

3-1-1993

The Scope of Article 9 Is Only One Quarter as Great as Is Commonly Supposed

Donald P. Board

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The Scope of Article 9 Is Only One Quarter as Great as Is Commonly Supposed

DONALD P. BOARD*

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* Associate Professor of Law, Boston University School of Law. I wish to express my appreciation to Jack Beermann, Tamar Frankel, Clay Gillette, Andy Kaufman, Saul Levmore, Julian McDonnell, Mark Pettit, Larry Sager, David Seipp, Joe Singer, and several anonymous reviewers for commenting on earlier versions of this paper. I also thank participants in The Boston University School of Law's Faculty Workshop Series for engaging me in spirited discussion. A dedicated series of student assistants, Philip von Mehren, Kurt Mueller, Gjon Nivica, and Ed Foye, contributed to this project. They have my gratitude.

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I. INTRODUCTION

We have been living with Article 9, more or less happily, for at least thirty years.¹ While Article 9 does not enjoy the jurisprudential vogue of Article 2,² its distinguished intellectual lineage and enor-

1. The first version of the U.C.C. enacted nationally was the 1962 Official Text, but earlier versions circulated as early as 1952. Grant Gilmore, who played a leading role in drafting Article 9, regarded 1950 as the U.C.C.'s intellectual birth date. See 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 288-89 (1965). By Gilmore's reckoning, we have been living with Article 9 for over *forty* years.

An amended version of Article 9 was promulgated as the 1972 Official Text. Every state except Vermont has enacted some version of the 1972 text. For convenience, my citations to the "1972 Code" will refer to the most recent edition. See A.L.I., *NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COMMERCIAL CODE: 1990 OFFICIAL TEXT WITH COMMENTS*. I refer to the 1962 and pre-1962 versions of the Code by including the date of the text in question.

2. The U.C.C. has attracted a good deal of self-consciously jurisprudential attention. Yet most of this literature has focused on Article 2, apparently assuming that the treatment of sales is paradigmatic for the Code as a whole. See, e.g., DONALD KING, *THE NEW CONCEPTUALISM OF THE UNIFORM COMMERCIAL CODE* (1968) (dealing almost exclusively with concepts operating within Article 2); Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 *STAN. L. REV.* 621 (1975) (primarily a comment on the jurisprudence of Article 2); John L. Gedid, *U.C.C. Methodology: Taking a Realistic Look at the Code*, 29 *WM. & MARY L. REV.* 341 (1988) (examining interpretive methodology in context of Article 2). While commentators have made important theoretical investigations of Article 9, see, e.g., Thomas H. Jackson & Anthony T. Kronman, *Secured Financing and Priorities Among Creditors*, 88 *YALE L.J.* 1143 (1979), students of jurisprudence find the law of secured transactions less attractive. Exceptions, of course, exist. See David G. Carlson,

mous practical importance keep it constantly before the eyes of courts³ and commentators.⁴ At this late date, we could be forgiven our assumption that we know the statute like the backs of our hands. In this paper, however, I contend that prevailing accounts are completely—or at least three-quarters—wrong. Dominant interpretations have misconstrued Article 9's principal substantive provision, section 9-201, which states that, except as otherwise provided by the Code itself, "a security agreement is effective . . . between the parties, against purchasers of the collateral and against creditors." Influenced by Article 9's broad statement that it "applies . . . to *any* transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures,"⁵ numerous courts⁶ and commentators⁷ have assumed that section 9-201 establishes a presumption that a

Rationality, Accident and Priority Under Article 9 of the Uniform Commercial Code, 71 MINN. L. REV. 207 (1986) (examining Article 9 from perspective of "legal existentialism"); Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335 (1988) (examining Article 9 from perspective of Wittgenstein's philosophy of language).

3. See Barkley Clark, *Survey: Uniform Commercial Code—Secured Transactions*, 42 BUS. LAW. 1333, 1333 (1987) (Article 9 is typically the "most heavily litigated portion" of the U.C.C.). Cf. DAVID EPSTEIN ET AL., BASIC UNIFORM COMMERCIAL CODE TEACHING MATERIALS 21 (3d ed. 1988) ("Article 9 is not only the 'most novel' and 'most important' article of the Uniform Commercial Code, it is also the most criticized and the most amended.") (footnotes omitted).

4. Article 9 has inspired a number of excellent and comprehensive treatises. See BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (2d ed. 1988 & Supp. 1991); PETER COOGAN ET AL., SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE (1987); GILMORE, *supra* note 1; RAY D. HENSON, HANDBOOK ON SECURED TRANSACTIONS UNDER THE U.C.C. (2d ed. 1979); ROBERT HILLMAN ET AL., COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE chs. 18-26 (1985 & Supp. 1991); JAMES J. WHITE & ROBERT S. SUMMERS, THE UNIFORM COMMERCIAL CODE (3d ed. 1988) (chapters 21-25).

5. U.C.C. § 9-102(1)(a) (1987). The Official Comment reinforces this, stating that § 9-102 "bring[s] *all* consensual security interests . . . under this Article." *Id.* § 9-102(1)(a) cmt. 1 (emphasis added).

6. See, e.g., *Griffin v. Continental Am. Life Ins. Co.*, 722 F.2d 671, 673 (11th Cir. 1984) (app.) (§ 9-201 is a "keystone rule" that "give[s] the Article 9 secured party, upon a debtor's default, priority over 'anyone, anywhere, anyhow,' except as provided by the remaining Code priority rules.") (quoting *Special Project: The Priority Rules of Article Nine*, 62 CORNELL L. REV. 834, 842 (1977); *May v. G.M.B., Inc.*, 778 P.2d. 424, 427 (Nev. 1989) ("UCC's so-called 'golden rule' . . . is found in [section 9-201]") (quoting JAMES J. WHITE & ROBERT S. SUMMERS, HANDBOOK OF LAW UNDER THE UNIFORM COMMERCIAL CODE 901 (1972); *Federal Depositors Ins. Corp. v. Yates*, 719 S.W. 2d 481, 484 (Mo. Ct. App. 1986) ("Article 9 'begins with the assumption that an unperfected security interest is good against the world.'") (quoting THOMAS M. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 9-301[A][8] (1978)).

7. For a recent example, see David G. Carlson, *Bulk Sales Under Article 9: Some Easy Cases Made Difficult*, 41 ALA. L. REV. 729, 735 n.13 (1990) [hereinafter *Bulk Sales*] ("the residual rule in section 9-201 . . . provides that secured parties *always* win unless some specific provision of the UCC says otherwise"). Cf. DOUGLAS G. BAIRD & THOMAS H. JACKSON,

security interest⁸ prevails in every sort of dispute with a competing claim. This presumption is rebuttable, but only by "specific provi-

SECURITY INTERESTS IN PERSONAL PROPERTY 330 (2d ed. 1987) ("[Section] 9-201 provides that, as a general matter, a secured creditor prevails against all other parties, once its interest attaches . . ."); 2 THOMAS M. QUINN, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 9-201[A][1] (1991) (under § 9-201, security agreement binds "not only . . . the contracting parties but third persons as well"); *id.* § 9-301[A] ("All disputes regarding the collateral would end right there [i.e., with § 9-201] save for the proviso that the rule applies 'except as otherwise provided by this Act.'"); WHITE & SUMMERS, *supra* note 4, § 24-2 (section 9-201 "means what it says, and the secured creditor, even an unperfected secured creditor, has greater rights in his collateral than any other creditor unless Article Nine provides otherwise"); David G. Carlson, *Death and Subordination Under Article 9 of the Uniform Commercial Code: Senior Buyers and Senior Lien Creditors*, 5 CARDOZO L. REV. 547, 563 (1984) [hereinafter *Death and Subordination*] ("The thrust of . . . [§ 9-201] is that a security interest lives on perpetually unless a UCC provision says otherwise."); John F. Dolan, *Good Faith Purchase and Warehouse Receipts: Thoughts on the Interplay of Articles 2, 7, and 9 of the UCC*, 30 HASTINGS L.J. 1, 32-38 (1978); Steven L. Harris, *The Rights of Creditors Under Article 2A*, 39 ALA. L. REV. 803, 865 (1988) (§ 9-201 "is written in broad enough language to suggest that a secured party always takes priority," although this "is subject to the rest of the Code.") (footnote omitted); Ingrid M. Hillinger, *The Treatment of Consignments in Bankruptcy: Two Codes and Their Fictions, at Play, in the Fields*, 6 BANKR. DEV. J. 73, 86 n. 59 ("Section 9-201 . . . provides that unless Article 9 provides otherwise, the security interest is effective against everyone."); Thomas Ward, *Ordering the Judicial Process Lien and the Security Interest Under Article Nine: Meshing Two Different Worlds Part I — Secured Parties and Post-Judgment Process Creditors*, 31 ME. L. REV. 223, 231 (1980); Dan Coenan, et al., *Special Project, The Priority Rules of Article Nine*, 62 CORNELL L. REV. 834, 842 (1977) ("the holder of an Article Nine security interest has rights in the claimed collateral superior to anyone, anywhere, anyhow").

There are occasional dissents from the Received View. One very early commentator observed that, although "[s]ection 9-201 does state that the security agreement is valid as against third parties except as provided in Article 9[,] [t]his provision seems to be directed at third parties asserting rights to the goods *subsequent* to the creation and perfection of the security interest." William E. Hogan, *The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety*, 38 B.U. L. REV. 571, 591 (1958). More recently, Professor McDonnell has stated that "[s]ection 9-201 does not embody a negotiability principle that automatically gives secured creditors priority over all prior legal and equitable claims to property not dealt with in Article 9." Peter F. Coogan & Julian B. McDonnell, *The Intelligent Lawyer's Guide to Secured Transactions After More Than Three Decades Under the Code*, in COOGAN ET AL., *supra* note 4, § 2.08[2]. Professor Baird and Dean Jackson have said, in connection with § 9-201, that "someone with a perfected security interest in property that the debtor already owns has an interest in the property superior to almost anyone whose rights arise at a *later* time." BAIRD & JACKSON, *supra*, at 76 (emphasis supplied). This not quite the same as saying that a secured party (or purported secured party) presumptively is subject to any rights that arise *before* the security interest attaches. Baird and Jackson here seem close to recognizing the limited scope of § 9-201. I am not sure how to reconcile this with their statement quoted above.

8. Section 9-201 refers by its terms only to the effectiveness of a "security agreement." However, as one early and meticulous commentator pointed out, Article 9 actually lays down rules governing the consequences of the *security interests* that a "security agreement" creates or for which it provides. See Peter F. Coogan, *A Suggested Analytical Approach to Article 9 of the Uniform Commercial Code*, 63 COLUM. L. REV. 1, 7 (1963). Following Coogan, I will treat § 9-201 as laying down a rule regarding the effectiveness of security interests.

sion[s]" of the U.C.C. that require a different result.⁹ My thesis is that this expansive reading—the "Received View" of section 9-201—overstates the intended scope of Article 9 and distorts interpretation of fundamental Code provisions regarding the attachment and priority of security interests.

My critique of the Received View focuses on the four basic "Scenarios" in which a purported Article 9 security interest collides with a competing claim.¹⁰ In the first two Scenarios, a purported secured party is pitted against someone to whom the debtor¹¹ has also pur-

9. See U.C.C. § 9-201 cmt. 1 (1987).

10. The present study does not discuss disputes in which the secured party and the competing person assert claims to or under *different* titles. Suppose, for example, that Finder finds a diamond ring on the street. Finder acquires an original title to the ring, but this title is inferior to that of Loser, the person who lost the ring. Finder can grant Bank a security interest on *his* title to the ring, but this security interest is not enforceable against Loser, who has a separate and superior title. Although commercial law scholarship has said little regarding "multiple titles" cases, I presume that Article 9 does not govern such disputes. Under general property-law principles, *Loser's* title to the ring prevails against Bank's valid and perfected security interest on *Finder's* title, even though the Code does not so indicate.

In another important class of cases, commentators have recognized a second unstated limitation on the scope of Article 9. These disputes involve a *single* title, but *two* purported debtors. Such cases must be determined using general property-law principles, even though the language of Article 9, e.g., § 9-312(5), seems to apply. See, e.g., *Bank of the West v. Commercial Credit Fin. Serv., Inc.*, 852 F.2d 1162, 1171-74 (9th Cir. 1988); CLARK, *supra* note 4, § 3.08[4] ("The Dual Debtor Dilemma"); Steven L. Harris, *The Interaction of Articles 6 and 9 of the Uniform Commercial Code: A Study of Conveyancing, Priorities, and Code Interpretation*, 39 VAND. L. REV. 179, 222-25 (1986); Charles H. Oldfather, *Floor Plan Financing Under Article 9 of the Uniform Commercial Code*, 14 U. KAN. L. REV. 571, 582-84 (1966); Robert H. Skilton, *Security Interests in After-Acquired Property Under the Uniform Commercial Code*, 1974 WIS. L. REV. 925, 948.

