

This article's presentation of an imagined community of investors relates the problem of informing non-adjusting creditors to a larger absence of class consciousness in the United States.[23] This article hypothesizes that widespread public identification with an imagined community of investors enables secured creditors to present unfettered expansion of

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20. *See infra* text accompanying notes 111-58.

21. For more explanation of this article's use of the term "community," *see infra* Part II.B.

22. To illustrate the false nature of these illusions, consider that according to The Federal Reserve Board Survey of Consumer Finances, one half of all Americans do not own a single share of stock even through a retirement account. The majority of those who do hold some stock have only a trivial amount. *See* Ana M. Aizcorbe et al., *Recent Changes in U.S. Family Finances: Evidence from the 1998 and 2001 Survey of Consumer Finances*, FED. RES. BULL., Jan. 2003, at 16, Table 6.

23. A lack of class consciousness refers to failure of individuals to identify with and understand the position of their class, leading to a failure to act in the best interests of their class. Class consciousness is the self-awareness of a social class and the capacity of the class to act in its own rational interests. It refers to the extent to which individuals are conscious of the historical tasks their class sets out for them. The concept of class consciousness originates in socialist or Marxist theory. *See generally* GEORG LUKÁCS, HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS (Rodney Livingstone trans., MIT Press 1971). Its contemporary meaning has evolved to include class allegiances that are not confined to the strict class hierarchies and economic determinism characteristic of Marx.

access to credit as consonant with public interest both within the UCC drafting process and before the state legislatures.

Finally, this article considers a few, leading scholars' responses to Article 9 in light of the imagined community concept. These commercial law scholars have failed to explore wide socio-political contexts in analyses of why the law of secured credit continues to expand the range of collateral and the reach of secured creditors.

James White observes that "[b]anks and other secured creditors . . . . worship secured credit with apostolic zeal. The secured creditors argue for stronger and broader security, not for weaker and narrower security. And no one has less power in such a debate than a law professor with a counterintuitive idea."[24] Yet, as Elizabeth Warren ("Warren") points out, the law does draw lines to limit the scope of security.[25] It does not permit security interests in the form of servitude, or in human organs.[26] If the law of secured credit were concerned *only* with expanding credit and increasing secured creditors' returns, then this would not be the case.[27] Warren's stance is based on the reasoning or the logic that as long as lines are being drawn, there is no reason why they cannot be drawn to give more protection to non-adjusting creditors.[28] But considering the current state of public discourse on finance and the myth of an imagined community of investors to which Americans belong,[29] reasoned arguments that academics deploy are not likely to move the line between enforceable and void or unenforceable security interests.

Part I describes recent debates over whether secured credit and asset securitization harm non-adjusting creditors. Part II explores how and why non-adjusting creditors have been unable to effectively participate in the debate described in Part I. Part II describes the current state of public discourse on finance, which is sorely missing alternative perspectives on the goals and social value of businesses' financing decisions. Part II presents the ideas that (i) the lack of critical distance in media coverage of business indicates an imagined community of investors, large or small, with which non-adjusting creditors identify, and (ii) this

24. White, *supra* note 9, at 2090-91.
25. Warren, *supra* note 6, at 1386-87.
26. *Id.* at 1386.
27. *Id.*
28. The Article 9 drafting committee flatly rejected a proposal by Warren to amend § 9-301 to preserve twenty percent of debtors' assets for unsecured creditors. Warren submitted her "Carve-Out Proposal" to the ALI in April 1996. Under Warren's proposal, a levying creditor could obtain 20% of the value of Article 9 collateral through a levy and execution under state law. Accordingly, in bankruptcy, a trustee using her power could carve out 20% of the value of a debtor's encumbered personal property for the benefit of the estate. At the Symposium on the Priority of Secured Debt at Cornell Law School in 1997, Steven Harris announced that a carve-out for unsecured creditors is "dead in the water." Warren, *supra* note 6, at 1374 n.3. *See also* William J. Woodward, Jr., *The Realist and Secured Credit: Grant Gilmore, Common-Law Courts, and the Article 9 Reform Process*, 82 CORNELL L. REV. 1511, 1511-13 (1997).
29. *See infra* Part II.

identification limits unsecured creditors' capacities to respond critically to dominant financial industry practices.[30] Part III critiques several prominent legal scholars' responses to Article 9 and the UCC drafting process in light of the discourse, social context and imagined community analysis presented in Part II. Part III shows how the idea of an imagined community of capitalists with which creditors identify affects scholars' arguments about full priority secured credit.

This article presents: (i) the inconclusive debate over secured transactions and lawmakers' deference to capital, (ii) the state of public discourse on finance, and (iii) how some prominent legal scholars seem to accept and ignore the larger socio-political context in which laws governing secured finance evolve. In doing so, it focuses attention on the hegemony of capitalist values that enables secured creditors' control over Article 9. It is this hegemony that yields laws that consistently err in favor of capital and against non-adjusting creditors – not just an insular UCC drafting process or the law's technical complexity.

I. THE COMPULSION TO ERR IN FAVOR OF CAPITAL

A. Debates over Article 9 and Asset Securitization

Full priority secured lending may produce net benefits for the parties involved.[31] Or, it may enable debtors to pursue negative-value projects to the detriment of parties with no ability to consent or respond to the risks imposed by the financing.[32] Scholars' arguments on these positions remain ultimately inconclusive.[33]

Proponents of Article 9 celebrate the relative ease with which contemporary lenders can secure loans and establish priority in a wide range of types of collateral.[34] They praise the increased access to capital provided by Article 9's clear rules applicable to virtually all of a debtor's personal property.[35] Capital raised through secured lending can fund value-adding projects, support employment, and contribute positively to collective economic health.[36] Proponents reason that just because some secured loans may be inefficient or produce negative externalities, this is

30. For a comparison of this article's imagined community hypothesis to collective action problems, *see infra* note 167.

31. *See, e.g.*, Steven L. Schwarcz, *Securitization Post-Enron*, 25 CARDOZO L. REV. 1539, 1563-67 (2004).

32. *See, e.g.*, Lynn LoPucki, *The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1897-99 (1994).

33. *See, e.g.*, Warren, *supra* note 6, at 1393.

34. *See, e.g.*, Steven L. Harris & Charles W. Mooney, Jr., *A Property-Based Theory of Security Interests: Taking Debtors' Choices Seriously*, 80 VA. L. REV. 2021, 2021-22 (1994).

35. *See id.* at 2050-52.

36. *See, e.g.*, Schwarcz, *supra* note 31, at 1544.

not cause to limit a financial practice that has become so central to contemporary finance.[37]

Yet Article 9's full priority schema, under which a secured creditor can recover the full value of its loan before any other creditors have a chance to recover, has raised equity concerns since the UCC was first promulgated.[38] These concerns were well voiced during the recent drafting process to substantially revise Article 9,[39] during which Lynn LoPucki, Lucian Bebchuck and Jesse Fried, and Warren all argued for various forms of equity cushion or carve-out to full priority.[40] These arguments echo sentiments of Grant Gilmore himself,[41] who wrote in the comments to the 1972 version of Article 9 (of which he was a principal architect):

> The widespread nineteenth century prejudice against the floating charge was based on a feeling, often inarticulate in the opinions, that a commercial borrower should not be allowed to encumber all his assets present and future, and that for the protection not only of the borrower but of his other creditors a cushion of free assets should be preserved. This inarticulate premise has much to recommend it.[42]

Gilmore's comment, along with the more recent scholarship of LoPucki, Warren, Bebchuck and Fried, evidences deep-seated concerns for equity and fairness raised by full priority secured credit.[43]

Scholars' concerns about full priority seem well-grounded when one considers that many unsecured creditors are either non-consenting or non-adjusting creditors. Unlike sophisticated, institutional unsecured creditors, non-consenting and non-adjusting creditors of a company have

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37. *See, e.g.*, Harris & Mooney, *supra* note 34, at 2023-24.

38. Janger, *supra* note 2, at 597-98.

39. Revised Article 9 was enacted in forty-six states and Washington, D.C. in 2001. It was effective in all states by January 1, 2002.

40. *See* sources cited *supra* note 6.

41. *See* Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 620 (1981).

42. U.C.C. § 9-204 cmt. 4 (1972) (amended 1998).

43. Of course there are many scholars who defend Article 9. Though couched in a wide range of specific arguments, these scholars generally state that the capital raised through full priority secured transactions benefits all creditors involved with a given debtor. This is because the proceeds of secured transactions fund value-increasing projects, create jobs and increase productivity. *See, e.g.*, Steven L. Harris & Charles W. Mooney, Jr., *A Property Based Theory of Security Interests: Taking Debtor's Choices Seriously*, 80 VA. L. REV. 2021, 2052 (1994) (arguing that the transfer of a security interest does not differ fundamentally from other transfers of property interests for equivalent value); with respect to securitization *see* Steven L. Schwarcz, *Securitization Post-Enron*, 25 CARDOZO L. REV. 1539, 1563-67 (2004) (arguing that harms from overinvestment should be more than offset by the benefits of securitization and that unsecured creditors themselves view securitization as providing net value). Despite these types of arguments, whether or not secured lending is efficient is an empirical question that is unanswered. Even if scholars could demonstrate that full priority secured credit and asset securitization are, in fact, efficient, such a demonstration would do nothing to assuage the fairness and equity concerns raised by LoPucki and Warren.

no power to consent or respond to the risk of non-payment that arises when the company assigns its assets to a secured lender.[44]

In the midst of this debate, the 1999 revisions to Article 9 only expand the reach of full priority secured credit.[45] As Edward Janger puts it: "Bankruptcy partisans view the recent revisions to Article 9 as shifting previously settled allocation of property and regulatory rights in favor of secured creditors, and against unsecured creditors . . . ."[46]

In addition, recent efforts to reform the federal bankruptcy code to soften the effects of Article 9 on unsecured creditors have failed.[47] In July 2002, Senator Richard J. Durbin (D-Illinois) and Rep. William D. Delahunt (D-Massachusetts) introduced the Employee Abuse Prevention Act of 2002.[48] This bill was an effort to enable the bankruptcy trustee to include assets assigned to a perfected secured creditor in the bankruptcy estate under certain circumstances.[49] It was packaged as a reform to protect workers and retirees from corporate misconduct.[50] The Durbin-Delahunt bill suffered an onslaught of criticism from organizations such as the National Conference of Commissioners on Uniform State Laws

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44. Note that Article 9 defenders contest the assertion that non-adjusting creditors are hurt by full priority. They argue that non-adjusting trade creditors receive the second highest returns of any creditor in bankruptcy (second to secured bank creditors). With respect to employees, they cite that certain wage claims are given priority as administrative expenses in bankruptcy and that any chapter 11 debtor has to pay ordinary wage claims in order to keep going and reorganize. However, these assertions do not fully address the equity concerns raised by full priority. Why should non-adjusting creditors always take second to secured creditors? A debtor's obligation to pay wage claims and to continue to pay wages during reorganization does nothing to protect creditors who lose their jobs or have unpaid claims because the bankruptcy estate is not sufficient to pay them. Again, whether these unsecured creditors are in fact hurt by full priority can only be established with empirical research that currently does not exist. Further, whether full priority is efficient regardless of concerns for equitable treatment of non-adjusting creditors is also not known. This article presents the political efficiency of full priority regardless of its economic efficiency. This political efficiency might perhaps explain why such research appears unlikely to be done.

45. The revisions expand secured lenders' reach by permitting security interests in several new types of collateral. For example, old Article 9 only covered deposit accounts insofar as they constituted proceeds of other collateral. New Article 9 generally permits security interests in deposit accounts as original collateral. Old Article 9 only applied to sales of receivables arising from goods or services transactions (accounts). *See* U.C.C. §§ 9-203(b)(3)(D), 9-104, 9-102(a)(29) (1951). Old Article 9 did not cover rights to payment arising from other transactions. Revised Article 9 covers a broader spectrum of sales of receivables. The definition of "accounts" is expanded to include payment obligations arising from the sale, lease or license of all kinds of tangible and intangible property. *See* U.C.C. § 9-102(a)(2) (2002). Revised Article 9 also covers commercial tort claims, software, and letter of credit rights, all of which were excluded under old Article 9. *See* U.C.C. §§ 9-102(a)(75), 9-102(a)(13), 9-102(a)(51), 9-107 (2002).

46. Edward J. Janger, *The Death of Secured Lending*, 25 CARDOZO L. REV. 1759, 1760 (2004).

47. These failures are disturbing in light of recent empirical research showing that by the time a company enters bankruptcy it likely has many poorly adjusting creditors. *See* Elizabeth Warren & Jay Lawrence Westbrook, *Contracting Out of Bankruptcy: An Empirical Intervention*, 118 HARV. L. REV. 1197, 1202-03 (2005).

48. S. 2798, 107th Cong. (2002); H.R. 5221, 107th Cong. (2002).

49. *See* Statement of the Honorable William D. Delahunt of Massachusetts Regarding the Introduction of The Employee Abuse Prevention Act of 2002 (Aug. 1, 2002), *available at* http://www.house.gov/delahunt/EAPA.htm.

