A FUNDAMENTAL INQUIRY INTO THE STATUTORY RULEMAKING PROCESS OF PRIVATE LEGISLATURES

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This Article examines the private rulemaking process under which uniform state laws are formulated. It suggests that deficiencies may arise from the failure of rulemakers to step back and ask fundamental questions about the consequences of the rules being proposed and sets forth a framework for asking these questions. As part of this

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framework, the Article identifies and explores the meaning of underlying statutory policies, such as consistency and fairness. Although the Article's focus is on private rulemaking, its conclusions are shown to be relevant to public rulemaking and possibly even to judicial decisionmaking.

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Perfection is unlikely in human contrivances... We hold to the values of the past provisionally only, in the knowledge that they will change, but we hold to them as guides.¹

Nought may endure but Mutability.²

I. INTRODUCTION

Uniform state laws increasingly represent some of the most important statutes in America.³ Yet because these laws originate from private lawmaking groups, such as the National Conference of Commissioners on Uniform State Laws (NCCUSL) and The American Law Institute (ALI),⁴ their enactment does not follow a traditional legislative process. Professors Schwartz and Scott recently found significant differences between private and public lawmaking and, as a result, concluded that “the complacency that has heretofore marked the academic attitude toward the private lawmaking groups [that is, ALI and NCCUSL, referred to in their article as “private legislatures”] is not warranted... [A]cademic attention should focus on ... how private lawmaking groups function.”⁵ This Article attempts to heed that challenge, and indeed goes beyond it, by examining fundamental questions that a rulemaking process should address.

² PERCY B. SHELLEY, MUTABILITY I, st. 4 (1816).
⁴ See generally infra note 11 (discussing composition, organization, and duties of NCCUSL and ALI).
This Article examines private rulemaking in the context of the most influential and widely followed uniform state law, the Uniform Commercial Code (UCC or “the Code”).6 Using the UCC revision process as a model, the Article suggests that deficiencies result from the ad hoc nature of private rulemaking. The author proposes a framework for helping to correct these deficiencies: the rulemaking process would become more focused, and less ad hoc, if rulemakers would step back and ask fundamental questions about the consequences of the proposed rules. The discipline of asking these questions is referred to as imposing “constraints” on the rulemaking process; the constraints themselves derive from the fundamental policies and principles underlying the body of law that is the subject of the rulemaking.

By examining academic literature and the Code itself, the author identifies clarity, flexibility, fairness, simplicity of implementation, consistency, and completeness as the fundamental categories of constraints. Although these categories may appear somewhat intuitive and general, the Article demonstrates the importance of precisely defining the constraints in the context of the law being examined7 and then applies the constraints to current NCCUSL and ALI rulemaking proposals. The constraints are shown to

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6 The UCC has been enacted as the basis of commercial law in every state of the Union. See U.L.A. DIRECTORY, supra note 3, at 9-74 (noting state by state enactment of UCC).

7 The precise meaning of the constraints is discussed in Part III, at least from the perspective of commercial law. As an overview, clarity reflects the goal of preserving expectations so that parties to commercial transactions will know in advance what is expected of them and the consequences of their actions. Supra subpart III.A. Flexibility preserves freedom of contract by allowing consenting parties to reach contractual arrangements different than those contemplated by law. Supra subpart III.B. Flexibility also allows the continuing development in the marketplace of new forms of commercial transactions. Id. Fairness helps to preserve expectations by ensuring that parties are governed by neutral rules. Supra subpart III.C. In more limited circumstances, fairness also can mean that the law should protect weaker parties, such as those with less bargaining power; that opportunistic behavior should be prevented in circumstances that could not have been contemplated in advance; and that implicit rules of conduct should be recognized if they arise from widespread courses of dealing in an industry or from particular courses of dealing between specific parties. Id. Simplicity of implementation reduces transactional costs and expenses. Supra subpart III.D. Consistency helps to preserve expectations and also minimizes transactional costs by eliminating multiple or conflicting legal requirements. Supra subpart III.E. Finally, completeness helps to minimize transactional costs by systematizing rights and obligations under developing areas of the law without waiting for the slower and more ad hoc process of the common law. Supra subpart III.F.
stimulate new, multidimensional ways of thinking about the problem addressed by the rulemaking and are useful in testing the consequences of the proposed rules. Constraints also are shown to help approximate the benefits of widespread participation in private rulemaking, a process that has been accused of being elite and not wholly participatory. Finally, the Article shows that, because constraints make conscious what ought to be implicit in any good rulemaking, they could apply to a public as well as a private rulemaking process and possibly even to judicial decision-making.

Constraints can guide rulemaking, but cannot be used as a formula to make rules. It would be misleading to believe, and this Article does not suggest, that constraints could be used by a rulemaker to reach a specific result. Just as a compass can orient a hiker in the right direction, but cannot distinguish between footpaths that appear to go in the same direction, so too the constraints can guide the direction of statutory rulemaking, but cannot dictate the ultimate result. The value of constraints lies in critically examining proposed rules and in revealing possible consequences and alternative approaches; constraints should be viewed in that context. Before asking how to examine statutory rulemaking, however, one must first understand the private rulemaking process.

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9 This Article does not advocate a natural law conclusion. The author is not insisting that there is a natural order to the law nor that, through the use of constraints, this order can be more easily discerned. On the contrary, this Article adopts a pragmatic view; it advocates that the use of constraints will enable private rulemakers to develop and attain consensual goals more effectively.
II. THE PRIVATE RULEMAKING PROCESS AND A FRAMEWORK FOR ADDRESSING ITS LIMITATIONS

A. THE UCC RULEMAKING AND REVISION PROCESS

Statutory rulemaking under the UCC is initiated by ALI and NCCUSL through a jointly sponsored Permanent Editorial Board for the Uniform Commercial Code (PEB). It is a somewhat discretionary process, initially dependent upon a perception by the PEB that some revision or addition to the UCC may be desirable. The multiyear revision process currently being undertaken with respect to Article 9 of the UCC provides both an opportuni-

10 The factual description of the Article 9 rulemaking process is based on the Agreement Describing the Relationship of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and Permanent Editorial Board with Respect to the Uniform Commercial Code, 64 A.L.I. Proc. 769 (1987) [hereinafter PEB Governing Agreement], see generally infra note 11 (describing agreement), and PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT (1992) [hereinafter PEB REPORT], see generally infra note 14 (describing report), as well as conversations with and comments from Professor Frederick H. Miller, Executive Director of NCCUSL, William M. Burke, chairman of the Article 9 study committee, and Professor Geoffrey C. Hazard, Director of ALI. Article 9 has been revised twice since its original promulgation in 1952, resulting in the 1962 and 1972 Official Texts. Article 9 is now in the process of being revised for the third time. See infra note 14 (discussing revision process).

11 ALI is a private group of American legal scholars, including practitioners, academicians, and judges. It is responsible not only for the UCC but also for the various "Restatements" of law. NCCUSL, which consists of about 300 practitioners, academicians, and judges, drafts uniform laws in various disciplines which it then proposes to state legislatures for enactment. The members in most instances are appointed by the governor or legislature of their state, and each state gets one vote on ballots on proposed uniform laws. In addition to administering drafting committees for uniform laws and assisting in revising the UCC, NCCUSL also meets annually to debate the work of the drafting committees and to adopt uniform laws. Robert E. Scott, The Politics of Article 9, 80 Va. L. Rev. 1763, 1804 (1994). ALI and NCCUSL created the PEB pursuant to an agreement on August 5, 1961. That agreement was superseded by an agreement dated July 31, 1986, which presently governs the PEB's operations and existence. PEB Governing Agreement, supra note 10.

12 The PEB Governing Agreement provides that "[i]t shall be the function of the PEB to ... monitor the law of commercial transactions for needed modernization or other improvement." PEB Governing Agreement, supra note 10, at 774.

13 Article 9 of the Code governs secured transactions, such as loans secured by collateral, and also covers certain sales of intangibles that are associated with commercial financing. Other articles of the Code govern sales of goods (Article 2), leasing of personal property (Article 2A), negotiable instruments (Article 3), bank deposits and collections (Article 4), electronic funds transfers (Article 4A), letters of credit (Article 5), bulk transfers and sales
ty and a reason to examine private rulemaking in action.\textsuperscript{14}

In the current process, two respected lawyers or academics are
designated as reporters for a study committee composed of Article
9 experts.\textsuperscript{15} They solicit comments and rulemaking suggestions
from others in the field, examine and refine these comments, and
contribute their own ideas. Subjects of particular difficulty may be
examined by specialized task forces of the study committee. The
study committee ultimately prepares a report setting forth its
recommendations. This report is considered and debated before a
larger and more diverse group of commercial lawyers and academ­
ics, including representatives of the American Bar Association.\textsuperscript{16}
The report, after being modified as considered appropriate and
approved by the PEB, is then submitted for action to the sponsoring
organizations.

The Article 9 report was accepted and a drafting committee was
appointed by ALI and NCCUSL in accordance with the PEB
Governing Agreement.\textsuperscript{17} The purpose of the drafting committee
is to consider the study committee's recommendations and to
propose statutory language. The drafting committee, by its nature,
is subjected to a lobbying process in the course of preparing the
proposals. The final product, once approved by the sponsoring
organizations, will be recommended to state legislatures for
enactment. The enactment effort, as for any other uniform state
law, is undertaken by NCCUSL alone.

\textsuperscript{14} Article 9 is presently undergoing revision. A PEB study committee, after obtaining the
views of various commercial lawyers and academics, submitted their proposals to the PEB, which, on December 1, 1992, issued a formal report. PEB REPORT, supra note 10. That
report is now being considered by the drafting committee.

\textsuperscript{15} The process is not, however, fully institutionalized. For example, there was no study
committee for the 1972 amendments to Article 9 and no reporters for the PEB study
committee that revised Article 2 of the Code. In some cases, such as revision of Article 5 of
the Code, the study may be performed by the American Bar Association.

\textsuperscript{16} In May of 1993, for example, ALI and the American Bar Association jointly sponsored
a two day forum in New York City to review the study committee report.

\textsuperscript{17} Although it is not widely known, meetings of the drafting committee are open, and
interested persons can attend.
B. FLAWS IN THE EXISTING RULEMAKING PROCESS

The UCC rulemaking process reflects an understanding that commercial transactions and practices change over time, and therefore, any statutory commercial code must be updated periodically. When the UCC was first adopted, ALI and NCCUSL agreed that the process should be renewed when experience showed that a statutory provision was unworkable or obviously in need of revision, when courts misinterpreted the UCC, or when new commercial practices rendered provisions obsolete or mandated structural change. No conceptual framework, however, has been put into place for amending the UCC. As a result, the rulemaking process has a tendency to expand and lose focus during consideration of proposals. The proposals may not even be related to the specific problems that caused the revision process to be undertaken; they may also fail to connect to any of the recommendations of the study committee.

Such an ad hoc approach is costly. Dozens, sometimes hundreds, of lawyers and academics periodically meet, usually for days at a time, to debate the myriad of rulemaking proposals that are

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18 See, for example Grant Gilmore, On the Difficulties of Codifying Commercial Law, 57 Yale L.J. 1341, 1359 (1948) where Gilmore notes: The theory of the proposed [Uniform] Commercial Code is that we must keep our statutes up to date. If the project is successfully carried through, we should understand that we have probably committed ourselves to basic revisions at fairly short time intervals. However excellent the new Code may be it will no doubt be necessary, in another twenty-five years or so, to revise the revisions.


20 For an evaluation of the approach, see Charles W. Mooney, Jr., Introduction to the Uniform Commercial Code Annual Survey: Some Observations on the Past, Present, & Future of the UCC, 41 Bus. Law. 1343, 1355 (1986). Mooney examines the drafting projects then underway in the mid-1980's and suggests ways to improve the revision process in the future. He argues that the only way to describe the drafting process is "that it was ad hoc. Other than [some ABA] Section involvement ... the process followed no perceptible pattern. Perhaps the most that can be said is that from time to time certain small groups of individuals decided, in the first instance, to cause the law to change or be codified." Id.
advanced. This effort goes on for years.\textsuperscript{21} It takes anywhere from three to five years for a statutory change to have been studied, drafted, and first proposed for legislative enactment. This requires an enormous devotion of human and professional capital.\textsuperscript{22} Other costs result from the inevitable transition and re-education of the commercial law community. Furthermore, indirect costs may result from inadvertent ambiguities and problems of the revised statutory language: New rules can raise new problems of interpretation.\textsuperscript{23}

Another flaw in the rulemaking process is that it creates an unintended momentum for change. Although at no point within the process is change technically a foregone conclusion, the investment of time represented by the creation of a study committee, its solicitation of comments and suggestions, and its preparation of a report,\textsuperscript{24} create an incentive to revise the UCC, even

\begin{itemize}
\item \textsuperscript{21} A member of ALI who reviewed this Article and wishes to remain anonymous suggested that the process takes as long as it does because it is administered by a group of "busy amateurs" and that the process would be streamlined if run by full-time staff. Although beyond the scope of this Article, the author's reaction is that such a change would reduce the process's valuable diversity, possibly diminish its quality, and shift costs from the "pro bono" hours now devoted by practitioners and academics to the more direct costs of staff salaries. Furthermore, the slowness of the process may have a silver lining if it encourages careful deliberation and broad participation of interested parties. In this context, at least one reviewer of this Article, Harry C. Sigman, a noted commercial law scholar, practitioner, and member of the Article 9 drafting committee, told the author that he felt too few people participate at the critical early stages of the revision process and that there is insufficient deliberation.
\item \textsuperscript{22} Cf. Mooney, supra note 20, at 1347 ("[T]he study, promulgation, and enactment of uniform state laws and amendments is an excruciatingly slow and cumbersome process.").
\item \textsuperscript{23} For example, the 1972 Article 9 revisions adopted the "last event test" for perfection of collateral consisting of goods in a multistate transaction. \textit{UCC} § 9-103(1)(b). Shortly after the 1972 text of the Code was promulgated, a heated dispute broke out between Homer Kripke and Peter Coogan, two of the Code's revisers, as to the meaning of this test. Compare Homer Kripke, \textit{The Last Event Test for Perfection of Security Interests Under Article 9 of the Uniform Commercial Code}, 50 \textit{N.Y.U. L. Rev.} 47, 48-49 (1975) (asserting that last event text harmoniously coexists with statutory priority rules), with Peter F. Coogan, \textit{The New UCC Article 9}, 86 \textit{Harv. L. Rev.} 477, 539-42 (1973) (criticizing last event test for creating uncertainty). See also Charles M. Levenberg, \textit{Comments on Certain Proposed Amendments to Article 9 of the Uniform Commercial Code}, 56 \textit{Minn. L. Rev.} 117, 164-55 (1971) ("[T]he revised version [of § 9-103(1)] must be deemed a failure. . . . [I]t is] overly complex and certain to cause confusion."). Indeed, the revisers of the UCC are now proposing to eliminate the last event test. See \textit{PEB REPORT}, supra note 10, at 78-79 (recommending ways to revise last event test).
\item \textsuperscript{24} The December 1, 1992 study group report for Article 9 revision, for example, occupies 249 printed pages in addition to its 624 page appendix. \textit{PEB REPORT}, supra note 10.
\end{itemize}
where, objectively, change may be unnecessary. Once extensive time is devoted to an endeavor, few will say that revision is not needed: people will feel compelled to show "results," and there will be an expectation on the part of third parties that results will be shown.\textsuperscript{25}

Scott also demonstrates that the UCC rulemaking process is susceptible to pressure from cohesive interest groups, such as financial institutions.\textsuperscript{26} He argues that when capture occurs, a private legislature "will create 'bright-line' rules, and . . . the substance of those rules will favor the capturing industry."\textsuperscript{27} The

\textsuperscript{25} Mooney notes that, traditionally, the response of the UCC's sponsors to "perceived problems" such as nonuniformity was "to change the text repeatedly." Mooney, supra note 20, at 1347. However, if changes occur too often, the Code itself may become confusing to parties engaging in commercial transactions: "[O]ne of the eight distinct routes to disaster" in maintaining a "system of legal rules" is "introducing such frequent changes in the rules that a [party affected] cannot orient his action by them." LON L. FULLER, THE MORALITY OF LAW 38-39 (rev. ed. 1969).


Professor John H. Langbein, an NCCUSL Commissioner, observed to the author that certain non-controversial areas of law, such as gratuitous transfers, are much less subject to interest group pressures and conflict. This comports with NCCUSL's own internal criteria: "As a general rule, [NCCUSL] should avoid consideration of acts on subjects that are: (1) entirely novel and with regard to which neither legislative nor administrative experience is available [and] (2) controversial because of disparities in social, economic or political policies or philosophies among the various states" NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1993-94 REFERENCE BOOK 109 (1994); see also John H. Langbein & Lawrence W. Waggoner, Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code, 55 ALB. L. REV. 871, 877 (1992) (noting that some uniform laws, such as the Uniform Probate Code, seldom attract attention of powerful interest groups because these laws are not "unduly controversial"). Schwartz and Scott echo this view:

The founders [of ALI and NCCUSL] intended their proposed organizations only to deal with issues that satisfied two "jurisdictional" requirements: first, that society had reached a consensus concerning the relevant values; and, second, that those values could be translated into laws solely with the use of traditional legal expertise. The organizations would perform poorly, the founders believed, were they instead to attempt the typically legislative tasks of harmonizing value conflict and regulating complex economic activity.

Schwartz & Scott, supra note 5, at 652.

\textsuperscript{27} Scott, supra note 11, at 1827; see also Schwartz & Scott, supra note 5, at 644 (explaining concept of capture in this context). For example, the revision process for Articles 3 and 4 of the UCC has been criticized for its alleged capture by financial institutions and failure to encourage the involvement of consumer groups. See Rubin, supra note 8
reason industry desires bright-line rules is that precise rules reduce its compliance costs. If the interests of the capturing group—frequently financial institutions—tend to coincide with the interest of society at large, the resulting rule will likely be beneficial. Unfortunately, those interests do not always coincide.28

The rulemaking process also involves many changes over many years by many different people. The UCC, as a result, has numerous provisions that are at best redundant and at worst conflict with others.29

The rise and fall of the so-called “New Payments Code” (NPC)30 illustrates these and other problems. Its intention was to integrate all areas of commercial law dealing with payments into one unified treatment within the UCC.31 Hal Scott, a distinguished Harvard Law School professor, acted as its reporter and produced a draft described as “a major intellectual achievement.”32 However, after years of work by Professor Scott and numerous others, opposition by both consumer groups and banks became so strong that the NPC was dropped.33 What went wrong?

The New Payments Code failed for several reasons, but the primary failure was its overriding focus on uniformity.34 The NPC, while thoughtful in many ways, was so complicated that people could not easily understand how it worked or how to

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28 Frank Grad suggested to the author that the public legislative process is subject to much of the same interest group pressure as private rulemaking. Interview with Frank P. Grad, Chamberlain Professor of Legislation at Columbia Law School, in New York, N.Y. (Mar. 20, 1995). For a discussion of the possible application of constraints to public legislating, see infra subpart V.B.

29 See, e.g., David Mellinkoff, The Language of the Uniform Commercial Code, 77 YALE L.J. 185, 185, 225 (1967) (noting that “language of 1962 Official Text of Code is now clear, now mud; now grammatical, now illiterate; now consistent, now inconsistent, slapdash and slovenly” and that “lack of internal consistency and clarity in the statute itself is the best possible assurance that in the long run construction will not be uniform.”).


31 The NPC would have revised Articles 3 and 4, added a new article dealing with electronic funds transfers, and harmonized the laws of credit card payments and payments made by checks. Id.