This paper does not deal with these limitations on the scope of Article 9. Rather, it focuses on cases involving a *single* title and a *single* debtor. Until now, there has been no systematic scrutiny of the assumption that Article 9 governs these cases.

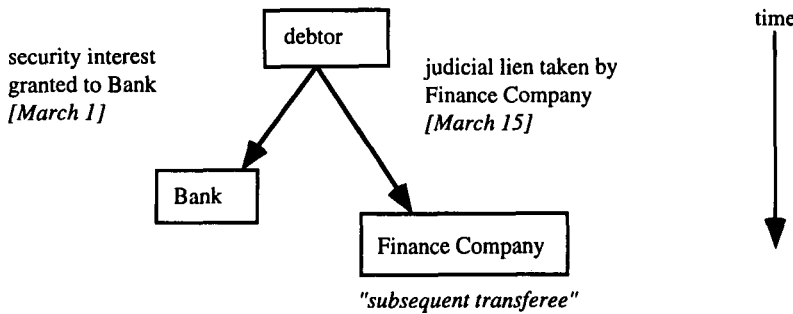
11. I will use "debtor" to refer to the person who purports to grant the security interest, whether or not the Code makes the purported grant effective. The Code, in contrast, defines "debtor" as *either* "the person who owes payment or other performance of the obligations secured, whether or not he owns or has rights in the collateral" *or* "the owner of the collateral," depending on the context. U.C.C. § 9-105(1)(d) (1987). In addition to being confusing, this definition often does not comport with Article 9's actual use of "debtor." Section 9-203(1)(c), for example, provides that a security interest cannot attach unless "the debtor" has "rights in the collateral." If "debtor" is defined to mean "the owner of the collateral," this requirement will *always* be satisfied. This cannot be what the drafters intended. Section 9-203(1)(c) obviously anticipates that situations will arise in which the "debtor" does not have "rights in the collateral," with the consequence that the attempt to create the security interest will *not* succeed. In such cases, the person that § 9-203(1) calls the "debtor" does not fit the definition set out in § 9-105(1)(d) ("the owner of the collateral"). My definition of "debtor" as the person who *purports* to create the security interest accommodates § 9-203(1)(c) and other provisions that determine whether a purported security interest will actually attach.

The confusion in the Code's definition of "debtor" is not an isolated lapse. Cf. Coogan & McDonnell, *supra* note 7, § 2.08[1] (observing that § 9-203(1)(c)'s use of "collateral" is

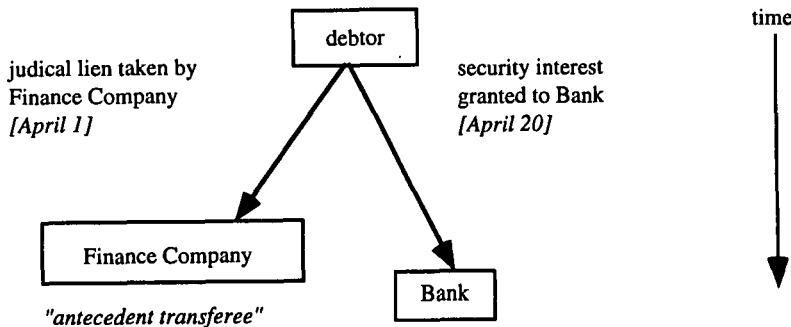
portedly made a transfer. The difference between the two Scenarios is one of timing. In the first Scenario, the "Subsequent-Transferee Scenario," the debtor makes its transfer to the rival claimant *after* having granted a security interest to the secured party.¹² In the second situation, the "Antecedent-Transferee Scenario," the transfer to the rival claimant *precedes* the purported grant to the would-be secured party.¹³ In the third situation, the "Antecedent-Transferor Scenario," the configuration of the parties is quite different. The rival claimant does not trace her claim back to a transfer from the debtor, but rather to a transfer from some independent source. What connects the rival claimant to the debtor is her transfer *to* the debtor of some limited interest relating to her own interest. After this transfer, the debtor purports to grant a security interest to the would-be secured party.¹⁴

circular unless that term means *purported collateral*). For a classic critique of the Code's ambiguity and occasional unintelligibility, see David Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L. J. 185 (1967).

12. For example, suppose that the debtor grants a security interest to Bank on March 1. On March 15, the debtor suffers the attachment of a judicial lien in favor of Finance Company on the same property to which Bank's security interest already attached. Finance Company, now a judicial lien creditor, is a "subsequent transferee." In a diagram:



13. Here suppose that a judicial lien attaches in favor of Finance Company on April 1. The debtor then purports to grant a security interest on that property to Bank on April 20. Finance Company is an "antecedent transferee." In a diagram:



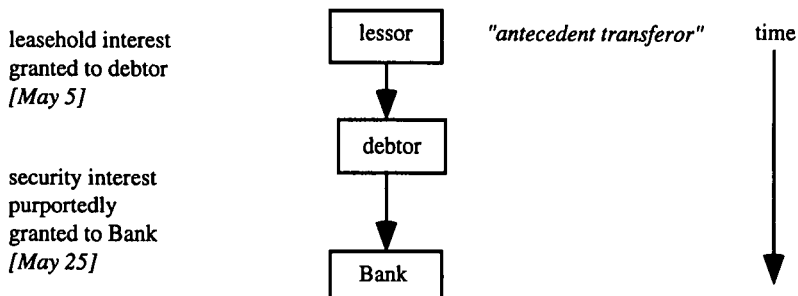
14. Suppose that someone with title to a tractor enters into a lease with the debtor on May

In the fourth situation, the "Set-Off Scenario," the rival claimant is a creditor who asserts a power to set off the amount she is owed against a debt that she owes the debtor.¹⁵ Her dispute with the secured party arises because the secured party has a security interest on the debtor's interest in the obligation that the rival claimant¹⁶ is trying to reduce by setting off.

The Received View is that section 9-201's presumption favors the purported secured party in *all four* Scenarios. The rival claimant, in other words, loses unless she can adduce a provision of the Code that specifically protects her from the purported security interest. I contend, however, that section 9-201 applies only to the *first* of the four Scenarios, leaving the scope of Article 9 only "one quarter" as great as is commonly supposed.¹⁷ Section 9-201 makes a security interest effective against a subsequent transferee, but not against antecedent transferees, antecedent transferors, or offsetting creditors. Because section 9-201 does not apply against them in the first place, these persons need not search the U.C.C. for provisions with which to rebut the statutory presumption.

Given the limited scope of section 9-201, we need to revise the prevailing understanding of Article 9 and its relation to non-Code law. Until now, courts and commentators espousing the Received View have had to argue that *the Code itself* protects antecedent trans-

5. The debtor then purports to grant Bank a security interest on title to the tractor on May 25. In a dispute between Bank and the lessor, the lessor is an "antecedent transferor." Another diagram:



15. For example, if the creditor owes \$100 to the debtor and the debtor owes \$75 to the creditor, setting off the mutual debts will leave the creditor owing the debtor only \$25; the debtor will owe the creditor nothing.

16. Because of its proprietary connotations, the term "rival claimant" can be misleading in this context. I prefer to use the more customary "account debtor" to refer to the creditor who attempts to set off. See *infra* note 233 and accompanying text.

17. This is not to say that only one quarter of cases actually litigated fall within Article 9. The great majority of reported cases involve conflicts between a secured party and a subsequent transferee, which are certainly covered by section 9-201. The three other types of cases are less common, but they are essential to understanding the limitations of Article 9.

feres,¹⁸ antecedent transferors,¹⁹ and offsetting creditors²⁰ from section 9-201. But if section 9-201's presumption does not apply, efforts to "protect" these persons are fundamentally misguided. A correct analysis of these cases should concentrate on identifying and applying the law that actually governs the disputes in question rather than looking to Article 9, which really addresses only conflicts between secured parties and subsequent transferees. The U.C.C. will contain some of this law, but most of it resides outside the Code.

This idea will surprise those who assume that the U.C.C. is a universal commercial code, not just a uniform one. Everyone concedes that the U.C.C., including Article 9, contains its share of gaps and omissions.²¹ The usual assumption is that we can fill these gaps by invoking "general principles of law and equity"²² or extrapolating from the text and policies of the Code. But the U.C.C.'s failure to deal with the three problematic Scenarios is not a "gap." On the contrary, the fact that section 9-201 makes a security interest effective only against subsequent transferees is a fundamental and intended limitation on the scope of the statute. Article 9 is not universal; the law relevant to security interests is therefore a good deal less uniform than courts and commentators have previously recognized.

This may seem disquieting, at least at first. But Article 9 does not, and was never intended to, supply a sensible set of rules to govern disputes between a secured party and an antecedent transferee, antecedent transferor, or offsetting creditor.²³ The efforts of courts and commentators to apply Article 9 outside the Subsequent-Transferee Scenario are ingenious and well intended, but they do not withstand

18. See *infra* Part IV.A.

19. See *infra* Part V.C.

20. See *infra* Part VI.A.

21. See, e.g., Julian McDonnell, *The Scope of Article 9*, in COOGAN ET AL., *supra* note 4, § 3-1.

22. See U.C.C. § 1-103 (1987) ("Supplementary General Principles of Law Applicable"). Here the Code declares that, "[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." For an exhaustive account of the jurisprudence that has grown up around § 1-103, see HILLMAN ET AL., *supra* note 4.

23. A partial exception to this statement is § 9-318, which addresses certain disputes between a secured party and a creditor seeking to set off. However, the existence of § 9-318 does not presuppose that § 9-201 applies to such disputes. See *infra* Part VI.B.

Section 9-114, added in 1972, provides another exception to the statement in text. Section 9-114 provides that a secured party claiming through a consignee sometimes defeats the interest of a consignor. This is an instance of the Antecedent-Transferor Scenario. In principle, the rule stated in § 9-114 should be part of § 2-326, which deals more generally with consignments.

close scrutiny. A restrictive reading of section 9-201, on the other hand, makes more substantive and analytical sense; it is also truer to the language and history of Article 9. Rejecting the Received View means we must abandon the idea that Article 9 is "comprehensive" in the strongest sense, but the benefits of a narrower reading far exceed the costs.

Inevitably, my substantive critique of the Received View involves a challenge to prevailing Code methodology. The fact that most courts and commentators have misunderstood Article 9 at such a fundamental level suggests that they have been using the wrong analytical and conceptual tools. Although each Article of the Code must be understood as part of a larger whole,²⁴ I reject the assumption that the relevant whole is the U.C.C.²⁵ We will make more progress by examining Article 9 as a component of the system I call "property-transfer law." This approach does not displace interpretative methodologies founded on commercial practice,²⁶ everyday morality,²⁷ or economic theory.²⁸ But fundamental aspects of Article 9—most notably, its scope—cannot be grasped without understanding the system of property-transfer law and the statute's place within it. Once Article 9 is understood in the proper context, it is easy to develop accurate interpretations of Code provisions that have misled previous investigators. It even becomes possible to identify and criticize several misconceptions that are enshrined within Article 9 itself.²⁹

Understanding Article 9's role within property-transfer law, however, is difficult because the system of property-transfer law is largely unformulated. Instead, there exists a congeries of doctrines, vocabularies, and conceptions that have grown up over centuries to deal with particular interests and particular modes of transfer. In

24. See, e.g., U.C.C. § 1-102 cmt. 1 (1987) ("The Act should be construed in accordance with its underlying purposes and policies. The text of each section should be read in the light of the purpose and policy of the rule or principle in question, as [sic] also of the Act as a whole . . .").

25. I acknowledge that a dense network of cross-references and shared definitions links Article 9 to the other Articles and that the Code's general approach to commercial-law problems informs Article 9. In ordinary contexts, these connections can be critical. However, they do not illuminate basic "structural" issues such as those implicit in the interpretation of § 9-201. If they did, the Received View would never have gained its present currency.

26. See, e.g., Homer Kripke, *Law and Economics: Measuring the Economic Efficiency of Commercial Law in a Vacuum of Fact*, 133 U. PA. L. REV. 929 (1986).

27. See, e.g., Carlson, *supra* note 2.

28. See, e.g., Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175 (1983); Robert Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901 (1986).