50. *See id.*

(NCCUSL), The Bond Market Association, The Depository Trust and Clearing Corporation, and The Options Clearing Corporation.[51] Its sponsors withdrew the bill in early September, 2002.[52]

Even if the federal bankruptcy code could be reformed to successfully protect non-adjusting creditors when companies enter the bankruptcy system, such a reform would not help unsecured creditors who are adversely affected by secured credit outside of the bankruptcy system. Many secured lenders are concerned primarily with the control over a debtor that they gain by taking an Article 9 lien – not their priority in the event of bankruptcy.[53] A secured loan agreement contains covenants – negative and affirmative – and sets forth events of default. These covenants can include detailed criteria for debtor performance and behavior. The notice and remedy provisions set forth in covenants permit a secured creditor to police a debtor's behavior and even to step in and take certain actions on behalf of the debtor if it fails to comply.[54]

Scholars have argued that the control that secured creditors gain over debtors benefits all creditors and equity holders as well.[55] The secured creditors are looking to be repaid, not to deal with a bankruptcy trustee.[56] For example, Scott contends that monitoring efforts of a secured creditor may also benefit unsecured creditors because a floating lien creditor expects to be repaid out of the proceeds of the business, not out of the collateral per se.[57]

However, Ronald Mann responds effectively that a secured creditor's interests and direction to a company will not necessarily coincide with unsecured creditors' interests.[58] For example, what is good for the company from a secured lender's perspective may be very harmful to employees. Mann finds that secured creditors focus on the enhanced leverage that security gives them to enforce payment.[59] A measure that increases the likelihood that one creditor will be repaid may increase the

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51. *See* Steven L. Harris & Charles W. Mooney, Jr., *The Unfortunate Life and Merciful Death of the Avoidance Powers Under Section 103 of the Durbin-Delahunt Bill: What Were They Thinking?*, 25 CARDOZO L. REV. 1829, 1831-32 (2004) (arguing that the Durbin-Delahunt bill was much more expansive in its attempt to avoid the interests of secured creditors in bankruptcy than the bill's sponsors had indicated).

52. *Id.* at 1831.

53. *See, e.g.*, Douglas G. Baird, *Secured Lending and Its Uncertain Future*, 25 CARDOZO L. REV. 1789, 1795 (2004) ("As long as the security interest is perfected outside of bankruptcy's preference window, everyone else must take a back seat.").

54. For an anecdotal example of how a secured creditor can control a debtor, see Douglas G. Baird's discussion of how Warnaco's lenders directed it to appoint a new officer. Baird, *supra* note 53, at 1792-96.

55. *See, e.g.*, Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901, 903-04 (1986).

56. *See, e.g.*, *id.* at 965.

57. *Id.* at 931.

58. *See* Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625, 654-55 (1997).

59. *Id.* at 649.

risk of nonpayment to other creditors, as secured lenders do not account for third party costs of secured credit in exercising their leverage to enforce payment.[60]

The multi-trillion dollar securitization or structured finance industry raises concerns for unsecured creditors that make plain old Article 9 secured lending appear equitable in contrast.[61] Recent debate over the efficiency and fairness of asset securitization is similar to the debate over full priority secured lending.[62] Proponents claim that securitization actually reduces costs for companies.[63] Dissenters assert that the gains enjoyed by some parties to a securitization result in losses to others.[64]

Asset securitization is the practice of selling assets to a special purpose entity (SPE) and then having the SPE either (i) assign the assets to secure a loan that will enjoy a better rate than the originator or seller could get, or (ii) sell securities backed by the pool of assets held by the SPE.[65] In either case, the costs of capital for the seller are reduced[66] because once the assets are transferred to the SPE they are isolated from other creditors of the seller.[67] The SPE is set-up to be remote from the seller's bankruptcy, so that an investor or lender to the SPE does not even need to participate in proceedings in the event of the seller's bankruptcy. The SPE's assets are simply not part of the bankruptcy estate since they were sold (and not just assigned as collateral for a loan).[68]

This type of financing raises some obvious questions. How does the originator on the one hand sell assets such that they are no longer part of the originator's estate, and yet on the other hand enjoy the proceeds of a loan or investment in the SPE? The current law on how to respond to

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60. *Id.*; *see also* Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, 818-19 (2004) (stating that a secured lender with a floating lien will not represent the interests of unsecured creditors).

61. Secured lending and asset securitization have traditionally been treated like industries with coterminous interests. Asset securitization or structured finance was viewed as a type of secured financing. However, recent legislative efforts to isolate securitizers from the true sale doctrine and even from Article 9 requirements indicate that the two types of financings have interests that are more divergent than it once appeared. *See* Edward J. Janger, *The Death of Secured Lending*, 25 CARDOZO L. REV. 1759, 1760-62 (2004).

62. *See, e.g.*, Warren, *supra* note 6, at 1393.

63. *See, e.g.*, Scott, *supra* note 55, at 931-33.

64. *See* Lynn LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 23-30; Lynn LoPucki, *The Irrefutable Logic of Judgment Proofing*, 52 STAN. L. REV. 55, 59-67 (1999) (arguing that securitization is a negative-sum game).

65. *See* COMPTROLLER OF THE CURRENCY, COMPTROLLERS HANDBOOK: ASSET SECURITIZATION 2 (1997), http://www.occ.treas.gov/handbook/assetsec.pdf (for a definition of asset securitization).

66. Some commentators claim that asset securitization provides as much as a 150 basis point spread over basic secured lending. *See* Janger *supra* note 46 at 1769 (citing Lowell Bryan, *The Risks, Potential and Promise of Securitization*, *in* A PRIMER ON SECURITIZATION 171-73 (Leon T. Kendall & Michael J. Fishman eds., 1996)).

67. *See* Leon T. Kendall, *Securitization: A New Era in American Finance*, in A PRIMER ON SECURITIZATION 3-5 (Leon T. Kendall & Michael J. Fishman eds., 1996)

68. *See* 11 U.S.C. § 541 (2005).

this question differs depending on the state in which the originator is located. In addition, model Article 9 itself gives inconsistent directions on whether courts can treat a transaction that the parties call a sale as a secured loan in a securitization context.[69] Section 9-318(a) states that "a debtor that has sold an account, chattel paper, payment intangible, or promissory note does not retain a legal or equitable interest in the collateral sold."[70] This provision is meant to give securitizers assurance that securitized assets will be deemed sold to the SPE as long as the parties characterize the transfer from the originator to the SPE as a "sale".[71] Yet, § 9-318(b) directs courts to look to the substance of a transaction to distinguish a sale from a secured loan.[72] It finds – in contrast to subsection (a) – that a sale without perfection by the "buyer" leaves the seller (or debtor) with an interest in the assets sufficient to come within reach of the seller's creditors.[73]

Securitizers have insisted for some years that provisions like § 9-318(a) – not to mention the ABS statutes discussed below – are not necessary to establish that an SPE has purchased the assets it holds.[74] As long as certain true sale criteria recognized by courts and the Financial Accounting Standards Board are met, they argue, a sale has occurred and courts should not override the parties' intentions and find a secured loan.[75] A transaction that meets the recognized standards for a sale can nonetheless permit the originator to offer some recourse to the SPE. However, the inclusion of § 9-318(a) in revised Article 9 and the passage of the ABS statutes indicate that asset securitizers may harbor doubt as to the legal status of their transactions.[76]

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69. Texas and Louisiana have enacted versions of Article 9 that function like ABS statutes to resolve this inconsistency. *See* LA. REV. STAT. ANN. § 10:9-109(e) (2003); TEX. BUS. & COM. CODE ANN. § 9.109(e) (Vernon 2004).

70. U.C.C. § 9-318(a) (2002). Note that this section applies to sales of accounts, chattel paper, payment intangibles or promissory notes. Asset securitization itself is not limited to these types of assets or collateral. Just about any type of Article 9 collateral can be securitized. However, accounts and other payment rights are the most commonly pooled and securitized assets.

71. U.C.C § 9-318 cmt. 2 (2002).

72. U.C.C. § 9-318(b) (2002).

73. *Id.*

74. *See* Lois R. Lupica, *Revised Article 9, Securitization Transactions and the Bankruptcy Dynamic*, 9 AM. BANKR. INST. L. REV. 287, 288–90 (2001).

74. *Id.* at 288.

76. *See In re* LTV Steel, Inc., 274 B.R. 278 (Bankr. N.D. Ohio 2001). In this case Judge Bodoh issued a preliminary opinion that ordered the "secured lenders to turnover to Debtor the cash proceeds of the inventory and receivables" that the "Debtor," LTV Steel, Inc., had transferred to two SPEs which in turn had entered into secured credit facilities with several lenders. This case sent shock waves through the securitization industry, as Judge Bodoh's opinion found that LTV Steel had an equitable interest in assets that it had sold to SPEs pursuant to an asset securitization. The opinion was preliminary and issued by the bankruptcy court – not an appellate court – and it was nullified by the fact that LTV gave up its challenge to the securitization shortly after the opinion was issued. *See* James J. White, *Threats to Secured Lending and Asset Securitization: Panel 1: Asset Securitization and Secured Lending: CHUCK AND STEVE'S PECCADILLO*, 25 CARDOZO L. REV. 1743 (2004) (describing *In re* LTV Steel, Inc. and the inconsistency between §§ 9-318(a) and (b)). Nonetheless, *In re* LTV Steel, Inc. has been the subject of much controversy and part of the inspiration for the statutes discussed in the text accompanying note 80 *infra*.

In most jurisdictions parties and courts faced with a challenge to their asset securitization, look to the "true sale" doctrine to determine whether a transaction is a sale or a loan. This doctrine, gleaned from the law of contract and property, looks to the economic substance of a transaction – not just its characterization by the parties.[77] It does not draw hard and fast lines as to when a sale has occurred.[78] Rather, courts are directed to assess whether, in a given transaction, the buyer has assumed the risks and benefits of ownership or instead merely advanced capital in exchange for a guaranteed return.[79]

Some jurisdictions have passed asset backed securities statutes (ABS statutes) to facilitate securitization. These statutes are meant to override the true sale doctrine and the murkiness of Article 9.[80] The ABS statutes state that a sale made in the context of a securitization transaction shall be treated as a true sale regardless of economic substance, so long as the documents call the transaction a "sale."[81] The most prominent such statute is Delaware's Asset-Backed Securities Facilitation Act, which states that assets transferred in a securitization transaction "shall be deemed to no longer be the property, assets or rights of the transferor."[82]

Asset securitization can raise some serious concerns for unsecured creditors of the originator. Edward J. Janger points out that a traditional secured lender cannot avoid state law rules surrounding foreclosure.[83] They must comply with Article 9's rules for perfection, which provide notice of their interest to third parties.[84] Property that is assigned to a secured lender is still part of a debtor's bankruptcy estate until the secured party establishes its priority and takes its collateral or is given adequate protection by the bankruptcy trustee.[85] Asset securitization, on the other hand, enables companies to move assets out of reach of the bankruptcy estate all together.[86] Furthermore, companies operating under an ABS statute can accomplish this without having to provide any notice to third parties.[87]

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77. *See* Stephen J. Lubben, *Beyond True Sales: Securitization and Chapter 11*, 1 N.Y.U. J. L. & BUS. 89, 95–97 (2004).

78. *Id.* at 96.

79. *Id.*

80. *See e.g.*, ALA. CODE § 35-10A-2(a)(1) (2005); DEL. CODE ANN. tit. 6, §§ 2701A-2703A (2005); LA. REV. STAT. ANN. § 10:9-109(e) (2005); OHIO REV. CODE ANN. § 1109.75 (2005); N.C. GEN. STAT. §§ 53-425, 53-426 (2005); S.D. CODIFIED LAWS § 54-1-10 (2005); TEX. BUS. & COM. CODE ANN. § 9.109(e) (2005).

81. For a discussion of the differences among these various statutes, *see* Janger *supra* note 46, at 1764–68.

82. DEL. CODE. ANN. tit. 6, § 2703A(1).

83. *See* Janger, *supra* note 46, at 1767.

84. *Id.*

85. *See* 11 U.S.C. § 502 (2005).

86. *See, e.g.*, S.D. CODIFIED LAWS § 54-1-10(3) (2005).

87. *Id.*

Those who extol the virtues of asset securitization remind naysayers that the originator sells the assets to be securitized to an SPE for cash or other consideration in a sale transaction.[88] Therefore, the creditors of the originator should not complain. The assets have not been assigned to a prior creditor, but exchanged for other assets – most often cash – of equivalent value. Securitization's skeptics are not placated by this response. Once the originator's assets are exchanged for cash, the originator can dispose of that cash in any way it deems appropriate.[89] For example, the originator could pay dividends to shareholders with the cash, circumventing creditors with claims that would have been enforceable against the assets sold to the SPE. The investors in the SPE have no incentive to monitor an originator once the true sale transaction is complete.[90]

There are at least some securitizations and some secured loans that are inefficient. A financing is inefficient when a debtor or originator uses the proceeds in a way that reduces the firm's value.[91] Scholars cannot prove whether these inefficient transactions: (i) represent a small exception to a norm of value-adding transactions, or (ii) reveal dubious incentives that make these types of financing attractive to businesses in the first place.[92] In other words, the fact that securitizations and full priority secured loans permit businesses to shift costs to non-consenting third parties may be the reason for their popularity.