32 Rubin, supra note 8, at 745.

33 Id. at 745-46.

34 Interview with Paul M. Shupack, professor of commercial law at Benjamin N. Cardozo School of Law, Yeshiva University, in Chicago, IL (May 18, 1995); interview with Donald J. Rapson, member of PEB, in Chicago, IL (May 18, 1995).
implement its rules.\textsuperscript{35} It was so specific that some wondered whether it could successfully accommodate future methods of payment.\textsuperscript{36} It was opposed by banks because unification of payment law would reduce their favorable treatment under UCC Articles 3 and 4 governing the checking system,\textsuperscript{37} and it was perceived as unfair to consumers, due to fears that the harmonization of laws would dilute their rights under credit card transactions with their lesser rights relating to bank checks.\textsuperscript{38} After much cost and years of wasted effort, the NPC was dropped because its main attribute—consistency among methods of payment—became illusory due to the remote likelihood of uniform state legislative enactment in the face of widespread bank and consumer opposition.

C. A FRAMEWORK FOR IMPROVING THE RULEMAKING PROCESS

Private rulemaking, therefore, can be unfocused, costly, and susceptible to interest group politics. Yet at least in the uniform state law arena, private rulemaking has important redeeming attributes.\textsuperscript{39} It brings together, in ways that an individual state legislature could not, experts from around the country to pool their knowledge and ideas in the development of nationally uniform statutes. It also provides—through organizations such as ALI and NCCUSL—a forum in which dedicated and talented lawyers, judges, and academics can provide a public service. This Article, therefore, takes as axiomatic that private rulemaking has a role in the creation of uniform state laws and focuses on how the private rulemaking process can be improved.

The author believes that one solution is to introduce a framework of constraints on the rulemaking process. Constraints are a set of precepts that reflect the fundamental policies and principles underlying a body of law; they can be used by rule-makers to question and assess the consequences of particular rulemaking

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Id. \textit{Accord} Rubin, supra note 8, at 746 (noting banking industry opposition due to NPC's less favorable treatment).

\textsuperscript{38} Id.

\textsuperscript{39} Cf. Schwartz & Scott, supra note 5, at 650 (analyzing strengths and weaknesses of private rulemaking groups such as ALI and NCCUSL).
proposals. The framework provided by constraints, however, would not yield specific rules. The value of constraints lies instead in making the process more efficient by ensuring that rulemakers maintain their focus on these fundamental principles. Furthermore, Part IV of this Article shows that the application of constraints can reveal hidden connections and stimulate new ways of thinking about the issues being addressed by the rules. However, before showing how constraints can improve the rulemaking process, it is first necessary to identify them.

D. IDENTIFICATION OF CATEGORIES OF CONSTRAINTS

Constraints should reflect the fundamental policies and principles that underlie the body of law to be governed by a statute. In revising a statute, therefore, the place to start in identifying potential constraints is the statute itself. Section 1-102 of the UCC sets forth the Code's "[u]nderlying purposes and policies" as follows: "(a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; [and] (c) to make uniform the law among the various jurisdictions." Other policies generally underlying the UCC are commercial reasonableness and preserving expectations.

40 Cf. Steven L. Harris, Using Fundamental Principles of Commercial Law to Decide UCC Cases, 26 Loy. L.A. L. Rev. 637, 648-49 (1993) ("Perhaps contemporary commercial law professors have directed the focus too far away from fundamental principles—either to nuts and bolts or to meta-theory—to the disadvantage both of their students and of those who in turn rely on them.").
42 See, e.g., U.C.C. §§ 1-203 (imposing duty of good faith), 2-510(3) (providing that, when buyer repudiates or breeches sales contract, seller may "treat the risk of loss as resting on the buyer for a commercially reasonable time"), 2-608(2) (requiring revocation of acceptance to be within reasonable time after buyer learns of grounds for revocation), 2-609 (allowing party to demand adequate assurance that is commercially reasonable when there are commercially reasonable justifications for party to be insecure).
43 See, e.g., U.C.C. §§ 1-205 (providing that parties' courses of dealing and usage of trade are important to interpretation of UCC contracts), 2-208 (stating that course of performance of sales contract is "relevant to determining the meaning of the agreement"), 2-315 (imposing implied warranty that goods are fit for particular purpose), 2-508 (allowing seller to cure defects in tender or delivery if time for performance has not expired), 2-608(1) (imposing "obligation on each party that the other's expectation of receiving due performance will not be impaired").
What categories of constraints can be derived from these policies? The goals of “simplifying” and “clarifying” the law suggest simplicity and clarity as possible constraints. Rulemakers should strive for a statute that is clear and simple to apply. “Moderniz[ation],” however, is not a constraint on rulemaking but merely a reason to revise a statute. Permitting “continued expansion” (and, by implication, modernization) of the law through “custom, usage and agreement of the parties” suggests that a statute should be flexible enough to allow such practices. This indicates flexibility as another possible constraint.

Making the law “uniform . . . among the various jurisdictions” suggests that uniformity might be a constraint. However, a more fundamental way of describing uniformity would be “consistency,” which includes various layers of meaning that are described later in this Article. 45

Commercial reasonableness and preserving expectations are related. They both mean that reasonable expectations should be preserved. Preservation of expectations, however, would be an unfortunate constraint on statutory rulemaking because, taken literally, it could be used as a justification to keep the law static. Perhaps a more rational way of ensuring that reasonable expectations are considered is to say that rules should be perceived as fair. Where a proposed rule would change expectations, rulemakers should judge the rule in part by whether the parties affected by it would view the change as fair. Fairness, therefore, is another possible constraint on rulemaking.

Another methodology for identifying constraints is to examine the policies and principles that scholars, academics, and legal philosophers have found to underlie the body of law governed by a statute. Gilmore, one of the chief legal theorists of the Code, focused on flexibility. 46 Llewellyn, the principal draftsman of the Code, 44 Uniformity of the law is merely a subset of consistency. For example, a low level of consistency would be for different states to have separate laws that are not inconsistent with each other, whereas a high level of consistency would be for those states to have the exact same (that is, absolutely uniform) laws.

45 See infra Part III.E (describing different levels of consistency).
46 “It is a matter of vital importance that the Code as a whole be kept in terms of such generality as to allow an easy and unstrained application of its provisions to new patterns of business behavior.” Gilmore, supra note 18, at 1355.
focused on certainty as an important policy consideration and also noted clarity, simplicity, convenience, fairness, completeness, and accessibility.47 Langdell and Grey would add comprehensiveness, completeness, formality, conceptual order, and acceptability.48 Hawkland also believed that pre-UCC commercial statutes failed because they were not preemptive and comprehensive.49

Llewellyn's principle of certainty would appear to be subsumed within the constraints of clarity and fairness. Certainty means that a law is clear, hence the constraint of clarity. Certainty also means that the law's application is predictable, thereby preserving expectations, but the proposed constraint of fairness already has been shown to be a way of ensuring that expectations are preserved.

Llewellyn's principles of fairness and simplicity already have been identified as possible constraints. Accessibility appears to be included in the constraints of clarity and simplicity. Convenience also appears to be subsumed in simplicity. This leaves Llewellyn's principle of completeness as an additional possible constraint.

Hawkland's belief that commercial law should be preemptive and comprehensive would appear to confirm the choice of completeness as a constraint. Regarding the principles of Langdell and Grey, completeness already has been noted as a possible constraint and appears to include comprehensiveness. Formality and conceptual order appear to be included in the proposed constraints of clarity and consistency, while accessibility appears to be included in the proposed constraint of simplicity.

It is reasonable, therefore, to hypothesize that there are six categories of constraints: clarity, simplicity, flexibility, fairness,

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consistency, and completeness. This hypothesis can be tested to some extent by considering Lon L. Fuller's allegory of how a legal code may miscarry. In the Storrs Lectures on Jurisprudence at Yale Law School in 1963, Professor Fuller examined how a monarch who “came to the throne filled with the zeal of a reformer” would “set about drafting a new [legal] code.” His analysis of how “a system of legal rules may miscarry” gives credence not only to this Article's proposed categories of constraints, but also to the possibility that those categories and the constraints themselves may have validity beyond Article 9 and commercial law.

Fuller believed that the “first and most obvious [way in which a system of legal rules may miscarry] lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis.” This lends support to the constraint of “completeness”: A statute should cover the subject matter purported to be governed by it so

50 Constraints do not directly address the question of when revision is necessary. Nonetheless, one might consider revision whenever a provision of Article 9 violates one or more of these constraints and cannot be justified in light of the remaining constraints. For a discussion of when statutory revision is necessary, see Fairfax Leary, Jr. & David Frisch, Is Revision Due for Article 2? 31 VILL. L. REV. 399 (1986). While that article deals specifically with Article 2 of the UCC, its insights may pertain to Article 9 as well. In answering the question, “What are the sources to which one should look in order to discover whether there is a strong enough need to justify revision?,” Leary and Frisch suggest that one must look, in part, to the practical difficulties that the provision has engendered. Id. at 405. For example, they suggest that one consider, among other things, whether there has been litigation arising from particular Code sections, splits of judicial authority, cases where judicial interpretations are inconsistent with reasonable trade practices, and criticisms by practitioners. Id. at 404-05.

51 FULLER, supra note 25, at 33-34.
52 Id.
53 Id. at 38-39.
54 Fuller posited that a system of legal rules may miscarry in at least eight ways: failing to achieve rules at all, failing to make rules understandable, enacting conflicting rules, enacting rules on conduct beyond affected parties’ powers, failing to properly administer rules, failing to publicize rules, passing retroactive legislation, and changing rules too frequently. Id. at 39. The first five are relevant to this Article. See infra Part III (discussing constraints of clarity, flexibility, fairness, simplicity of implementation, consistency, and completeness). Of the remaining three ways, two—failure to publicize rules and abuse of retroactive legislation—relate to the administration of justice and are not relevant here. The last way—“introducing such frequent changes in the rules that the subject cannot orient his action by them,” FULLER, supra note 25, at 39—already has been addressed in the context of the danger of constantly changing the Code, supra note 25 and accompanying text.
55 FULLER, supra note 25, at 39.
that most issues can be decided by applying rules. Next, Fuller said that a legal code may miscarry through "a failure to make rules understandable."\textsuperscript{56} The constraints of clarity and, to a lesser extent, simplicity would counter this failure. Fuller also criticized "the enactment of contradictory rules."\textsuperscript{57} The constraint of consistency would prevent this failure. Lastly, Fuller argued against "rules that require conduct beyond the powers of the affected party" and against incongruities between rules as announced and as actually administered.\textsuperscript{58} According to Fuller, these incongruities may arise "in a great variety of ways [including] mistaken interpretation [and] inaccessibility of the law."\textsuperscript{59} This suggests that the constraint of simplicity should take into account the ability of the parties to act in accordance with the proposed rule. Simplicity, therefore, may be better expressed as "simplicity of implementation."

These categories of constraints strike a responsive chord in the author's own experience as a teacher and practitioner of commercial law, and they have been discussed with various leading academics and practitioners.\textsuperscript{60} Some have queried whether the constraints may represent no more than what ought to be implicitly considered in an ideal rulemaking process. To some extent, the answer is yes, but rulemaking involves people and, therefore, is imperfect. Precise definition and explicit application of constraints, as shown in Parts III and IV, will bring into conscious thought an essential judgment that otherwise may remain inarticulate and ignored.\textsuperscript{61} The

\begin{flushleft}
\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} Id.

\textsuperscript{59} Id. at 81.

\textsuperscript{60} This Article benefits from comments and criticisms received from the following distinguished academics and practitioners: Amelia H. Boss, Robert A. Burt, Barkley Clark, Neil B. Cohen, Robert C. Ellickson, Stanley H. Fuld, Frank P. Grad, Henry B. Hansmann, Geoffrey C. Hazard, John H. Langbein, Frederick H. Miller, Charles W. Mooney, Thomas E. Plank, Donald J. Rapson, Cruz Reynoso, Susan Rose-Ackerman, Albert J. Rosenthal, Edward L. Rubin, Stephen Scher, Alan Schwartz, Paul M. Shupack, Harry C. Sigman, Sandra S. Stern, Peter H. Weil, Peter Winship, William F. Young, Barry L. Zaretsky, and Julianna J. Zekan.

\textsuperscript{61} \textit{Cf.} Ramin Jahanbegloo, \textit{Conversations with Isaiah Berlin} 110 (1992) (defining profound thought as one that "touch(es) a nerve and thereby reveal[s] . . . quite suddenly something which is part of our common experience and matters very greatly in our lives, but of which we were not clearly aware").
\end{flushleft}
constraints also can bring conceptual clarity and intellectual rigor to the rulemaking process and provide a basis for judging consequences of proposed rules. The ultimate test, though, will be found in experience itself. Can constraints provide a conceptual framework and perspective that rulemakers will find useful? Will constraints add discipline and efficiency to the rulemaking process? This Article is intended to begin a dialogue on the subject.62

It should be re-emphasized that constraints do not constitute a rulemaking formula. Their value is in examining and critically questioning proposed rules and revealing possible consequences and alternative approaches.63 Constraints therefore supplement, but do not replace, an examination of the sociological, economic, psychological, and political factors that are also necessary for rulemaking.64 Using the compass analogy discussed earlier,65 constraints can give guidance to rulemakers like a compass can give direction to a hiker. Constraints ultimately will be subject to sociological and other factors just like the direction given by a compass must be altered to avoid unpassable gorges or rivers.66

62 Some may contend that rationality is or should be a constraint. The author believes that rationality is generally subsumed within the foregoing constraints (particularly fairness and simplicity of implementation). Although it is possible to conceive an irrational rule that may stretch the application of the constraints—for example, that no statutory sentence exceed 25 words—ultimately people with serious intent will decide what changes are appropriate. Changes that are silly, or just plain not sensible, either will not seriously be proposed or will be winnowed out through the application of common sense.

Others may contend that the synthesis or unification of commercial law and the clearing away of "dead wood" also should be constraints. These, however, are subsumed within the constraints of clarity, consistency, and simplicity of implementation. If Article 9 is straightforward, unambiguous, and clear, and can be applied to actual transactions in a cost-effective and commercially acceptable way, the "dead wood" of commercial law has been cleared.

It is not claimed that the constraints identified in this Article are immutable. The author has sought, however, to identify fundamental categories of constraints. Whether or not these categories are enduring, their content will undoubtedly change over time to reflect changes in the principles and policies underlying commercial law.

63 See supra Part I.G (discussing value of constraints).

64 Cf. RICHARD POSNER, OVERCOMING LAW 207 (1995) (maintaining that social science sometimes may contribute more than law to judicial decisionmaking); see also infra subpart V.D (addressing law and psychology of constraints).

65 Supra text following note 9 (comparing hiker's use of compass to constraints on rulemaking).

66 Another way of thinking about this is to view the constraints as implicit in crafting any well made rule. A well made rule is not necessarily a good rule unless it successfully grapples with the social, economic, and political factors that may be relevant.
III. DEFINING THE CONSTRAINTS

The remaining job of this Article is to give content to the constraints, demonstrate how they can be applied to private rulemaking, and show why they can improve the rulemaking process. Before applying the constraints, this Article now turns to an analysis—really a precise definition—of what these constraints mean.

A. CLARITY

A statute, particularly one governing commercial law, should be clear. Clarity is important to minimize mistakes, ambiguities, and resulting disputes and litigation. Clarity also helps to preserve expectations, which is essential to market transactions.

A clear statute minimizes misinterpretations by judges and practitioners. Poorly decided commercial law cases often result from "textual inadequacies or ambiguities in the U.C.C. itself." For example, the Tenth Circuit recently erroneously held, in Octagon Gas System, Inc. v. Rimmer, that a transfer of accounts, even if a true sale, will not remove the accounts from the transferor's bankruptcy estate. The court erred because it confused the terminology of Article 9—denominating a true sale as a security interest in order to treat a sale of accounts the same as a loan secured by accounts for purposes of perfection and other UCC requirements—with a substantive determination that a sale of accounts is not effective to transfer owner-

67 See Mellinkoff, supra note 29, at 223-27 (discussing UCC's emphasis on uniformity over clarity).
68 Cf. Vallejo v. Wheeler, 1 Cowp. 143, 153, 98 Eng. Rep. 1012, 1017 (1774) (Mansfield, L.J.) (declaring that "in all mercantile transactions the great object should be certainty").
ship of the accounts in the event of the seller's subsequent bankruptcy.\textsuperscript{71}

Had the terminology of Article 9 been drafted more clearly, this confusion would not have resulted.\textsuperscript{72}

The Octagon Gas case illustrates, however, that speaking about drafting a clear statement is sometimes easier than actually drafting one. Article 9 artificially had defined the term "security interest" to include sales of accounts.\textsuperscript{73} This was a shorthand drafting technique that created a more elegant statute by avoiding constantly having to refer both to sales and secured transactions.\textsuperscript{74} Article 9 could repeatedly have referred to sales and secured transactions where it meant to cover both, but the resulting verbiage itself might have been confusing and, therefore, unclear. It is beyond the scope of this Article to suggest how Article 9 should have been drafted to avoid the Octagon Gas problem.\textsuperscript{75} The

\textsuperscript{71}Steven L. Schwarcz, 'Octagon Gas' Ruling Creates Turmoil for Commercial and Asset-Based Finance, 210 N.Y. L.J. 1 (Aug. 4, 1993). For a charming discussion of how misleading Code definitions can confuse a reader, see Mellinkoff, supra note 29, at 195-96. Mellinkoff suggests the problem is that old words are given not merely new meanings, but meanings that contradict their everyday usage in and out of the law, as well as conflicting with their meanings in other portions of the Code. The language is difficult for anyone (even the draftsman) to follow. It is as though one suddenly redefined ears to mean shoelaces, and went about telling friends, "I put on my shoes and tied my ears." After a time, a good friend might understand, whatever his private opinion might be. Anyone else would dismiss it as gibberish. Id. at 196.

\textsuperscript{72}See Thomas E. Plank, Sacred Cows and Workhorses: The Sale of Accounts and Chattel Paper Under the U.C.C. and the Effects of Violating a Fundamental Drafting Principle, 26 CONN. L. REV. 397 (1994) (discussing how certain provisions of Article 9 violate normal usage in drafting); see also PEB COMMENTARY NO. 14, supra note 70 (illustrating confusion and offering clearer position).

\textsuperscript{73}U.C.C. §§ 1-201(37), 9-102(1)(b) (1994).

\textsuperscript{74}See PEB COMMENTARY NO. 14, supra note 70, at 89 n.3 (noting that including both sales and secured transactions was "simply a drafting technique"). Issuance of PEB Commentaries is one method by which the PEB presently attempts to maintain clarity and resolve ambiguities in the UCC. PEB RESOLUTION ON PURPOSES, STANDARDS AND PROCEDURES FOR PEB COMMENTARY TO THE UCC, 3B U.L.A. 600, 600 (1992). The constraints might be applicable especially to the formulation of PEB Commentary and UCC Official Comments because the Commentary and Comments are not subject to the controls of legislative ratification.