29. See, for example, my criticism of the Code's conception of "collateral" and my proposed reformulation of § 9-203(1)(c). See *infra* Part V.D.

recent years, commercial-law scholarship has emphasized themes and principles that run through property-transfer law,³⁰ but the extreme diversity of surface structures has precluded a systematic treatment of the subject. As a result, courts and commentators still lack a rigorous framework within which to examine prevailing interpretations of Article 9.

The problem has been one of conceptualization. Previous studies have proceeded without a well-defined "model" of property transfers, that is, without a consistent means of representing what is common to a variety of transactions while bringing to prominence the features that distinguish one type of transfer from another. An aversion to explicit conceptualization (not to mention systematization) has marked commercial-law scholarship for fifty years.³¹ It is unclear whether this aversion has saved Article 9 from the vices of "conceptualism," but it has certainly discouraged efforts to analyze, classify, and compare transfer transactions and the rules that determine their consequences.

To engage the Received View, we must locate Article 9 within the system of property-transfer law. Part II sets out a simple model of property transfers and a basic account of the property-transfer system. These provide the conceptual framework and diagnostic vocabulary for the remainder of the paper; they are essential for understanding Article 9's relations to its doctrinal neighbors and, equally importantly, its doctrinal predecessors. My account of property-transfer law may be neither all-embracing nor definitive in its details, but the body of the paper will demonstrate its utility.

The next four Parts examine the four Scenarios. My plan is to

30. See John Dolan, *The U.C.C. Framework: Conveyancing Principles and Interests*, 59 B.U. L. REV. 811 (1979). For an instructive example of work building on Dolan's analysis, see Harris, *supra* note 10. See also BAIRD & JACKSON, *supra* note 7, at 3-8 (discussing the "derivation principle" and its role in analysis of purported property transfers).

I use the phrase "property-transfer law" instead of "conveyancing principles" to avoid the narrowing connotations of "conveyancing," which historically has been associated with transfers of interests relating to real and not personal property. I also want to emphasize that the transfer rules should be understood *as rules of law*. "Principles" suggests themes, patterns, or policies that we discern in our rules of law; but themes, patterns, and policies are not governing rules. To construct a coherent system of rules, we need more than heuristic "principles."

31. See, e.g., Grant Gilmore, *Security Law, Formalism, and Article 9*, 47 NEB. L. REV. 659, 668-69 (1968) (Article 9 aimed to simplify secured transactions and end "extreme formalism of security law"); Homer Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L. REV. 321, 328 (Code drafters "feared that they might produce a code inviting conceptual jurisprudence, i.e., a decision-making process based not directly on the merits of a problem but on selection among pigeon-hole categories constituting pre-determined answers to the questions at issue.").

show that prevailing accounts of the Antecedent-Transferee, Antecedent-Transferor, and Set-Off Scenarios are unconvincing as statutory interpretation and unappealing as a matter of policy. I demonstrate that the language and history of Article 9 support a narrow reading of section 9-201's declaration of the persons against whom a security interest is presumptively effective; that this reading fits Article 9 neatly into the system of property-transfer law; and that it generates results that are truer to the ideals that animate the statute.

II. A SIMPLE MODEL OF PROPERTY TRANSFERS AND THE PROPERTY-TRANSFER SYSTEM

A. *Property Transfers: Assigning and Encumbering Interests*

Our legal system recognizes a variety of persons, most of them capable of being vested with an array of property and other interests. The legal system also recognizes a number of transactions that may be termed "transfers" of interests. My model divides transfers into two types. In the first type of transfer, the person making or suffering³² the transfer (the transferor) is divested of an interest while the beneficiary of the transfer (the transferee) is simultaneously invested with a substantially similar interest. I call these divesting transfers "assignments" of interests. Familiar examples are gifts or sales of interests, which are assignments of the interests donated or sold.

In the second type of transfer, the transferor is not divested of his interest; nor is the transferee invested with an interest like the one retained by the transferor.³³ Instead, the transferee becomes vested with a new interest, which takes the transferor's interest as its "object" or "target." These transactions invest the transferee with an "encumbrance" on the transferor's interest. The paradigm of an encumbering transfer is a judgment creditor's acquisition of a judicial lien on an interest of a judgment debtor. Attachment of the encumbrance does not divest the judgment debtor of its interest, although enforcement of the judicial lien will ultimately do so.³⁴ The attach-

32. When the transfer takes place without the transferor's consent, such as when a judicial lien creditor forces a sale of a judgment debtor's property, it might be better to say that the transferor "suffers" the transfer. For convenience, however, I will describe even involuntary transfers as actively "making" the transfer. This usage is generally consistent with that of the Bankruptcy Code. See 11 U.S.C. § 101(54) (1979) (" 'transfer' means every mode . . . voluntary or involuntary, of disposing of or parting with property or an interest in property") (emphasis supplied).

33. My terminology diverges from that of the Restatement of Property, which defines "transfer" as "the extinguishment of such interests existing in one person and the creation of such interests in another person." RESTATEMENT OF PROPERTY § 13(1) (1936). The Restatement uses "transfer" in the same sense that I use "assignment."

34. When enforcing a judicial lien, the sheriff sells the judgment debtor's interest, free of

ment of a security interest under Article 9 works the same way.³⁵ It is useful to think of transactions creating bailments, leaseholds, and trust beneficiaries' interests as encumbering transfers. The bailor, lessor, or trust settlor retains his original interest even after the transfer—although his enjoyment of that interest is suspended to the extent it has been encumbered in favor of the transferee.³⁶ This is a departure from traditional concepts, which often treat the transferee's interest as something "subtracted" from the transferor's "bundle of sticks,"³⁷ not as an encumbrance on the bundle itself.³⁸

the judgment creditor's lien and any junior encumbrances, to the highest bidder. The proceeds of the sale are applied, first, to the sheriff's expenses and then to the satisfaction of the judgment debt. If the proceeds are insufficient to pay off the judgment creditor, the sheriff will levy on something else. If anything remains after the judgment creditor and any junior encumbrancers receive full payment, the sheriff turns it over to the judgment debtor. *See generally* THOMAS CRANDALL ET AL., DEBTOR-CREDITOR LAW MANUAL § 6.01-.07 (1985 & Supp. 1990).

35. This may sound uncontroversial, but it is a serious point of contention in the analysis of Antecedent-Transferor cases. In those cases, it is essential to be clear about what a security interest attaches to. The prevailing analysis founders, in part, because it conceives of security interests (and other encumbrances) as attaching to *things*, e.g., computers and copyrights, rather than to *interests respecting things*. *See infra* Part V.B.

36. As Kocourek suggests, "[t]he jural situation may be described figuratively as a partial eclipse of one legal relation by another." ALBERT KOCOUREK, JURAL RELATIONS 118 (1927). "If the moon happens to be occluded through a temporary conjunction of celestial bodies, we do not say that there is no moon simply because for a limited time it ceases to be visible." *Id.* 118-19. The chief benefit of keeping the encumbered interest intact is that it promotes "accuracy of jural accounting." *Id.* at 120. No substantive agenda is implied.

37. In leasing transactions, for example, the lessor's original interest is commonly viewed as splitting into a leasehold and a reversion, with the leasehold immediately assigned to the lessee; the reversion remains vested in the lessor. *See* 1 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY §§ 110-13 (3d. ed. 1939 & Supp. 1991). Similarly, in transactions creating equitable interests, it is often assumed that title to property is divided into *two* titles, one "legal" and the other "equitable." The legal title remains in the grantor, and the equitable title is assigned to the equitable beneficiary.

38. I emphasize that I have selected conceptions because I find them easy to work with; I do *not* intend for them to be outcome determinative. In particular, I disavow any suggestion that characterizing a transferee's interest as an encumbrance means that interest is somehow "weaker" than one acquired by assignment. The unfortunate idea that a "mere encumbrance" endows its holder with a second-rate entitlement has a long history in commercial law. *Cf.* 1 GILMORE, *supra* note 1, § 3.2 (observing that title retention devices "have always been looked on as somehow 'stronger' than the 'weaker' lien devices of mortgage, pledge and factor's lien") (footnote omitted). The consequences of either type of transfer should depend not on the nature of the transfer but on other rules of the legal system. By the way we frame those rules, we can achieve whatever substantive result we think fair, efficient, or otherwise desirable, whether the rules must operate on assignments or encumbrances. Our initial selection of conceptions is important merely because it dictates the contours of the rules that must ultimately determine the consequences of the transfers in question. But the determination of outcomes is up to us. An emphasis on conceptions does not entail a formalistic approach to substantive issues.

B. *The Transfer Baselines and the Structure of Exceptional Rules*

Now that we know how the pieces move, we can formulate the rules of the game itself. Traditional accounts of property-transfer law often begin with the venerable maxim *nemo dat quod non habet*.³⁹ I follow their lead, but unpack the formula and restate it as two “baseline rules” focusing on the two types of transfers—assignments and encumberings.

1. THE VESTEDNESS RULE AND ITS EXCEPTIONS

The first transfer baseline, the “Vestedness Rule,” states a presumptive limitation on a person’s power to transfer an interest: A person has a power to assign or encumber an interest only if that person is vested⁴⁰ with that interest at the time of the purported transfer.⁴¹

The Vestedness Rule states a baseline, but our legal system often rejects the results it generates, usually because of concern about ostensible ownership.⁴² There are two main ways for a legal system to reverse the results flowing from the Vestedness Rule. The first is to adopt an exceptional rule that expressly empowers a person to transfer an interest even though that interest is vested in someone else. Article 2’s treatment of “entrusting” provides a good example. Suppose that Owner, who is vested with title to a broken watch, delivers the watch to Jeweller for repair. The next day, Jeweller purports to assign title to Customer, who pays Jeweller \$50 and leaves with the

39. The latin tag means “no one gives what he does not have.” See generally BAIRD & JACKSON, *supra* note 7, at 4-6 (discussing *nemo-dat* rule as “derivation rule”); 1 GILMORE, *supra* note 1, § 7.10; ROYSTON M. GOODE, COMMERCIAL LAW 392-93 (1982); HILLMAN ET AL., *supra* note 4, § 18-3; Dolan, *supra* note 30, at 812-13; Harris, *supra* note 10, at 192 n.55. Another familiar maxim, “first-in-time, first-in-right,” can be viewed as restating the *nemo-dat* rule. See Harris, *supra* note 7, at 808.

The law of real property embraces this baseline. See, e.g., 2 WILLIAM F. WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY § 216 (1947) (“Apart from the [recording] statutes, . . . a valid title or lien existing and enforceable at law is never cut off or affected by a subsequent deed or mortgage executed by the same owner or vendor to another person, whether a purchaser for value or not.”); 4 AMERICAN LAW OF PROPERTY § 17.1 (James Casner ed., 1952 & Supp. 1958).

40. I am using “vestedness” as my own term of art. Disregard any associations that it may arouse regarding similar terms used in the rule against perpetuities, the Takings Clause, or other contexts.

41. The formulation in text applies to voluntary transfers. The rule for involuntary transfers is harder to state in general form, although the basic idea is clear. A judgment creditor, for example, has the power to impose a judicial lien on an interest only if that interest is vested in the judgment debtor at the time of the purported transfer.

42. See, e.g., Boris Kozolchyk, *Transfer of Personal Property by a Nonowner: Its Future in Light of Its Past*, 61 TUL. L. REV. 1453 (1987); Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43 (1987).

watch. Ordinarily, the Vestedness Rule would prevent the purported assignment from taking effect. When Owner entrusted Jeweller with possession of the watch, Owner encumbered his title with some sort of bailment interest in favor of Jeweller, but title remained in Owner. Under the Vestedness Rule, Jeweller's purported assignment of title to Customer cannot succeed. If, however, Jeweller is a merchant dealing in watches, Article 2 expressly endows her with a "power to transfer all rights of the entruster [in this case, title, which remained vested in Owner] to a buyer in ordinary course of business."⁴³ Assuming that Customer buys in the ordinary course of business,⁴⁴ this straightforward rule lets Jeweller do what she purports to do, even though this is "impossible" under the Vestedness Rule.⁴⁵

The second kind of exceptional rule takes a roundabout route to the same result. Rules of this type create exceptions by *amending the facts*⁴⁶ so that the desired result follows under the baseline rule itself. The rule of section 2-403(2), for example, could be replaced by one declaring that Owner's purported retention of title to the watch "is void as against a buyer in ordinary course of business." This would let Customer argue that the transaction in which Owner appeared to grant Jeweller only a bailment interest actually invested Jeweller with title to the watch. Given these new "facts," the Vestedness Rule would pose no obstacle to Jeweller's subsequent purported assignment of title to Customer. This type of rule, which employs a fiction,⁴⁷ is at

43. U.C.C. § 2-403(2) (1987).

44. A buyer in the ordinary course of business is "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind." U.C.C. § 1-201(9) (1987). The fact that Jeweller can legally assign Owner's title to Customer does not mean that Jeweller may do so with impunity. Section 2-403(2) gives Jeweller a power, but not a privilege, to assign the title. If she violates her duty to Owner not to exercise her power, she will be liable to Owner for conversion and may suffer criminal penalties as well.