B. Common Sense Deference to Capital in the Face of Inconclusive Debate

Proponents of full priority and asset securitization concede that they cannot demonstrate that these modes of financing are efficient, nor do they offer satisfying responses to concerns about fairness and distributive justice that these transactions raise. In the face of this uncertainty, recent legislative trends only encourage asset securitization.[93] Similarly, lawmakers seem to have ignored concerns about non-adjusting creditors raised by LoPucki and Warren, Bebchuck and Fried during debates over reform of Article 9.

88. *See, e.g.*, Steven L. Schwarcz, *The Inherent Irrationality of Judgment Proofing*, 52 STAN. L. REV. 1 (1999) (responding to Lynn LoPucki's assertion that asset securitization constitutes judgment proofing by the originator); *but see* Lynn LoPucki, *The Irrefutable Logic of Judgment Proofing: A Reply to Professor Schwarcz*, 52 STAN. L. REV. 55, 59-67 (1999).

89. *See* Schwarcz, *supra* note 88, at 18–20.

90. *See, e.g.*, Lois R. Lupica, *Asset Securitization: The Unsecured Creditor's Perspective*, 76 TEX. L. REV. 595 (1998).

91. For an explanation of overinvestment, *see* Steven L. Schwarcz, *Securitization Post-Enron*, 25 CARDOZO L. REV. 1539, 1555–57 (2004).

92. *Id.* at 1553–55.

93. Another example of this trend is the attempt of securitizers to insert into the bankruptcy code a safe harbor provision for sales made pursuant to a securitization. *See* Janger, *supra* note 46, at 1776.

Many scholars who observe this trend explain it in terms of common sense. Consider William H. Widen's common sense approach to his Article 9 scholarship:

> I can design models in which secured credit is efficient and I can design models in which it is not efficient. Thus, in my view, what you have is really just a political choice. Once a political choice is made as to which social relationships to allow (e.g., absolute priority secured credit), I am in favor of whatever rules let me create the social relationship at lowest cost without really worrying too much about whether we should have a rule that allows the relationship to form in the first place.[94]

To whom does Widen concede the political choice to permit full priority? Widen finds that absent more certain evidence of particular harms to non-adjusting creditors, the debate over efficiency is undecideable. As long as this debate is undecidable, efficiency should not be a primary consideration in addressing questions of grand reform to Article 9. It does not make sense to focus on efficiency in a political climate committed to expand access to capital through full priority.

Similarly, James J. White finds debate over the efficiency or fairness of Article 9 largely irrelevant so long as businesses and financial institutions continue to passionately embrace full priority.[95] In stating his dismissal of any inefficiency claims, he writes:

> I conclude that [Article 9] is probably efficient . . . . The pervasiveness of security not only in modern industrial society but also in more primitive and ancient societies supports the argument. Never has security been required by law; always it has been chosen by debtors and creditors. Were it inefficient, why and how has it persisted for so long, in so many ways, in so many places?[96]

White chooses to ignore obvious responses here, including the response that debtors chose secured credit precisely because it enables them to transfer costs to non-adjusting creditors. He speaks of secured credit generally without recognizing that Article 9's absolute priority schema is relatively new and has been highly controversial. Further, he implies that Article 9 is simply the latest evolution of a longstanding financial practice, rather than a creation of legal scholars and lawmakers fulfilling a political commitment to capital.

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94. E-mail from William H. Widen to Heather L. Hughes (June 14, 2005) (on file with author); *see also* William H. Widen, *Lord of the Liens: Towards Greater Efficiency in Secured Syndicated Lending*, 25 CARDOZO L. REV. 1577, 1641 (2004).

95. *See* White, *supra* note 9.

96. *Id.* at 2089–90.

II. CONTEMPORARY PUBLIC DISCOURSE ON FINANCE

What explains lawmakers' consistent deference to secured creditors in the face of unresolved concerns over full priority and asset securitization? Does the public offer an opinion or consensus on these transactions that justifies this deference? What enables some legal scholars to regard the political choice to permit certain relationships among non-adjusting creditors and powerful investors as settled, such that it is beyond the scope of the debate?

This section takes up these questions by exploring the current state of public discourse on finance and presenting the concept of an imagined community of capitalists with which non-adjusting creditors identify. This section analyzes the socio-political context that seems to paralyze lawmakers and non-adjusting creditors who might otherwise oppose the legislative trend towards expanding secured lending and asset securitization. It presents a political efficiency enjoyed by Article 9 and the ABS statutes that seems to simply overwhelm issues of economic efficiency or equity.

The reporters for the drafting committee that completed revisions to Article 9 of the Uniform Commercial Code in 1999 have declared Article 9 to be "the . . . most publicly vetted uniform law project to date."[97] Yet, not surprisingly, there are few references to Article 9 in the past fifteen years in any serials of general distribution, even during the late nineties and in 2001 when the law was overhauled and the revised version adopted by states.[98] Why is an overhaul of the rules governing secured debt finance, a major source of capital for business, absent from mainstream business reporting?

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97. Steven L. Harris & Charles W. Mooney, Jr., *How Successful Was the Revision of UCC Article 9?: Reflections of the Reporters*, 74 CHI.-KENT L. REV. 1357, 1400 (1999). By "publicly vetted" Harris and Mooney may mean passed by many legislatures without dissent or material alternation. Commentators such as Lynn LoPucki reject the assertion that revised Article 9 was publicly vetted in the sense of being crafted in response to a range of commentary.

98. This statement is based upon the following three searches: (1) LexisNexis, News & Business, News All (English, full text), search terms: Article 9; Nexis, News & Business, News, Major Papers, date restricted 01/01/94 through 01/01/03, search terms: "article 9" and (UCC or "uniform commercial code"); (2) LexisNexis, News & Business, News, Major Papers, search terms: "article 9" and (UCC or "uniform commercial code"); and (3) LexisNexis, News & Business, News, Magazine Stories, Combined, search terms: "article 9" and (u.c.c. or "uniform commercial code"). For an analysis of the references to Article 9 that these searches produces, *see infra* text accompanying notes 124–34. In addition to the few substantive references analyzed in *infra* Part II.A, the newspaper searches produced the following results: reference to Article 9 in obituaries of a commercial law practitioner and UCC advocate, announcements of professional conferences for lawyers and business groups on the changes to Article 9, alumni notes citing graduates who co-authored a book on the UCC, and other passing references. Again, in addition to the references analyzed in Part II.A, magazine coverage was limited to reports on Article 9 appearing in the American Bar Association magazine and other publications geared towards industry participants such as *Business Credit, The Bond Buyer, ABA Banking Journal, American Banker, Purchasing, American Business Law Journal, The Journal of Lending and Credit Risk Management*, and various state bar journals. The coverage of Article 9 in these publications is devoted almost entirely to describing the revisions to Article 9 and how the revisions affect various, everyday business practices.

Homer Kripke finds that Article 9 is too complex for widespread understanding and that it lacks "popular appeal." He states, "The Code was 'lawyers' legislation,' largely outside the potential understanding of most members of state legislatures . . . . Difficult legislation like this without popular appeal can seldom be passed without a broad consensus of agreement of interested parties."[99] Banks, finance companies and other private trade groups, in Kripke's view, were the universe of interested parties.[100]

Kripke's statement that most state legislators – not to mention the general public – cannot understand Article 9 due to its technical difficulty continues to pervade writings on the UCC. Yet, the bankruptcy code, which is arguably more technical and complex than Article 9, receives attention in popular sources.[101] In fact, media representations have impacted the legislative process.[102] Melissa Jacoby has analyzed how media treatment of bankruptcy issues has affected the course of Congress's recent bankruptcy reform efforts.[103] Some scholars reason that if unsecured creditors could understand their relationship to the law of secured transactions they might be able to organize to oppose full priority secured credit.[104] The critique of business journalism that follows begins to excavate the dynamics of the information asymmetry that persists between secured creditors and third parties affected by Article 9.

Many scholars have studied the role of media in shaping public discourse and policy. [105] News media have a documented agenda-setting power.[106] Some even refer to the media as the "fourth branch" of American government.[107] This article accepts these findings about the power of news media and applies them to media on business and finance. However, the approach here to the relationship between media and law is

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99. *See* Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, U. ILL. L. F. 321, 327 (1962), *quoted in* Edward J. Janger, *supra* note 2, at 632.

100. *See* Kripke, *supra* note 99.

101. *See* Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091 (2004) (discussing the role of news media in shaping bankruptcy reform legislation).

102. *Id.*

103. *Id.*

104. *See infra* Part III.B.

105. *See generally* GARY C. WOOD, PERSPECTIVES ON AMERICAN POLITICAL MEDIA 237 (1997) (asserting that we cannot assess the forms of American political discourse without considering popular media); Robert H. Giles, *The Media and Government Regulation in the Great Tradition of Muckraking*, 11 KANS. J. L. PUB. POL'Y 567, 570 (2002) (describing the formative role of news media in the development of policy and legislation); SIDNEY KRAUS & DENNIS DAVIS, THE EFFECTS OF MASS COMMUNICATION ON POLITICAL BEHAVIOR (1976) (discussing the centrality of media to policy making); TIMOTHY E. COOK, GOVERNING WITH THE NEWS: THE NEWS MEDIA AS A POLITICAL INSTITUTION (1998) (arguing that news is a political institution).

106. *See* Everett Rogers et al., *A Paradigmatic History of Agenda-Setting Research*, *in* DO THE MEDIA GOVERN? POLITICIANS, VOTERS, AND REPORTERS IN AMERICA 225 (Shanto Iyengar & Richard Reeves, eds., 1997); Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of the Mass Media*, 36 PUB. OPINION Q. 176, 176–85 (1972).

107. *See* DOUGLASS CATER, THE FOURTH BRANCH OF GOVERNMENT 13 (1959) (describing news media's power); Jacoby, *supra* note 101, at 1093.

different from most prior approaches. This article attempts to identify and explore the causes and implications of an *absence* of reporting on commercial law and an *absence* of journalistic perspective on finance. It proposes that these absences indicate the presence of a dominant, imagined community of capitalists that accepts obedience of finance experts' rules and predictions as consonant with public interest.[108]

A. Business So-Called Journalism and the Reign of Finance Experts

Contemporary discourse on finance bears resemblance to the views of religion in sixteenth century Italy presented in Carlo Ginzburg's book, *The Cheese and the Worms.*[109] Ginzburg features a miller who is persecuted for having his own opinions about the Bible in a society where reading and interpreting the Bible is the sole province of an educated clergy.[110] Imagine a non-executive employee of a publicly traded company looking at his or her employer's disclosures on the Securities and Exchange Commission website and then raising a stink about executive decisions to assign the employer's assets to a secured creditor, or about the employer's current loan to value ratio.

Many unsecured creditors likely do not even identify with the concept that they are creditors of a company that have a stake in the rules governing secured finance. Businesses can fail at their attempts to increase wealth for society as a whole, but the financing mechanisms and structures that they employ along the way are not directly critiqued. Stories of bankrupt entities that have left their employees pension-less and their unsecured creditors without recourse abound. But these stories generally decline to mention – let alone critique or analyze – the financings that preceded the loss of pensions. Companies' financing decisions are only criticized when they involve fraudulent or criminal dealings. Stories that portray businesses simply using Article 9 to assign their assets to secured creditors, rendering themselves judgment proof, to obtain loans that they can then use to engage in risky behavior, are virtually impossible to find.

The scenario of a secured creditor taking all of the assets of a debtor leaving tort claimants and employees out of luck is simple and provocative enough for widespread consumption. The image of a family forced from home after foreclosure of a mortgage is culturally salient. Stories about consumer debt and the consequences of credit extended to individuals are common. Yet, stories that critique the effects on unsecured

108. Again, in a formal sense, the absence of one thing does not prove the existence of another. However, it is very important to explore to the greatest extent possible how a law with controversial distributive consequences stays under the radar of public opinion.

109. CARLO GINZBURG, THE CHEESE AND THE WORMS: THE COSMOS OF A SIXTEENTH CENTURY MILLER (1980).

110. *Id.*

creditors of *businesses'* decisions to finance their operations or projects with secured credit are not in the news.

Popular writing indicates that Americans feel a collective, personal stake in businesses' financing options. Bill Wasik of *Harper's Magazine* states,

> "[Business writing today] is the serialized fiscal bildungsroman of you, the reader: you invest your 401k, . . . the reader-investor becomes, implicitly, the protagonist. . . . That crooked financier has absconded with your money. . . . Try, for example, to imagine a column in *The New Republic* devoted to how to contact one's congressman, . . . or *Rolling Stone* with fold-out bass tablature."[111]

Finance experts' learned and moneyed status authorizes them to shape the law on secured finance. But these experts are not speaking in an isolated UCC drafting forum that disregards social context. Rather, their task – offering businesses as much debt financing as possible – is of wide-ranging, personal relevance to the constituencies of the state legislatures to which they appeal. Scholars like LoPucki and Warren have tried to persuade UCC drafters and state legislatures to reform the law on secured credit. In doing so, they are speaking to representatives of a public that feels personally dependent on the business growth associated with secured transactions.