\textsuperscript{75}For drafting suggestions in that regard, see Plank, supra note 72, at 497-520.
problem illustrates, however, that clarity does not always mean simplicity or economy of expression.\textsuperscript{76}

Neither does clarity necessarily mean that Article 9 should specify its application in detail or adopt rigid, although clear, pronouncements. More detail results in less flexibility. Also, because commercial law practices constantly change but Article 9 changes only periodically, an overly detailed or rigid statute may become out-of-date and unusable sooner than a broader one.\textsuperscript{77}

Professors Schwartz and Scott have theorized that private rulemaking may be inherently biased against clarity:

\begin{quote}
[A] vague rule that leaves the status quo relatively intact is preferred, \textit{cet. par.}, to doing nothing. . . . [Some] rules are less likely to create reputational losses for participants [in private rulemaking] and may actually create reputational gains. . . . Reputational gains derive from the fact that [these] rules are couched in phrases with positive affect (such as "good faith" or "reasonable") or appear to consider all relevant factors. . . . [V]ague rules can create direct economic gains for [private rulemakers; they] increase or maintain uncertainty, and thus increase, or do not reduce, the occasions on which lawyers will have to give advice or be involved in litigation.\textsuperscript{78}
\end{quote}

\textsuperscript{76} Fuller echoes this principle:

\begin{quote}
During a visit to Poland in May of 1961 I had a conversation with a former Minister of Justice that is relevant here. She told how in the early days of the communist regime an earnest and sustained effort was made to draft the laws so clearly that they would be intelligible to the worker and the peasant. It was soon discovered, however, . . . that making the laws readily understandable to the citizen carried a hidden cost in that it rendered their application by the courts more capricious and less predictable.
\end{quote}

\textit{Fuller, supra} note 25, at 45.

\textsuperscript{77} Cf. \textit{infra} note 83 and accompanying text (addressing dangers of over-precision).

\textsuperscript{78} Schwartz & Scott, \textit{supra} note 5, at 616 (footnotes omitted). An NCCUSL Commissioner, who wished to remain anonymous, told the author that drafting committee members frequently are unable to agree on a substantive rule and then are presented with three alternatives: (i) no rule; (ii) the rule as stated; (iii) the rule as qualified by a phrase having positive affect, such as "reasonable" or "good faith." Usually, the qualified statement of the rule wins.
Such an inherent bias of the rulemaking process would make the constraint of clarity all the more important as a counterbalance. One of the main advantages of having a clear statute is that parties can understand what is expected of them and of others. However, the ability to innovate around unwanted or outmoded expectations is part of the principle of flexibility.

B. FLEXIBILITY

Flexibility to innovate has long been regarded an underlying goal of commercial law. Commercial law must adapt to changing markets and circumstances. It must also be flexible enough to allow people involved in commercial transactions to innovate in response to such changes. One of the strengths of Article 9 is that it approaches secured transactions from a conceptual standpoint and does not (as did pre-UCC statutes) use the transactions themselves or their form as the organizing principle. The conceptual approach, although less precise, allows greater flexibility by providing a framework for the creation of transaction forms unimagined when Article 9 was first drafted.

A flexible commercial law statute also can reduce the need to amend the statute constantly in order to take new practices into account. Fewer revisions can mean lower costs and greater consistency, provided the statute itself does not create additional costs by impeding advantageous commercial transactions or creating ambiguities. The UCC presently encourages flexibility, not only by permitting the continued expansion of commercial practices by custom and usage, but also by allowing parties considerable freedom to contract around existing impediments within Article 9 itself.

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80 U.C.C. § 9-102 cmt. 1 states: When it is found that a security interest as defined in Section 1-201(37) was intended, this Article [9] applies regardless of the form of the transaction or the name by which the parties may have christened it. . . . [Any new forms of secured transactions] which the ingenuity of lawyers may invent, are included. . . .
81 U.C.C. § 1-102(2).
82 See U.C.C. § 1-102(3) (allowing parties to contract around all but a few requirements). Contractual variations can bind only the parties consenting to the contract. They cannot bind, for example, general unsecured creditors, judgment and tort creators, and trade
Flexibility also can be better served by keeping statutory language broad, thereby encouraging courts to interpret the law innovatively as customs and practices evolve:

[I]t is a matter of vital importance that the Code as a whole be kept in terms of such generality as to allow an easy and unstrained application of its provisions to new patterns of business behavior. Commercial codification cannot successfully over particularize: the penalty for being too precise is the statute will have to keep coming in for repairs (and amendment is a costly, cumbersome, and unsatisfactory process) or else become a dead letter.83

There is, however, considerable tension between the constraints of clarity and flexibility. Consider, for example, the question of whether a given transfer of accounts receivable constitutes a sale under the UCC. In order to preserve "freedom of contract" "between business men" and to increase flexibility, Article 9 leaves that question to the courts to decide.84 This reduces clarity (and consistency), however, because the courts in each jurisdiction are able to define what would constitute a sale. Today, even more so than when Article 9 originally was drafted, clear and consistent rules determining what constitutes a sale would be desirable because of the increasing dominance of the capital markets by structured finance and asset securitization transactions.85 On the other hand, rigid rules would undermine the flexibility to create creditors. See generally infra notes 103-105 and accompanying text (labelling these groups as "Affected Non-Parties" and addressing related fairness concerns). Nor can they vary the order of priorities among conflicting security interests in the same collateral, except as between the consenting parties. Compare U.C.C. § 9-312 (establishing rules for priority of conflicting security interests in same collateral) with § 9-316 (allowing priority rules to be subordinated by agreement).

83 Gilmore, supra note 18, at 1355.
84 See U.C.C. § 9-502(2) cmt. 4 ("The determination whether a particular assignment constitutes a sale or a transfer for security is left to the courts.").
85 See STEVEN L. SCHWARZ, STRUCTURED FINANCE, A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION (2d ed. 1993) (noting rise of structured finance and explaining legal principles of asset securitization).
new approaches that help to expand these markets.\textsuperscript{58}

The tension between clarity and flexibility also is illustrated by Article 9's definition of an “instrument” as “a negotiable instrument . . . or any other writing which evidences a right to the payment of money . . . and is of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment.”\textsuperscript{87} The flexibility achieved by adding the underscored language undercuts the clarity of knowing exactly what constitutes an instrument when the ordinary course of business of transfers is ambiguous or unknown.\textsuperscript{88}

C. FAIRNESS

The principle of fairness is integral to virtually all bodies of law, including commercial law.\textsuperscript{93} Its meaning, however, is often obscure.

Fairness encompasses the oft-heard goal of commercial law—preserving expectations.\textsuperscript{90} This, however, may have different levels of meaning. Consider first a group of children playing baseball. If a player ran directly from first to third base, without touching second, the opposing team would cry out, “That's unfair!” What they mean is that the runner attempted to gain an advantage by

\textsuperscript{58} See, e.g., Steven L. Schwarcz, The Parts Are Greater than the Whole: How Securitization of Divisible Interests Can Revolutionize Structured Finance and Open the Capital Markets to Middle Market Companies, 1993 COLUM. BUS. L. REV. 139 (1993) (proposing sale of divisible interests in financial assets as innovative and economically desirable way to accomplish true sale of assets).

\textsuperscript{87} U.C.C. § 9-105(1)(i) (emphasis added).

\textsuperscript{88} The author recently faced that problem in determining whether promissory notes being assigned in connection with the securitization of certain payment streams of a home relocation company constituted instruments or general intangibles. Although it created extra costs, the prudent solution was to perfect in the manner required for both categories of collateral.

\textsuperscript{90} See Richard Danzig, A Comment on the Jurisprudence of the Uniform Commercial Code, 27 STAN. L. REV. 621, 622-23 (1975) ("Commercial law . . . deals with a subcommunity ('merchants') [in the UCC Article 2 context] . . . whose primary rules derive from a sense of fairness widespread—if imprecisely defined—within the commercial community.").

\textsuperscript{90} Cf. ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 570 (Kaufman Supp. 1994) (asserting that "purpose of contract law is to enforce the reasonable expectations of parties induced by promises"); E. Allan Farnsworth, Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code, 30 U. CHI. L. REV. 666, 669 (1963) (stating that good faith obligation serves to prevent party from being "deprived of his reasonable expectations").
violating the rules generally expected of the game. If players could arbitrarily change the rules whenever they saw an advantage, or if the rules themselves subverted expectations by encouraging arbitrary behavior, most people would stop playing the game, and for those who continued to play, the game would become chaotic and bullying. The same would happen to commercial transactions if the law did not promulgate and enforce basic, neutral rules. The rules of the game must be respected; furthermore, they should not give an undue advantage to either side.

This principle of playing by neutral rules is recognized in part by the UCC's basic good faith requirement requiring "honesty in fact."91 Honesty in fact does not create a fiduciary relationship or general duty of care among parties, and it does not attempt to reallocate bargaining power; it requires merely that the parties abide by the rules that are agreed to or mandated:

Firms that have negotiated contracts are entitled to enforce them to the letter, even to the great discomfort of their trading partners, without being mulcted for lack of [the UCC § 1-201 "honesty in fact" standard of] "good faith." . . . [K]nowledge that literal enforcement means some mismatch between the parties' expectation and the outcome does not imply a general duty of 'kindness' in performance, or of judicial oversight into whether a party had 'good cause' to act as it did. Parties to a contract are not each others' fiduciaries; they are not bound to treat customers with the same consideration reserved for their families. Any attempt to add an overlay of 'just cause'—as the bankruptcy judge effectively did—to

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91 See U.C.C. § 1-201(19) (1994), which defines "good faith" to mean "honesty in fact in the conduct or transaction concerned," and UCC § 1-203, which states that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Fairness does not, however, mean that the rules of the game should never change. The rules of commercial law, like those of baseball, evolve over time. Bare hands may be protected by mitts, and mitts may be extended by webbed pockets, but these changes in rules are implemented by common consent of the players. Cf. U.C.C. § 1-102(3) (allowing parties to vary UCC provisions by agreement); supra Part III.B (describing constant of flexibility). When enough players in enough games play by the changed rules, law revisers should consider whether the law itself should be changed.
the exercise of contractual privileges would reduce commercial certainty [for parties to commercial transactions generally - as compared to the "mis-match" between the expectations and outcome in the instant case] and breed costly litigation.\textsuperscript{92}

There is, however, a second aspect to fairness.\textsuperscript{93} Again consider a group of children playing baseball. The older children decide to join together as a team to play against the younger children. That does not violate any rules of the game, but the younger children, as well as impartial observers in the bleachers, again would cry out, "That's unfair!" They now mean that a team consisting of older children would gain an advantage over a team consisting of younger children because of factors \textit{extrinsic} to the rules. Although this second aspect of fairness is not recognized throughout Article 9, it is recognized in certain sections of Article 9.\textsuperscript{94} It is also recognized by the additional good faith requirements in other articles of the UCC that seek to prevent oppression and unfair

\textsuperscript{92} Kham \& Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir. 1990) (refusing to equitably subordinate claims of bank lender that had relied on literal terms of its credit agreement in refusing to advance additional funds). Similarly, in Metropolitan Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504, 1508 (S.D.N.Y. 1989), the court emphasized the importance of general commercial predictability over the expectations of particular bondholders by refusing to read into a bond indenture an implied covenant to prevent a leveraged buyout. For a contrasting approach, compare K.M.C., Inc. v. Irving Trust Co., 757 F.2d 752, 759-63 (6th Cir. 1986) (holding that obligation of good faith may impose duty on lender to give borrower notice before refusing to advance funds pursuant to financing agreement), with which the Seventh Circuit "respectfully disagree[s]." \textit{Kham \& Nate's Shoes No. 2, Inc.}, 908 F.2d at 1358.

\textsuperscript{93} Social psychologists also make distinctions between two types of fairness: distributive and procedural fairness. See \textit{generally} E. ALLAN LIND \& TOM R. TYLER, \textit{THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE} 10-12 (1988) (describing distributive fairness); id. at 36-39 (describing basic theory of procedural justice). What is referred to in this Article as \textit{extrinsic} fairness likely would fall under the psychologists' heading of distributive fairness. Concerns for expectational and process fairness discussed in this Article likely would be included in the psychologists' heading of procedural fairness. See subpart V.D (discussing law and psychology of constraints).

\textsuperscript{94} \textit{E.g.}, U.C.C. § 9-201 ("Nothing in this Article validates any charge or practice illegal under any statute or regulation. . ."); § 9-206 (providing that buyer's agreement not to assert defenses against assignee is generally valid "[s]ubject to any statute or decision which establishes a different rule"); § 9-504(3) (requiring that every aspect of disposition be "commercially reasonable").
surprise and to require that parties act in accordance with "reasonable commercial standards of fair dealing."

There appear to be two corollaries to fairness. Where the extrinsic factors causing one party to have an advantage over another could not have been contemplated in advance, courts have stepped in to prevent opportunistic behavior. The theory behind this tendency is not well articulated, but has similarities to the concept of mutual mistake in contract law. Courts have held that even the basic good faith requirement of "honesty in fact" includes this corollary aspect of fairness:

"Good faith" is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties... [It does] not block use of terms that actually appear in the contract.

Contrast the foregoing corollary, which is similar to mutual mistake, with the following corollary which might be characterized as "mutual understanding": Implicit rules of conduct sometimes may be so generally or universally understood that a court, in

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95 U.C.C. § 2-302 cmt. 1.
96 U.C.C. §§ 2-103(1)(b), 3-103(a)(4) cmt. 4.
97 See, e.g., Sherwood v. Walker, 33 N.W. 919 (Mich. 1887) (recognizing that mutual mistake regarding term material to transaction justifies rescission of contract). Compare the view of Goetz and Scott:
Where the future contingencies are peculiarly intricate or uncertain, practical difficulties arise that impede the contracting parties' efforts to allocate optimally all risks at the time of contracting... A contract is relational to the extent that the parties are incapable of reducing important terms of the arrangement to well-defined obligations.


98 Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351, 1357 (7th Cir. 1990) (citing the "honesty in fact" standard of good faith under UCC § 1-201(19)); see also Neuman v. Pike, 591 F.2d 191, 195 (2d Cir. 1979) (recognizing implied covenant of fair dealing in every contract); Katz v. Oak Indus., 509 A.2d 872, 879 n.7 (Del. Ch. 1986) (recognizing duty of good faith and fair dealing owed by corporation to bondholders as matter of contract law); but cf. Dennis M. Patterson, A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith, 76 IOWA L. REV. 503 (1991) (arguing that Kham decision "fails to render a thorough analysis of the meaning of 'good faith' under the Code").
effect, takes judicial notice of them to preserve reasonable expectations of parties to a transaction. Implicit rules might arise from widespread courses of dealing in an industry or from a particular course of dealing between specific parties. The essential element is that the expectations created by the course of dealing should be objectively apparent to the parties. However, the danger of such a doctrine of "mutual understanding" is that, if not used sparingly and with circumspection, a court might substitute its view of fairness for that of the parties.

Applying these concepts, it becomes clear that the first aspect of fairness, by ignoring extrinsic factors, preserves expectations for most parties to commercial transactions. One can read the law, know one's rights and obligations, and generally anticipate the outcome. The second aspect of fairness, by looking to extrinsic factors, may help to preserve the expectations of individuals with less bargaining power, but in doing so, thereby makes commercial law generally less predictable.

The corollary aspects of fairness—preventing the parties from opportunistically taking advantage of circumstances that could not have been contemplated in advance and recognizing universal courses of dealing—do not impair the expectations of the parties.

99 Indeed, UCC § 1-201(3) defines the "agreement" itself as "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing" (emphasis added). A "course of dealing" is defined in UCC § 1-205(1) as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding." Thus, under the UCC, the second corollary may be unnecessary because the implicit rules are deemed by statute to define the contract between the parties.

100 Another way of thinking about this is to consider that the first aspect of fairness—playing by neutral rules—is similar to justice in other areas of the law. The second aspect of fairness—considering external factors—is similar to mercy. Although mercy has an important role in cases involving the state against an individual, such as criminal cases, it would impede general expectations in arm's length commercial transactions between private parties.
In the former case, the parties could not have expected the circumstance to occur and, therefore, could not have formed expectations regarding it. In the latter case, the court merely recognizes the parties' mutual understanding.

The first aspect of fairness, employing neutral rules, raises a dilemma when applied to general unsecured creditors, judgment and tort creditors, and trade creditors ("Affected Non-Parties"). Their rights may be affected by Article 9 secured transactions, but they are not themselves parties to such transactions.\(^{103}\) For the rules to be neutral, they must not unduly disadvantage any class of persons.\(^{104}\) Therefore, either Affected Non-Parties should be included in the rulemaking process or the process should take their rights into account. It may not always be feasible to include these persons in the rulemaking process because one does not always know their identity in advance. Companies that ship goods to the debtor on credit or people who are later injured by one of the debtor's products are examples of classes of persons who may turn out to be Affected Non-Parties. Fairness, therefore, requires that the rulemaking process consider changes from the standpoint of Affected Non-Parties.\(^{105}\)

The second aspect of fairness, considering extrinsic factors such as the bargaining power of the parties, is the reason the law sometimes distinguishes between parties who are in consumer as opposed to non-consumer contexts. In the consumer context, fairness is a type of \textit{pares patriae} concept by which consumers, like the younger children in the ballgame, should be protected against exploitation because they clearly lack bargaining power or adequate information.

In the non-consumer context, on the other hand, fairness is more of an arm's length concept, akin to the UCC's standard of honesty.

\(^{103}\) See \textit{supra} note 82 (noting that Affected Non-Parties cannot be bound by agreements to modify UCC provisions).

\(^{104}\) This statement, of course, begs the question of what is "undue." The answer may depend on other policy considerations. For example, if secured credit is believed to stimulate the credit markets, and hence the economy, it may not be "undue" to adopt a statute that gives an advantage to secured parties over debtors.

\(^{105}\) This Article shows that applying the constraints helps to achieve fairness in that and other regards.
in fact. To attempt to do so would undercut the constraints of clarity, flexibility, and consistency.

D. SIMPLICITY OF IMPLEMENTATION

Simplicity of implementation also has two aspects. First, it should be simple to understand how to apply commercial law. In this sense, simplicity is related to the principle of clarity, which maintains that the law should be straightforward, unambiguous, and clear. Second, the implementation of commercial law should be practical and cost-effective. The following examples will illustrate the difference.

As an example of the first aspect of simplicity of implementation, consider the original perfection requirements of Article 9. They required that financing statements for collateral consisting of certain intangibles be filed where the debtor kept records relating to those intangibles. The location of the records had no logical connection, however, to the intangibles themselves. The debtor could keep the records at its executive offices, at regional offices, or even on computers at isolated locations and easily could change the location without knowledge or suspicion of the secured party. It would be difficult, therefore, to understand in a given situation how

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106 See U.C.C. § 1-203 (1994) (imposing obligation of good faith); U.C.C. § 1-201(19) (defining good faith as honesty in fact).
107 For example, while it may be relatively easy to distinguish a consumer—that is, an individual who engages in a transaction for personal, family, or household purposes—from a business, should the law attempt to distinguish between small and large businesses? Using the baseball analogy, should the law attempt to distinguish amateur, minor, and major league players? Small businesses may have no greater sophistication than consumers, but because they engage in generic commercial transactions with large businesses, the author would favor the preservation of general expectations over any individual expectations preserved by such a special standard.
108 See KURT VONNEGUT, WELCOME TO THE MONKEY HOUSE (1968) (showing absurdity of law's requiring absolute extrinsic equality).
109 See supra Part IIIA (discussing constraint of clarity).
110 See U.C.C. §§ 9-401(4) (providing that rules stated in § 9-103 determine whether filing is necessary in state), 9-103(1) (1952) (stating that questions of perfection of security interests regarding accounts or contract rights are governed by law of state where related records are kept).
a secured party could be sure that its security interest was perfected. The secured party ultimately might have to rely on assurances from the debtor as to the records' location, but if the debtor misrepresented the location of the records, either dishonestly or by mistakenly moving their location without alerting the secured party, the security interest would be unperfected.111

As an example of the second aspect of simplicity of implementation, imagine that, in response to the confusion caused by the original Article 9 perfection rule, the law was changed to require that financing statements be filed in all 50 states to perfect security interests in intangibles. This would avoid the need to determine the location of records and would make it simple to understand how to perfect. However, it then would become impractical and expensive to achieve perfection.