45. See, e.g., *Baehr v. Clark*, 49 N.W. 840, 841 (Iowa 1891) ("If one delivers property to another as a mere bailee, a purchaser from the bailee acquires no title, however innocent he may be."). Eventually, the common law reached a conclusion similar to the one set out in § 2-403(2). See *Zendman v. Harry Winston, Inc.*, 111 N.E.2d 871 (N.Y. 1953) (theories of estoppel and apparent authority protect purported buyer of title to ring entrusted to auction house).

46. I intend this and similar phrases to be merely suggestive. I take no position regarding, for example, the status of facts vis-a-vis legal conclusions flowing from facts.

47. See LON FULLER, *LEGAL FICTIONS* 28 (2d ed. 1967). As Fuller notes, real-estate recording acts typically declare unrecorded transfers void as against certain third persons, but not as against others. Thus, courts sometimes describe the situation following an unrecorded assignment of title by saying that, as between assignor and assignee, title is vested in the assignee; but, as between the assignee and third persons protected by the statute, title remains vested in the assignor. Fuller quite sensibly asks, "[w]hat kind of title is this which is both in, and not in, the grantor and the grantee at the same time? Does not such a contradictory

least as common as rules that explicitly empower someone to transfer an interest that is admittedly vested in someone else. Examples of the fictive approach appear in Article 2's treatment of consignments;⁴⁸ fictions were also prevalent in pre-Code statutes dealing with conditional sales.⁴⁹

2. THE ENCUMBRANCE RULE AND ITS EXCEPTIONS

The second baseline rule, the "Encumbrance Rule," applies to transfers that have passed muster under the Vestedness Rule or one of its exceptions. The Encumbrance Rule's formulation depends on the type of transfer under consideration. The first formulation of the Rule states that an encumbrance remains attached to its targeted interest despite the assignment of that interest to a third person. Thus, if Abel is vested with an interest he has encumbered in favor of Beatrice, he can sell or donate the interest to Cedric, but the interest remains encumbered in favor of Beatrice.⁵⁰

The second formulation of the Encumbrance Rule applies when

assertion deserve the disparaging epithet 'fiction'?" Fuller concludes, benignly, that it does not. *Id.* Legal Realism has instilled in us a horror of fictions, but we can promote clarity at the technical and structural levels by acknowledging the fictive aspect of many common types of rules, e.g., those that declare a purported transfer effective as to some persons, but not as to others.

48. Section 2-326 "deems" consigned goods to have been sold to the consignee, but subject to an option on the part of the "buyer" (the consignee) to sell them back to the "seller" (the consignor). This fiction vests the consignor's interest in the goods in the consignee, where it can be reached by the consignee's creditors without violating the Vestedness Rule.

It is interesting to observe that the Mercantile Factor's Acts, *see infra* Part V, achieved a similar result by providing that a purported transfer by a mercantile factor would sometimes "be as valid as if [the factor] were expressly authorized by the owner of the goods to make the same." Stat. 52-53 Vict. 189 § 2(1) (1889). The "as if" marks this as a fiction, or at least as a rule that takes a counterfactual state of affairs as its standard.

49. *See, e.g.*, UNIFORM CONDITIONAL SALES ACT § 5 (1918)

Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as herein provided, unless such contract or copy is so filed within ten days after the making of the conditional sale.

See In re Bell, 55 B.R. 246, 249 (Bankr. M.D. Tenn. 1985) ("[A]ssuming that the conveyances are fraudulent as to [the claimant], upon recovery, [the claimant's] recorded judgment lien is attached to the property as if it had never been conveyed.").

50. Article 9 codifies a version of this rule in § 9-306(2): "Except where this Article otherwise provides, a security interest continues in collateral notwithstanding [its] sale . . . [or] exchange . . ." Codifying the baseline rules is, strictly speaking, unnecessary. It can also lead to confusion if the codification fails to make appropriate allowance for exceptions. *See, e.g.*, Carlson, *supra* note 7, at 575-81 (expressing concern that state laws discharging junior encumbrances, including security interests, in judicial sales to enforce a judicial lien are inconsistent with sections 9-201 and 9-306(2) because the laws relating to such sales are not part of the U.C.C.).

the holder of an already encumbered interest purports to encumber it again. The attempt to encumber the targeted interest succeeds, but the new encumbrance is subordinate to its predecessor. For example, if Abel is vested with an interest that is encumbered by a judicial lien in favor of Beatrice, he can grant Cedric a security interest on the targeted interest. But this security interest will be subordinate to Beatrice's existing judicial lien. Although what it means for one encumbrance to be subordinate to another varies with the characteristics of the encumbrances involved, the general idea is familiar.⁵¹

Exceptional rules overriding the first version of the Encumbrance Rule are sometimes framed as rules letting the assignor assign the interest "free of" the existing encumbrance. Article 9, for example, declares that a buyer in ordinary course of business "takes free of a security interest created by his seller."⁵² Exceptions to the second version of the Encumbrance Rule can operate by abrogating the rule that the second encumbrance is subordinate to the first. Suppose that Elaine grants a security interest to Fred and later suffers the attachment of a judicial lien in favor of Gus. Under the second branch of the Encumbrance Rule, Gus's judicial lien is subordinate to Fred's security interest. But if Fred has failed to "perfect" his security interest by the time Gus's lien attaches, Article 9 reverses this result: Fred's unperfected security interest "is subordinate to the rights of a person who . . . becomes a lien creditor before the security interest is perfected."⁵³ Gus takes priority, even though Fred's encumbrance was the first to attach.

The Encumbrance Rule can also be overridden by rules that recharacterize the facts. Most often, such rules declare the transfer creating the initial encumbrance "ineffective" or "void as against" the subsequent assignee or encumbrancer. This means the Encumbrance Rule does not apply against the subsequent transferee under the "facts" of her case, according to which no prior transfer occurred. Historically, most exceptions to the Encumbrance Rule have taken this form. The chattel mortgage acts, the principal predecessors of Article 9, established conditions under which unrecorded security

51. In my example, both encumbrances secure some indebtedness of Abel. If Beatrice enforces her judicial lien, the sheriff will sell Abel's interest, free of Beatrice's lien and Cedric's security interest, and pay the proceeds over to Beatrice. If the proceeds are sufficient to pay her all she is owed, the remainder can be paid over to Cedric. If Cedric is paid in full, any surplus is remitted to Abel.

52. U.C.C. § 9-307(1) (1987).

53. *Id.* 9-301(1)(b). The rationale is that Fred has failed to cure the ostensible-ownership problem created when the security interest attached to Elaine's apparently unencumbered interest.

interests were "void as against" certain subsequent transferees.⁵⁴ Recharacterization rules are also common in contemporary real-estate recording acts.⁵⁵ Article 9 is actually somewhat unusual in not employing the "void-as-against" device.

C. Dramatis Personae: "Debtor," "Secured Party," "Rival Claimant," and "X"

Having formulated the transfer baselines and described the operation of exceptional rules, I will examine the four Scenarios. My discussion features a stock cast of characters playing very simple parts. In each instance, a corporation (call it "Debtor") is purporting to grant a security interest to someone (call him "Secured Party") who eventually gets involved in a dispute with someone (call her "Rival Claimant") asserting a competing claim to the interest (call it "X") that Debtor is purporting to encumber.⁵⁶ Possible values of *X* include

54. See, e.g., ARIZ. REV. CODE § 2330 (1928) (repealed):

A chattel mortgage or other instrument or writing intended to operate as a mortgage or lien upon personal property, which is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument, is void as against the creditors of the mortgagor or person making the same, and as against subsequent purchasers and mortgagees and lienholders in good faith, unless such instrument or a true copy thereof was forthwith filed in the office of the county recorder

N.J. CHATTEL MORTGAGE ACT § 4 (1 Comp. St. 1910) (repealed 1962):

Every mortgage or conveyance intended to operate as a mortgage of goods or chattels hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the thing mortgaged, shall be absolutely void as against subsequent purchasers and mortgagees in good faith, unless the mortgage . . . be recorded as directed in the succeeding section of this act.

Cf. MINN. STAT. 1927 § 8360 (Mason 1927) (repealed 1966) (conditional sale contract "shall be void as to creditors of the vendee and subsequent purchasers and mortgagees of such property in good faith unless the . . . contract . . . be filed as in the case of a chattel mortgage"). See generally 2 LEONARD JONES, THE LAW OF CHATTEL MORTGAGES AND CONDITIONAL SALES §§ 324-26 (6th rev. ed. 1933); 1 GILMORE, *supra* note 1, § 15.1 ("Without exception, all filing statutes provided that unfilled interests are void against good faith purchasers of the collateral.").

55. See, e.g., CAL. CIV. CODE, § 1214 (West 1990) ("Every conveyance of real property . . . is void as against any subsequent purchaser or mortgagee of the same property . . . in good faith and for a valuable consideration, whose conveyance is the first duly recorded, and as against any judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action."); WIS. STAT. ANN. § 706.08 (West 1990) ("Every conveyance . . . which is not recorded as provided by law shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate . . . whose conveyance shall first be duly recorded.").

56. I have made Debtor a corporation and Secured Party and Rival Claimant male and female human beings so that I can use the pronouns "it," "he," and "she." None of this is necessary except for purposes of exposition.

every kind of transferrable interest: titles to tangible and intangible things, such as computers and copyrights; leasehold interests on titles to such things; trust beneficiaries' interests on leasehold interests on titles to such things; and so on to any desired degree of complexity. However, it is rarely necessary to specify the content of *X*; the relevant rules operate the same way no matter what *X* happens to be.

III. THE SUBSEQUENT-TRANSFEREE SCENARIO: SECURED PARTIES VERSUS SUBSEQUENT ENCUMBRANCERS AND ASSIGNEES

When the Subsequent-Transferee Scenario opens, Debtor is vested with some interest, *X*. Two transactions ensue. Debtor first purports to grant Secured Party a security interest on *X* to secure an indebtedness that Debtor owes to Secured Party.⁵⁷ Debtor then purportedly makes or suffers a transfer of *X* in favor of Rival Claimant. The dispute between Secured Party and Rival Claimant concerns their relative entitlements respecting *X* in the event that Debtor defaults on its debt to Secured Party.

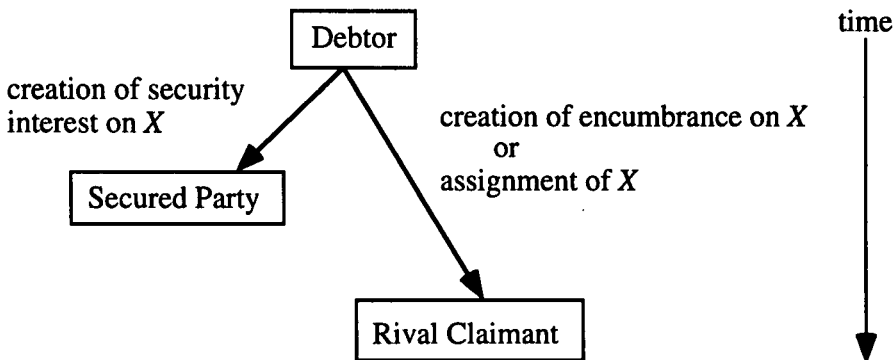


Figure 1: Secured Party v. Subsequent Transferee

No one doubts that section 9-201 applies against subsequent transferees. But analysis of this Scenario helps to establish three important propositions about the structure and origins of Article 9. First, section 9-201's presumption in favor of Secured Party and the priority rules that allow subsequent transferees to rebut that presumption fit neatly into the general system of property-transfer law. Second, section 9-201 is closely related to the operative provisions of the chattel mortgage acts that preceded Article 9. Third, the rules gov-

57. In fact, it is not necessary that the indebtedness be *Debtor's*. Debtor may encumber its interest to secure the obligation of some fourth person. For convenience, I will ignore this possibility, which does not affect the analysis.

erning subsequent transferees are plausible responses to the problem of ostensible ownership. It is not easy to make analogous claims when the Code is invoked in the other Scenarios.