The protagonist of a story is its leading character or principal figure. In reporting on business and finance the reader becomes the implied protagonist in the sense that this reporting implicitly casts the reader's own financial position as the sine qua non of relevance. The reader is presumed to be a participant in capital markets or real estate markets. Mainstream media report the activities of various enterprises with a view towards providing information that will enable the implied protagonist to understand market trends and evolving business practices in order to protect and enhance her own position.[112]

For example, go to the internet homepage for National Public Radio's popular *Marketplace* program produced by American Public Media.[113] *Marketplace* assumes its listeners to be willing participants in the activity of capitalism. The following examples are taken from that page's content on January 11, 2005. First, notice that we see weather symbols next to each of DOW, NASDAQ, and S&P. On January 11 we see three little clouds indicating that market performance is negative.[114]

111. Bill Wasik, *Dismal Beat: The March of Personal-Finance Journalism*, HARPER'S MAG., Mar. 1, 2003, at 82. (critiquing the narrow range of perspectives and lack of journalistic distance in reporting on finance and business) (hereinafter Wasik, *Dismal Beat*).

112. *See* Wasik, *supra* note 111.

113. American Public Media, Marketplace, http://marketplace.publicradio.org (as visited on Jan. 11, 2005).

114. *Id.*

These symbols naturalize the market. In the world of Marketplace, major markets are like the weather: constantly relevant to daily life, larger than all of us, and part of the forces of nature.

Further, just above the weather report, we have a headline that reads: "Playing economics with China."[115] Apparently economics is a game we can "play." Yet games are played by players who consent to participate and know the rules of the game. Can we speak of economics as a "game" when its alleged players are nations compelled to reckon with one another, and whose decisions have grave, life-long consequences for many who are never permitted to play? We learn in the accompanying blurb that "while the U.S. and Chinese economies have fueled the global economic growth of the past decade, commentator Robin Bew believes the fun won't last in 2005."[116] Global economic growth sure is "fun" – if, of course, you are an investor who profits from expansions in production and not an under-compensated worker whose labor enables growth the benefits of which accrue primarily to others.

Move now to CNN.com.[117] It appears that CNN.com does not regularly devote journalistic efforts to reporting on business and finance. Instead, it has partnered with *Money* magazine to create "CNNMoney" – a page of "news" provided by *Money* for CNN's audience.[118] As one might guess from its title, CNNMoney does not venture any reporting that questions the objectives or social consequences of business or finance. Instead, we read stories with the same presumption of the reader as protagonist, as capitalist participant. A headline alerts us to "The dark side of the boom."[119] The boom here is rising real estate prices and the dark side is that "as home values rise, so do property taxes."[120] We are given "seven tips for easing the sting."[121] This story projects the image of a readership of home owners.[122] The bad news is that the reader has to deal with a higher tax bill.[123] The "dark side of the boom" for those unable to afford a home – namely, that as prices rise this goal falls farther and farther out of reach – does not receive attention. Part II.B explores how this presumed readership functions as an imagined community of capitalists with which many unsecured creditors identify.

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115. *Id.*
116. *Id.*
117. *See, e.g.*, CNN.com Home Page, http://www.cnn.com.
118. *See, e.g.*, CNNMoney Home Page, http://money.cnn.com.
119. *See* Jon Birger, *The Dark Side of the Boom*, MONEY, Feb. 2005, at 29.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*

Reporting that mentions commercial law is sparse,[124] and the reporting that does exist tends to further the image of the reader as investor-protagonist. For example, two stories that reference the UCC in the *New York Times* inform readers who own homes in co-op buildings about rules for making loans to the co-ops.[125] A question-and-answer column in the *St. Louis Post-Dispatch* references Article 9 as it responds to concerns of a reader who has sold a car to a friend who has failed to pay in accordance with their agreement.[126] Finally, a *Seattle Times* business columnist reports on a local bank that plans to profit from changes to Article 9 by offering electronic search and filing services.[127] This article simply describes the bank's plan to offer filing services.[128] This story appears to inform investors of the filing service in hopes of receiving their business.

Defying the general trend is one story from the *Chicago Tribune* that reports on unsecured trade creditors who lost money doing business with companies who assigned assets to a secured lender that subsequently foreclosed on the assets.[129] In this rare exposure of the effects of the UCC on smaller unsecured creditors, freelance reporter Joanne Cleaver reports that some venture capital firms convert their failing equity investments to secured debt and then foreclose on their loans.[130] Cleaver presents a photographer who is owed $1,500 and will not be paid, and a visual communications firm that was forced to write off a debt of $177,000 and fire six of its nine employees. Both losses are explicitly attributed to the status of secured creditors under the law.[131] Cleaver explains that "one technique the venture firms are using is to extend a bridge loan to the firm and then foreclose on it under Article 9

124. *See supra* note 55. Two stories in the *Financial Times* (London) report on proposed changes to collateral security rules in England and reference Article 9 as a successful model statute. *See* A. H. Hermann, *Business Law: Credit and the Quickening Pace of Change*, FIN. TIMES, July 10, 1986 at 10, *available at* 1986 WLNR 575736; Editorial Comment, *Creditors in a Legal Jungle*, FIN. TIMES, Nov. 4, 1983. at 14, *available at* 1983 WLNR 309783.

125. *See* Jay Romano, *YOUR HOME: New Rules on Loans for Co-ops*, N.Y. TIMES, July 29, 2001, § 11, at 5; Jay Romano, *YOUR HOME: Share-Loan Payoff in a Co-op*, N.Y. TIMES, Feb. 14, 1999, § 11, at 5. LexisNexis maintains in its commercial law database a file called "The New York Times – Commercial Law Stories." However, a search of this file for "Article 9" yields no results. A search for "unsecured w/s creditor!" is also fruitless; "security interest" produces the two stories by Jay Romano cited above. A search for "uniform commercial code" yields several stories which indicate that *The New York Times* is aware that the UCC exists, but does not regard it as fodder for critical discussion. The lack of reporting on commercial law that appears in this file may result from the way in which LexisNexis maintains the file, rather than from a dearth of attention to the subject in *The New York Times* generally. The fruitlessness of similar searches in the general news database corroborates the accuracy of the file-specific searches.

126. *See* John Roska, *Signed Papers Must Include "Security Interest" to Repossess*, ST. LOUIS POST-DISPATCH, Jan. 31, 2002, at 2.

127. *See* Stephen H. Dunphy, *The Newsletter*, SEATTLE TIMES, Apr. 10, 2001, at C1.

128. *Id.*

129. *See* Joanne Cleaver, *New Debt-free Life for Shaky Firms; Venture Capitalists are Employing Legal and Financial Tools to Salvage Investors' Money, Often Leaving Smaller Creditors in the Lurch*, CHI. TRIB., May 8, 2002, at 1.

130. *Id.*

131. *Id.*

of the Uniform Commercial Code."[132] She makes clear that secured creditors are first to be paid when a company is in trouble and that smaller, unsecured creditors get only what is left over.[133]

Cleaver's story does provide a journalistic perspective on business practices. It presents a few companies using Article 9 to shift assets to secured creditors and out of the hands of non-adjusting creditors. Unfortunately, it is one 980-word piece in a huge volume of reporting on business and finance that generally fails to report on companies' financing practices that harm non-adjusting creditors. Also, the article's subject is limited to predatory "venture capitalists." Cleaver implies that the financing practice she describes occurs when these aggressive speculators are looking to salvage investors' money using any and all available means.[134] The fact that banks and other investors routinely take full priority security interests in the assets of businesses to the potential detriment of various non-adjusting creditors is still missing from the mainstream media landscape.

Plenty of reporting informs us on the fall-out of financial failures. Stories abound about lay-offs, about decimated pension funds and irresponsible accounting, about corrupt executives, about consolidation of major enterprises. Again, these stories assume the reader is an investor. As Wasik observes, these stories feel relevant because the reader's own retirement funds might be involved.[135]

Why do the media decline to report thoroughly and critically on financings that affect the courses that businesses take and the implications of those courses for a range of interested parties? Why do the media ignore recent, major changes to the law on secured finance that will aggravate the effect of financial failure on labor and other non-consenting or non-adjusting creditors? Stories about lay-offs or unemployment after bankruptcy read like "people stories" – stories about individuals and communities – not stories appropriate for the financial pages. The "people" will want to hear about a community's hardship. But are they up to hearing about the structure and legal rights that make up the financings that result in community hardship? No, no – that's way too complex and technical. The fact that a statute exists that enables companies to assign all assets to secured lenders, placing them beyond the reach of other creditors goes unmentioned in the people-friendly, community story. These stories do not question the validity or desirability of the enterprise (created and enabled by statute) concerned solely with profit. Businesses' financing decisions tend to go unvetted by journalists and left out of public discourse.

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132. *Id.*
133. *Id.*
134. *Id.*
135. Wasik, *supra* note 111.

LTV Steel, Inc. is an example of a large employer that entered into several secured debt financings, went into bankruptcy several times, and finally shut down, leaving many thousands of retirees' pensions and health benefits in jeopardy.[136] Coverage of the bankruptcies and eventual shutdown of LTV Steel included numerous community interest stories.[137] Many of these stories do not even mention the financings that enabled secured creditors to take LTV's assets ahead of workers and retirees dependent on company health care benefits and pensions.[138] The stories that do mention secured debt and explain that workers and retirees cannot get paid until secured lenders are paid in full report this fact with no explanation or critique.[139] The idea that certain laws create and protect secured creditors' rights – let alone that workers could organize to oppose the one-sided formulation of such laws – does not appear in the reporting.

Granted, cash did flow to LTV companies with employees and other creditors as a result of LTV's securitizations.[140] Whether this cash flow should have adequately protected workers – and why it ultimately did not – raises more questions the press declined to explore.

One reporter, Peter Krouse, does venture an explanation of how LTV securitized its accounts receivable in the *Cleveland Plain Dealer*'s coverage of *In re LTV Steel Company*.[141] This controversial and well-publicized case considered the status of assets sold to a bankruptcy remote special purpose vehicle for purposes of securitization.[142] In this case the bankruptcy court allowed LTV Steel to use funds collected from assets it had previously "sold" to a special purpose vehicle.[143] Krouse explains the securitization of LTV's receivables as follows:

> LTV Sales bought the accounts receivable of LTV Steel and used them as collateral to borrow from Abbey National. . . . LTV Steel wanted to borrow money at a lower rate, but the lender, Abbey National, was concerned about repayment. When LTV switched its collateral to LTV Sales Finance, that sheltered Abbey from LTV Steel's troubles.[144]

Krouse keeps his description to a bare minimum. His willingness to explain structured finance to his lay readership is refreshing, but Krouse

136. *See, e.g.*, Jim Weiker, *Steel Era, and a Way of Life, Ends in Cleveland*, COLUMBUS DISPATCH, Dec. 9, 2001, at 1A.

137. *See, e.g.*, *id.*

138. *See, e.g.*, *id.*

139. *See, e.g.*, Jennifer Scott Cimperman, *LTV's Court Battle: Who Will Survive, Who Will be Shuttered*, CLE. PLAIN DEALER, July 7, 2002, at A7; Peter Krouse, *British Bank Cries Foul in LTV Ruling*, CLE. PLAIN DEALER, Mar. 2, 2001, at 1C.

140. Cimperman, *supra* note 139.

141. Krouse, *supra* note 139; 274 B.R. 278 (Bankr. N.D. Ohio 2001).

142. *In re LTV*, 274 B.R. at 285-87.

143. *Id.* at 278-81.

144. Krouse, *supra* note 139.

and others at the *Cleveland Plain Dealer*[145] never explain that the sale of LTV Steel's assets to LTV Sales Finance meant that these assets were to be stripped from the company that actually employs workers at the plant. The concept of debt finance as judgment-proofing schema – as a way to shelter assets from claims by LTV Steel's workers or other unsecured creditors is completely absent.

Finance industry experts, of course, wrote and read plenty on LTV Steel. Reports on LTV's financings appear in publications circulated among finance experts such as *Asset Securitization Report, Investment Dealers Digest, CFO Magazine, Bankruptcy Strategist* and others.[146] These publications are specifically written and published for those who participate in and already understand structured finance. They do not expand the public discourse on structured finance to the greater public.

The scope and perspective in the reporting on LTV's bouts with bankruptcy typify reporting on financing and bankruptcy of large companies. For example, *The Miami Herald* offers similar fare in its coverage of Winn-Dixie.[147] On September 1, 2004, *The Miami Herald* ran a story entitled "Winn-Dixie shares plunge amid talk of bankruptcy."[148] The story reports that shareholders have been selling their interests in Winn-Dixie and that the company is making plans to avert bankruptcy.[149] About three-fourths of the way through, we learn that "in late June, lenders agreed to give the company a $600 million loan. The three-year deal includes a $400 million revolving credit line and a $200 million letter of credit."[150] The fact that this loan is secured by the assets of the company is not mentioned. Of course, since the security interest itself goes unmentioned, there is no reference to the possible effects of Winn-Dixie's credit facility on the company's unsecured creditors and equity holders. The loan appears as a glimmer of hope that the company might survive, that is has bought some time in which to turn itself around so that it may yet be a good investment. We learn that "'steps are being

145. The *Plain Dealer* ran a number of stories on LTV Steel (which had a large steel plant in Cleveland). *See, e.g., supra* note 139.