Simplicity of implementation, therefore, demands that experienced individuals be part of the revision process. One cannot say, "make a simple law," any more than one can say, "make a rational law." Some legal rules are inherently complex. It is the people process itself and the exercise of good judgment that prevent distortion, so long as individuals recognize that simplicity of implementation is a desirable goal.

E. CONSISTENCY

That a law should be internally consistent is taken for granted. Commercial law, however, because it governs transactions that routinely cross state and national borders, also should be consistent, or at least not inconsistent, with related bodies of law. The achievement of uniformity was the most important goal when the UCC was originally drafted.112 Prior to that time, commercial law was full of contradictions and gaps making commercial practice uncertain, time-consuming, and expensive.113 This confrontation

111 These original perfection requirements, therefore, also undermined fairness by subverting expectations.
112 Mellinkoff, supra note 29, at 223.
113 Karl Llewellyn noted that commercial law was "extremely scattered, no longer has identity, is costly in time to the lawyer, and therefore is costly in money to the business man." Llewellyn, supra note 47, at 779. Indeed, inconsistency even has been recognized as an evil by a noted, though fictitious, nineteenth-century physician and philosopher, Dr.
with multiple, inconsistent legal provisions was frustrating to the growth of commercial transactions and to the legal practitioner whose advice was sought.

1. Interstate Consistency, or "Uniformity". The consistency, or "uniformity" as it traditionally has been called, of interstate laws was one of the primary goals of the original drafters of the UCC.\(^{114}\) It is interrelated with two other constraints—clarity and simplicity of implementation—because consistent laws are easier to understand and to apply. It is obviously satisfied if each state adopts changes to Article 9 in their proposed form, without modification. Absolute consistency is theoretically possible among states, but consistency is subject, as a practical matter, to the legislative processes of each state. Thus, true uniformity is difficult to achieve. Those who argue for the present structure would maintain that the benefits resulting from state variations outweigh absolute uniformity and favor a mitigated uniformity.\(^{115}\) That debate, as well as the debate over whether there should be a federal commercial law code, is beyond the scope of this Article.\(^{116}\)

Nonetheless, it should be an underlying goal to attempt to seek

\(^{114}\) The central impetus behind the creation of the PEB was to promote uniformity among the states. The agreement which originally created the PEB begins: "It shall be the policy of the [Permanent Editorial] Board to assist in attaining and maintaining uniformity in state statutes governing commercial transactions and to this end to approve a minimum number of amendments to the Code." See Mooney, supra note 20, at 1349 (quoting Report No. 1 of the PEB for the U.C.C. (Oct. 31, 1962), 1 U.L.A. XXV, XXVII (1976)).

\(^{115}\) State variations indeed may provide the diversity that helps the law evolve, as well as serve as a model for future uniform changes. See, for example, California's non-uniform inclusion of deposit accounts within Article 9's coverage which presently is serving as a helpful test case for a possible uniform inclusion of deposit accounts. CAL. U.C.C. § 9-302(1)(g),(h) (West 1994).

\(^{116}\) The author suggests, however, that to the extent the formulation of uniform state laws benefits from the participation of private rulemaking groups such as ALI and NCCUSL, federal lawmaking also may benefit from the assistance of such groups. For those interested in the federalism debate, see, for example, Neil B. Cohen & Barry L. Zaretzky, Drafting Commercial Law for the New Millennium: Will the Current Process Suffice?, 26 LOY. L.A. L. REV. 551 (1993) (comparing current UCC adoption process to national commercial code); E. Hunter Taylor, Jr., Recent Developments in Commercial Law: Forward-Federalism or Uniformity of Commercial Law, 11 RUTGERS L.J. 627 (1980) (arguing federal involvement needed to achieve uniformity in commercial law).
interstate uniformity to the extent uniformity can accommodate the needs of all states. Proposed changes should be scrutinized as to whether they are suited for adoption in all states. Lastly, it should be noted that, because a change itself may take from five to ten years to be adopted by all states, any proposed change will create at least temporary non-uniformity.

2. Federal Versus State Consistency. Consistency also means that state and federal laws should be congruent. Article 9, like any other uniform law, is a state-enacted law. The most obvious federal laws that impact secured transactions, and therefore come into potential conflict with Article 9, include bankruptcy, consumer, environmental, railcar and aircraft equipment financing, and copyright and intellectual property laws.

The recent case of BFP v. Resolution Trust Corporation illustrates the conflict between state and federal law. The circuit courts were split over whether a foreclosure sale that satisfied state-law procedures also satisfied the requirement under Section 548(a)(2) of the Federal Bankruptcy Code that the debtor receive "reasonably equivalent value" for transferred property (that is, the foreclosed collateral) to ensure that the transfer will not be found fraudulent. Confusion had arisen because state foreclosure law gave no basis for setting aside a foreclosure sale unless the foreclosure procedures are violated or the price is so low as to "shock the conscience or raise a presumption of fraud or unfairness." This was arguably inconsistent with federal law's

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117 Private rulemaking bodies should be sensitive not to allow the goal of interstate uniformity to exclude other considerations. The proposed New Payments Code is an example of rulemaking that failed because of an overemphasis on uniformity. Supra notes 30-38 and accompanying text. A practical consequence of the need for interstate uniformity is that private rulemaking probably should avoid highly political areas of law, such as abortion rights. Cf. supra note 26 (suggesting that controversial areas of law sometimes may not be suitable for uniform rulemaking).

118 The time estimate is based on discussions with several NCCUSL Commissioners.


120 114 S. Ct. 1757 (1994).


122 See 114 S. Ct. at 1760-61 (describing split in circuits).

123 114 S. Ct. at 1793.
The Court, in a five to four split, resolved the inconsistency by deeming the value of property subject to a foreclosure sale to be "worth less" than it would be worth absent the foreclosure:

We deem ... that ... a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.126

The Court's ruling, however, covered "only mortgage foreclosures of real estate,"127 leaving unresolved the question of how UCC foreclosures of personal property collateral would be treated under the federal fraudulent transfer requirements. Foreclosures of personal property, therefore, still could be interpreted inconsistently with mortgage foreclosures of real estate.

In considering whether to conform a provision of Article 9 to a related federal law, or vice versa, the constraints set forth in this Article can be used to assess the proposed change. Furthermore, Part IV explains that constraints may be useful in addressing the broader question of whether federal and state commercial laws should continue to operate side-by-side as independent sources of the law covering the same subject matter.128

124 Id. at 1764.
125 Id. at 1762.
126 Id. at 1765.
127 Id. at 1761 n.3.
128 Mooney argues that perhaps they should not:

[V]arious provisions of the U.C.C., and various matters within the scope of the U.C.C., have been and continue to be assaulted by the existence of or proposals for non-U.C.C. federal and state laws and regulations. In many respects, the impact of these other laws and regulations may do more damage to uniformity and predictability in commercial transactions than perceived problems in the text of the U.C.C.

Mooney, supra note 20, at 1351 (emphasis added). Mooney provides as an example Section 1324 of the Food Security Act of 1985. This Section repeals the farm products exception to UCC § 9-307(1) for certain sales of farm products to a "buyer in the ordinary course of business":

[T]he goals, methods, and likely results of section 1324 illustrate the non-UCC statutory assault . . . . Section 1324 stemmed from a desire to facilitate interstate commerce by providing a uniform rule. It will more
3. International Consistency. Many secured transactions cross national borders. Article 9, therefore, must also accommodate foreign bodies of law in cross-border secured transactions. The best that can presently be hoped for is that the laws will not be inconsistent with each other, as there are no international commercial law treaties.\footnote{There are, however, various private accords currently awaiting ratification by the United States, including the Convention on International Factoring and the Convention on International Financial Leasing. See Amelia H. Boss & Patricia B. Fry, Divergent or Parallel Tracks: International and Domestic Codification of Commercial Law, 47 BUS. LAW. 1505, 1510 (1992). In addition, private groups have codified certain international commercial practices. For example, the Uniform Customs and Practices for Documentary Credits is sponsored by the International Chamber of Commerce and governs letters of credit in cross-border and domestic transactions. \textit{Id.} at 1509-1510.} Consistency with foreign laws does not mean that Article 9 should be changed to reflect different and sometimes parochial laws. Rather, such inconsistencies need to be addressed on a case-by-case basis. However, much of the commercial law of nations around the world is remarkably similar. Concepts may be called by different names or labels but, in this author's experience, the ideas behind commercial law generally are congruent.

than likely result in a burden to interstate commerce . . . . Although even the most pejorative hyperbole is inadequate to fully express what section 1324 deserves, the following is a frail attempt: Section 1324 is internally inconsistent, unintelligible, and unworkable. It was drafted and enacted without apparent knowledge or understanding of present and past systems of public notice and secured financing . . . . It does not draw upon, acknowledge, or include many matters that are adequately covered in the U.C.C. . . . . It is a disaster.\footnote{Boss & Veltri, supra note 119, at 1588-89; see also Barkley Clark, Forward: Growing Federal Presence in the Law of Secured Transactions, 42 BUS. LAW. 1333 (1987). Many believe that the solution to federal-state inconsistency is to enact a federal commercial code. \textit{Supra} note 44. But this approach would destroy the ability of states to "experiment" and formulate their own solutions to varied problems. The constraints in this Article, however, would allow for federalism, while encouraging uniformity, by providing all parties in the business of revising commercial law (states, federal government, and those involved in the UCC revision process) with a common language for discussion and debate.} Id. at 1351-1352. In addition, federal statutes have reordered priorities among unpaid sellers of livestock, meatpackers, and purchasers from meatpackers, reordered priorities among unpaid sellers of perishable agricultural commodities and other persons in the chain of distribution, restricted the sale of goods by foreclosing secured parties if the goods were produced in violation of labor standards, . . . and established central filing systems for farm products.
A statute ideally should address the entire subject matter of the behavior being regulated. In the commercial law context, changes in commercial behavior, emerging market forms, or areas impacted or created by new technologies, must be considered as they arise. Furthermore, certain areas of law that previously were not considered within the subject matter of commercial law, such as intellectual property, may now fall within commercial law because rights thereunder are increasingly being transferred in the market place or among third parties. Accordingly, the principle of completeness can be important in creating a policy basis for statutory change in such circumstances.

The need to revise Article 9 due to changes in technology raises its own questions. Should the approach to revision be different for technologies that change the manner in which commercial transactions are conducted as compared to technologies that affect the substantive coverage of commercial law? An example of the former would be changes in the way funds are transferred, such as the new technology of electronic wire transfers now governed by Article 4A of the Code. An example of the latter would be the issue of obtaining a security interest in a living person's body parts due to advances in organ transplant technology.

Technological advances in the way commercial transactions

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130 See John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 WM. & MARY L. REV. 341, 355. Gedid argues that "[t]he most important attribute of the code form is probably orderliness . . . . Orderliness means the reduction of an entire area of law to a complete system . . . . [O]rderliness requires that the code provide for keeping the subject matter of the statute current and for filling gaps in the statute." Id. Article 9, however, does not presently cover all secured transactions. Section 9-104 excludes, for example, secured transactions subject to federal statutes, or involving insurance, real estate, or deposit accounts. U.C.C. § 9-104(a), (g), (j), (l) (1994)

131 The constraint of completeness also can create a policy basis to extend Article 9 to areas logically within its purview but intentionally left uncovered. Patchel notes that "concerns about the ultimate goal of enactment restricted the initial scope of the Code. Most fields [such as insurance] that could be expected to cause political controversy were excluded or treated as severable." Patchel, *supra* note 26, at 98. Patchel quotes Professor James J. White to explain that the tendency to avoid political controversy results because NCCUSL "lacks the power to cause its legislation to be adopted." *Id.* at 92. Therefore, the "legislation [that] is appropriate" is the "legislation [that] can be passed." *Id.* The same statement could be applied to any private rulemaking.
traditionally are conducted reduce transaction costs and therefore tend to be used by parties whether or not the law has developed to cover the change. For example, electronic wire transfers are so efficient that financial institutions engaged in them prior to the adoption of Article 4A, which set forth the parties’ rights and obligations. At the time Article 4A was approved, the volume of wire transfers already had exceeded one trillion dollars per day. The need to revise the Code in such circumstances is a game of “catch up,” to allocate rights and obligations and define proper procedures before something goes wrong.

Technology changes that affect the substantive coverage of commercial law, such as obtaining a security interest in organs and other body parts of a living person, can raise fundamental policy and ethical questions. In this example, the threshold issue is whether such security interests should be permitted. That issue transcends commercial law. Only when that issue is resolved can one begin to address how to create and perfect the security interest under a revision to Article 9.

The constraint of completeness is indirectly related to consistency. Without a statute to systematize the law, courts will decide cases by reference to statutory provisions that are not necessarily designed to cover the subject matter. The result may be the development of different common-law rules in different jurisdictions. Article 4A again provides an example:

[Prior to the adoption of Article 4A, there was] no comprehensive body of law that defines the rights and obligations that arise from wire transfers. . . . The result is a great deal of uncertainty. There is no consensus about the juridical nature of a wire trans-

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133 Id. The prefatory note states the following:
Because the dollar amounts involved in funds transfers are so large, the risk of loss if something goes wrong in a transaction also may be very large. A major policy issue in the drafting of Article 4A is that of determining how risk of loss is to be allocated given the price structure in the industry.

Id.
fer and consequently of the right and obligations that are created. Article 4A is intended to provide the comprehensive body of law that we do not have today.134

There is a second relationship between completeness and consistency that also bears noting. Should a statute that is "complete" be interpreted by reference to other sources of law? The answer turns on what is meant by complete. Completeness can mean that a judge should look only to the statutory language for interpretation, excluding, to the extent feasible, all other sources ("absolute completeness"), or it can mean that a judge still may consider external sources to help with interpretation ("relative completeness").

Absolute completeness would enhance consistency by making a statute immune to competing concepts. The benefits of referring to cases or historical patterns to interpret a statute, however, would be lost. Relative completeness, on the other hand, actually would undercut statutory consistency by allowing competing concepts to be used for interpretation.136

Few bodies of law are intended to be absolutely complete. Indeed, the UCC recognizes that it does not cover all of commercial law, and that pre-Code law may be used for interpretation in those instances: "Unless displaced by the particular provisions of this [Code], the principles of law and equity, including the law merchant . . . shall supplement its provisions."137 This incorporation into the UCC of pre-Code law has fostered some confusion that reflects the tension between completeness and consistency. Article 3 of the Code provides a better example of the problem than Article 9. Section 3-418 is a statutory version of the general restitution

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134 Id. Accord, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 74 (Harv. Univ. Press 1982). Calabresi states the following: "As technological demands made . . . deviations from the common law more frequent, however, potential conflicts became much greater. At the same time, the 'shrinking' of America as a result of technological change made conflicts all the more dangerous." Id.

135 Statutes are written, of course, in natural language, and therefore, no statute is immune from the imprecision that is inherent in natural language.

136 Taken to its extreme, relative completeness would undermine a statute if judges regard the statute as subordinate to these competing concepts.

137 U.C.C. § 1-103 (1994).
principle that applies to the right to recover a mistaken payment made under an instrument. Its origins were in the Bills and Notes Acts and decisions of the English courts in the Eighteenth Century.\textsuperscript{138} A court that broadens the categories of payees against whom recovery can be sought would say that it was interpreting Section 3-418 consistently with its historical and case law antecedents.\textsuperscript{139} Under the constraint of completeness, however, that court could be criticized for having failed to take account of the way that Section 3-418 has displaced pre-Code law and narrowed such categories.

Having identified and defined the constraints, this Article next gives examples of how the constraints can be applied.

IV. APPLYING THE CONSTRAINTS

This Section demonstrates how constraints might be applied by considering current Article 9 revision proposals and certain rulemaking proposals outside of Article 9. The constraints are thereby shown to be valuable in examining and testing the consequences of statutory rulemaking as well as for revealing possible alternative approaches.

Constraints are significant on several levels. On a basic level, they provide a checklist\textsuperscript{140} of policy goals and perspectives by which rulemaking can be judged and consequences tested. Moreover, they provide a means of focusing a large group of diverse rulemakers on issues that are fundamental to the body of law being codified, while simultaneously stimulating multi-dimensional thought about those issues.

\textsuperscript{138} See, \textit{e.g.}, 
Price v. Neal, 3 Burr. 1354 (1762) (holding that one can recover money mistakenly paid under instrument only when other party is at fault).

\textsuperscript{139} A statute that addresses a subject previously covered by the common law is presumed \textit{not} to change the law absent clear evidence to the contrary. \textit{See United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.}, 484 U.S. 365, 380 (1988) (explaining that changes to existing rules would not likely be made without specific provisions in text of statute); Midlantic Nat'l Bank \textit{v. New Jersey Dep't of Envtl. Protection}, 474 U.S. 494, 501 (1986) (stating that when Congress intends to change judicially created rules, it makes that intent specific); \textit{cf. United States v. Texas}, 113 S. Ct. 1631, 1635 (1993) (declaring that congressional legislation includes common-law rules except when statutory purpose to contrary is evident).

\textsuperscript{140} See Appendix (providing model of basic checklist).
Constraints also can make the rulemaking process more efficient by introducing a common language, thereby organizing the debate and bringing greater coherence and better communication to the study and drafting process. A common language is important because words help to express concepts, and confusion as to the meaning of words often results in confusion as to the concepts themselves. For example, one of the constraints identified in this article is fairness. Virtually everyone would agree that a statute should be fair, but few would agree on precisely what fairness means. As this Article shows, fairness not only has many layers of meaning, but also these meanings may be different in an Article 9 context than in a general UCC context or in a non-commercial law context. Real consequences—such as how the Code standard of “good faith” should be defined or how consumer transactions should be treated—flow from the precise meaning of fairness in each context. Constraints give us the precision, and therefore the efficiency, of a common language.

A common language is important for another reason. Some have queried whether the constraints are so broad, as categories, that they can be used to justify any position the rulemakers wish to advance. The categories may be that broad, but the possibility of misuse only underscores the importance of precisely defining the constraints in light of the fundamental principles and policies of the body of law that is the subject of the rulemaking, as was done in Part III of this article for Article 9 and commercial law. Indeed, to the extent the constraints make explicit what already should be

141 See, e.g., Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions As Applied in Judicial Reasoning, 23 YALE L.J. 16, 21-35 (1913). Hohfeld states the following: “A second reason for the [unfortunate] tendency to confuse or blend non-legal and legal conceptions consists in the ambiguity and looseness of our legal terminology.” Id. at 21.

Even if the difficulty related merely to inadequacy and ambiguity of terminology, its seriousness would nevertheless be worthy of definite recognition and persistent effort toward improvement; for in any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and lucid expression. Id. at 28-29.