This Part begins by examining how Subsequent-Transferee cases play out under the property-transfer baselines. It then reviews how pre-Code law, specifically the chattel mortgage acts, modified these results in favor of certain subsequent transferees to vindicate concerns about ostensible ownership. Finally, it examines Article 9's treatment of three important priority disputes: (1) secured party versus subsequent buyer; (2) secured party versus subsequent judicial lien creditor; and (3) secured party versus subsequent secured party. Taken together, these points elucidate Article 9's connection to the Subsequent-Transferee Scenario.

A. *Analysis Under the Property-Transfer Baselines*

In Subsequent-Transferee cases, the Vestedness Rule poses no obstacle to the two purported transfers. Because debtor is vested with *X* when it purports to encumber that interest in favor of Secured Party, the intended security interest attaches to *X*. The first transfer does not divest Debtor of *X*, so Debtor can subsequently transfer *X* to Rival Claimant.

In this Scenario, it is the Encumbrance Rule that counts. In the case in which Debtor's transfer to Rival Claimant *encumbers X*, the second branch of the Encumbrance Rule tells us that this second encumbrance, whether a judicial lien, security interest, leasehold interest, or something else, is subordinate to the security interest already granted to Secured Party. The situation is essentially the same when Debtor *assigns X* to Rival Claimant. The assignment, whether a sale or gift, invests Rival Claimant with *X*, but the first branch of the Encumbrance Rule informs us that *X* remains encumbered in favor of Secured Party. Therefore, under the baseline property-transfer rules, Secured Party enjoys priority over both types of subsequent transferees.

B. *Exceptional Rules Before Article 9: Ostensible Ownership and the Chattel Mortgage Acts*

Secured Party's priority under the baseline rules has often been tenuous, however, because of rules creating exceptions in favor of subsequent transferees. For centuries, Anglo-American law has been reluctant to apply the Encumbrance Rule against Rival Claimant if

Debtor was in possession of the relevant chattel,⁵⁸ with Secured Party's consent, at the time of the transfer to Rival Claimant. This reluctance is rooted in the conviction that third persons who find someone in possession of a thing are entitled to infer, without further inquiry, that the possessor is vested with unencumbered title to that thing.⁵⁹ This is the principle of *ostensible ownership*, probably the chief source of exceptions to the property-transfer baseline rules.⁶⁰

In the Subsequent-Transferee Scenario, rules that protect Rival Claimant from the ordinary consequences of the Encumbrance Rule vindicate ostensible-ownership concerns. In most cases, these rules have operated by recharacterization—i.e., they have adjusted the facts so that acceptable results can be reached without creating an explicit exception to the Encumbrance Rule itself. An early and important example is the Statute of 13 Elizabeth,⁶¹ the ancestor of today's statutes that regulate fraudulent conveyances. The Statute declared that any transfer intended to hinder, delay, or defraud the transferor's "creditors" was "utterly void, frustrate, and of none effect" as against those creditors.⁶² For two hundred and fifty years, Anglo-American courts, concerned about ostensible ownership, used the Statute to hold a security interest on *X* void as against Rival Claimant if she obtained a judicial lien on *X* while Debtor was still in possession of

58. I will consistently use phrases such as "the relevant chattel" or "the relevant thing" in place of the more customary "collateral." Article 9 defines "collateral" as "the property subject to a security interest." U.C.C. § 9-105(1)(c) (1987). A security interest (or other encumbrance) attaches to *another interest*, not to the tangible or intangible thing that is the targeted interest's ultimate focus. See *supra* Part II.A. There are many instances, however, in which Article 9 uses "collateral" to refer to *things*. See, e.g., *id.* § 9-203(1)(a) (signed security agreement unnecessary if "the collateral is in the possession of the secured party pursuant to agreement"). I take up this point again in my analysis of the Antecedent-Transferor Scenario. See *infra* Part V.D. In the meantime, I steer clear of the ambiguous term "collateral."

59. For a justification of the principle on efficiency grounds, see generally Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299 (1984) (Article 9 efficiently allocates information costs); Douglas G. Baird, *Notice Filing and the Problem of Ostensible Ownership*, 12 J. LEGAL STUD. 53 (1983).

60. The ostensible-ownership principle is enforced widely, but by no means universally, in our legal system. It is responsible for the many exceptions to the Encumbrance Rule, but it has not generated a comparable number of exceptions to the Vestedness Rule. As a result, the prevailing state of affairs is roughly this: A third person who finds someone in possession of a thing can legitimately infer (in the absence of some form of recording act) that the possessor's interest, *if any*, is free of encumbrances. This is a far cry from a license to infer that the possessor is vested with *title* to the thing. See generally Baird & Jackson, *supra* note 28; Jeffrey Helman, *Ostensible Ownership and the Uniform Commercial Code*, 83 COM. L.J. 25 (1978).

61. Stat. 13 Eliz. ch. 5 (1571).

62. *Id.* (fraudulent transfers of interests relating to land or goods void as against "creditors"); *cf.* Stat. 27 Eliz. ch. 4 (1584) (fraudulent transfers of interests relating to land void as against purchasers for value).

the relevant thing.⁶³ Once it was established that the security interest was void as against Rival Claimant, she would have no reason to fear application of the Encumbrance Rule because, for purposes of her dispute with Secured Party, the prior encumbrance did not exist.

During the nineteenth century, the various American jurisdictions found ways to accommodate nonpossessory⁶⁴ security interests. Borrowing from their real-property recording acts, the states enacted special statutes, the chattel mortgage acts, legitimating nonpossessory security interests on the condition that their existence be publicly recorded. The operative provision of these statutes typically declared nonpossessory security interests that were not properly recorded (“unperfected” security interests) “void as against” certain “subsequent purchasers” and “creditors.” Thus, in Subsequent-Transferee cases, the chattel mortgage acts created effective exceptions to the Encumbrance Rule in order to deal with ostensible-ownership concerns.

C. *Analysis of Three Basic Disputes Under Article 9*

There is a significant relationship between the way the chattel mortgage acts and Article 9 deal with subsequent transferees. Analysis under the U.C.C. begins with section 9-201, which presumes a security interest to be “effective . . . against purchasers of the collateral and against creditors.”⁶⁵ When “purchasers” and “creditors” are subsequent transferees, section 9-201 functions like a codification of the Encumbrance Rule. I contend, however, that section 9-201 is *nothing but* a codification of this baseline rule as it applies in favor of secured parties against subsequent transferees.⁶⁶ The present discussion provides intuitive grounds for regarding section 9-201 as essentially concerned with subsequent transferees.

To understand the relationship between section 9-201 and the chattel mortgage acts, we need to consider the analogy between the

63. See, e.g., *Clow v. Woods*, 5 Serg. & Rawle 275 (Pa. 1819). See generally 1 GILMORE, *supra* note 1, § 14.1; 1 GARRARD GLENN, *FRAUDULENT CONVEYANCES AND PREFERENCES*, §§ 61-61(E) (REV. ED. 1940).

64. A security interest is “nonpossessory” if the secured party has not taken possession of the relevant thing. Needless to say, a secured party who takes possession eliminates the ostensible-ownership problem that his security interest would otherwise impose on persons dealing with the debtor. In some situations, possession by someone other than the secured party will remove the security interest from the “nonpossessory” category. See U.C.C. 9-305 (1987) (secured party deemed to have possession from the time he gives notice of his encumbrance to a bailee in possession of the relevant thing, provided that the bailee is not subject to the debtor’s control).

65. *Id.* § 9-201.

66. See *infra* Parts IV.B., V.D., VI.B.

basic Article 9 priority rules⁶⁷ and the exceptions to the Encumbrance Rule recognized in the chattel mortgage acts. The acts typically declared unperfected security interests void as against certain "subsequent purchasers" and "creditors." Although Article 9 does not use the "void-as-against" device, a careful observer can discern remarkable substantive and structural similarities between the old and the new regimes.

1. RIVAL CLAIMANT AS SUBSEQUENT BUYER

The case where Rival Claimant is a subsequent buyer reveals the similarity between the chattel mortgage acts and Article 9. The acts held an unperfected security interest on *X* void as against a "subsequent purchaser" who took *X* for value and without knowledge of the existing security interest. Similarly, section 9-301(1)(c) provides that a buyer takes *X* free⁶⁸ of an unperfected⁶⁹ security interest "to the extent that . . . [she] gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected." Section 9-301(1)(c) retains the thrust of the chattel mortgage acts by requiring that Rival Claimant purchase in good faith (i.e., without knowledge) and for value while the security interest is unperfected. The only difference is that section 9-301(1)(c) adds a requirement that the buyer take possession of the relevant thing before the secured party perfects his security interest.⁷⁰ Rival Claimant, in other words, cannot prevail unless she first cures the ostensible-ownership problem

67. By "priority rules," I refer primarily to §§ 9-301(1) and 9-312(5). Of course, there are other important exceptional rules, such as § 9-307(1). However, it is generally clear that the other rules apply only in favor of subsequent transferees. Thus, I do not deal with them here.

I make no attempt to account for the Code's complicated and largely unassimilated rules governing interests relating to "fixtures." See generally *id.* § 9-313. They are a world unto themselves.

68. Unfortunately, the text of § 9-301(1)(c) does not describe the buyer as taking "free" of the security interest. Instead, it says that an unperfected security interest "is subordinate to the rights of [the buyer]," which does not make it clear that the "subordinate" security interest is *detached* from *X*. See Carlson, *Death and Subordination*, *supra* note 7, at 575-81. Article 9's imprecision on this point has misled at least one important commercial court. See *Aircraft Trading & Serv. Inc. v. Braniff, Inc.*, 819 F.2d 1227 (2d Cir. 1987). For critiques of the Second Circuit's decision, see Carlson, *Bulk Sales*, *supra* note 7, at 748-62; Clark, *supra* note 3, at 1462-63; Harris, *supra* note 7, at 821 n.68. The Permanent Editorial Board for the U.C.C. has issued a Commentary disapproving the Second Circuit's reasoning and result. See PEB COMMENTARIES ON THE UNIFORM COMMERCIAL CODE Commentary 6 (Final Draft March 10, 1990).

69. In general, a security interest is "unperfected" if it has attached but the secured party has neither taken possession of the relevant thing nor filed appropriate financing statements giving public notice of the security interest. U.C.C. §§ 9-302 to 9-305 (1987). For our purposes, an unperfected security interest can be compared to an unrecorded, nonpossessory security interest under the chattel mortgage acts.

70. A parallel rule exists for buyers when *X* is an interest relating to "accounts" or

created by her purchase of *X*. This is a departure from the regime of the chattel mortgage acts, but hardly a radical one. Here Article 9 simply adopts a "race-notice" rule, directly analogous to the "race-notice" rules found in most states' real-property recording acts.⁷¹ Overall, section 9-301(1)(c) treats subsequent buyers pretty much the same way that the chattel mortgage acts did.

2. RIVAL CLAIMANT AS SUBSEQUENT JUDICIAL LIEN CREDITOR

The chattel mortgage acts frequently declared an unperfected security interest on *X* void as against "creditors." We will explore the precise extension of the term "creditors" in Part IV, but for now it is enough to observe that the term has always included subsequent judicial lien creditors, who clearly fall within the Subsequent-Transferee Scenario. Section 9-301(1)(b) of the U.C.C., which declares an unperfected security interest "subordinate to the rights of . . . a person who becomes a lien creditor before the security interest is perfected" protects judicial lien creditors from section 9-201. This effectively protects subsequent judicial lien creditors from unperfected security interests and the ostensible-ownership problems that such security interests present. In fact, the rules stated in the current Code and in the chattel mortgage acts are both somewhat overprotective of judicial lien creditors. In contrast to results reached under section 9-301(1)(c) and the former acts, a judicial lien creditor can prevail against an unperfected security interest even if she acquires her lien with actual knowledge that there is a security interest on *X*. This was not true of the 1962 version of section 9-301(1)(b), which required the subsequent transferee to acquire her interest without knowledge of the existing security interest.⁷² But except for this difference, the treat-

"general intangibles," but it omits the possession requirement. See U.C.C. 9-301(1)(d) (1987). It is impossible for a buyer (or anyone else) to take possession of these intangible things.

71. See AMERICAN LAW OF PROPERTY, *supra* note 39, § 17.5 n.63 (listing states). For a general discussion of the principles underlying race-notice systems, see 6A RICHARD A. POWELL, POWELL ON REAL PROPERTY § 905[1][c][iii] (1992). For an examination of problems inherent in notice requirements in the real-estate recording acts, see Corwin W. Johnson, *Purpose and Scope of Recording Statutes*, 47 IOWA L. REV. 231, 238-43 (1962).