146. These publications devoted ample energy to assessing the health and future of the securitization industry after *In re* LTV Steel. *See, e.g.*, Kevin Donovan, *Is There Safety in Structure When Structures Can Change?*, ASSET SECURITIZATION REP., Mar. 15, 2004 (discussing uncertainty surrounding securitization and citing the bankruptcy of LTV Steel); Michael Gregory, *Lessons of Risk in AAA-Rated ABS, In the Rare Bankruptcy, it's Servicers, Not Collateral, That are the Problem*, INVESTMENT DEALERS DIG., Mar. 15, 2004 (discussing the role of servicers when a company that has securitized assets entered bankruptcy and citing LTV Steel); Barbara M. Goldstein, *Decision of Note; How Secure Are Your Securitizations? LTV Case Raises Important Issues for Creditors*, BANKR. STRATEGIST, Apr. 2001, at 1 (discussing asset securitization and the impact of *In re* LTV Steel, Inc.).

147. Josh Fineman, *Winn-Dixie Shares Plunge Amid Talk of Bankruptcy*, MIAMI HERALD, Sept.1, 2004, at 3C.

148. *Id.*

149. *Id.*

150. *Id.*

taken to shrink the company and strengthen remaining operations.'"[151] The nature of these steps is not relevant – only that the steps exist, indicating that Winn-Dixie shares may be a good buy at their reduced price.

Imagine the alternative headline: "Winn-Dixie Assigns Away Assets as It Staves Off Bankruptcy." Such a story could report that Winn-Dixie's recent financing assigns all assets to its lenders and out of reach of its non-adjusting creditors should the company ultimately fail. Journalists could report whenever businesses with significant numbers of non-adjusting creditors enter into secured credit facilities. Such stories might read: "Manufacturing Co. Assigns All Assets to Bank, Taking Loan to Fund Activities."[152] These stories would treat as news the event of a businesses' assignment of all of its assets to secure a loan.

Even reporting on Enron's financings failed to broadcast the basic ethical issues described in Part IA above surrounding asset securitizations.[153] Enron was criticized for abusing securitization; its methods of accounting for securitizations were examined. But statements criticizing securitization itself were few and far between.[154] Rather, securitization industry participants were quick to distinguish the practice of securitization generally – which they present as common and efficient – and Enron's failures to accurately account for assets it transferred to special purpose entities. Lobbying organizations like the American Securitization Forum arose after Enron to protect the industry from onerous regulation.

In a story that is exemplary of its Enron coverage[155] *The New York Times* reported the following:

151. *Id.*

152. Such a story might also alert readers to possible deficiencies in Manufacturing Co.'s liability insurance coverage.

153. Asset securitization has received widespread attention when it occurs in a public finance context – primarily, as states securitize tobacco settlement payments. In this context, critics are quick to point out that the state is taking and spending cash upfront to fix short term budget crises, relinquishing its rights to future revenue. *See e.g.*, Dennis Chaptman, *Tobacco Money is a Quick Fix; State's Planning Called Weak*, MILWAUKEE J. SENTINEL, May 5, 2002, at B1; American Lung Association of California, *In the Spotlight: Securitizing Tobacco Settlement Funds, Questions and Answers*, www.californialung.org/spotlight/securitizing000710.html (last visited Nov. 11, 2001). The policy considerations surrounding this type of securitization differ significantly from those surrounding a business asset securitization. For example, the state may not want to depend on future revenue that is tied to particular industry performance. Despite differences, the fact that securitization is openly criticized in a public finance context makes the lack of serious criticism in a business finance context even more perplexing.

154. Reporting on Enron's failure and suspect accounting practices did offer a few statements that speak to ethical concerns of securitization generally. These stories, however, are a small minority and have largely disappeared since reporting on the scandal has diminished. *See e.g.*, Janet Kidd Stewart, *Flashing Yellow on Asset-Backed Debt*, CHI. TRIB., June 16, 2002, at C1; Mary Vanac, *Now Investors are Wondering Whether They Can Trust the Numbers of Any Company That Uses Off-the-Balance-Sheet Arrangements; Enron Shows Your Ignorance Can Hurt You*, CLE. PLAIN DEALER, Apr. 3, 2002, at C1.

155. *E.g.*, *cf.* Riva D. Atlas, *Enron's Many Strands: The Law Firm; A Law Firm's 2 Roles Risk Suit by Enron*, N.Y. TIMES, Jan. 29, 2002, at C1; Floyd Norris & Kurt Eichenwald, *Enron's Many*

> 'Enron gives a very useful tool a bad name for no reason,' said Ronald Gilson, a law professor at both Stanford and Columbia. 'Structured finance is used for a zillion different and worthwhile purposes. The problem is Enron used it to create a structure that was genuinely not transparent, to hide things.' [156]

The story continues:

> [Gilson's] concern was echoed by David M. Eisenberg, a partner at the law firm Simpson Thacher & Bartlett and a pioneer in securitization, the process of creating asset-backed securities. 'Any financing techniques can be abused,' Mr. Eisenberg said. 'Securitization is not special in that. But true securitization is about transferring risk to others – and Enron only appeared to be doing that, when in reality they were retaining the risk themselves.' [157]

This story offers no statements to counter these characterizations of securitization. The problem with Enron was that it just did not get its asset securitizations right.

Given the volume of information provided by CNNMoney, Marketplace, NPR, *The New York Times* and other similar sources, the uniformity of vantage point in the business and finance stories of these sources raises questions. Obviously *The New York Times*, CNN and NPR are well aware of wealth disparities. In addition, as major providers of journalistic reporting, people within these organizations are aware of the concept of objectivity, of distance from a subject, essential to decent reporting. Why are wealth disparities and critical distance from one's subject suddenly ignored when the subject is business finance?

Business writing reports on business successes and failures for an audience of self-interested players or pawns in a game the objectives of which are beyond questioning. Wasik states that with few exceptions "business writers base their work on . . . the idea that, as the ultimate authors of business, . . . Americans need not be lectured about its plots, themes, and subtexts."[158] Contemporary business "journalism" suggests that Americans view finance as the province of experts and large finan-

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Strands: The Accounting; Fuzzy Rules of Accounting and Enron, N.Y. TIMES, Jan. 30, 2002, at C1; Kurt Eichenwald, *After Enron, Bankers Weigh Clients' Motives*, N.Y. TIMES, Sept. 19, 2003, at C1.

156. Diana B. Henriques, *The Brick Stood Up Before. But Now?*, N.Y. TIMES, March 10, 2002, § 3, at 31.

157. *Id.*

158. Wasik, *supra* note 111. Wasik writes that business reporting has not always been so monolithic. He contrasts contemporary writing on business to writing in Fortune magazine in the 1930s: "Reading the Depression-era Fortune at seventy years' remove, one is struck not by the magazine's purported progressivism . . . but instead by its critical distance. Although aimed at the businessman, Fortune never pretended to serve his immediate self-interest. It held industry apart as an object of analysis." Wasik, *supra* note 111. Wasik attributes the change in practices of reporting on business to "democratization" of stock ownership. *Id.* An analysis of whether contemporary discourse on finance differs from that of the past, and the causes of such difference, are beyond the scope of this article.

cial institutions as our keepers, our sources of capital and livelihood. What is scandalous about Enron, or insider trading, is that individuals have taken advantage of the corporate form and engaged in dishonesty for illicit personal gain. The idea of the corporation itself as paternal, as having interests that are aligned with public interests, remains extremely salient.

The absence of critical distance in widely circulated writing about business evidences the hegemony of the idea that business growth is Americans' best and even our only source of economic and social stability.[159] This hegemony obviates the space in which we might find in reference to Article 9 the irony or emotional response that socially contentious topics command. Without critical distance, conversations about secured financing will continue to seem boring, neutral, technical and irrelevant to those not invited into the board room or the drafting session despite secured financing's broad social implications.

B. Unsecured Creditors and an Imagined Community of Individual Investors, Large and Small

The lack of critical distance in reporting on business and finance is a form of collective disregard of severe socio-economic inequalities among Americans. This article proposes that this disregard enables secured creditors to present full priority secured credit as a system that furthers the public's best interest. Where does this collective disregard come from and how does it persist?

Building on the work of Benedict Anderson[160] and others, this article hypothesizes that contemporary reporting on business and finance indicates an imagined community of capitalists or investors. This community of investors is imagined because its members assume commonalities with one another despite the fact that they may never meet or even have any contact with one another. It is a community (as discussed in greater detail below) because those who do and those who aspire to participate in capitalism as investors share a unified field of exchange that generates comradeship despite vast differences and inequalities among members. The myth of this community is that everyone belongs. Media on business and finance further the myth of opportunity – of an open playing field – for financial gain. This myth fuels the imaginings that encourage even those who struggle financially to identify as members.

Contemporary reporting on business and finance shows an uncritical deference to businesses' objectives, to finance experts and the capi-

159. Again, hegemony means a system or set of ideas that is so dominant that people living within the system of ideas have internalized its premises and values to the point where those values become invisible. *See supra* text accompanying note 17.

160. BENEDICT ANDERSON, IMAGINED COMMUNITIES (2nd ed. 1983).

talist values they express.[161] How might we infer the existence of an imagined community from this reporting? What are this community's salient features? Further, how does the concept of an imagined community of investors affect legal scholars' responses to Article 9 and the UCC drafting process? The remainder of this article pursues these questions.

Benedict Anderson's book, *Imagined Communities*[162] has widely influenced scholars in many fields, including many legal scholars.[163] This article relates Anderson's concept of imagined community and the lack of critical distance in public discourse on finance to critique legal scholars' responses to the expansion of full priority secured credit.

Anderson develops his concept of imagined communities in a study of the rise of the nation-state.[164] This article extracts the concept of imagined communities from Anderson's work in order to name and to capture the sense of collective identification with the needs of capital that enables secured creditors' control over laws governing secured transactions.

Though this article is by no means a thorough reading or application of Anderson's thesis, it can be read to imply a relationship between an imagined community of capitalists and the identity of the United States

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161. *See supra* Part II.A.

162. *See* ANDERSON, *supra* note 160. Anderson's idea of the nation as imagined community has widely influenced the study of nationalism in the twenty years since its publication. Though the study of nationalism has evolved significantly since 1983, the idea of imagined community as a basis for national consciousness remains central to many scholars' understandings of the subject. Scholars of nationalism describe Anderson's book as "unavoidable in recent discussions of nationalism." ROSS POOLE, NATION AND IDENTITY 10 (1999); *see generally* E.J. HOBSBAWM, NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY (1990); BECOMING NATIONAL: A READER (Geoff Eley & Ronald Grigor Suny eds., 1996). This article does not address nationalism or the idea of nation as imagined community. Rather, it uses Anderson's concept of imagined communities to propose the existence of an imagined community of investors or capitalists the existence of which limits unsecured creditors' possibilities for response to Article 9.

163. Many legal scholars writing in a wide range of areas draw on Anderson's concept of imagined communities. There are so many references to Anderson and "imagined communities" within legal scholarship that a thorough inventory of them is not possible here. Following are a few examples of some recent, and some common, uses of Anderson by legal academics: Rachel F. Moran applies Anderson's ideas to discuss of the evolution of law and history. *See* Rachel F. Moran, *Critical Race Studies: Race Representation, and Remembering*, 49 UCLA L. REV. 1513, 1515-20 (2002). Imagined communities are created in part through a telling of the community's history. *Id.* This telling of history in the process of creating an imagined community involves suppression or erasure of counter-history. *Id.* at 1528. Hence, in Moran's words, "slavery and its legacy represent one of the most direct challenges to America's imagined community, bound by ties of fraternity and equality." *Id.* Anderson's work has influenced numerous other scholars in the area of critical race theory as well. These writers cite Anderson – or simply reference the concept of imagined communities – to show how certain groups imagine themselves to have a particular racial, national, or other social identity. Martha Minow cites Anderson in her discussion of the social construction of identity. *See* Martha Minow, *Speech: Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 662-63 (1996). Paul Schiff Berman draws heavily on Anderson's presentation of nation-states as imagined communities in his critique of jurisdiction. *See* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 462-65 (2002).

164. ANDERSON, *supra* note 160, at 4-7.

as a nation-state.[165] Robert E. Scott has stated that "Article 9 simply cannot be rationalized as a panglossian experiment in nation-building."[166] Scott is right if nation-building means institutionalizing a preference for national over local creditors in the market for secured loans. However, this article might be read to hypothesize that Article 9 has a relationship to nation-building in the United States separate from whether it facilitates local or national markets in the sense that it institutionalizes collective deference to the demands and viewpoints of finance experts and financial institutions.