142 See supra notes 89-93 and accompanying text (defining fairness).

143 See supra notes 91-96 and accompanying text (explaining different aspects of fairness).

144 Id.
The use of constraints, however, would help counterbalance any misrepresentations by interest groups by requiring rulemakers to judge proposals from a perspective of fundamental, and therefore neutral, standards. This would make it more difficult to justify rulemaking that is solely the result of capture.\textsuperscript{148}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{145} See supra notes 7-8 and accompanying text (identifying advantages of consciously conceptualizing constraints).
\item \textsuperscript{146} Cf. Posner, supra note 64, at 198-199 (attributing to John Hart Ely view that there is a "necessity for tethering constitutional law—in the sense of the body of principles actually applied by judges—to the Constitution's text and history, [in contrast to] those who would make constitutional law a vehicle for enforcing 'fundamental values' [which] gives judges too much discretion").
\item \textsuperscript{147} Schwartz & Scott, supra note 5, at 630.
\item \textsuperscript{148} Cf. Corinne Cooper, The Madonna's Play Tag of War with the Whores Or Who Is Saving the UCC?, 26 Loy. L.A. L. Rev. 563, 568-69 (1993). Cooper states the following: [L]awyers who have as their main goal to advance the cause of clarity, uniformity, and elegance . . . in commercial law and damn the special interest oxen which are gored in the process . . . are the keepers of the precious flame that is the UCC, and without their persistence, their vigilance, their almost religious dedication, the UCC would be nothing
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Consider, for example, the problem of "truncation" that arose during the most recent revision of Articles 3 and 4 of the UCC. Under traditional procedures for collection of a bank check, the payee presents the check to its own bank for payment. That bank then transfers the check, directly or through an intermediary bank, to the drawee (or payor) bank. The canceled check ultimately is returned to the customer of the drawee bank. Revised Articles 3 and 4, however, would create a process called truncation, which permits only electronic information to be transmitted through the bank collection process and, accordingly, entitles the customer to electronic information but not the canceled check.\textsuperscript{149}

Truncation would save money for banks and, in theory, ultimately for customers by eliminating the burden of physical delivery of checks through the collection process. However, it provides less information to customers. During the Articles 3 and 4 revision process, a dispute arose as to how much electronic information should be provided.\textsuperscript{150} Those private rulemakers who habitually represent banks argued for minimum information—the check number and amount and the date of payment—because providing more information would require banks to reconfigure their automatic processing equipment at considerable cost.\textsuperscript{151} Academics participating in the private rulemaking process argued for providing more information but were largely ignored.\textsuperscript{152}

Had the rulemakers been required to act within a framework of constraints, they would have been more responsive to the need to reach a balanced proposal. The constraints would have required them to consider truncation from the perspectives of fundamental principles and to justify truncation in light of those principles.\textsuperscript{153}

\textsuperscript{149} Rubin, supra note 8, at 754.

\textsuperscript{150} Id. at 755-56.

\textsuperscript{151} Id. at 756-57 (noting that rulemakers did not act with malice but, rather, regarded banks as trustworthy institutions that would be motivated to please customers).

\textsuperscript{152} Id. at 755-56.

\textsuperscript{153} The constraints thereby may contribute to creating a "commonly shared set of criteria that establish the rules of persuasion" that Professor Rubin observes are fundamental to resolving conflicts in fields other than law. Id. at 766.
For example, Professor Rubin observes that the fairness arguments he made were virtually ignored; requiring rulemakers to consider the constraint of fairness would assure that fairness no longer could be ignored.

There is a psychological reason for this. Private rulemakers, at least those involved in ALI and NCCUSL, are not lobbyists per se. They are lawyers, judges, and academics who are required to "[check their] client[s] at the door." Nonetheless, at least in the case of practicing lawyers, they sometimes identify subconsciously with their clients and take on their clients' perspectives:

[There is a] well-recognized tendency of lawyers to identify with their clients. . . . The bank attorneys not only identified with their clients . . . but they also tended to perceive the underlying structure of the situation in the way their clients did. . . . Most consumer representatives would have reacted exactly the opposite way. . . . Their basic allegiance as representatives, like the allegiance of bank attorneys, not only governs their judgments about appropriate solutions but determines their underlying perception of the problem to be solved.

The constraints would help to impose on the consciousness of rulemakers a more evenhanded perspective, particularly if the rulemakers were required to produce a report that justifies proposed rules in light of the constraints.

The application of constraints also serves another function—it helps a statute remain internally consistent. A primary impetus for creating the UCC or any other uniform state law is to harmonize the law among states and thereby remove conflicting provisions which make conducting business difficult for everybody but lawyers. The avoidance of conflicting statutory provisions within

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154 Id. at 766.
156 Rubin, supra note 8, at 766-57.
157 See infra Part V.D (analyzing law and psychology of constraints and impact of accountability). The constraints would help to shift accountability from a political and onedimensional audience to one that is more abstract and multi-dimensional. Id.
the UCC itself is at least as important as the avoidance of inconsistencies *among* the laws of different states. Constraints can serve to reduce this divergent tendency by providing common ground rules to be followed each time rulemaking is considered.

The following examples will illustrate these ideas. Although the application of constraints to these examples suggests possible alternatives to the current Article 9 revision proposals, the intent of this Part is not to recommend specific rules, but rather to illustrate how the constraints might be applied.

A. SALE OF GENERAL INTANGIBLES

One of the most controversial issues presently debated in the revision process is whether Article 9 should be amended to cover the sale of general intangibles for the payment of money.\(^{165}\) Article 9 presently covers sales of certain intangibles even though sales are not technically secured transactions: "Commercial financing on the basis of accounts and chattel paper is often so conducted that the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by [Article 9] whether intended for security or not."\(^{165}\) The issue has

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\(^{165}\) See *PEB REPORT*, supra note 14, at 43-48 (addressing whether sale of general intangibles should be covered by Article 9). General intangibles can loosely be thought of as intangibles other than accounts (rights to payment for goods sold or leased or services rendered), chattel paper (writings that evidence both a monetary obligation and a security interest in or lease of specific goods), and negotiable instruments. See *U.C.C.* \\
§\§ 9-105(1)(b), (i), 9-106 (1994). A right to payment under an ordinary contract or under a license or franchise agreement would be an example of general intangibles.

\(^{166}\) *U.C.C.* § 9-102 cmt. 2 (1994). At the time Article 9 originally was drafted, the law was in a state of flux, with many states modifying the common-law rules governing transfers of accounts by adopting statutes protecting receivables transfers through filing or other means. These modifications were triggered to a significant extent by the Supreme Court's decision in *Corn Exchange Nat'l Bank & Trust Co. v. Klauder*, 318 U.S. 434 (1943), which held that the assignment of an account without notice to the obligor may be voidable as a bankruptcy preference. These statutes covered sales of accounts as well as loans secured by accounts. 1 *Grant Gilmore, Security Interests in Personal Property* § 8.7, at 276 (1955) ("Pre-UCO statutes were typically very broad: transfers which were sales or outright assignments were included as well as transfers for security."). The reason for treating sales and secured transactions as one for the purpose of statutory coverage was to provide protections for all types of assignments of accounts: "There was an obvious reason for the inclusion of sales; it was necessary to protect (transferees) not only (in) straight accounts receivable financing but also (in) arrangements of the factoring type." *Id.* § 8.7, at 275 (emphasis added). *Article
become important because commercial finance now routinely includes the sale of general intangibles, particularly in the burgeoning area of securitization. The issue also has generated controversy because banks traditionally diversify their loan portfolios and, hence, their risks by selling to other banks general intangibles consisting of undivided interests, or "participations," in their loans.\footnote{160 Cf. U.C.C. § 9-304 cmt. 1 (perfecting security interest in money or instruments can be achieved only by secured party taking possession because it is "universal" practice for the secured party to do so). A loan participation, however, is not the transfer of an actual instrument but only of an undivided interest therein—hence, a general intangible.} The volume of these sales has been enormous, and any new perfection requirement (such as Article 9's filing of UCC financing statements) imposed on the sale of these general intangibles would be costly and burdensome to the banking industry.

Application of the constraints to this proposal indicates that the controversy may have little basis. The proposal would enhance clarity by eliminating the need to distinguish between, on the one hand, accounts and chattel paper whose sale presently is covered by Article 9 and, on the other hand, general intangibles whose sale (as indicated) is not presently covered. The proposal enhances fairness because it would protect the reliance interest of an innocent third party buyer of general intangibles without impairing the rights of Affected Non-Parties.\footnote{See supra note 103 and accompanying text (defining Affected Non-Parties). This Article does not address the more general issue of whether security interests themselves are fair or "efficient." See, e.g., David G. Carlson On the Efficiency of Secured Lending, 80 Va. L. Rev. 2179 (1994) (arguing security interests are efficient); Thomas H. Jackson & Alan Schwartz, Vacuum of Fact or Vacuous Theory: A Reply to Professor Kripke, 133 U. Pa. L. Rev. 987 (1985) (rejecting Professor Homer Kripke's theory on efficiency of security interests); Homer Kripke, Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact, 133 U. Pa. L. Rev. 929 (1985) (using factual inquiry to show security interests increase efficiency); Alan Schwartz, The Continuing Puzzle of Secured Debt, 37 Vand. L. Rev. 1051 (1984) (rejecting separate arguments made by Professor Saul Levmore and Professor James White which defend efficiency of security interests); Robert E. Scott, A Relational Theory of Secured Financing, 86 Colum. L. Rev. 501 (1986) (using relational theory to support efficiency of security interests); Paul M. Shupack, Solving the Puzzle of Secured Transactions, 41 Rutgers L. Rev. 1067 (1989) (arguing efficiency or inefficiency of security interests cannot be determined).} Subject to discussion of loan participations, the proposal would appear to enhance signifi-
cantly simplicity of implementation because it would replace the burdensome common-law perfection requirements of obligor notification and policing with the simplicity of the UCC filing system. Indeed, one of the original purposes of the UCC filing system was to avoid the uncertainty and confusion regarding common law perfection.162

From a consistency standpoint, it makes sense to treat the sale of all intangibles—whether accounts, chattel paper, or general intangibles—in the same manner. Under existing law, sales of general intangibles are treated differently than sales of accounts and chattel paper. As to completeness, the sale of general intangibles has become widespread not only in commercial transactions but also as a basis of structured finance and asset securitization capital market transactions, suggesting the sale should be covered by statutory rules. Finally, the proposal enhances flexibility because it recognizes that general intangibles are increasingly being used in securitization and other innovative commercial transactions. Parties to those transactions, however, are unable to contract around perfection requirements because contractual variations can only bind the parties to the contract.163 Accordingly, revision of Article 9 itself is the only way to provide such flexibility.164

Perhaps the only reason not to amend Article 9 to cover the sale of general intangibles is that, as mentioned, it may interfere with the well established practice of banks selling loan participations

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163 See supra note 82 (stating that contract and variations only bind contracting parties). Because perfection establishes rights against third parties who do not consent, perfection requirements may not be varied by contract.
164 The author previously stated that Article 9 achieves flexibility by approaching secured transactions from a conceptual, as opposed to a transactional standpoint. See supra note 80 and accompanying text. Yet the sale of general intangibles is being addressed from a transactional standpoint. Why? The answer is that the sale of intangibles is not a secured transaction. Certain categories of sales transactions (sales of accounts and chattel paper) already are covered by Article 9, and the sole issue discussed in the text above is whether another category—sales of general intangibles for the payment of money—also should be covered because it is such an integral part of commercial finance. No one would doubt that secured transactions involving general intangibles already are covered by Article 9.
without filing UCC financing statements.\textsuperscript{165} Filing financing statements in such circumstances might well be impractical and therefore undermine the principle of simplicity of implementation because of the volume of these interbank transactions. At the same time, there are no known instances of abuse by reason of not filing. Accordingly, as the PEB Report recommends, any change should specify that perfection of the sale of loan participations need not require the filing of financing statements. Also, any change must define loan participations in order to distinguish them from other general intangibles, which raises a clarity issue as to how to make the distinction.

Perhaps the distinction used in Section 9-104(f) and Comment 6 thereto to determine when filing is required to perfect the sale of accounts and chattel paper could be used here with equal effect. That distinction excludes from the coverage of Article 9 "a sale of accounts or chattel paper as part of the sale of the business out of which they arose\textsuperscript{166} and other sales of accounts and chattel paper, "which, by their nature, have nothing to do with commercial financing transactions."\textsuperscript{167} Sales between banks\textsuperscript{168} of loan participations have nothing to do with commercial financing transactions and therefore could be excluded on the same or a similar basis. On balance,\textsuperscript{169} therefore, the application of constraints would support Article 9's coverage of the sale of general intangibles for the payment of money.

\textsuperscript{165} Therefore, banks should protect their purchases of loan participations by complying with any applicable pre-Code common-law requirements for sales of intangibles. Few banks actually do comply with such common-law requirements, which may involve obligor notification or "policing." See supra notes 85-86. If a bank does not comply, then its failure to file financing statements under Article 9, if it applied to sales of loan participations, would put it in no worse position than at present. Banks would take the insolvency risk of the selling bank, as they likely do now.

\textsuperscript{166} U.C.C. § 9-104(f).

\textsuperscript{167} U.C.C. § 9-104 cmt. 6.

\textsuperscript{168} For this purpose, the term "bank" might include any financial institution in the business of making loans and selling participations therein to allocate risk. The theory of the suggested exclusion is that, as between banks and such other financial institutions, purchases and sales of loan participations are not intended to facilitate commercial transactions but, instead, constitute a means of allocating lending risk between such institutions.

\textsuperscript{169} The use of the phrase "balance" should not be taken literally. The constraints are not intended to have a quantitative ranking or order. The ultimate rulemaking determination should be a judgment call by the rulemakers themselves.
B. COMMINGLED PROCEEDS

Proceeds constitute "whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds." The significance of the term is that a security interest generally continues in identifiable proceeds, including cash, notwithstanding the disposition of the collateral. In an "insolvency proceeding" (such as bankruptcy), however, a special rule applies: A security interest that otherwise would continue in cash proceeds will be lost if the cash is commingled, or mixed, with other funds of the debtor, except to the extent an artificial formula in Section 9-306(4) preserves the security interest.

The PEB Report proposes that this special rule applying to commingled proceeds in the event of a debtor's insolvency proceedings be deleted and replaced by common-law principles of tracing. The proposal is intended to eliminate the unfairness to a secured party that the artificial formula of UCC Section 9-306(4) presently can cause by arbitrarily limiting a perfected security interest in commingled cash proceeds. This unfairness can be exacerbated where the debtor, in what has become a commonplace legal strategy, intentionally commingles proceeds of a perfected security interest in advance of filing a bankruptcy petition in order to use the formula to defeat the perfected interest.

The proposal applies neutral from the standpoint of completeness and flexibility. The proposal would enhance consistency by making the same rule apply to commingled proceeds both within and outside of bankruptcy. The proposal also enhances clarity because the results of the present formula are unpredictable. A secured creditor could not use the formula to predict the extent of its rights in commingled proceeds because a perfected security interest therein is "limited to an amount not greater than the

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171 U.C.C. § 9-306(2). See U.C.C. § 9-203(3) (giving secured party rights to proceeds under § 9-306 unless otherwise agreed). The secured party cannot prevent commingling in most cases because, consistent with the realities of commerce, § 9-205 of the Code permits the debtor to "use, commingle or dispose of... collateral... or proceeds." U.C.C. § 9-205.
172 U.C.C. § 1-201(22).
174 PEB REPORT, supra note 10, at 122-25.
amount of cash proceeds received by the debtor within ten days before the institution of the insolvency proceedings.\(^\text{176}\) Such an amount, of course, is not ascertainable by a secured creditor until after the debtor's bankruptcy.

The proposal to reinstitute common-law principles of tracing is troublesome, however, from the standpoint of simplicity of implementation. The PEB Report itself recognizes that "[a]rguably, the tracing approach may be more difficult and expensive to apply (than the formula presently in subsection (4))" and refers to suggestions (which the PEB Report nonetheless questions) "that a virtue of [subsection (4)] is the reduced need to 'trace.'\(^\text{176}\)

In assessing this proposal, therefore, the increased fairness, consistency, and clarity would have to be weighed against the difficulty of implementation that results from the application of common-law principles of tracing. This suggests the consideration of a two-step approach, with the second step only used infrequently. The formula in Section 9-306(4) would be retained, and the first step would be to apply it to commingled proceeds. In most situations, the formula would protect the secured party's interest. However, as a means of preserving the secured party's expectations and discouraging opportunistic behavior on the part of the debtor, the common-law principles of tracing would be reinstated as a second step. \textit{This second step, however, would be used only to protect the secured party's interest in commingled proceeds that are unprotected by the formula.}\(^\text{177}\)

Such a two-step approach would enhance fairness by discouraging a debtor from intentionally commingling proceeds prior to bankruptcy because common-law tracing then would preserve the perfected security interest. In most cases where commingling does occur, the formula in Section 9-306(4)(d) would protect the secured creditor without the need to go through the difficulty and expense of actually applying the common-law tracing principles.\(^\text{178}\)

\(^{175}\) U.C.C. § 9-306(4)(d)(ii).

\(^{176}\) PEB REPORT, supra note 10, at 124.

\(^{177}\) Alternatively, the formula in § 9-306(4) could be retained, but a secured party would have the option to choose common-law principles of tracing. Cf. 11 U.S.C. § 1111(b) (1994) (providing election option in bankruptcy where certain conditions are met).

\(^{178}\) One of the reviewers of this Article suggested that a bankruptcy court might require a secured party claiming an interest in commingled proceeds under existing UCC § 9-306(4) either to demonstrate that it would be receiving no more than it would have received under common-law tracing or to face a preference claim. If federal bankruptcy law is determined
C. GOOD FAITH

Should the definition of "good faith," as used in Article 9, be changed?\footnote{179} Under PEB's proposal, serious consideration would be given to adding the extrinsic standard of "the observance of reasonable commercial standards of fair dealing" to the current intrinsic standard of "honesty in fact."\footnote{180} The proposal is neutral from the standpoint of completeness. It would increase consistency by harmonizing the Article 9 standard of "good faith" with that contained in other Articles of the UCC\footnote{181} as well as the Restatement of Contracts.\footnote{182} It might be perceived as increasing fairness by mandating fair dealing as a standard. As shown in the earlier to require the application of tracing, then the two-step approach of this Article would not simplify matters. However, the author believes that federal bankruptcy law should not require tracing; the bankruptcy courts were confusing the relationship under state perfection law (i.e., Article 9) between consistency and completeness. \textit{Cf.} U.C.C. § 3-418 (1994) (providing state law remedies expressly). Section 9-306(4) is presently intended to displace pre-Code law. Therefore, perfection of commingled proceeds is not presently governed by common-law tracing, and nothing in federal preference law, 11 U.S.C. § 547 (1994), would reinstitute tracing for a security interest that is perfected under applicable state law. \footnote{179} PEB REPORT, \textit{supra} note 10, at 248-49. \footnote{180} Id. at 248. \footnote{181} See, e.g., U.C.C. §§ 2-103(1)(b), 3-103(a)(4) cmt. 4 (defining good faith). The author has severe doubts, however, whether the "fair dealing" standard should have ever been exported out of Article 2 to Articles 3, 4, and 4A. See U.C.C. §§ 3-103(a)(4), 4-104(c), 4A-105(a)(6) (using "fair dealing" standard). The Article 2 standard applies only "in the case of a merchant." U.C.C. § 2-103(1)(b). Merchants have been described as "a subcommunity . . . whose primary rules derive from a sense of fairness widespread." Danzig, \textit{supra} note 89, at 622-23. They engage in a high volume of undifferentiated transactions involving goods, often without sophisticated contracts. Therefore, the fair dealing standard helps preserve the relationship of trust that is essential to permit the smooth functioning of such transactions. Other articles of the Code work differently. As will be discussed, Article 9 in particular involves sophisticated contracts and non-trusting parties. \textit{Infra} note 185 and accompanying text. \footnote{182} See \textit{RESTATEMENT} (SECOND) OF CONTRACTS § 205 (1979) (providing duty of good faith and fair dealing derived from UCC Article 2 fair dealing requirement). However, the fair dealing concept in the Restatement may have an objective basis, similar to this article's second corollary to fairness, because it addresses whether an action would "violate community standards of decency, fairness or reasonableness." \textit{Id.} at cmt. a. (emphasis added). This raises the question of how standards are determined. In a UCC Article 2 context, the community is limited to merchants. In an Article 9 context, it is less clear whether a coherent "community" exists. \textit{Cf.} Farnsworth, \textit{supra} note 90, at 671-72 (noting that "good faith performance can be measured by an objective standard based on the decency, fairness or reasonableness of the community, commercial or otherwise, of which one is a member.").
discussion of fairness, however, this proposal would preserve the expectations of parties with less bargaining power while diminishing expectations of parties to Article 9 transactions generally. Furthermore, its imposition would undercut clarity because there will always be a prior judgment call on whether a particular action constitutes fair dealing. In addition, the corollary aspects of fairness—preventing opportunistic behavior where extrinsic factors could not have been contemplated in advance and recognizing implicit rules of conduct that arise from widespread courses of dealing in an industry or from particular courses of dealing between specific parties—already are read into the law by courts. The net result of the proposal therefore would be to diminish clarity while not materially increasing fairness.