72. Commentators have argued that the deletion in 1972 of the "no-knowledge" requirement is justified because it obviates potentially costly and uncertain inquiries into the judicial lien creditor's state of mind. See, e.g., BAIRD & JACKSON, *supra* note 7, at 366-70 (discussing the difficulties created by systems that take knowledge into account). By this reasoning, we should also eliminate the "no-knowledge" requirement that still applies against buyers in sections 9-301(1)(c) and (d).

The revisors offer two explanations for their amendment of section 9-301(1)(b). First, it is anomalous or unfair to "den[y] the lien creditor priority even though he had no knowledge when he got involved by extending credit, if he acquired knowledge while attempting to extricate himself." U.C.C. § 9-301 Reasons for 1972 Change. This rationale justifies very little. To begin with, it applies only if the lien creditor lent without knowledge of the

ment of subsequent judicial lien creditors is identical under the old and new regimes.

3. RIVAL CLAIMANT AS SUBSEQUENT SECURED PARTY

The current rule, section 9-312(5)(a), states that competing security interests "rank according to priority in time of filing or perfection." That is to say, priority goes to whichever of the two secured parties is the first either to file a financing statement or to perfect his or her security interest. This rule departs notably from the chattel mortgage acts, although "notice-filing" systems were employed in some other pre-Code statutes.⁷³ Section 9-312(5) does not make clear how, or even whether, it relates to the older rules governing conflicts with a subsequent secured party. Yet, a connection exists, hidden in the history of the now-vestigial section 9-301(1)(a).

First, however, the mechanics of section 9-312(5)(a) should be clarified. Suppose that Rival Claimant files a financing statement cov-

unperfected security interest; why should we protect the lien creditor who lent with knowledge of an existing encumbrance? Moreover, the basic premise of the argument, that we ought to protect lien creditors who lent without knowledge, finds little support in Article 9. Suppose the secured party perfects *after* the creditor lends but *before* the creditor gets a judicial lien. Undoubtedly, the secured party prevails, even under the 1972 Code. Whether the judicial lien creditor innocently extended credit is irrelevant so long as the secured party perfects before the judicial lien attaches. If the creditor's lack of knowledge at the time of extending credit makes no difference in this situation, it is hard to see why it should in the first one.

The revisors' second argument, that a "no-knowledge" requirement is inconsistent with the spirit of Article 9, presupposes a controversial determination of what that spirit is or should be. See Carlson, *supra* note 2, at 235-38. For discussion of similar problems raised by "no-notice" requirements in the real-property recording acts, see POWELL, *supra* note 71, § 905[1][c][2]; Francis Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L. REV. 125 (1944).

Ironically, two provisions added in 1972 require an inquiry into the *secured party's* knowledge at the time that *he* extends credit, if this extension of credit is a "future advance." See U.C.C. § 9-301(4) (1987) (subsequent judicial lien creditor who acquires lien while security interest is perfected is subordinate to the security interest, except to the extent that the security interest secures repayment of discretionary advances made by the secured party more than 45 days after attachment of the lien *and* with knowledge thereof); U.C.C. § 9-307(3) (1987) (subsequent buyer takes subject to a perfected security interest, except to the extent that it secures discretionary advances made more than 45 days after the sale *or* with knowledge thereof).

73. "The Uniform Trust Receipts Act [U.T.R.A.] was the first widely enacted notice filing statute. Subsequently the accounts receivable filing statutes and the Factor's Lien Acts, which were adopted during the 1940's and 1950's, all adopted the system of notice filing." 2 GILMORE, *supra* note 1, § 34.3. For a general account of the notice filing system under the U.T.R.A. and the Factor's Lien Acts, see Robert H. Skilton, *The Factor's Lien on Merchandise*, pt. 2, 1955 Wis. L. REV. 609, 614-19. The chattel mortgage acts, by contrast, mandated a system of transactional filing in which the security agreement itself was recorded, generally accompanied by affidavits that the transaction was for good consideration and not an effort to hinder, delay, or defraud creditors of the mortgagor. See 1 GILMORE, *supra* note 1, § 15.2; JONES, *supra* note 54, §§ 308-14.

ering *X* on January 1—before she lends any money to Debtor and before Debtor grants her any security interest on *X*.⁷⁴ On January 5, Debtor does a quick deal, borrowing \$75,000 from Secured Party and granting him a security interest on *X*; Secured Party perfects by filing on January 6. On January 10, Rival Claimant lends \$100,000 to Debtor and Debtor simultaneously grants Rival Claimant a security interest on *X*.

Under section 9-201, Secured Party is presumptively entitled to priority against Rival Claimant, who is a subsequent purchaser. But because Rival Claimant filed (on January 1) before Secured Party either filed or perfected (both on January 6), she can rebut the presumption using section 9-312(5)(a). Under the chattel mortgage acts, in contrast, Rival Claimant could have overcome the Encumbrance Rule only if she acquired her interest while Secured Party's existing security interest was unperfected. But Rival Claimant's security interest did not attach until January 10—a date well after Secured Party perfected his security interest (January 6). The fact that Rival Claimant purported to record her security interest on January 1 would be irrelevant. Under the chattel mortgage acts, an attempt to record a transfer that had not yet occurred was a nullity.⁷⁵

The substantive distinction between the two regimes is that Article 9 not only permits filing prior to attachment, but also adopts a rule that can make that filing the decisive factor in determining priorities. The first-to-file-or-perfect rule allows a secured party to obtain a "prospective priority" (as against other secured parties) by filing a financing statement in advance of taking a security interest. Here Article 9 has moved beyond traditional concern about ostensible ownership. Section 9-312(5)(a) lets Rival Claimant, a subsequent transferee, take priority even if Secured Party never allows an ostensible-ownership problem to come into being. Suppose that Secured Party files a financing statement or takes possession of the relevant thing *before* Debtor grants him his security interest on *X*. In that case, there is no period during which Secured Party has a "secret" encumbrance on *X*. Notwithstanding that Rival Claimant cannot claim to

74. For the financing statement to be effective, it must be signed by Debtor. U.C.C. § 9-402(1) (1987). It is not uncommon, though, for a potential debtor to sign financing statements even before the potential secured party has committed himself to lend. If the potential secured party makes no loan, the disappointed debtor can force the filing of a termination statement that cancels the earlier filing. *Id.* § 9-404(1).

75. The acts generally demanded that the executed mortgage itself be filed. Moreover, attempts to encumber property to be created or acquired in the future were void. See Skilton, *supra* note 74, at 614-19; Samuel Williston, *Transfers of After-Acquired Personal Property*, 19 HARV. L. REV. 557 (1906).

have been misled by Debtor's apparently unencumbered ownership, she will take priority over Secured Party if she filed her financing statements before he either filed or perfected.⁷⁶

More importantly for present purposes, section 9-312(5)(a) seems to depart *structurally* from the pattern of the chattel mortgage acts. In contrast to the acts, section 9-312(5)(a) is not cast as a rule permitting a subsequent transferee to take priority over an existing, but unperfected, security interest. On the contrary, section 9-312(5)(a) states that priority goes to whichever secured party is the first to file or perfect, without any reference to whose security interest was the first to attach. The structure of section 9-312(5)(a) does not reveal that its function is to provide the subsequent secured party with an exception to a baseline rule that ordinarily favors the secured party whose encumbrance was the first to attach. As it stands, section 9-312(5)(a) is self-sufficient. It would apparently function the same way even if the baseline rule, section 9-201, were stricken from the Code. This obscures the pattern of baselines and exceptions that is the framework for analysis under property-transfer law.

However, the structural anomaly is not so great as it may seem. Although section 9-312(5)(a) is not drafted as an explicit exception to section 9-201, this is not attributable to anything in the substance of the first-to-file-or-perfect rule. Section 9-312(5)(a) could be reformulated to state, for example, that "a subsequent secured party takes priority over an existing security interest if the subsequent secured party files or perfects her security interest before the holder of the existing security interest files or perfects his security interest." This rewording would not only preserve the substance of the current rule, but also make clear the rule's status as an exception to a baseline rule favoring the initial secured party. Thus, the structural analogy between the way section 9-312(5)(a) and the chattel mortgage acts treat subsequent secured parties would be restored, despite the important substantive differences between the old and the new regimes.

The drafting history of Article 9 supports my reformulation. Consider section 9-301(1)(a), which is probably Article 9's least-discussed provision. Section 9-301(1)(a) states only that "an unperfected security interest is subordinate to the rights of persons entitled to priority under Section 9-312." The cross-reference to section 9-312,

76. The fact that Rival Claimant has made a public filing means that Secured Party can easily discover his potential vulnerability to subordination. Hence, it is not unfair to allow Rival Claimant to take priority pursuant to § 9-312(5)(a). Note, however, that Rival Claimant files in order to stake a potential claim, not to disclose an existing encumbrance. Ostensible ownership is not at issue.

which picks up the first-to-file-or-perfect rule, drains section 9-301(1)(a) of any independent content; this explains why everyone ignores it. But section 9-301(1)(a) was not always the statutory zombie it is today. In drafts of the Code preceding the 1956 revisions,⁷⁷ section 9-301(1)(a)⁷⁸ paralleled the provisions governing judicial lien creditors⁷⁹ and buyers.⁸⁰ The pre-1956 version of section 9-301(1)(a) declared an unperfected security interest subordinate to the rights of “a *subsequent secured party* who becomes such without knowledge of the earlier security interest and perfects h[er] interest before the earlier security interest is perfected.”⁸¹ Except for the requirement that the second secured party be the first to perfect, a close substantive and structural connection exists between the early version of section 9-301(1)(a) and the chattel mortgage acts. The acts protected subsequent secured parties who were subsequent good faith purchasers for value; early section 9-301(1)(a) protected a “subsequent secured party” in the same circumstances,⁸² subject only to the requirement that the subsequent secured party be the first to perfect. It is not difficult to recognize this rule’s status as an exception to section 9-201.

The 1956 revisions deleted the language concerning “subsequent secured part[ies]” and replaced it with today’s bland reference to “persons entitled to priority under section 9-312.”⁸³ It seems unlikely that the purpose of this change was to disrupt the functional analogy between the Article 9 priority rules and the chattel mortgage acts. In fact, commentary regarding the 1956 amendments indicates that the revisers intended nothing more profound than to consolidate all the rules relating to disputes between two secured parties into a single provision, present section 9-312.⁸⁴ Furthermore, the consolidation was executed less carefully than it should have been: it appears that a drafting accident is responsible for the deletion of the “no-knowl-

77. AMERICAN LAW INSTITUTE & NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, 1956 RECOMMENDATIONS OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE (1957) [hereinafter 1956 REVISIONS].

78. At that time, the predecessor to present § 9-301(1)(a) appeared as § 9-301(1)(b). *Id.* at 297. For simplicity, I will refer to the section using its current designation.

79. Prior to the revisions, the predecessor to present § 9-301(1)(b) appeared as § 9-301(1)(c). *See id.*

80. Prior to the 1956 revisions, §§ 9-301(1)(c) and (d) appeared as §§ 9-301(1)(d) and (e). *See id.*

81. 1956 REVISIONS, *supra* note 77, § 9-301.

82. Section 9-301(1)(a) did not say that this “subsequent secured party” must be a purchaser for value, but this was unnecessary. Unless “value has been given,” the purported security interest cannot attach. *Id.* § 9-203(1)(b) (1956).

83. U.C.C. § 9-312 (1956).

84. 1956 REVISIONS, *supra* note 77, § 9-301 (“Subsection (1) has been changed to transfer all questions of priority [between secured parties] to § 9-312.”).

edge” requirement that was part of the original section 9-301(1)(a).⁸⁵ If an important *substantive* feature of the original rule could disappear by accident, it would seem possible that the loss of *structural* coordination between section 9-201 and the new section 9-312(5)(a) was also unintentional. The structure of section 9-312(5)(a) is indeed anomalous, but it need not be taken as a deliberate rejection of the system of baselines and exceptional rules that generally characterizes property-transfer law.

D. Summary

In Subsequent-Transferee cases involving buyers or judicial lien creditors, there are clear substantive and structural parallels between Article 9 and the old chattel mortgage acts. The acts, in order to vindicate the principle of ostensible ownership, protected certain subsequent buyers and subsequent judicial lien creditors from the Encumbrance Rule. Article 9, also motivated by ostensible-ownership concerns, supplies priority rules that protect certain subsequent buyers and subsequent judicial lien creditors from section 9-201. The main structural difference between the two regimes is that Article 9 codifies the Encumbrance Rule in section 9-201; the chattel mortgage acts simply presupposed it as one of the property-transfer baselines.