The purpose here is to introduce the idea of an imagined community of investors that: (i) undermines non-adjusting creditors' capacity for organized political participation,[167] and (ii) provides an explanation for secured creditors' control over Article 9 that commercial law scholars have heretofore overlooked. This purpose is fulfilled regardless of whether the imagined community of investors could ever be related successfully to United States nationalism.

The critical reading of contemporary media on business in Part II.A suggests that the persistence of full priority can be viewed as the product of a docile acquiescence with which the public responds to finance industry rules and statements.[168] This docile acquiescence is not a function

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165. The analysis in this article could perhaps be expanded to argue that belonging to an imagined community of capitalists is a crucial component of national identity in the United States. Participating in common capitalist endeavors could be viewed as a way in which citizens of the United States identify one another as sharing nationality. *See* LIAH GREENFELD,THE SPIRIT OF CAPITALISM: NATIONALISM AND ECONOMIC GROWTH 363-472 (2001) (tracing the history of capitalist values in the formation of United States nationalism and describing a "spirit of capitalism" that has permeated the formation and development of America). Though every such participation may not represent an instance of national consciousness, one could present the phenomenon of collective participation in capitalism and deference to finance experts in the United States as one facet of national identity. An analysis sufficient to sustain these claims about American nationalism could go on to argue that this facet of national identity has gone unexplored in legal scholars' critiques of how Article 9 expands the scope of secured credit despite serious and legitimate concerns for fairness and just distributions of wealth. This deference can be viewed as a crucial component of national identity. This article leaves such an assessment of United States national identity and Article 9 to another project.

166. Robert E. Scott, *The Mythology of Article 9*, 79 MINN. L. REV. 853, 856 (1995) [hereinafter *Mythology*].

167. The imagined community hypothesis presented here suggests an affirmative identification with or desire to belong to a class of people that invests on some level. This identification aggravates and precedes problems of collective action. Collective action problems arise from the fact that rational and self-interested behavior in individuals does not lead to self-interested behavior at the collective or group level. Theorists of collective action have shown that in a large group, in order for collective interest to give rise to collective action, there must be compulsion or individual incentive to act in the group's interest. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965). Disadvantaged unsecured creditors, however, do not even recognize themselves as a class or as having collective interests vis-à-vis the laws governing secured finance that they could articulate and then pursue either out of individual interest or through compulsion. The constant urging by the media to identify with an imagined community of investors discourages the possibility of alternative collective identification. Failure to identify collective interest undermines capacity for action. Whether, and under what conditions, collective identification would in fact yield collective action is a separate problem.

168. For a discussion of instances of dissent that disrupt this docile acquiescence, *see infra*, text accompanying notes 183-84.

of inability to comprehend sophisticated financial concepts. Rather, it can be attributed to a widespread identification among unsecured creditors of belonging to an imagined community of capitalists. To imagine oneself as belonging to a community one must be willing, on some level, to disregard or suppress inequalities between oneself and one's fellow members of the community.[169] Critics of UCC Article 9 have not considered the possibility of such an imagined community, or the myths that perpetuate it, in assessing how and why full priority secured credit persists.

Anderson writes about the capacity of strangers to imagine themselves as belonging to one, abstract community.[170] The rise of print capitalism, in Anderson's view, fostered this capacity.[171] He writes the following about reading newspapers:

> The significance of this mass ceremony – Hegel observed that newspapers serve modern man as a substitute for morning prayers – is paradoxical. It is performed . . . in the lair of the skull. Yet each communicant is well aware that the ceremony he performs is being replicated simultaneously by thousands (or millions) of others of whose existence he is confident, yet of whose identity he has not the slightest notion. . . . At the same time, the newspaper reader, observing exact replicas of his own newspaper being consumed by his subway . . . neighbours, is continually reassured that the imagined world is visibly rooted in everyday life. . . . [F]iction seeps quietly and continuously into reality, creating . . . remarkable confidence of community in anonymity . . . .[172]

Reporting on business and finance in the United States enjoys an audience the members of which, by virtue of their shared consumption of this reporting and the capitalist values it reflects, can imagine commonalities with one another despite anonymity. If readers are protagonists and there are many readers, then there are many protagonists – many in the same position vis-à-vis businesses' activities, vis-à-vis a world of investment activity. This shared position urges business owners in one region, for example, to imagine that business owners in another region read the same *Wall Street Journal*, care for the profitability of their businesses, and hope for financial success, just as they do. It urges collective identification with investment options. An employee in one state can assume that an employee in a completely different state must consider the same interest rate trends, think about the same 401K investment options, and

169. *See, e.g.*, GREENFIELD, *supra* note 165, at 365 (finding that "equality is a central value in all nationalisms"); ANDERSON, *supra* note 160, at 7 (stating that a community achieves horizontal comradeship despite actual inequality and exploitation among its members).

170. ANDERSON, *supra* note 160, at 37-46.

171. *Id.*

172. *Id.* at 35-36. Note that the final phrase of this passage in the original text is: "which is the hallmark of modern nations."

hope to take advantage of the latest home mortgage incentives, just as he or she does. The media's constant appeal to reader-investors, coupled with the existence of common endeavors for profit, enables business owners or employees to imagine commonality with one another despite the fact that they will never meet.

This imagined commonality generates a sense of community. Readers of business or finance journalism share a unified field of exchange in the form of markets, primarily capital markets and real estate markets. The public discourse surrounding these markets projects the image of participation as a necessary, common endeavor. The rhetoric of economics, of game metaphors, of competition – deployed in the voice of the self-interested player – invite readers to imagine their fellow "players." Readers can be confident that these players exist even if they never meet. We imagine a community of investors in the sense that for every seller we can infer a buyer (and vice versa). Everyone's individual investments are growing in proportion to everyone else's. Sometimes members of this community view one another as competitors, such as when two buyers bid for the same asset. Sometimes they view one another as cohorts, such as when collective excitement about a certain stock raises its value. Regardless of perpetual shifting of interests within the community, the mode of reporting described in Part II.A constantly reinforces the existence of fellow community members and their basic commitment to capitalist values.

Anderson writes that the imagined community that comprises a nation can be described as a community because it is based on a sense of comradeship that persists regardless of inequality and exploitation within its borders.[173] This article views lack of critical distance in business so-called journalism as disregard for or denial of inequality. This virtually uncontested denial suggests existence of an imagined community of investors or capitalists that maintains a sense of horizontal comradeship, of common endeavor, despite intense inequality and exploitation within the group.

One major difference between this community and Anderson's imagined communities is that the limits of this community are not explicitly delineated by reference to an "other". Anderson's imagined communities are limited "because even the largest of them, encompassing perhaps a billion living human beings, has finite, if elastic, boundaries, beyond which lie other nations."[174] Again, Anderson's focus is on the nation-state as imagined community.[175]

173. *Id.* at 7.
174. *Id.* at 7.
175. *See generally id.*

Many definitions of community focus on constructions of otherness and exclusion to evidence affiliation among members. But clear indicia of unity and exclusion are not endemic to the idea of community.[176] For example, Jerry Frug does "not cede the term community to those who evoke the romance of togetherness."[177] Frug presents community as "the being together of strangers"; community is not limited to "feelings of identity or unity."[178] Yet, to speak of a community, one must identify some commonality or sharing of space that makes the concept of community relevant. The communities Frug describes and proposes, for example, are rooted in geographic commonality.[179]

Who is the "us" for whom popular writing on business and finance is produced? The community of investors shares no specific territory. Rather, the community of investors congregates in the virtual space of the marketplace. Scholars have researched and written about communities that transcend traditional boundaries.[180] As one such scholar, Jessica Berman, writes: "We move in a realm of being-in-common that rests upon the border between 'I' and 'we,' a border that may not necessarily coincide with the political boundaries that surround us"[181] when we speak of community.

The "us" of the imagined community of capitalists is expansive in that it extends beyond physical borders to various marketplaces –for home mortgages, for retirement plans, for stocks, for leases. These markets themselves are limited by the laws that create and police them, and the "us" that participates in these markets is restricted as well. This community presumes and imposes highly specific, particular thought patterns and behaviors. It is limited in the sense that, though the range of members is broad and wide, the members can picture a proverbial "bottom rung of the social ladder" to which the community does not extend. The excluded are rarely held up and spoken about as an "other" against which the "us" of the community must be defined. Rather, the presence of, and the fear for many of falling into or remaining forever within, that "other" is conspicuously absent. This conspicuous absence functions as a threat of exclusion for those who do not participate in the community or who reject the community's values.

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176. Ample scholarship in anthropology and other fields addresses the question of what is a community, but comes to very little consensus. *See, e.g.*, George A. Hillery, Jr., *Definitions of Community: Areas of Agreement*, 20 RURAL SOC. 111 (1955) (compiling ninety-four attempts within the social sciences to define community and finding that the only significant overlap among them was that all of the definitions deal with human beings); NIGEL RAPPORT & JOANNA OVERING, SOCIAL AND CULTURAL ANTHROPOLOGY 60-65 (2001) (discussing various theorists approaches to community).

177. Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1049 (1996).

178. *Id.* at 1048-49.

179. *Id.*

180. *See, e.g.*, JESSICA BERMAN, MODERNIST FICTION, COSMOPOLITANISM, AND THE POLITICS OF COMMUNITY 1-27 (2001); Special Issue, *Globalization*, 12 PUB. CULTURE 1-289 (2000).

181. BERMAN, *supra* note 180, at 3-4.

This article proposes that employees and other non-adjusting creditors identify with the imagined community of investors.[182] This use of the concept of imagined community relates obstacles to informing non-adjusting creditors to a lack of class consciousness in the United States.[183] This article does not intend to imply that class consciousness is completely non-existent in the United States. Rather, this article situates the relative obscurity of laws governing debt finance within a more general apathy towards challenging the legal mechanisms with which business raise capital. This apathy can be described as a lack of class consciousness, given the distributive effects of the laws in question. Identification with or a sense of belonging to an imagined community of investors is one way to explain this apathy.

Instances of dissent that disrupt identification with this imagined community, like labor or environmental movement responses to capitalist behavior, are products of specific types of direct violence. Also, labor and environmental movement advocates remain voices from the outside vis-à-vis business finance. The indirect violence of a secured loan – that a company continues or even augments exploitative practices in order to service debt agreements – escapes notice. (Default can mean loss of control, of assets, of viability).

Widespread identification with an imagined community of investors is not just a simple matter of ignorance of the effects of financing practices like secured credit that can be attributed to a lack of reporting on business finance. Identification with an imagined community of investors stems in part from the knowledge – reinforced in public discourse – that social safety nets are thin and becoming thinner in the United States. Americans need to be able to identify with the activities of capitalism and investment, even if they personally can only hope to invest on a small scale. The alternative – again, conspicuously absent from the discourse – is to weather the threat of a life of severe constriction, poor

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182. Organized labor has traditionally been one of the few, powerful voices against unchecked capitalism in the United States. However, this historical role does not prevent workers from identifying as members of the imagined community of capitalists. Far from feeling a sense of opposition to an investor class, a great many workers identify as investors themselves. *See, e.g.*, Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351 (2002). Many workers organize employee stock ownership plans (ESOPs) to own their employers and to bid for companies or company divisions. Investment banking firms encourage unions – whose pension funds are major investors in leveraged buyout pools – to consider bidding.

183. Phenomena of identification among middle and working class individuals in the United States with institutions and political programs that are exploitative have been described by a wide range of writers. For example, with respect to labor, *see* ROBIN D.G. KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS 32 (1994) (discussing how white working-class racism has undermined black labor struggles and undercut the potential for working class solidarity); Befort, *infra* note 182, at 375 (referencing the American labor movement's embrace of capitalist objectives); Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394, 1400-04 (1971) (citing that the American labor movement has lacked in class consciousness).

health, and poverty in old age. This threat has been taken on. But it has only been taken on to avoid the violence of substandard labor conditions and of cruel diseases associated with environmental pollution and destruction. Because violence associated with secured credit ensues indirectly, it seems that fidelity to the values of an imagined community of investors will preclude any targeted uprising of disadvantaged creditors against absolute priority credit.

Very few individuals in the United States succeed in exempting themselves from the imagined community of investors. Many may ignore the type of reporting and information described in Part II.A, but few can claim independence from the financial activities, both personal and institutional, on which that reporting focuses. If social security were ever "privatized" the general public would feel that identification with the imagined community of investors even more intensely.[184] Widespread media makes this identification seem necessary to achieve a sense of personal security, especially in old age and in light of difficulties in accessing decent health care.

This reading that an imagined community both produces and is created by the monolithic investors' vantage point in popular media on business and finance may feel like a throwback to the "myth and symbol" school of the 1950s. The myth and symbol historians and writers were among the first American scholars to analyze the intellectual content of popular culture.[185] They showed the power of myth and symbols to affect public policy and social values even when the myth or symbols themselves were irrational or lacked any relation to actuality.[186] Later, this mode of scholarship was highly criticized for presenting an "American world view" that is monolithic – that excluded heterogeneous, minority and other viewpoints.[187] More recent trends have focused on rejecting the construction of dominant myths or on how dissident groups reject the myth.[188] However, in contemporary times (e.g., during George W. Bush's campaigns and presidency) symbolic language and myth-making in public discourse has gained prominence. Contemporary scholars have recognized the need to revisit understandings of the creation and role of dominant myths in policy making.[189]

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184. *See generally The Diane Rehm Show: Social Security and Market Risk* (NATIONAL PUBLIC RADIO broadcast Feb. 23, 2005), *available at* http://www.wamu.org/prorams/dr/05/02/23.php (discussing the effects and desirability of Bush's proposed social security reforms).