Secured transactions under Article 9, by their nature, are arm's length transactions where the parties do not start from a relation of mutual comfort. The transactions are secured by collateral because the secured party is uncomfortable with the debtor's unsecured credit. This is different from the “between merchants” grounding of Article 2, where merchants routinely ship goods, often

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183 “[F]air dealing is a broad term that must be defined in context. . . .” U.C.C. § 3-103 cmt. 4; see also Christina L. Kunz, Frontispiece on Good Faith: A Functional Approach Within the UCC, 16 WM. MITCHELL L. REV. 1105, 1109-1110 (1990). Kunz states the following:

[The inclusion of fair dealing within the UCC's definition of good faith adds] very little certainty to the law, because the meaning of "good faith" must be further established in each litigated case by proof of these "reasonable commercial standards" or "reasonable standards," as well as "fair dealing." . . . In fact, as a commercial litigator bitterly complained at a recent ABA meeting, the use of good faith in the UCC seems to invite disputes and litigation, as well as increase attorney fees and the need for expert witness testimony.

Id. Prof. Kunz nonetheless believes there is credibility to the point of view that some uncertainty can increase socially desirable behavior by motivating parties to act within the range of clearly acceptable behavior:

Except in the tiny percentage of commercial cases that end up in the court system, parties may well be motivated to act well within the bounds of good faith, in order to avoid having to pay the costs associated with litigating good faith definitions and applications. As in other portions of the UCC, uncertainty probably “depolarizes” the disputing parties and brings them back to the middle—to the negotiating table.

Id. at 1110.

184 See supra notes 97-101 and accompanying text (describing corollary aspects of fairness as akin to “mutual mistake” and “mutual understanding”).
The volume of sales transactions creates a marketplace in goods that is made more efficient by implied standards of fair dealing. The transaction-by-transaction nature of Article 9, on the other hand, puts greater weight on the negotiated terms of the security agreement and the expectations of the secured creditor that it will have a means of being repaid if the debtor defaults.

Recall the baseball analogy previously used in this Article to illustrate the principle of good faith. With limited exceptions, Article 9 presently requires only that the parties play by neutral rules. The proposed additional requirement of fair dealing would prevent parties in Article 9 transactions from attempting to gain undue advantage over each other. The question is, however, whether the law should impose such a parens patriae standard where the parties, having adequate information and not lacking bargaining power, are "big boys and girls." Given that the imposition of this subjective standard would undercut clarity, flexibility, and simplicity and that the parties already are held to an "honesty in fact" standard, this analysis at least questions...

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185 In discussing the tension between legislative clarity and standards such as "good faith," Professor Lon Fuller notes that "[i]n commercial law, . . . requirements of 'fairness' can take on definiteness of meaning from a body of commercial practice and from the principles of conduct shared by a community of traders." Fuller, supra note 25, at 64. The author believes that Professor Fuller's view was limited to communities of merchants, such as under Article 2 of the UCC, and not to secured (and therefore nontrusting) transactions, under Article 9.

186 See supra notes 90-92 and accompanying text (explaining necessity of neutral rules to insure fairness in commercial transactions).

187 By way of comparison, even the federal Trust Indenture Act (TIA), which mandates appointment of a trustee to act as agent for holders of publicly issued debt securities (the proverbial "widows and orphans"), only requires the trustee to perform ministerial contractually agreed upon duties until the obligor defaults on the securities: "[P]rior to default, . . . the indenture trustee shall not be liable except for the performance of such duties as are specifically set out in such indenture." 15 U.S.C. § 77000(a)(1) (1981 & Supp. 1995). Even after a default, the trustee's duties to the security holders are limited to acting with the "same degree of care and skill . . . as a prudent man would exercise or use under the circumstances in the conduct of his own affairs." 15 U.S.C. § 77000(c).

188 Because fair dealing is a subjective determination that depends on the circumstances of the parties and their particular transaction, its imposition would undercut clarity. Flexibility would be undercut because fair dealing would limit the ability under UCC § 1-102(3) to vary the provisions of Article 9 by agreement of the parties. Implementation may become more difficult or costly because alternatives would have to be scrutinized to avoid actions that might not constitute fair dealing.
whether its adoption is generally compelling. On the other hand, it may be appropriate to consider adopting this standard for consumer transactions because consumers, in general, are relatively unsophisticated and individually have little negotiating power, and consumer transactions are relatively easy to distinguish.

D. PURCHASE MONEY SECURITY INTEREST COMPETING PRIORITIES

Article 9 grants special protection to persons who extend secured credit to enable debtors to purchase identifiable assets. Such a purchase money security interest ("PMSI") entitles its holder to priority over a secured creditor who previously had obtained a security interest in the debtor's after-acquired property and therefore has been described as "a device for alleviating the situational monopoly created by an after-acquired property clause." There is an ambiguity under Article 9, however, as to the relative priority, as between themselves, of the following PMSI creditors:

189 The foregoing analysis of good faith is not intended to be dispositive of the issue of "fair dealing"; rather, it illustrates how the constraints can be applied. For a thoughtful analysis of why good faith should include fair dealing, see Donald J. Rapson, Who is Looking Out for the Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations, 28 Loy. L. Rev. 249 (1994) (examining UCC's revision process and its ability to serve public interest and suggesting reforms).

190 See Barkley Clark, The Law of Secured Transactions Under the Uniform Commercial Code § 3.01[2][e], at 3-5 (2d ed. 1988) (describing special protection of purchase money security interests).

191 The UCC defines a PMSI to include the security interest of either a seller on credit or a lender who finances the purchase. U.C.C. § 9-107 (1994) (discussing priority of security interests).

192 U.C.C. § 9-312(3)-(4).


194 The PEB Report notes that each of such PMSI creditors] has some reason to believe that it enjoys first priority and, as a practical matter, in many cases it is likely that a purchase money secured party will be unable to discover the filing (or, in the case of consumer goods, the automatically perfected security interest) of its competitor.

PEB REPORT, supra note 10, at 105.
debt) secured by the sold property (a "PMSI Seller") and a lender who advances funds to the buyer of the property to enable the buyer to pay the downpayment and then secures the loan by the purchased property (a "PMSI Lender"). The PEB Report recommends that Section 9-312 be revised to resolve this ambiguity by providing that these creditors receive pari passu, or pro rata, treatment on account of their PMSI.195

How would the constraints apply to resolve the relative priority of a PMSI Seller and a PMSI Lender? From the standpoint of clarity, the PEB's proposal is favorable because it would establish a rule that eliminates the present ambiguity and, once the rule is known, preserves the expectations of these parties. The proposal appears neutral as to flexibility, consistency, and completeness.

The proposal is troublesome, however, from the standpoint of simplicity of implementation. Creditors with pari passu security interests can exercise remedies with respect to the collateral, thereby affecting the rights and impairing the expectations of the other creditors. The PEB Report itself recognizes this problem: "[T]he [Study] Committee acknowledges that a rule of equal priority may create complications when one secured party tries to enforce its security interest."196 In practice, where two or more creditors have security interests in the same collateral, they negotiate and enter into an "intercreditor agreement" that sets forth their rights and remedies as to the collateral. In the case of a PMSI, however, an intercreditor agreement is unlikely to be practical. Other than in a situation of PMSI financing of expensive equipment, the PMSI Seller and the PMSI Lender customarily would not negotiate with each other. Each party deals separately with the buyer, and in some instances, they are not aware of the other's existence.197

Furthermore, the cost of negotiating an intercreditor agreement for

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195 PEB REPORT, supra note 10, at 105. Barkley Clark has suggested that, because the existing law is ambiguous, pari passu treatment is the result "more consistent with both letter and spirit of § 9-312." CLARK, supra note 190, ¶ 3.09[5], at 3-120. Even assuming that is the equitable result under existing law, it does not control how the law should be changed to resolve the ambiguity and reallocate the expectations of the parties.

196 PEB REPORT, supra note 10, at 105.

197 If the PMSI Seller and the PMSI Lender were in privity of contract, one might argue that a pari passu rule would force them to accept the shared priority or reallocate priorities by negotiation.
each PMSI transaction, even if it could be done, would be prohibitively high.\textsuperscript{198}

If the PEB's proposal of \textit{pari passu} treatment is accepted, the constraints suggest that simplicity of implementation still must be preserved. For example, Article 9 can be revised to specify how the PMSI Seller and PMSI Lender may exercise their respective remedies, perhaps inspired by examining to what parties to actual intercreditor agreements have tended to agree.\textsuperscript{199} The parties would be free under Section 1-102(3) to vary the rule if they so desired.

Examining the PEB's proposal from the standpoint of fairness suggests even other approaches. Fairness (in its first aspect) requires neutral rules, or at least rules that do not give an undue advantage to any party. A \textit{pari passu} interest may give an undue advantage to a PMSI Seller over a PMSI Lender in a way that could discourage PMSI lending. As the following numerical example shows, a \textit{pari passu} interest will always result in a significantly greater loss for the PMSI Lender than for the PMSI Seller.

Consider, for example, a buyer who wishes to purchase a computer for $10,000. The seller is willing to finance $7,000 of the purchase price by taking back an installment sales note. A local bank is willing to lend the buyer the remaining $3,000 if it receives a purchase money security interest in the computer. The cost to the seller of manufacturing the computer, or otherwise acquiring it for sale, is $6,500.

The PMSI Lender in this example justifiably expects to recover its loan plus interest because the value of the collateral greatly exceeds the amount of the loan. On the other hand, if even $1 of principal on the loan were not repaid, the PMSI Lender would suffer a loss.\textsuperscript{200} Its profit factor derives from payment of interest

\textsuperscript{198} In the author's experience, intercreditor agreements are among the most sophisticated and hotly negotiated of financing agreements.

\textsuperscript{199} Cf. U.C.C. § 9-315(2) cmt. 4 (addressing competing \textit{pari passu} security interests in goods that become part of product or mass).

\textsuperscript{200} This is actually a simplification because interest represents both a profit factor and a return of costs. Also, the use of the term "loss," here and with regard to the PMSI Seller, is not quite precise because even the failure to recover an anticipated profit can be characterized as a loss. Nonetheless, the \textit{comparative} analysis should be valid.
and not from repayment of principal. Accordingly, if the purchaser defaults on his obligations and, as is inevitable, the $10,000 computer is worth less than that amount in foreclosure, the PMSI Lender not only will fail to recover its anticipated profit (i.e., interest) but also will suffer a direct loss on its investment.

In contrast, the PMSI Seller in this example may not recover its full profit but is far less likely to suffer a loss, and whatever loss is suffered would be significantly less than that suffered by the PMSI Lender. For example, if the foreclosure sale value of the computer collateral were $6,000, then under the PEB’s proposal of pari passu sharing, the PMSI Lender would recover $1,800 on account of its $3,000 loan and the PMSI Seller would recover $4,200.201 Therefore, the PMSI Lender would suffer a loss of $1,200.202 The PMSI Seller, on the other hand, not only would not suffer a loss but would recover a profit of $700! This profit arises because the PMSI Seller’s cost of the computer is $6,500; it already has been paid $3,000 as a down payment from the proceeds of the PMSI Lender’s original loan (reducing its unpaid cost to $3,500), and it now recovers $4,200 from the foreclosure sale.

The PEB’s proposed rule, therefore, could be viewed as unfair because it unduly disadvantages PMSI Lenders. There are two ways to mitigate this unfairness. One way would be to calculate pari passu sharing based on the PMSI Seller’s unpaid cost of goods and not on the sale price. This approach would undercut simplicity of implementation, however, because it would require the expense and delay of a hearing to determine the cost of the goods. Even more troublesome, a PMSI Lender could not always know the cost in advance and, therefore, would be unable to assess its position. Another way to mitigate this unfairness and preserve simplicity of implementation would be to give priority to PMSI Lenders over PMSI Sellers.203 Although this approach would give an advantage to the PMSI Lender, the advantage may not be undue given that the proceeds of PMSI loans are paid to PMSI Sellers and that

201 That is, $6,000 foreclosure proceeds multiplied by the PMSI Lender’s pari passu 30% interest and the PMSI Seller’s pari passu 70% interest.

202 That is, the $3,000 loan minus the $1,800 recovery.

203 The PMSI Lender would not be required to notify the PMSI Seller. If the PMSI Seller is paid a down payment, it should assume the possibility of a PMSI Lender, and it can always inquire of the buyer in cases of doubt.
such loans permit buyers to finance downpayments that facilitate the ability of PMSI Sellers to continue to sell their products.\(^{204}\)

There is, however, one further wrinkle to this problem. The PMSI Seller could have sold its installment note to a third party, such as a finance company, to acquire funds.\(^{205}\) The third party (referred to herein as the "PMSI Factor") then would enjoy the purchase money priority of the PMSI Seller.\(^{206}\) This raises the issue of whether the PMSI Lender should have priority over the PMSI Factor.

This analysis at least suggests that the PMSI Lender should have priority. The rule would be clear and simple to implement: Any PMSI Factor would know its interest in the collateral is subordinate to a PMSI Lender and, therefore, would be able to negotiate a discount to the purchase price of the installment note in appropriate cases.\(^{207}\) Thus, to accord priority to the PMSI Lender also would be fair because the PMSI Factor would pay less than par value for the note. Furthermore, to change the priority of the installment note based on who is the holder—the PMSI Seller or the PMSI Factor—would undercut consistency.\(^{208}\)

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\(^{204}\) The foregoing analysis recognizes loss or gain for the PMSI Seller as a single entity, taking into account its combined roles as seller and financier. The counterargument would be that fairness should be judged for a PMSI Seller by viewing only its role as financier, irrespective of its role as seller. That argument may not be persuasive, however, because the PMSI Seller provides purchase money financing primarily as a means of inducing, and thereby profiting by, the sale. From a flexibility standpoint, however, it would be interesting to observe whether giving the PMSI Lender priority over the PMSI Seller would cause PMSI Sellers not to sell unless PMSI Lenders agree, under UCC § 1-102(3), to convert their senior positions into pari passu positions.

\(^{205}\) Such a sale would be routine for PMSI Sellers that need immediate cash to replenish inventory and make new sales. Depending on how the sale is structured, and whether capital market funding is involved, it may be termed factoring, securitization, or some hybrid. See Steven L. Schwarz, The Alchemy of Asset Securitization, 1 STAN. J. L. BUS. & FIN. 133, 144-46 (1994) (comparing securitization and factoring).

\(^{206}\) See U.C.C. § 9-107 cmt. 1 (explaining that "[a] financing agency has a purchase money security interest when it advances money to the [PMSI] seller, taking back an assignment of chattel paper [i.e., the installment note] . . . ").

\(^{207}\) An appropriate case would exist where the combined PMSI claims of the PMSI Seller and the PMSI Lender exceeded the expected liquidation value of the collateral. The PMSI Factor could require such information before purchasing the installment note.

\(^{208}\) Holders in due course of instruments are the only persons to whom the Code presently accords greater rights than the original holder of the instrument. See U.C.C. § 3-302 cmt. 4 (1994) (discussing definition and rights of holder in due course). The PMSI Factor would not be similar to a holder in due course because it would be deemed to know that a PMSI
E. FORECLOSURE STANDARD

Should the “safe harbor” given by Section 9-504 to secured parties who foreclose in a “commercially reasonable” manner be changed to ensure that the debtor obtains a market price for its property given as collateral? This possible change, not proposed in the PEB Report but under discussion at the suggestion of individual PEB members, is neutral from the standpoint of consistency, completeness, and flexibility. It would enhance the first aspect of the principle of fairness by attempting to ensure that the debtor obtains a market price for its collateral, but it would seriously undermine the constraints of clarity and simplicity by depriving a secured party of the procedural “safe harbor” presently provided by UCC Section 9-504 in a foreclosure. Given that the debtor is not an Affected Non-Party, this suggested change may not be compelling.

F. FILING IN DEBTOR’S LOCATION

Should Section 9-103 be amended to look to the debtor’s location, not the location of the collateral, for filing in all cases (other than possessory security interests)? Adoption of this proposal generally would (subject to the discussion below) enhance clarity and simplicity of implementation by eliminating the need to

Lender always has priority. See U.C.C. § 3-302(a)(2) (stating holder in due course is one who takes without notice of another’s claim to instrument).


See supra note 103 and accompanying text (defining Affected Non-Party).

Cf. BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994) (concerning Chapter 11 debtor who brought action contending price received at foreclosure sale was less than “reasonably equivalent value” of property). The Supreme Court held that in a (non-UCC) mortgage foreclosure, as long as all the requirements of the State’s foreclosure law have been complied with “[m]arket value cannot be the criterion.” Id. at 1761. The Court emphasized that “the law has always deemed that a fair and proper price . . . is the price in fact received at the foreclosure sale.” Id. at 1765. The Court ruled that the federal fraudulent transfer requirement of “reasonably equivalent value” under 11 U.S.C. § 548(a)(2) was deemed satisfied by a properly performed state foreclosure sale. Id.

PEB REPORT, supra note 10, at 74-78. UCC § 9-103 presently requires filing where the collateral is located for most tangible items of collateral and filing where the debtor is located for accounts and other intangibles and for mobile goods. U.C.C. § 9-103 (1994).
determine the location of each collateral item and also, equally, if not more importantly, by eliminating the need to refile financing statements in new jurisdictions where the items of collateral are moved. Furthermore, this proposal would be neutral as to fairness. Regarding consistency, the proposal would minimize certain priority problems by having one filing location. Moreover, once adopted by all states (after a period of admitted inconsistency, during which filings could be made both in the debtor's jurisdiction and in the jurisdictions where the collateral is located), there would be consistency among states as to filings. Finally, the proposal would be neutral as to completeness and flexibility.

In considering this proposal, however, the method of determining the location of a small business should be addressed from the standpoints of clarity and simplicity of implementation. In this age where personal computers and telefaxes permit executives to work at home, bricks and mortar no longer are the sole determinants of a company's location. Furthermore, it sometimes may be costly to verify the location of a small business or to monitor whether the business remains in that location. These constraints, therefore, indicate a need for either a distinction in determining the location of filing for small businesses and other debtors or, alternatively, a common location of filing for all debtors.

G. FILING SYSTEM

How would the constraints apply to the problems inherent in the filing system? In assessing the existing UCC scheme for filing financing statements, one is confronted by a state-by-state filing system that is not entirely computerized and as to which different

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213 Determining the location of collateral sometimes can be highly confusing. See, e.g., In re L.M.S. Assocs., Inc., 18 B.R. 425 (Bankr. S.D. Fla. 1982) (determining location of collateral consisting of inventory of gift shops aboard ships that had moved through several jurisdictions both domestic and foreign).