In Subsequent-Transferee cases involving two secured parties, Article 9 significantly expands the subsequent secured party’s rights relative to those she would have enjoyed under the chattel mortgage acts. By making priority depend on, among other things, the date on which a subsequent secured party files a financing statement, section 9-312(5)(a) lets her prevail against an existing security interest despite the codification of the Encumbrance Rule in section 9-201. Section 9-312(5)(a) is not cast as an exception to anything, but it can easily be reformulated to bring out its function as an exception to section 9-201. While this parallel disappeared from the text in 1956, Article 9 and the chattel mortgage acts continued to deal with subsequent transferees in a remarkably similar manner. The question thus becomes whether such parallels can be found in cases involving antecedent transferees, antecedent transferors, and offsetting creditors.

85. Former § 9-301(1)(a)’s requirement that the subsequent secured party take without knowledge of the existing security interest is not reflected in present § 9-312(5). Grant Gilmore says it is unclear whether this omission “was by design or inadvertence. If it is assumed that the draftsmen were deliberately making a considerable change in prior law, this was an odd and unsatisfactory way to have done it, particularly in view of the fact that the 1956 version of § 9-301(1) maintains the earlier policy unchanged in comparable situations.” 1 GILMORE, *supra* note 1, § 34.2. See generally Carlson, *supra* note 2, at 235-38 (tracing the revision of §§ 9-301(1) and 9-312(5)).

IV. THE ANTECEDENT-TRANSFEREE SCENARIO: SECURED PARTIES VERSUS ANTECEDENT ENCUMBRANCERS AND ASSIGNEES

The Antecedent-Transferee Scenario is identical to the Subsequent-Transferee Scenario except that the order of the two purported transfers is reversed. In Antecedent-Transferee cases, Debtor first makes (or suffers) a transfer of *X* to Rival Claimant; only later does Debtor purport to grant Secured Party a security interest on *X*. Letting the purported transfer to Secured Party serve as our temporal benchmark, Rival Claimant is an “antecedent transferee.”

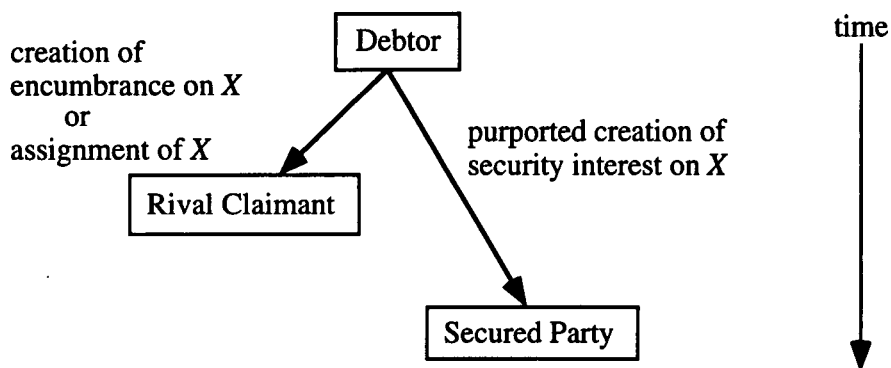


Figure 2: Secured Party v. Antecedent Transferee

Does section 9-201's declaration that a security interest is effective against “purchasers of the collateral” and “creditors” apply against “purchasers” and “creditors” who are *antecedent* transferees? The Received View holds that a security interest is effective against all competing claimants, including those whose interests were created before the security interest purportedly attached to *X*.⁸⁶ The burden, then, is on the antecedent transferee to adduce an exceptional rule to rebut the presumption in favor of the secured party. Section 9-201, however, admits only such exceptions as the U.C.C. provides. Proponents of the Received View must therefore provide antecedent transferees with appropriate exceptions provided for in the Code itself.

Notwithstanding the opinion of the commentators, the U.C.C. does not provide antecedent transferees with a defensible set of exceptions to section 9-201. Moreover, historical and structural considerations affirmatively support my contention that “purchasers of the

86. For leading statements of the Received View in this context, see David G. Carlson & Paul M. Shupack, *Judicial Lien Priorities Under Article 9 of the Uniform Commercial Code: Part I*, 5 CARDOZO L. REV. 287, 320 (1984); Ward, *supra* note 7, at 233.

collateral” and “creditors” refer exclusively to purchasers and creditors who are *subsequent transferees*. Under my restrictive reading, there is no need to protect antecedent transferees or even non-transferees from section 9-201. Rather, we should determine their rights against a purported secured party by applying the property-transfer baselines and any relevant exceptions, even if these are not found in the Code. The relevant non-Code law varies from state to state, so the rules determining priority in Antecedent-Transferee cases are by no means uniform. Still, non-Code law follows fairly predictable patterns and addresses the same ostensible-ownership concerns that are the focus of Article 9. Evaluated in terms of those concerns, results reached under non-Code law are better than those that follow under tortured attempts to “protect” antecedent transferees using Article 9. In Antecedent-Transferee cases, we do more honor to Article 9 by limiting its scope.

A. *The Received View and Its Problems*

The “plain language” of section 9-201 declares a security interest “effective . . . against purchasers of the collateral and against creditors.” The statute says “purchasers” and “creditors”—not “subsequent purchasers” and “subsequent judicial lien creditors.” Linguistically, there is little reason to suspect that section 9-201 does not apply to antecedent transferees. The Official Comment also speaks in generic terms: section 9-201 is said to make a security interest “effective against third parties.” There seems to be a *prima facie* case for the Received View that Article 9 governs the Antecedent-Transferee Scenario.

Yet, if section 9-201 applies against antecedent transferees, proponents of the Received View must identify the Code provisions that create reasonable exceptions in favor of Rival Claimant. The leading candidates are the priority rules stated in section 9-301(1) and the rules found in section 9-203(1) relating to attachment. But none of these rules provides a sensible set of exceptions applicable to disputes between a secured party and an antecedent transferee.

1. ARGUMENTS UNDER SECTION 9-301(1)

Section 9-301(1) protects *subsequent* judicial lien creditors and *subsequent* buyers from section 9-201 by declaring that these persons defeat “an unperfected security interest” in various circumstances. It is much harder, however, to sustain the claim that section 9-301(1) also resolves disputes between a secured party and an *antecedent* transferee.

a. Rival Claimant as Antecedent Judicial Lien Creditor

Section 9-301(1)(b) awards a judicial lien creditor priority over “an unperfected security interest” if she acquires her lien “before the security interest is perfected.” Commentators argue that Rival Claimant, as an *antecedent* judicial lien creditor, necessarily acquires her encumbrance on *X* before Secured Party’s security interest attaches, which means that she acquires her lien “before the security interest is perfected.”⁸⁷ According to this interpretation, section 9-301(1)(b) provides Rival Claimant with ironclad protection against section 9-201’s (alleged) presumption in favor of Secured Party’s subsequently attaching security interest.

Commentators who invoke section 9-301(1)(b) on Rival Claimant’s behalf are not entirely comfortable with this argument—and with good reason. They acknowledge two principal objections. The first is textual. In keeping with its caption (“Persons Who Take Priority Over Unperfected Security Interests”),⁸⁸ section 9-301(1)(b) tells us when “an unperfected security interest” is subordinate to a judicial lien. On its most natural interpretation, “an unperfected security interest” refers to a security interest that has attached to *X* but is not yet perfected—just as “an unfrosted cake” refers to a cake that has been baked, but is not yet frosted. This natural reading, which finds support in the Comments,⁸⁹ implies that section 9-301(1)(b) is directed at situations in which the security interest attaches before Rival Claimant acquires her judicial lien. Only in those cases can a judicial lien attach while there is any security interest for us to call “unperfected.” But if Secured Party’s encumbrance attaches before Rival Claimant’s lien, Rival Claimant cannot be an *antecedent* judicial lien creditor. Section 9-301(1)(b), it would appear, shelters only judicial lien creditors who are *subsequent* transferees.

If section 9-301(1)(b) is going to protect antecedent judicial lien creditors from section 9-201, “an unperfected security interest” must encompass security interests that have not even attached by the time Rival Claimant acquires her lien on *X*. But this construction is quite a stretch. The Code is emphatic that Secured Party cannot have a

87. U.C.C. § 9-301(1)(b) (1987); *see id.* § 9-303(1) (1987) (“A security interest is perfected when it has attached and when all the applicable steps required for attachment have been taken.”).

88. The second half of the caption—“Rights of ‘Lien Creditor’”—was added in 1972 in connection with the introduction of § 9-301(4) regarding future advances. It is not relevant to the present discussion.

89. *See id.* § 9-203 cmt. 1 (“Section 9-301(1) states who will take priority over a security interest that has attached but which has not been perfected.”).

perfected security interest until his intended encumbrance attaches,⁹⁰ but this hardly entails that he has an *unperfected* security interest while he is waiting for attachment to occur.⁹¹ Until the hoped-for security interest attaches, it is more sensible to describe Secured Party as having *no* security interest, perfected or otherwise.

The commentators concede that the language of section 9-301(1)(b) does not quite fit the dispute between a secured party and an antecedent judicial lien creditor. Indeed, Professors Carlson and Shupack claim to have discovered a “lacuna” in the statute, inasmuch as section 9-301(1)(b) does not explicitly say “that subsequently created security interests are also junior to earlier judicial liens.”⁹² They conclude that this omission is “almost certainly an accident.”⁹³ The text of section 9-301(1)(b) is flawed, but there can be no doubt (based upon their view) that it was intended to protect antecedent judicial lien creditors. This conclusion flows naturally from the Received View: Unless an antecedent judicial lien creditor can invoke section 9-301(1)(b), she will always lose to a subsequent secured party under section 9-201. Such a result is “unthinkable,”⁹⁴ so we are forced to construe section 9-301(1)(b) as applying in favor of antecedent judicial lien creditors.

The second objection to using section 9-301(1)(b) to protect antecedent judicial lien creditors is that it can lead to conflict with non-Code law that already seems to deal with these disputes. Statutes or decisional law in every state regulate the creation and enforcement of judicial liens. This local lien law must address priority disputes between judicial lien creditors and competing transferees—including buyers, secured parties, and rival judicial lien creditors. Local lien law, as the phrase suggests, is not the subject of any uniform law or model act, although it would be a good candidate for such treatment. Regardless, local lien law remains an essential part of every state’s debtor-creditor law.

In some states, local lien law must deal with the ostensible-ownership problem created when a judicial lien attaches to *X*, but the judgment debtor remains in possession of the relevant thing. In most states, this cannot happen, because a judicial lien does not attach to *X* until the sheriff levies, i.e., seizes the relevant thing or at least takes steps to put third persons on notice of the judgment creditor’s inter-

90. *Id.* § 9-303(1).

91. A cake cannot be frosted until it is baked, but someone who has not even baked a cake does not have an unfrosted cake.

92. Carlson & Shupack, *supra* note 86, at 317 n.127; cf. Ward, *supra* note 7, at 245.

93. Carlson & Shupack, *supra* note 86, at 317 n.127.

94. *Id.* at 320.

est.⁹⁵ But a significant minority of jurisdictions, including New York,⁹⁶ New Jersey,⁹⁷ and West Virginia,⁹⁸ follow an older rule.⁹⁹ According to this rule, judicial liens attach to all the debtor's interests "located"¹⁰⁰ in a given county as soon as the judgment creditor delivers a writ of execution to the local sheriff. In these date-of-delivery jurisdictions, attachment of a judicial lien creates a serious ostensible-ownership problem because persons dealing with a judgment debtor cannot easily discover that a judicial lien has already attached to the particular *X* in which they are interested. This problem persists until the sheriff levies, which may involve a delay of days or weeks following delivery of the writ.

Aware of this publication problem, date-of-delivery jurisdictions generally seek to protect a judgment debtor's transferees from secret judicial liens. They do this by devising some way to keep the Encumbrance Rule from applying against someone who takes a transfer in the period between attachment of the lien and the sheriff's levy. New York, for example, holds that a judicial lien creditor's encumbrance is subordinate to the rights of "a transferee who acquired . . . the property for fair consideration before it was levied upon."¹⁰¹ New Jersey takes a similar position, but adds the sensible requirement that the transferee take without notice of the lien and give value for his inter-

95. For a general description of the process of attachment and execution, see 9 DEBTOR-CREDITOR LAW 37[A] (Thomas Eisenberg ed., 1992); CRANDALL ET AL., *supra* note 34, §§ 6.05[3][b], [e]. Levying on immovables might be done by padlocking a machine, posting signs, or taking similar actions. In some jurisdictions, a valid levy may be conducted, without the sheriff doing much that would provide effective notice to third parties. For example, in *Credit Bureau of Broken Bow, Inc. v. Moninger*, 284 N.W.2d 855 (Neb. 1979), a deputy sheriff purported to levy on a pickup truck by putting his hands on the truck and announcing that he was conducting a levy on behalf of the county. The deputy left the truck in the possession of the judgment debtor, who promptly drove away and sold title to the truck to someone else. *Id.* at 857. The Nebraska Supreme Court found that, although the deputy sheriff left the judgment debtor in possession of the truck and keys, the judgment creditor had acquired a valid judicial lien. *Id.* at 858. For an incisive discussion of the formal requisites for levy, see STEPHAN RIESENFELD, *CREDITORS' REMEDIES AND DEBTORS' PROTECTIONS* 129-32 (3d ed. 1979).