185. *See, e.g.*, HENRY NASH SMITH, VIRGIN LAND: THE AMERICAN WEST AS SYMBOL AND MYTH (1950); C. Wyatt Evans, *An Analysis of 'Myth and Symbol'*, THE CHRON. OF HIGHER EDUC., Feb. 11, 2005, at B4.

186. Evans, *supra* note 185.

187. *Id.*

188. *Id.*

189. *Id.*

This article's presentation of an imagined community of capitalists – the projected readers of widespread media on business and finance – does not intend to suggest homogeneity within the community. Rather, it presents a dominant myth projected by media – that Americans are investors or capitalists who encounter business and finance as self-interested players, large or small – and then speculates on the audience for and effects of this dominant myth.

UCC scholars write that Article 9's full priority schema was recently expanded without opposition in part because unsecured creditors' interests are too diffuse to oppose the relatively coherent interests of secured creditors.[190] The story goes that this diffusion, plus the technical difficulty of the code, makes effective popular opposition to Article 9 impossible. This work builds on this reading of the capacities of unsecured creditors by considering why these creditors' interests seem so diffuse. The existence of an imagined community of investors, plus the myth that everyone belongs to such a community, would lead non-adjusting creditors to accept without pause secured creditors' standard refrains, such as: (i) giving companies maximum ability to raise capital is in the community's common interest, and (ii) any limitation on full priority will restrict access to capital.

III. READING LEGAL SCHOLARSHIP IN LIGHT OF CREDITORS' IMAGINED COMMUNITIES

This Part demonstrates how the idea of an imagined community of capitalists with which non-adjusting creditors identify affects arguments about full priority secured credit. It critiques the work of prominent commercial law scholars Robert E. Scott, Warren, Lynn LoPucki and others. Scott writes about the UCC drafting process and certain structural peculiarities of Article 9, while Warren and LoPucki propose revisions to Article 9 to counter its distributive effects. This article builds upon the works of Scott, Warren and LoPucki by situating them within the socio-political context described in parts I and II.

A. Robert E. Scott's Analysis of the UCC Drafting Process

In *The Politics of Article 9*, Robert E. Scott rejects the "standard scholarly practice" of treating "the UCC and similar laws as if they were created by rule-generating 'black boxes.'"[191] Because of this scholarly practice, Scott contends, scholars have failed to debate whether internal workings of institutions that produce laws like the UCC are desirable.[192] Scott seeks to begin such a debate by "examining the Article 9 law mak-

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190. *See supra* notes 6-7. For example, there is an organization – The National Association of Credit Management – that represents trade creditors and has about 50,000 members. This association did not insert itself into the Article 9 debate leading up to the 1999 revisions.

191. Scott, *Politics*, *supra* note 3, at 1803.

192. *Id.*

ing process in much the same way that political scientists study legislatures."[193]

Scott focuses on how special interest groups can dominate uniform commercial law revision because uniform laws are drafted by what he calls "private legislatures."[194] The ALI and NCCUSL function as a "private" lawmaking or policy setting team.[195] We can regard the ALI and NCCUSL as a "legislature" since states largely adopt pro forma laws like Article 9 that the ALI and NCCUSL propose.[196] Yet, despite their law-making function, according to Scott, the ALI and NCCUSL "believe that their function is to deal with technical problems that can be resolved by legal expertise and to avoid issues whose resolution requires controversial value choices."[197] State representatives apparently regard this "legislature's" task in drafting revised Article 9 as non-political. How can the drafting of a statute with profound consequences for wealth distribution and liability stand as a non-political process?

A "private legislature" – like the UCC drafting committee – has no constituency or independent power base to which it answers.[198] Therefore, it needs interest group support (or lack of opposition) to have its proposed laws enacted.[199] Also, Scott writes:

> Ordinary legislatures have mechanisms for finding facts [hearings] that are unavailable to [private legislative groups], and are exposed to many more sources of information concerning the effects of the proposals that they consider. Truth is a likely corrective to outputs that are skewed by the process itself.[200]

Scott does not draw a firm conclusion as to whether the Article 9 drafting process is in fact dominated by interest group influence, but he suggests that evidence weighs in favor of such a conclusion.[201] Scott's work co-authored with Alan Schwartz predicts that a private legislature such as ALI and NCCUSL would adopt bright-line rules and not flexible

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193. *Id.*

194. Scott's private legislature analysis of the UCC drafting process first appeared in an article that he co-authored with Alan Schwartz. *See* Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 595 (1995). Schwartz also studied the ALI and NCCUSL predicting that "a private legislature (a "PL") would: (a) have a status quo bias, rejecting serious reforms; (b) adopt rules (as opposed to standards) when lobbied by a single interest group; and (c) adopt standards, or succumb to paralysis, when lobbied by competing groups." Alan Schwartz, *The Still Questionable Role of Private Legislatures*, 62 LA. L. REV. 1147, 1147 (2002) (responding to Robert Rasmussen's arguments on the competence and desirability of private legislatures).

195. Schwartz & Scott, *supra* note 194, at 596.

196. *See id.*

197. Scott, *Politics*, *supra* note 3, at 1805-06.

198. *Id.* at 1813.

199. *Id.* at 1813-14.

200. *See* Schwartz & Scott, *supra* note 194, at 651.

201. *See* Scott *Politics*, *supra* note 3, at 1816.

standards when lobbied by a single interest group.[202] Revised Article 9 consists primarily of bright-line rules.

Scott asserts that the efficiency of the ALI/NCCUSL private legislature depends in large part on whether the interests of the dominant group in the drafting process are aligned with public interest.[203] Scott does not opine as to whether this is the case for Article 9.[204] However, throughout his argument we see that the relation between interest group interests and the private legislature participants' conception of public interest is central to assessment of the nature and quality of the Article 9 drafting process.[205] This article builds on Scott's theory by proposing that the lack of critical distance on finance and the existence of an imagined community of investors encourage lawmakers to perceive creditors' interests as consonant with public interest.

If the Article 9 drafting process is controlled by a coherent interest group, then, Scott suggests, this interest group is permitted to control in large part because of a perceived consonance of industry objectives and public good.[206] Scott repeatedly references the issue of whether the public's interest is aligned with the interests of the dominant group in the Article 9 revisions process.[207] Interest group influence on the Article 9 revisions process is benign, Scott states, as long as interests of the group sufficiently align with the public interest.[208] Scott never articulates a position or offers any evidence as to whether such an alignment of interests actually exists.[209]

This article argues that the interest groups that participate in the Article 9 drafting process do benefit from a societal view that increasing businesses' access to credit is in the public interest. The analysis in Part II articulates and makes controversial the social reality that implicitly drives Scott's argument. The current state of public discourse on finance and the existence of an imagined community of investors with which unsecured investors identify, make secured creditors' influence on the UCC drafting process appear benign.

Scott writes:

> [An] underlying intellectual premise of the ALI and NCCUSL [is that i]f Article 9 rules can be derived from uncontroversial moral premises and constructed with traditional legal skills, then small groups of

202. *See* Schwartz & Scott, *supra* note 194, at 597.

203. Scott, *Politics*, *supra* note 3, at 1850.

204. *See generally id.* (discussing ALI/NCCUSL efficiency in general without applying the analysis specifically to Article 9).

205. *See generally id.* (describing the private legislature Article 9 drafting process).

206. *Id.* at 1818.

207. *Id.* at 1790.

208. *Id.*

209. *See generally id.* (failing to offer empirical evidence showing interest group influence as benign).

'experts' can create . . . reforms, and larger groups of less informed practitioners and judges . . . can choose the best ones.[210]

The study group convened by the ALI to propose revisions to Article 9 was comprised of experts whose technical expertise authorized them to propose rules to govern security interests in personal property. The experts' proposals were offered to the remainder of the private legislature participants for review. Scott states that the messages of an expert "will be taken as credible when . . . not inconsistent with the uninformed preferences of the median PL [private legislature] members."[211] "People of good judgment," Scott writes, "tend to heed . . . expert advice, especially when they are unable to inform themselves independently."[212]

But Scott does not ask: What constitutes these "uninformed preferences" of the private legislature participants? Why are they "unable to inform themselves independently?" The lack of critical distance in media on business and finance is perhaps one very important factor driving these uninformed preferences. From the vantage point of an imagined community of investors to which everyone belongs, secured creditors' views can appear fully consonant with public interest. The limited range of viewpoints in public discourse on business and finance, and the myth of belonging to an imagined community of investors that this discourse generates, converge to facilitate secured creditors' influence on the law and limit the range of unsecured creditors' responses.

B. Information Asymmetry as a Hindrance to Reform

Scott repeatedly implies that secured creditors' control over Article 9 would erode if the public were more aware of and engaged by the subject of commercial secured finance.[213] The interests of unsecured creditors, he writes, are just not sufficiently cohesive to oppose secured creditors.[214] Scott states that unsecured creditors must bear the costs of becoming informed and organizing to oppose the effects of Article 9.[215] These costs are high, according to Scott, because of the heterogeneity of interests among unsecured creditors and the infrequency of involvement in transactions involving secured credit.[216]

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210. *Id.* at 1808. The Article 9 study group was comprised of two academic reporters and sixteen members – three legal academics and thirteen practicing lawyers. On particularly technically complex issues, the reporters and chair sought recommendations from advisory groups of "experts." *Id.* at 1907-08. Given the UCC drafters' conception of their task, Scott continues, "The principal currency in the [Article 9] Study Group is technical expertise . . . and the greatest asset is knowledge of how the rules 'really work' in practice." *Id.* at 1808.

211. *Id.* at 1815.

212. *Id.*

213. *See id.* at 1850.

214. *Id.* at 1806.

215. *See id.* at 1848-49.

216. *Id.* at 1807.

Scott is far from alone in this conclusion. A range of scholars cite as an obstacle to reform the apparent inability of unsecured creditors to inform themselves sufficiently to oppose Article 9's favoring of secured creditors. For example, Edward J. Janger, like Scott, writes that unsecured and non-consenting creditors are too diffuse to mount any opposition to secured creditors.[217] Warren also echoes the sentiment that unsecured creditors have not been able to articulate their positions in the debate over full priority.[218] In addition, Warren suggests that many lawyers concerned with social justice are not adequately engaged and informed when it comes to commercial law issues.[219]

It is true that costs to unsecured creditors of becoming sufficiently informed to oppose the distributional consequences of Article 9 are high. However, these scholars have not thoroughly, critically addressed why they are high. The interests of all unsecured creditors, viewed as a single class, may be highly diverse. But there are many large groups of unsecured creditors – such as employees – whose interest in having recourse against a debtor that assigned all of its assets to a secured creditor are fairly coherent. Also, employees cannot be said to deal infrequently with secured transactions when their financial security may be affected by one or a few secured transactions that encumber the assets of their employer for the duration of their working life. Likewise, trial lawyers representing tort claimants are a relatively coherent group with an interest in their clients' ability to recover awards. They may deal repeatedly with defendants who do not pay awards because the defendant's liability insurance is inadequate and a secured creditor recovers all of the value of a defendant as collateral before the company pays a tort judgment.[220]

The high cost to unsecured creditors of becoming sufficiently informed to oppose Article 9 is not due to the UCC's technical difficulty or complexity. Rather, it is due to a privileged position that contemporary writing on finance and business *gives* to the statements of finance insiders. It is due to the monolithic quality of the information on business and finance made widely available. The information asymmetry between secured creditors and non-adjusting creditors is entrenched by the lack of

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217. *See* Janger, *supra* note 2, at 587. Janger's take on how secured creditors maintain control over the substance of Article 9 focuses on concerns for uniformity in the enactment of Article 9 in state legislatures and state legislatures' ability to externalize the costs of full priority secured credit. State legislatures, he argues, have incentive to enact the full priority version of Article 9 because to do otherwise might increase costs of capital in the state, causing businesses to incorporate or do business elsewhere. The costs of secured credit do not necessarily affect the state in which a business is located. A business may be registered or have headquarters in one jurisdiction, but have employees, hold assets and conduct risky activities in another jurisdiction. *See id.* at 581.

218. *See* Warren, *supra* note 6, at 1394-95.

219. *See generally* Elizabeth Warren, *What is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L. J. 19 (2002) (arguing that students and lawyers concerned with social justice must learn to understand and consider commercial and bankruptcy law in order to be effective).

220. See LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 4 (1996) (explaining how parties to secured transactions use such transactions to avoid liability).

critical voices in discourse on finance that might otherwise provide needed information to non-adjusting creditors.[221] The monolithic vantage point of widespread public discourse on finance encourages non-adjusting creditors to identify with belonging to an imagined community of investors irrespective of their personal financial situations.