214 U.C.C. § 9-103(1)(d). Of course, debtors move also, although usually less often than collateral. When such a move occurs, financing statements must be refiled. U.C.C. § 9-103(3)(e).

215 Examples of possible locations of debtor's filings include the state of the debtor's organization or, politically more sensitive, a central single national location or database.
states have different forms and requirements.\textsuperscript{216} When closing an actual transaction, this often makes it difficult to know in advance what adverse financing statements may be on file. The need to deal with multiple filing offices is costly and logistically inefficient. In short, the present filing system lacks clarity, simplicity, and consistency.

Suppose, for example, that a secured party has made a loan to a debtor and wishes to perfect a security interest in the debtor's accounts. Under UCC Section 9-103(3), the law of the state in which the debtor has its chief executive office (or place of business if only one) governs perfection. Under UCC Section 9-401(1), however, different states can choose differing requirements for where to file financing statements, including whether to require local county filings (in addition to central filings in the office of the applicable Secretary of State). Because the central state filing is required anyway, it is unclear what benefit the local county filing provides except to enrich county filing officers and to create a trap for the unwary secured party who forgets to file locally.

Once financing statements are presented for filing with the proper fee or accepted by the filing officer, the filing is effective.\textsuperscript{217} A filing is not, however, immediately recorded in a manner that a search will disclose; in the author's experience, recording delays of weeks, or in some cases even months, are common. Such a delay creates the dilemma that searches of filing records\textsuperscript{218} sometimes will not reveal previously filed, but as yet unrecorded, financing statements; yet, the previously filed financing statements will take priority over those later filed by a secured party in good faith.\textsuperscript{219} This often motivates the duplicative and expensive search for adverse financing statements at the outset of a transaction, then filing prior to the closing, and again searching for adverse financing statements weeks or months later to ensure that no such adverse statements would take priority by reason of previously having been filed but not recorded.

\textsuperscript{216} See Julianna J. Zekan, The Name Game—Playing to Win Under Section 9-402 of the Uniform Commercial Code, 19 Hofstra L. Rev. 365 (1990-91) (arguing UCC has generated extensive and uncertain litigation resulting from non-uniform practices and decisions).

\textsuperscript{217} U.C.C. § 9-403(1).

\textsuperscript{218} See U.C.C. § 9-403(4) (outlining manner in which financing statements must be filed).

\textsuperscript{219} See U.C.C. § 9-312(5) ("Conflicting security interests rank according to priority . . . from the time a filing is first made covering the collateral.").
The constraint of flexibility—particularly to adapt to changes in technology—calls for an improved filing system that takes advantage of the computer technology that has developed largely since the manual filing system originally was proposed by the UCC in the 1950's. Furthermore, a central filing system to which all states subscribe would obviate the need to search on a state-by-state basis and greatly reduce the filing and searching burden.

In short, the application of constraints to the filing system problems not only would help to articulate solutions but also could be useful in establishing a policy basis to help overcome any political inertia or opposition to change.220

H. PERFECTION OF SECURITY INTEREST IN INSTRUMENTS

Should filing be permitted for perfection of a security interest in an instrument?221 This proposal would allow, for example, a practical means of perfection in securitization transactions involving pools of notes or other instruments. Under present law, the only way to perfect such a security interest is by the secured party's taking possession of the instruments.222

Perfecting by filing would significantly enhance the simplicity of these transactions. In assessing the proposal, however, its fairness would have to be weighed from the standpoint of a third party who, unaware of the filing, pays money to purchase one or more of the instruments. Furthermore, the impact of perfecting an interest in negotiable instruments by filing would have to be harmonized, from the standpoint of consistency, with other areas of commercial law involving negotiability.223

In discussing this proposal, the PEB Report indirectly addresses fairness and consistency. It recommends that "holders in due course and certain other good faith purchasers for value who take possession would be senior to security interests earlier perfected by

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220 An example of possible political inertia or opposition to change includes the opposition by employees in county clerk offices.
221 PEB REPORT, supra note 10, at 152-55.
223 This proposal is consistent, however, with U.C.C. § 9-304(1) (providing that security interests in chattel paper or negotiable documents may be perfected by filing).
filing.\textsuperscript{224} This solution also upholds simplicity because, as the PEB Report points out, "secured creditors in many [finance] transactions may view [the debtor's voluntary transfer of instruments to third parties in breach of contractual restrictions on transfer] as a remote possibility that is not of serious concern."\textsuperscript{225}

I. FEDERAL VERSUS STATE PERFECTION

How would the constraints apply to the question previously raised in this Article of whether federal and state commercial law should continue to operate side-by-side covering the same subject matter? Consider this from the standpoint of railcar financing. Under the constraint of consistency, separate federal and state commercial laws should not cover the same subject matter—\textit{e.g.}, perfection of a security interest in railcars—in different ways. Having only one means of perfection also would enhance clarity and simplicity of implementation by making the law more straightforward as well as reducing the burden and cost of complying with duplicative perfection requirements. The constraints of fairness and flexibility are neutral on this question.

From the standpoint of completeness, it would not appear to matter whether federal and state law jointly govern so long as together they create a complete system for perfecting the security interest. Nonetheless, if from the standpoints of consistency, clarity, and simplicity it is better to have only one governing body of law, then completeness requires that the body of law that is chosen be comprehensive in its application.

At present, Article 9 has a better track record than federal law in covering the perfection of secured transactions. Furthermore, from the standpoint of internal consistency, most secured transactions presently are governed by Article 9. Therefore, the Article 9 method for perfection of a security interest in railcars—filing financing statements for the railcars as mobile goods—would be more consistent with the greater body of secured transactions than would perfection requirements under federal law.\textsuperscript{226}

\begin{footnotesize}
\begin{enumerate}
\item[224] PEB REPORT, \textit{supra} note 10, at 155. Those persons would be Affected Non-Parties. \textit{Cf.} U.C.C. § 9-308 (containing similar rule regarding chattel paper).
\item[225] Id.
\item[226] Whether federal law or the UCC would be the more appropriate governing law in other circumstances would require, of course, a case-by-case analysis.
\end{enumerate}
\end{footnotesize}
J. ORIGINAL ADOPTION OF ARTICLE 9

Some may contend that the application of constraints depends on Article 9 being a mature and widely accepted body of law. This theory can be tested, however, by applying the constraints to the original adoption of Article 9, which made radical and innovative changes to the then existing law of secured transactions. Pre-Article 9 law was unclear, complex, and impractical. Its separate rules for different types of secured transactions created troublesome inconsistencies, while rigid common-law forms of perfection greatly hindered flexibility and the ability to innovate. Furthermore, although some laws were uniform among states, others were not, creating significant inconsistencies. The constraints, therefore, would have provided a compelling basis for the original adoption of Article 9.

K. AN EXAMPLE OUTSIDE OF ARTICLE 9

As an example of the use of constraints not involving Article 9 rulemaking, consider an ongoing controversy of whether to change governmental forfeiture statutes to recognize the rights of creditors in business forfeitures:

Forfeiture laws, which allow the Government to [seize] any assets that are reasonably traceable to a crime, . . . do not adequately shield . . . unsecured creditors.

. . .

Caught in the web of . . . seizure are many innocent creditors, from major financial institutions [that have made loans] to . . . suppliers of goods and services. . . .

In [business] forfeitures, unsecured creditors have virtually no way to become informed about or to contest matters affecting their interests. Prosecutors notify them intermittently, at best, about the progress of the case. Unlike unsecured creditors in a bankruptcy case, unsecured creditors in a forfeiture . . . are not guaranteed payment from seized as-
One recommendation to address this concern was that the government’s seizure of assets in a business forfeiture be subordinate to the interests and claims of innocent parties but senior to claims and interests of wrongdoers.228 The intention was to balance the rights of government prosecutors with those of innocent creditors, while still taking the profit out of crime.229 This recommendation was opposed, however, by government prosecutors. The prosecutors were unfamiliar with creditors’ rights law, and their objections apparently reflected a misunderstanding of the issues.230

The use of constraints would not necessarily dictate the acceptance of the recommendation. However, it would have allowed the recommendation and its consequences to be evaluated on a more informed and objective basis, permitting greater consideration of the recommendation’s various benefits.

One such benefit includes the recommendation’s increase in clarity by permitting unsecured creditors to know their rights, whether such rights are tested in a bankruptcy or forfeiture context. This is particularly important because, from the stand-

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228 See Schwarcz & Rothman, Civil Forfeiture: A Higher Form of Commercial Law?, supra note 227, at 317-18 (stating recommendation addressing concern of whether to change governmental forfeiture statutes to recognize rights of creditors in business forfeitures); id. at 318 n.226 (providing basis for recommendation).

229 Id.

230 As reported to the author by several NCCUSL Commissioners. Cf. Schwarcz & Rothman, Save the Blameless from Seizure Laws, supra note 227, at 11. Schwarcz and Rothman state the following:

The fortunes of unsecured creditors sit right in the hands of prosecutors, who too often given them little attention. Why? Because prosecutors focus primarily on criminal investigations, not commercial matters, and . . . are not likely to want to deal with a multitude of creditors unrelated to the illegals of a case. And prosecutors are seldom sophisticated in business.

Id.
point of unsecured creditors, forfeitures are completely random.\textsuperscript{231} By the same token, prosecutors would be able to know that, as against wrongdoers, the government’s seizure would be just as effective as under existing law because the subordination would only protect innocent parties.

From the standpoints of flexibility and completeness, the recommendation is neutral. The recommendation decreases simplicity somewhat because existing law gives all rights to the government whereas the recommendation would require the government to be subordinate to the rights of unsecured creditors. Subordination, however, is widely used in commercial and bankruptcy law,\textsuperscript{232} and its application to forfeiture would be consistent with customary usage.

The recommendation enhances fairness by preserving the expectations both of the government under forfeiture law and of creditors under non-forfeiture law. Because creditors are Affected Non-Parties under forfeiture law—their rights are affected although they are not themselves parties to the wrongdoing giving rise to forfeiture actions—forfeiture law has inadvertently ignored their claims. The recommendation, by subordinating the government’s claim against seized assets to claims of innocent creditors, acknowledges that making loans and supplying trade credit are legitimate business activities.\textsuperscript{233} At the same time, the recommendation continues to recognize the government’s right under forfeiture law to seize a wrongdoer’s assets and thereby completely deprive the

\textsuperscript{231} Schwarez & Rothman, Civil Forfeiture: A Higher Form of Commercial Law?, supra note 227, at 303, 315. Schwarez and Rothman state as follows:

\begin{quote}
It is, of course, impossible at the time of the [decision to extend unsecured credit] to estimate the likelihood of civil forfeiture because the underlying illicit action that may give rise to the forfeiture is as yet undiscovered, and also because the bringing of such action is politically determined. Lenders and other creditors have no means to predict how, when or if a borrower’s assets might be seized . . . .
\end{quote}

\textit{Id.}

\textsuperscript{232} See, e.g., 11 U.S.C. § 510 (1994) (stating subordination agreement is enforceable in bankruptcy to same extent enforceable under non-bankruptcy law); U.C.C. § 9-316 (permitting entity entitled to priority to subordinate its interest by agreement); see also \textit{American Bar Foundation, Commentaries on Indentures} 569 (1971) (providing model subordination language for bonds and debentures).

wrongdoer of any profits from its crime.

Forfeiture law also is inconsistent with bankruptcy law. The recommendation would make these bodies of law consistent by giving unsecured creditors in a forfeiture many of the rights they would have in a bankruptcy case:

In a civil forfeiture action, an unsecured creditor has virtually no procedural mechanisms through which to become informed and contest matters affecting its interests. . . .

In comparison, under federal bankruptcy law, all creditors are notified and [participate directly or through a representative creditors' committee in the proceeding] . . . .

. . . Civil forfeiture does not recognize unsecured creditors as having claims as of right. . . .

. . . . This is contrary to bankruptcy law. . . .

. . . . [I]n bankruptcy, the claims of unsecured creditors are superior to any governmental claims [in certain circumstances] . . . .

. . . The policy question raised, again, is whether in a commercial context conflicting bodies of law should be allowed to govern the same subject matter, especially when, from the standpoint of innocent third parties, the determination of which body of law applies to a given situation is random. 234

Constraints, therefore, could help prosecutors understand why rights and interests of innocent parties should be respected in a forfeiture and would provide a more objective basis by which rulemakers could judge the consequences of the recommendation.

234 Id. at 304-06, 311 (footnotes omitted). See generally id. at 303-16 (describing historical grounds of civil forfeiture, its development into current law, and tension between forfeiture law and commercial and bankruptcy law).
V. CONCLUSIONS

Irish poets, learn your trade,
Sing whatever is well made. . . .

A. CONSTRAINTS APPLIED TO PRIVATE RULEMAKING

Constraints are fundamental to the private rulemaking process because they make explicit the considerations that ought to be implicit in any good rulemaking. They focus the process by providing a basis to judge proposed rules and their consequences, and they stimulate consideration of viable alternative approaches. They make the process more efficient by introducing the precision of a common language and more rigorous by requiring rulemakers to use that language. Constraints also make private rulemaking less susceptible to lobbying influence by providing neutral standards to counterbalance interest group politics.

It is true that, without reference to constraints, private rulemaking now often produces rules that are consistent with the constraints. This does not make the constraints superfluous. Explicit consideration of constraints would improve the process of private rulemaking whether or not its product demonstrates that constraints have been present implicitly. Even the best of private rulemakers are imperfect and fallible human beings; bringing the constraints into consciousness would ensure that no constraint has been overlooked. Furthermore, requiring rulemakers to focus on questions raised by the constraints is likely to reveal hidden connections and stimulate new ways of thinking about the problem.


236 This raises the question of whether there should be an institutional enforcement mechanism that mandates the application of constraints. For example, private rulemaking reports, such as those issued by the study and drafting committees, e.g. PEB REPORT, supra note 10, could explicitly be required to justify proposed rules and potential alternatives in light of the constraints. Such a requirement would be addressed politically by ALI, NCCUSL, and other private rulemaking bodies.
being addressed. In short, the constraints increase the likelihood that the rulemaking process will result in a well-made statute.

Constraints also can give greater legitimacy to the private rulemaking process. The problem of legitimacy in private rulemaking is a bit like the Wizard of Oz. When human beings are seen to be behind the process—as has happened with the rulemaking process becoming increasingly open to public participation—the “authority of the source imposing” law weakens. Furthermore, subsequent legislative ratification, through enactment, of uniform state laws is ultimately unsatisfying as a basis of legitimacy because state legislatures do not always exercise, and indeed the goal of uniformity discourages, independent scrutiny.

If legitimacy does not derive from the rulemaking source, then it must derive from some other aspect of the process or not at all. Habermas has shown that “legal norms are . . . open to criticism and in need of justification [such as through] a morality grounded

237 This Article suggests, for example, that rulemakers consider retaining the formula in UCC § 9-306(4) for commingled cash proceeds of debtors in insolvency proceedings and that common-law principles of tracing be instituted only as a second step to be used to protect a secured party's interest that is unprotected by the formula. See supra notes 170-178 and accompanying text (discussing commingled proceeds and alternative proposal for treatment of them). The definition of good faith should not necessarily be changed to add “the observance of reasonable commercial standards of fair dealing” to the current standard of “honesty in fact.” See supra notes 179-189 and accompanying text (discussing good faith). The ambiguous competing priorities of a PMSI Seller and a PMSI Lender under UCC §§ 9-312(3) and (4) should not be made pari passu, but instead, the PMSI Lender perhaps should be given priority over the PMSI Seller. See supra notes 190-208 and accompanying text (discussing priority between competing purchase money security interests). The “safe harbor” given by UCC § 9-504 to secured parties who follow UCC procedural requirements in foreclosing should not necessarily be changed to ensure that the debtor obtains a market price for its property given as collateral. See supra notes 209-211 and accompanying text (discussing foreclosure standard). Finally, the application of constraints to examine problems inherent in the filing system would help not only to articulate solutions, but also to establish a policy basis to help overcome opposition to change. See supra notes 216-220 and accompanying text (discussing filing system). The author defers to ALI and NCCUSL to determine whether these proposals would be better. The point is that new ways of thinking about the problem were stimulated by the application of constraints.


239 See, e.g., infra note 253 (providing example of lack of scrutiny in adopting legislation).
This Article posits that legitimacy can derive, at least in part, from the application of constraints that are intended to reflect fundamental principles—as Habermas would put it, “justification by principles whose validity could in turn be criticized.”

Constraints also can give legitimacy to the rulemaking process by approximating the benefits of widespread participation. No rulemaking—much less private rulemaking—ever can be wholly participatory. Even with “open” meetings, there are practical and logistical limitations on the number of participants that can be included in a working session. Some parties, such as consumer groups, may be unable to afford the time or monetary cost of attending numerous meetings at different geographical locations. Moreover, other persons—the so-called Affected Non-Parties—will be unaware (except in retrospect) of the rule’s impact on them.

Participation, however, has two goals: to elicit the perspectives of all affected parties and to create a forum where those perspectives and their consequences can be debated. Because constraints require rulemakers to consider a variety of perspectives and their consequences, constraints effectively serve to achieve some, if not all, of the same goals that would be obtained by increasing the participatory nature of the private rulemaking process. Constraints also focus rulemakers on consequences to Affected Non-Parties, whereas a participatory process is unlikely to include them. Constraints, therefore, may be even more “participatory,” in effect, than open meetings because constraints take Affected Non-Parties into account.

In analyzing the application of constraints as a means of

240 HABERMAS, supra note 238, at 260-61.
241 Id. at 264.
242 Harry Sigman, a noted commercial law scholar, practitioner, and member of the Article 9 drafting committee, suggested to the author that private rulemaking could be made more participatory by opening the process to the public at an earlier stage. One should be wary, however, of making the process logistically unworkable, or of inviting interest group politics at a more impressionable stage. Cf. Patchel, supra note 26, at 146 (exploring impact of interest groups on uniform laws process).
243 Even conference calls can be costly. For example, the author recently received an $890 telephone bill for a one-hour conference call among nine parties—not all of whom were long distance.
increasing the participatory nature of private rulemaking, it is useful to compare ALI and NCCUSL to the hypothetical "semirepresentative body" that Professor Guido Calabresi, facing similar issues of legitimacy, considers as a possible approach to dealing with "the problem of legal obsolescence."\(^{244}\) Calabresi defines legal obsolescence as the combination of lack of fit and lack of current legislative support [that results] . . . because a statute is hard to revise once it is passed. [Therefore,] laws are governing us that would not and could not be enacted today, and . . . some of these laws not only could not be reenacted but also do not fit, [and therefore] are in some sense inconsistent with, our whole legal landscape.\(^{245}\)

Calabresi maintains that obsolescence must be overcome,\(^{246}\) but the hard decision is how to accomplish that institutionally:

We are bound in the end to choose whether updating by an institution [which he later calls a semirepresentative body] that has a fairly good sense of current majoritarian feelings, but is not bound by principles in its decision making, is preferable to updating by courts, which are good at discerning changes in the legal landscapes but which, we are still assuming, have no great capacity for evaluating current popular desires.\(^{247}\)

Calabresi chooses the courts as the institution best suited in the first instance to overcome statutory obsolescence.\(^{248}\) His reason-

\(^{244}\) CALABRESI, supra note 134, at 2.
\(^{245}\) Id.
\(^{246}\) Id. at 110.
\(^{247}\) Id. at 110 (emphasis added) (footnote omitted).
\(^{248}\) Id. at 119. Calabresi focused on which institution—the courts, the legislatures, or administrative agencies—is best suited to overcome the "burden of inertia" by initiating statutory revision. He would choose the courts for two reasons: first, a court, as a body, is better suited to commence a judicial-legislative dialogue; second, a court decides cases on the
ing, however, also would lend support to the choice of a semirepresentative body that is bound by principles in its decisionmaking—not unlike a private rulemaking body such as ALI or NCCUSL that undertakes to be bound by the application of constraints. Calabresi concludes that the primary basis of judicial lawmaking authority derives from the principled nature of judicial decisionmaking and the approximation of the popular will that legal principles represent:

Most classic justifications of judicial common law power . . . emphasize the subservience of courts to principles, to rational decision making, . . . as explaining and justifying judicial lawmaking power. . . . But [this] leaves unanswered the crucial issue: what there is about principles of law . . . and about rational decision making which suggests that a body, selected for its capacity to discern these principles and to act rationally on them, should make the conditional rules for society. . . . The answer must lie in the belief that the legal fabric, and the principles that form it, are good approximations of one aspect of the popular will, of what a majority in

basis of principles although at the expense of majoritarian wishes at the first instance. Id. at 124. Thus, Calabresi is arguing that, all things being equal, it is better for the courts to directly attack laws which they feel are obsolete and to revise them, using legal principles, in the manner they believe best fits the legal landscape, and then allow the legislatures, if dissatisfied, to come back and overturn or revise them.

Calabresi contemplated the semirepresentative body to be governmental: “an administrative agency or a legislative or executive committee.” Id. at 118. Neither the PEB, nor ALI or NCCUSL, is strictly governmental. Professor Patchel states that although NCCUSL

is representative of the states . . . in the sense that it draws its membership from them[,] . . . [t]he states have no official control over its procedures or over the subject matter of the laws it promulgates, and its members do not view themselves as official representatives of their states’ interests in the process. Indeed, the primary defining characteristic of the National Conference of Commissioners on Uniform State Laws

is that it is neither a democratically elected representative body, nor one owing allegiance, or having any accountability, to any political body.

Patchel, supra note 26, at 91. Also, ALI is a private institution although it is dedicated to the public interest.

250 CALABRESI, supra note 134, at 96.
some sense desires.\textsuperscript{251}

\ldots
\ldots [L]egal principles \ldots reflect a deeper popular will. That is still the primary basis for judicial lawmaking authority. Unprincipled decisions, \textit{ad hoc} rules that do not fit, remain in a sense outside the pale and subject to criticism.\textsuperscript{252}

Applying the constraints to private rulemaking would make the process more principled\textsuperscript{253}—and therefore more reflective of the popular will—to the extent the constraints incorporate fundamental

\textsuperscript{251} Id. at 96-97 (emphasis added). An earlier draft of this Article was subtitled, "A Bickelian Approach to Statutory Drafting and Obsolescence," based upon the author's belief that constraints reflecting legal principles will not only be majoritarian (as Calabresi suggests) but also will reflect consensus, and that the authority or law derives from a process that is reflective of consensus. See ALEXANDER M. BICKEL, THE MORALITY OF CONSENT (1975) (arguing that broad constitutional principles become entrenched only as they gather common assent).

\textsuperscript{252} CALABRESE, supra note 134, at 113. Cf. Patchel, supra note 26, at 146 (asserting that NCCUSL, in uniform law process, obtains legitimacy for its laws not from its democratic origins but from neutrality of its drafters and nonpolitical nature of drafting process and later questioning whether interest group politics has prevented process from really being neutral and nonpolitical). Id. Requiring proposed statutory revisions to be judged in light of the constraints of this Article would enhance the perception, and hopefully the reality, that the process would be more neutral and less political.

\textsuperscript{253} It is not enough to say that private rulemaking gains all of its legitimacy from subsequent legislative enactment. Once specific rules are proposed, the momentum created sometimes can overcome the democratic control imposed by the requirement of legislative enactment. For example, Donald Rapson, see supra note 34 (noting other details of conversation with Rapson), and Neil Cohen, a professor of commercial law at Brooklyn Law School and the reporter for the Restatement of Guarantees and Suretyship, told the author that Professor Cohen was teaching a course in Article 9 when a student asked whether New Jersey had adopted the 1972 amendments. Cohen replied that it had not. The student called his father, a senior member of the New Jersey legislature, and asked why the 1972 amendments had not been adopted. The father then asked the legislature's drafting office to present the amendments to his committee for possible legislative adoption, and Rapson was asked to testify in support of the amendments at a legislative hearing. When Rapson arrived, he was directed to read verbatim the amendments for the record, starting with the definitions section. Droning on while the committee enacted other business, he had not even completed the definitions before he was thanked, asked to stop, and informed that the amendments would be adopted without modification. See also Patchel, supra note 26, at 158. Patchel suggests that state legislatures need clear explanations of "the major policy choices that have been made—and the alternative choices that have been rejected" in proposals for uniform legislation. Id. The constraints identified in this Article can be used to help explain those choices.
legal principles. See infra notes 259-269 and accompanying text (discussing how constraints correlate to principles used in judicial decisionmaking). Calabresi regards legal principles as the judge's own sense of right and wrong and the popular will, as constrained by the fabric of past common-law decisions:

[E]ach judge inevitably brings to the task some sense of the majority that selected him or her and some sense of what is right for the country . . . .

But the judge does not directly seek to apply his or her sense of the popular will or of right and wrong except as it seems to fit in the fabric.

Calabresi, supra note 134, at 97.

Patchel, supra note 26, at 158.
made—and the alternative choices that have been rejected."

Constraints also may be useful in enhancing the principled basis of administrative rulemaking. Because administrative rulemaking is constrained by the statute pursuant to which the rule is to be adopted, the statute itself could mandate the application of constraints as part of the rulemaking process.

C. CONSTRAINTS APPLIED TO JUDICIAL DECISIONMAKING

The use of constraints in judicial decisionmaking, particularly regarding issues of statutory interpretation, also may merit study. Although it is beyond the scope of this Article to fully explore the application of constraints to judicial decisionmaking, a few observations may be in order.

In interpreting a statute, courts implicitly look to the principles underlying the statute to reach their decision. For example, in Security National Bank & Trust Co. v. Dentsply Professional Plan, the court relied on clarity and consistency to refuse to reinstate a creditor's security interest to the priority lost by the release of its UCC financing statement in ignorance of another creditor's security interest. The court stated the following:

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256 Id. The use of constraints to explain legislative policy choices would also further the legislature's goal of ensuring that its enactments are enforced by the executive and interpreted by the courts according to the legislature's intention.

257 CALABRESI, supra note 134, at 96-97, 110, 113.

258 Federal administrative rulemaking also could be mandated by Executive Order, such as now is done by requiring cost-benefit analyses in certain circumstances. See, e.g., Exec. Order No. 12,291, 3 C.F.R. 127 (1981); Exec. Order No. 12,866, 3 C.F.R. 638 (1993) (successor to Exec. Order No. 12,291). Under Executive Order No. 12,291, for example, all federal government agencies are required, in connection with promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulations, to weigh the costs and benefits. Exec. Order No. 12,291, 3 C.F.R. at 128. Specifically, an agency must, except in emergency situations, base its rulemaking actions on "adequate information concerning the need for and consequences of" the action; an action may not be taken unless its potential benefits outweigh its potential costs, and actions shall be chosen among alternatives to maximize net benefits and minimize net costs to society. Id. at 128. Furthermore, the agency must consider lower cost alternative approaches in promulgating "major rules," and must prepare a "Regulatory Impact Analysis" as the basis of such consideration. Id. The author is only mentioning this as a possible analogy and is not necessarily recommending that the same bureaucratic formality apply to the application of constraints to administrative rulemaking.

259 617 P.2d 1340 (Oka. 1980).
Although strict adherence to the Code requirements may at times lead to harsh results, efforts by courts to fashion equitable solutions for mitigation of hardships experienced by creditors in the literal application of statutory filing requirements may have the undesirable effect of reducing the degree of reliance the market place should be able to place on the Code provisions. The inevitable harm doubtless would be more serious to commerce than the occasional harshness from strict obedience.  

One might ask: What about fairness? As this Article has shown, the aspect of fairness that applies to Article 9 transactions is a concept of “honesty in fact,” or playing by neutral rules. As so defined, fairness was respected. The Dentsply case illustrates that to the extent constraints are relevant to statutory rulemaking, they also may have relevance in guiding a judge in the interpretation of a statute. In this regard, legislative history showing the application of constraints to the statute might be useful. Constraints also may be useful to help judges articulate the “principled” basis of common-law decisionmaking. At least five of the constraints appear to have similarities to principles used in judicial decisionmaking. Clarity has as much application in deciding cases as in making rules. Several judges have expressed

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260 Id. at 1343.
261 See supra notes 89-93 and accompanying text (discussing aspects of fairness in commercial transactions).
262 Constraints could be included in legislative history or, in appropriate cases, even in a statute's statement of purpose or policy. Cf. U.C.C. § 1-102 (1994) (stating purpose of Uniform Commercial Code). Cf. Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed, 3 VAND. L. REV. 395, 400 (1950). Llewellyn states that “[i]f a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.” Id.
263 This is not to say that the constraints embody all of the principles used in judicial decisionmaking. Stare decisis, for example, is technically outside of any single constraint with the possible exception of consistency, as discussed below. Nonetheless, the cumulative effect of the constraints, by binding rulemakers to consider rulemaking in light of fundamental principles, would provide a measure of continuity in decisionmaking that is not dissimilar to stare decisis.
to the author the desirability of deciding cases in ways that parties will know what is expected of them and the consequences of their actions. Fairness, of course, is generally viewed as a principle underlying judicial decisionmaking. Simplicity of implementation certainly would appear to be a judicial goal. Consistency may be less important because judges usually decide cases based on the particular facts before them and want the flexibility (a constraint, but here used to refer to the decisionmaker as opposed to the parties) to decide different cases differently. The Dentsply case, however, illustrates that, at least in situations (such as commercial transactions) where clarity is important, consistency will be respected to the extent it helps to preserve clarity. Furthermore, consistency would ensure that a judicial determination is scrutinized from the standpoint of consistency with the general body of law, and to that extent, consistency is similar to (although not as rigid as) the judicial principle of stare decisis.

The constraint of flexibility is tricky. As mentioned above, judges want flexibility in deciding cases. Because the constraints highlight competing considerations, they can help a judge articulate how different results can be reached in different cases. On the other hand, to the extent the constraint of flexibility itself is relevant to judicial decisionmaking, it probably would focus on whether a judge recognizes evolving customs and usages and the ability of parties to contract around impediments. That focus is more clearly desirable for commercial law cases than for other areas of law.

The final constraint, completeness, appears to have less application to common-law judicial decisionmaking. Courts deal with the specific matters before them and often strive to resolve only those issues and to avoid making rules that are unnecessary to decide the
case. That seems logical because court decisions, unlike rules made by private rulemaking bodies or legislatures, are typically made by individual judges who have little access to the information or resources that would enable them to reach decisions of general application. The role of the judge is to do justice in the case before her, not to promulgate rules of general application.

It should be observed that judges are unlikely to have as much time or resources as legislatures to rigorously apply constraints to each decision they make or to decide what each constraint means in the context of reaching judicial determinations under different bodies of law. Furthermore, because judges are already bound to a principled decisionmaking process, they do not need constraints to the extent that private rulemakers may need them. The role of constraints in common-law judicial decisionmaking is therefore more likely to remain implicit than to become explicit.

D. LAW AND PSYCHOLOGY OF THE CONSTRAINTS

The private rulemaking process ultimately involves the interaction among people in a group. It is therefore relevant to ask how the constraints would be viewed from the standpoint of the psychology of group behavior. Within this context, the issue of accountability is especially salient.

266 Indeed, judicial statements that are not necessary to decide the case are referred to as "dicta" and are not accorded the same precedential authority as statements that are necessary to decide the case.

267 Judges, however, could require litigants to include in their briefs to the court a discussion of the application of constraints to the litigated facts.

268 As mentioned above, the meaning or interpretation of each category of constraint might differ for different bodies of law.

269 See CALABRESI, supra note 134, at 96-97 (noting "the way judges are trained and selected, their relative independence, the limitations imposed on their staff, the fact that they make law incrementally in response to specific situations, and the requirement that they explain the grounds of their decisions.

270 The author addressed this question to three scholars who are nationally prominent for their research into the psychology of group behavior: Professor John M. Levine of the University of Pittsburgh; Professor Reid Hastie of the University of Colorado at Boulder Institute of Cognitive Science, Center for Research on Judgment and Policy; and Dr. Marvin Aronson, Director of the Postgraduate Center for Mental Health. Each of these scholars was kind enough to review a draft of this Article in preparation for responding to the question.
In general, people work harder to accomplish a perceived goal when they feel they are accountable to an authority or an interest group.\footnote{Discussions with Professors Levine and Hastie.} Under the existing rulemaking process, there is already a form of accountability of the rulemakers to their constituent organizations—ALI and NCCUSL—as well as (indirectly) to segments of the legal community affected by the rulemaking changes. Psychological research has shown, however, that people often will adopt positions to gain the favor of those to whom they feel accountable.\footnote{Philip E. Tetlock, \textit{The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model}, in \textit{25 Advances in Experimental Social Psychology} 331, 341 (Academic Press 1992).} To that extent, this somewhat narrow accountability is not necessarily good because it prevents people from becoming multi-dimensional, flexible thinkers about problems.\footnote{Id. at 356 (noting that accountability leads to least common denominator responses). The author thanks Elana S. Teitelman, Columbia Law School '96, for helpful comments on this section of the Article.}

The constraints can help overcome this limitation by stimulating more flexible thought. When people know nothing about their prospective audience, they tend to think through issues more carefully to anticipate objections.\footnote{Id. at 345.} The constraints affect this process in two ways. First, the nature of the constraints creates a broader accountability by shifting the audience from one that is purely political and one-dimensional to one that is more abstract and multi-dimensional. Second, the content of the constraints provokes flexible thought by requiring rulemakers to consider competing considerations.

Furthermore, psychological research has confirmed that people are often excessively confident in the correctness of their views.\footnote{Id. at 356.} The constraints, by forcing rulemakers to view proposals from different perspectives, can help to overcome that bias. In this connection, it is noteworthy that rulemakers would have knowledge of the constraints at the beginning of the revision process. Research shows that accountability \textit{before} initial consideration of an issue is necessary to “prevent first impressions from dominating final judgments.”\footnote{Id. at 353-54.} Thus, introduction of the constraints at the...
onset will ensure that rulemakers remain open minded.

The constraints also can be useful to stimulate changes to the status quo. Psychological research has shown that people are reluctant to make changes without a clear-cut and sensible sounding set of reasons to justify one's conduct. The constraints can serve as the basis for articulating such reasons.

Thus, the constraints would create a form of broader accountability that increases flexible and multi-dimensional thinking by mandating consideration of a wide range of ideas as an integral part of the rulemaking process.

E. CONCLUSION

This Article is intended to continue the dialogue begun by Professors Alan Schwartz and Robert Scott on rulemaking by private legislatures. Private rulemaking has, and will continue to have, an important role in the creation of uniform state laws. The precise definition and conscious application of constraints will further legitimize this role by making explicit those considerations that are essential to any good rulemaking process and by counter-balancing interest group influences. The constraints also will help rulemakers to judge consequences of proposed rules while adding focus, conceptual clarity, and intellectual rigor to the rulemaking process. Constraints also may have application to public rulemaking and, to a more limited extent, to judicial decisionmaking.

277 See id. at 364 (providing evidence that individuals are less likely to be blamed when one can offer sound reasoning for conduct); id. at 367 (detailing status quo effect).

278 The use of psychological methodology to shed light on law can be compared with law and economics. According to Tetlock, "[t]wo hard core assumptions have proved particularly fruitful in the study of judgment and choice—the view of the person as intuitive psychologist and as intuitive economist." Id. at 332. Both views, however, are imperfect: "The psychologist and economist metaphors are like beacons: They highlight some aspects of judgment and choice, but leave equally important aspects in the dark." Id. "The preponderance of the evidence currently favors a moderately pessimistic assessment of our skills as both intuitive psychologists and economists. . . . And we often ignore variables to which normative theories say we should attend. In many situations, people are as oblivious to opportunity costs as they are to sunk costs." Id. at 334-35. The reason for these shortcomings is that "[p]eople . . . are limited-capacity information processors . . ." Id. at 335. This suggests at least two responses: first, any study of law and economics, or of law and psychology, must acknowledge these inherent shortcomings; second, law and economic predictions of human behavior may benefit by taking psychology into account.
## APPENDIX

**Model of a Basic Checklist To Apply the Constraints*  

<table>
<thead>
<tr>
<th>CONSTRAINT:</th>
<th>MEANING:</th>
<th>INDICATORS:</th>
</tr>
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<tbody>
<tr>
<td><strong>I. CLARITY</strong></td>
<td>Clarity reflects the goal of preserving expectations so that parties to commercial transactions will know in advance what is expected of them and the consequences of their actions.</td>
<td>Can parties (and judges) understand from the text of the rule what is expected of them and others?</td>
</tr>
<tr>
<td><strong>II. FLEXIBILITY</strong></td>
<td>Flexibility preserves freedom of contract by allowing consenting parties to reach contractual arrangements different than those contemplated by law. Flexibility also allows the continuing development in the marketplace of new forms of commercial transactions.</td>
<td>Is the rule flexible enough to permit parties to adapt to changed circumstances?</td>
</tr>
<tr>
<td><strong>III. FAIRNESS</strong></td>
<td>Fairness helps to preserve expectations by ensuring that parties are governed by neutral rules. Fairness also can mean, in more limited circumstances, that the law should protect weaker parties, such as in consumer transactions.</td>
<td>Are parties whose behavior is being regulated sufficiently sophisticated so that fairness requires only neutral rules? Is there such a gross imbalance of the parties' sophistication (such as in consumer transactions) that the rules should take</td>
</tr>
</tbody>
</table>

* This checklist is subject to the discussion in the Article.
CONSTRAINT: as those with less bargaining power, that opportunistic behavior should be prevented in circumstances that could not have been contemplated in advance, and that implicit rules of conduct should be recognized if they arise from widespread courses of dealing in an industry or from particular courses of dealing between specific parties.

IV. SIMPLICITY OF IMPLEMENTATION

MEANING: Simplicity of implementation reduces transaction costs.

INDICATORS: Is the rule simple to understand and apply?

Will implementation of the rule be practical and cost-effective?

V. CONSISTENCY

MEANING: Consistency helps to preserve expectations and also minimizes transaction costs by eliminating multiple or conflicting legal requirements.

INDICATORS: Is the rule internally consistent?

Is the rule consistent, or at least not inconsistent, with related bodies of law (whether state, federal, or international)?

VI. COMPLETENESS

MEANING: Completeness helps to minimize transaction costs by systematizing rights and obligations under developing areas of the law without waiting for the slower and more ad hoc process of the common law.

INDICATORS: Does the rule address the entire subject matter of the behavior being regulated?

If the rule is to address changes in behavior caused by a change in technology, does the new technology affect the way in which transactions are conducted (procedural) or does it affect substantive rights?
CONSTRAINT: MEANING: INDICATORS:

Should the rule be "absolutely complete" and therefore intended to be interpreted without reference to other sources? Or should the rule be "relatively complete" and therefore intended to be interpreted by reference to sources outside the rule?

How should flexibility and absolute completeness be balanced?