C. The Threat of Credit Constriction as a Hindrance to Reform

The most obvious and powerful response that secured creditors make when faced with the prospect of partial priority is that that they will extend less credit under a partial priority system.[222] Participants in the Article 9 revisions process echo the secured creditors' position.[223] Steven Harris and Charles Mooney, the reporters for the Article 9 drafting committee, for example, cite purported diminution in financing in their defense of full priority.[224] Warren describes how assertion of credit constriction is treated as a debate stopper.[225] Warren points out that whether partial priority will reduce credit is untested and unfounded[226] and that debtors in nations with partial priority systems do not appear to suffer from a dearth of credit.[227]

Bebchuck and Fried make an efficiency based argument to debunk the credit constriction claim.[228] They argue that "on an aggregate basis, the availability and cost of credit need not change substantially under a rule of partial priority."[229] In practice, they claim, many current secured claims do not end up having full priority in bankruptcy, so lenders cannot claim that they wouldn't lend under a partial priority system.[230] They go on to argue, among other things, that projects that would not go forward under a partial priority system would be projects that externalize costs onto non-adjusting creditors that are not offset by the overall value the project creates.[231]

But Warren, LoPucki, Bebchuck and Fried seem to discount the force of secured creditors' threat of credit constriction. Bebchuck and Fried make a thorough case that this threat is not rational. But rationality seems to have little to do with how the laws on priority of secured claims

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221. Again, on whether better informing unsecured creditors would lead to reform, *see supra* note 167 and text accompanying notes 183-84.

222. Harris & Mooney, *Measuring the Social Costs and Benefits and Identifying the Victims of Subordinating Security Interests in Bankruptcy*, 82 CORNELL L. REV. 1349, 1359 (1997).

223. *See id.* at 1356-64; Jeffrey S. Turner, *The Broad Scope of Revised Article 9 is Justified*, 50 CONSUMER FIN. L.Q. REP. 328, 328-29 (1996).

224. Harris & Mooney, *supra* note 222, at 1363-64.

225. Warren, *supra* note 6, at 1386.

226. *Id.* at 1379.

227. *Id.* at 1385 n.34.

228. Lucian A. Bebchuck & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*, 82 CORNELL L. REV. 1279, 1332 (1997).

229. *Id.* at 1329.

230. *Id.* at 1291-92.

231. *Id.* at 1332-35.

are structured. The absence of critical distance on finance permits secured creditors to air threats of credit constriction without opposition or questioning. Members of an imagined community of investors heed financial industry warnings. Article 9 reflects a pervasive social reality that when faced with a threat of diminished credit availability, which might have consequences like diminished growth or diminished business opportunity, lawmakers acquiesce in pursuit of collective well-being. Secured creditors are asserting their interests within a social context in which finance experts know best and lawmakers perceive any threat – however unsubstantiated – of constricting access to capital for businesses as against public interest.

In his argument to establish priority for non-consenting creditors, LoPucki seems to disregard concerns about increased costs of capital. He reasons that "[i]n a world where involuntary creditors have priority, the secured creditor who can anticipate the priority contest can react to it by declining to extend credit beyond the debtor's ability to pay."[232] LoPucki reinforces precisely the prediction that drives much of the opposition to partial priority. His writing seems blind to the strength of the fear of credit constriction against which he is working.

Harris and Mooney go so far as to denounce the moral hazard of threatening businesses' access to credit.[233] They state, "data may confirm that small businesses (and, accordingly, minority-owned businesses) would disproportionately comprise that group [that would face constriction of credit]."[234] Warren balks that this argument "can be rephrased to say that banks want full priority to help their minority friends"[235] and that Harris and Mooney have no more than anecdotal evidence to support their contention.[236] But Harris and Mooney do not need empirical evidence to make an assertion that is so squarely rooted in public belief that restricting businesses' access to capital will result in a parade of social travesties.

Within a society steeped in capitalist values – irrespective of how orthodox its capitalist practices – business growth, credit, and increases in sources of capital are good. If partial priority would potentially reduce the availability of credit, then it is highly suspect. Secured creditors do not need empirical or other evidence to support their claims that partial priority will mean less credit. Their threat is enough.

232. Lynn M. LoPucki, *The Politics of Article 9: The Unsecured Creditor's Bargain*, 80 VA. L. REV. 1887, 1909 (1994).

233. Harris & Mooney, *supra* note 222, at 1371.

234. *Id.*

235. Warren, *supra* note 6, at 1394 n.62.

236. *Id.*

D. Warren's and LoPucki's Calls for Reason and Morality in the Face of Impoverished Discourse on Finance

Warren and LoPucki each make principled demands that either Article 9 must be made more fair or its proponents must offer some well-reasoned justification for full priority.[237] Warren advocates preserving twenty percent of debtors' assets for unsecured creditors.[238] LoPucki argues for granting priority to tort claimants.[239] In making their arguments, both Warren and LoPucki decry the lack of principled justification for full priority. But their insistence that scholars and UCC drafters either provide a reasoned defense of Article 9, or reform Article 9 to conform to their well-reasoned critiques, disregards the mythology through which full priority persists.

Writers who defend the current formulation of Article 9 invoke a sense of inevitability about the continued expansion of secured credit. Many commentators on Article 9 treat proposals to temper full priority secured credit as if they would only mangle the parts and make bumpy the course of an unstoppable train. But, as Warren observes, if secured creditors are like a locomotive just plowing ahead towards more and more ways to extend secured credit, what stops them from attempting to secure loans with servitude or with human organs?[240]

Warren describes academic proponents of full priority as sheepish and equivocal in their defenses of Article 9. She writes:

> While the attack on full priority is quite spirited, the defense of full priority is hedged in qualifications. Commercial lenders and their lawyers are willing to come out foursquare for full priority for secured creditors, but the academic analysis has been very different in tone. Most academic supporters carefully note the limited evidence on which a conclusion can be based, often describing themselves as agnostic or waiting for the empirical studies before they commit to a position on full priority.[241]

Warren suggests that commercial lenders and lawyers can perhaps be expected to advocate the priority schema that allocates the most money to them.[242] But academics, she implies, recognize the moral poverty of that position and therefore skirt around defending it squarely.[243]

LoPucki laments that so little of legal scholarship has focused on "whether the institution of security is justified [or] good."[244] He argues

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237. *Id.* at 1390; LoPucki, *supra* note 232, at 1917.
238. *See* Warren, *supra* note 6, at 1388 n.44.
239. LoPucki, *supra* note 232, at 1900-01.
240. Warren, *supra* note 6, at 1386.
241. *Id.* at 1373.
242. *See id.*
243. *See id.*
244. Lynn LoPucki, *supra* note 232, at 1890.

that security misallocates resources by imposing on unsecured creditors a bargain to which many, if not most, of them have given no meaningful consent.[245] He states that security enables secured creditors to extract a subsidy from unsecured creditors.[246] He argues that Article 9 is essentially a judgment-proofing device that debtors should not be able to use to avoid liability to non-consenting unsecured creditors.[247]

But given public discourse on business and finance and the myth that we all belong to an imagined community of investors, reasoned arguments by legal scholars are not likely to define the scope of enforceable security interests. Consider the following statement by Jean Baudrillard: "Capital, which is immoral and unscrupulous, can only function behind a moral superstructure . . . ."[248] Secured creditors represent capital in the most literal sense. What conception of social good might drive the endurance of full-priority secured credit?

Homer Kripke has written that "the legal structure of secured credit developed to make possible the mass production and the distribution of goods" and "that these developments have increased human welfare."[249] The public discourse on finance described in Part II.A corroborates Kripke's view. Part II.B casts the reader-participants in that discourse as part of an imagined community of investors that comprises the constituencies to which state representatives answer. Warren's and LoPucki's calls for reason or morality-based opposition to laws that increase access to capital and facilitate business growth disregard the presence and power that such an imagined community presents. Warren and LoPucki appeal directly to non-adjusting creditors and those who would be their advocates. Their calls go largely unheard because of a failure of widespread identification with those groups.

E. Robert E. Scott's Presentation of Internal Incoherence in Article 9

According to Scott "the mythology of Article 9 asserts that informed creditors use the filing system to signal less informed creditors, and that this signaling function justifies the unique priority position certain creditors enjoy."[250] Filing is inadequate to address many fairness concerns because it helps only voluntary creditors, but it is a fairness mechanism nonetheless.

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245. *Id.* at 1891.
246. *Id.*
247. *See id.* at 1905.
248. JEAN BAUDRILLARD, *Simulacra and Simulations*, *in* JEAN BAUDRILLARD: SELECTED WRITINGS 166, 173 (Mark Poster ed., 1988).
249. Homer Kripke, *Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. PA. L. REV. 929, 931 n.14 (1985).
250. *See* Scott *Politics*, *supra* note 3, at 1801; *see also* Scott, *Mythology*, *supra* note 166, at 856.

The aims of the filing system are undermined by other central features of Article 9 such as, for example, the protection given the floating lien and the special priority given to the purchase money security interest (PMSI).[251] On the one hand, Article 9 presents a rule: secured creditors must file a UCC-1 financing statement to perfect and the first to file will be first in line to recover.[252] But at the same time, exceptions within Article 9 to this rule reveal a policy-driven structure designed to maximize access to credit regardless of fairness. The best way to describe the policy furthered by revised Article 9 is as a policy of maximizing secured credit. Whether Article 9 pursues this maximization to further efficiency, administrative capacity, freedom of contract, etc., in the litany of classic policy objectives, is unclear in both the drafting sessions and the scholarly literature on Article 9.[253]

Scott finds that:

> The [1999] revisions reflect a dramatic escalation of the tension between the twin goals of Article 9: the maintenance of public confidence through the use of a broad-based, facially neutral filing system and the development of rules that reduce costs for particular classes of secured creditors.[254]

Scott identifies this contradiction as "an institutional and structural problem, a function of the political economy of the process by which the UCC is produced and revised."[255]

Scott accepts as trenchant a contradiction between maintaining the "mythology of a filing system"[256] and at the same time enacting exceptions, or other rules, in the name of expanding secured credit. Scott writes of this tension:

> It is proof positive of the fact that legal doctrine masks inherent and irreducible contradictions, and recalls that it is the role of the legal critic to expose these contradictions in order to displace the privileged status of law and return the debate to the realm of pure politics.[257]

But is it possible to "expose" contradiction? Is there any such thing as a "realm of pure politics" separate from "the privileged status of law" to which the debate over full priority secured credit could be relegated? It is indeed difficult to distinguish law and politics, but not because "it's all

251. *See* U.C.C. § 9-323 (2002) (giving security for future advances priority as of the date of the original financing); U.C.C. § 9-103 (2002) (defining purchase money security interest); U.C.C. § 9-324 (2002) (codifying re priority of purchase money security interest).

252. *See* U.C.C. § 9-309 (2002).

253. *See supra* notes 7 & 12.

254. Scott, *Politics*, *supra* note, 3, at 1851.

255. Scott, *Mythology*, *supra* note, 166, at 857.

256. Scott, *Politics*, *supra* note, 3, at 1851.

257. Scott, *Mythology*, *supra* note, 166, at 857-58.

just politics." An attempt to distinguish "the privileged status of law" from "pure politics" denies the legal institutions, rules and structures that create political forums and enable political exertions of will.

The erosion of the effectiveness of filing with the expansion of exceptions for certain secured creditors should not be mistaken for triumph of political forces driven by capital over a rule of law meant to ensure fairness. From the vantage point of an imagined community of investors, (i) exceptions to encourage increased secured lending; and (ii) rules that signal to other creditors – are both fair. Scott's "twin goals" of Article 9 represent two valid sets of interests that UCC drafters must balance.[258]

From the vantage point of critical theory, there is no meta-theory with which to balance these interests if they are in fact incoherent as Scott presents them to be. In the words of Duncan Kennedy: "The imagery of balancing presupposes exactly the kind of more abstract unit of measurement that the sense of contradiction excludes."[259] But the imagined community of investors believes that just such an abstract unit of measurement exists in the form of commitment to wealth maximization. The way in which Article 9 strikes that balance, the community accepts in deference to capital, must reflect finance experts' judgments about how to best increase access to capital for all.

CONCLUSION

Article 9 disregards the effects of full priority on non-adjusting creditors. But this disregard for fairness should *not* be mistaken for a disregard for distributive consequences or attributed to an isolated or exclusionary drafting process. Article 9 is not the product of secured creditors asserting their interests in an isolated forum impervious to social consequences. Rather, it is a product of secured creditors asserting their interests in a socio-political climate in which the general public accepts the needs of capital as consonant with public interest.

This article directs attention to the background values and commitments that fuel support for full priority and asset securitization. It questions the common sense that leads lawmakers and many scholars to consistently err in favor of encouraging these types of financing despite serious concerns about fairness and efficiency. Article 9's expansion of full priority secured lending cannot be explained completely by the nature of the UCC drafting process, the code's technical complexity, or a fatal diversity of interests among unsecured creditors. No analysis of Article 9 – or asset securitization – is complete without direct acknowledgement of the hegemony of capitalist values that informs institutional and individual common sense with respect to the laws governing finance.

258. *See id.* at 856.

259. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1775 (1976).