96. N.Y. CIV. PRAC. L.&R. § 5202 (McKinney 1978 & Supp. 1992).

97. N.J. REV. STAT. § 2A:17-10 (1987).

98. W. VA. CODE § 38-4-8 (1985).

99. See generally Daniel H. Distler & Milton J. Schubin, *Enforcement Priorities and Liens: The New York Judgment Creditor's Rights in Personal Property*, 60 COLUM. L. REV. 458, 465-76 (1960). For a list of states adopting a date-of-delivery rule, see CRANDALL ET AL., *supra* note 34, § 6.05[3][e].

100. Strictly, we should say that the judicial lien attaches to all of the judgment debtor's interests that relate to things located in the relevant county. On my conceptualization, encumbrances attach to interests, not to things; but the location of a thing may still determine whether or not a particular interest becomes encumbered by delivery of a writ.

101. N.Y. CIV. PRAC. L.&R. § 5202(a)(1) (McKinney 1978 & Supp. 1992).

est before the sheriff actually levies.¹⁰² These non-Code rules vary from state to state, making it unlikely that they are *all* perfectly fair or optimally efficient. Nevertheless, they are plausible responses to the ostensible-ownership problem created in jurisdictions where mere delivery of a writ creates a lien.

The problem troubling the commentators is that application of section 9-301(1)(b) in Antecedent-Transferee cases can lead to conflict with this type of local lien law. Suppose that Rival Claimant wins a judgment against Debtor on June 1 and delivers a writ of execution to the sheriff on June 2. On June 10, before the sheriff takes any action on the writ, Debtor borrows \$5,000 from Secured Party, who knows nothing of Rival Claimant, her judgment, or her writ. Debtor grants him a security interest on *X*, Debtor's interest respecting a local drill press. The next day, June 11, Secured Party perfects by filing. On June 20, the sheriff finally levies on the drill press pursuant to the writ. In a date-of-delivery jurisdiction, Rival Claimant's judicial lien attaches on June 2, which is more than a week before the security interest either attaches to *X* (June 10) or becomes perfected (June 11). Under the Received View, Rival Claimant takes priority over Secured Party because she "becomes a lien creditor" before Secured Party obtains a perfected security interest.

Consider the same case under local lien law, assuming it declares a judicial lien subordinate to the rights of subsequent purchasers who take for value, without knowledge of the lien, before the sheriff levies. Suppose that Secured Party takes his security interest, for value and without knowledge of Rival Claimant's lien, on June 10. This precedes the sheriff's levy (June 20), so local lien law awards priority to Secured Party. This seems reasonable, in view of the ostensible-ownership problem created by Rival Claimant's secret lien. But this result contradicts the conclusion we reached when applying section 9-301(1)(b).

Professor Ward diagnoses this conflict, but sees no analytical solution to the difficulty. He ultimately resorts to Article 9 because it contains a "more comprehensive priority scheme" than local lien law.¹⁰³ Applying Article 9 also promotes uniformity in commercial law. A single rule, section 9-301(1)(b), resolves disputes whether Rival Claimant is a subsequent or an antecedent judicial lien creditor and, effectively, repeals local lien law as it applies to secured parties.

102. N.J. REV. STAT. § 2A:17-14 (1987). Although the statute applies, by its terms, only to "buyers," it should sensibly apply to other kinds of purchasers, e.g., grantees of a security interest.

103. Ward, *supra* note 7, at 245

An analysis based on sections 9-201 and 9-301(1)(b) may promote uniformity, but it clashes with the basic policies animating Article 9. A rule that lets the antecedent judicial lien creditor *always* win ignores the ostensible-ownership problems present in date-of-delivery states. Rival Claimant's lien, pending the sheriff's levy, is for practical purposes a secret encumbrance. Awarding such a lien priority over Secured Party's subsequent security interest, which he took for value and without notice of Rival Claimant's interest, flies in the face of traditional concerns about ostensible ownership. The aspirations of Article 9 are better realized not by invoking section 9-301(1)(b), but by applying local lien law, which usually protects subsequent good-faith purchasers from secret judicial liens.

Professors Carlson and Shupack try to resolve Professor Ward's difficulty by arguing that the conflict between section 9-301(1)(b) and local lien law is merely apparent. They contend that section 9-301(1)(b) makes Rival Claimant's prospects a function of exactly *when* she "becomes a lien creditor." In date-of-delivery jurisdictions, this would seem to happen when she delivers a writ of execution to the sheriff. As Carlson and Shupack point out, however, the U.C.C. never explicitly says that it adopts local definitions of when a judicial lien attaches. This leaves us free to develop our own test of when someone "becomes a lien creditor" for purposes of section 9-301(1)(b). The test should promote the Code's purposes, which presumably include avoiding conflict with non-Code law.¹⁰⁴

Accordingly, Carlson and Shupack deny that Rival Claimant "becomes a lien creditor" as soon as she delivers a writ to the sheriff. They propose instead that Rival Claimant becomes a lien creditor only when her lien becomes "established against bona fide purchasers" under local lien law.¹⁰⁵ Rival Claimant's judicial lien, on this account, does not attach to *X* until that lien would be sure to prevail against someone who purchased *X* from the judgment debtor in good faith and for value. In most date-of-delivery states, judicial liens achieve this status only when the sheriff levies. Thus, it is only then that Carlson and Shupack would recognize Rival Claimant's lien for purposes of section 9-301(1)(b).

By this device, Carlson and Shupack claim that "statutory conflict between the UCC and state lien law would be eliminated."¹⁰⁶ We

104. At one point, Carlson and Shupack suggest that their proposed definition will have "Optimal Welfare Effects." Carlson & Shupack, *supra* note 86, at 306. Professor Carlson backed away from this kind of claim after his conversion to "legal existentialism." See Carlson, *supra* note 2.

105. Carlson & Shupack, *supra* note 86, at 312.

106. *Id.*

can see how their proposal works in my example involving the drill press. Under local lien law, Rival Claimant's judicial lien does not become "established against bona fide purchasers" until June 20, when the sheriff levies on the press. Hence, under their proposal, Rival Claimant's lien attaches on June 20, not June 2. This means she "becomes a lien creditor" after the security interest is perfected (June 11). We can then apply section 9-301(1)(b) and conclude that priority goes to Secured Party, which is the same result we reached under local lien law. The conflict with Article 9 has disappeared.

There is something in this proposal that makes me think Carlson and Shupack are putting a rabbit into a hat and pulling it out again. But, whatever we think of the trick, the fact is that it does not always work. Suppose that Secured Party somehow learns of Rival Claimant's judicial lien on June 8, two days before he makes the loan and takes his security interest. In that case, Secured Party does not qualify as a good faith purchaser, so he cannot invoke the local rule protecting good faith purchasers. Rival Claimant therefore retains her priority under local lien law. The conflict with section 9-301(1)(b) now reappears. Regardless of the state of Secured Party's knowledge, Rival Claimant's lien does not become established against bona fide purchasers *in general* until the sheriff levies. Thus, she does not become a judicial lien creditor until June 20, nine days after the security interest is perfected (June 11). Secured Party is therefore entitled to priority under section 9-301(1)(b).¹⁰⁷

Conversely, Secured Party may enjoy priority under local lien law, while Rival Claimant takes priority under section 9-301(1)(b). Assume that Secured Party lends and takes his security interest without knowledge of the judicial lien; further assume that he does not perfect his security interest until June 25. Under local lien law, Secured Party wins because he is a purchaser for value, without knowledge, who takes on June 10, ten days before the levy. It appears, however, that Secured Party loses to Rival Claimant under section 9-301(1)(b). Carlson and Shupack's proposal tells us that Rival Claimant does not "become a lien creditor" until June 20, but this is still early enough for her to defeat Secured Party, who does not perfect until June 25. So again there is an unresolved conflict between local lien law and Article 9.

107. Carlson and Shupack try to avoid this conflict by claiming that local lien law can be applied against Secured Party in the period before the levy, while Article 9 will govern during the post-levy period. *See id.* 312 n.114. But this attempt to limit the scope of Article 9 is inconsistent with their endorsement of the Received View that section 9-201 applies against antecedent judicial lien creditors.

The proponents of the Received View face a dilemma. Their commitment to an expansive interpretation of section 9-201 virtually compels them to assume that section 9-301(1)(b) protects antecedent judicial lien creditors from subsequent secured parties. Section 9-301(1)(b), however, is strong medicine. If the rule, despite its inapposite phrasing, governs these disputes, the antecedent judicial lien creditor will always defeat the secured party. This result is inconsistent not only with non-Code rules that govern priorities in date-of-delivery jurisdictions, but also with the ostensible-ownership concerns that drive Article 9. Carlson and Shupack's proposal rests on the sound intuition that local lien law is better suited to handle disputes involving antecedent judicial lien creditors. Nonetheless, their commitment to the Received View of section 9-201 prevents their applying these rules directly. The best they can do is to try to shoehorn local lien law into section 9-301(1)(b).

There is a simple way around these difficulties: reject the Received View that section 9-201 applies against antecedent transferees. In that case, we do not have to appeal to section 9-301(1)(b); we can leave the dispute to local lien law. We can drop the implausible claim that "an unperfected security interest" includes a security interest that has not even attached; and we can avoid the unpalatable conclusion that an antecedent judicial lien creditor always defeats a subsequent secured party, even when the judicial lien is a secret encumbrance. Finally, rejecting the Received View eliminates any concern that section 9-301(1)(b) must be "reconciled" with non-Code law.

b. Rival Claimant as Antecedent Buyer

Several commentators have suggested that an antecedent buyer can use section 9-301(1)(c) to protect herself against subsequent secured parties.¹⁰⁸ A buyer of *X* takes free of "an unperfected security interest" to the extent that she gives value and takes delivery of the relevant thing, without knowledge of the (later) security interest, "before . . . [the security interest] is perfected." If section 9-301(1)(c) is to protect an *antecedent* buyer, however, we must again construe "an unperfected security interest" as including a security interest that has not even attached by the time of the sale. As in the case of section 9-301(1)(b), this construction is obviously artificial.

Professor Harris, recognizing the linguistic objection, suggests

108. See Harris, *supra* note 7, at 810-17; Dolan, *supra* note 7, at 34-39; see also RAY D. HENSON, HANDBOOK OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 163-67 (1979).

that "a fortiori reasoning" may nonetheless establish an antecedent buyer's priority against a subsequent secured party. The essence of the argument is that "any buyer who prevails over the holder of an attached but unperfected interest ought to prevail over a person who holds no security interest at all."¹⁰⁹ It is uncontroversial that Rival Claimant, when she is a *subsequent* buyer, takes free of an existing ("attached") security interest if she satisfies the requirements of section 9-301(1)(c). In such a case, she also prevails a fortiori against a security interest that does not even exist. Hence, an antecedent buyer who satisfies section 9-301(1)(c) is entitled to priority even if that provision does not explicitly address her dispute with a subsequent secured party.

This argument is intuitively appealing, so it is important to see where it goes wrong. It is true that a subsequent buyer sometimes takes free of "an attached but unperfected interest." Nevertheless, the *reason* she does is to protect her from the ostensible-ownership problem created by the (unperfected) security interest that attached before the sale. An *antecedent* buyer, in contrast, does not need protection from an ostensible-ownership problem created by a security interest that (purportedly) attaches after the sale. The rationale for the buyer's priority in the former case is absent in the latter. The fact that a buyer can defeat an "attached but unperfected interest" does not imply that the buyer should also defeat "a person who holds no security interest at all."¹¹⁰ While there are good reasons for holding that the antecedent buyer defeats the subsequent (purported) secured party, these reasons do not relate to the ostensible-ownership problem that is the focus of section 9-301(1)(c). If an antecedent buyer takes priority, it is not on any "a fortiori" rationale.

Linguistic difficulties aside, applying section 9-301(1)(c) in cases involving antecedent transferees leads to substantive complications.¹¹¹ The statute tells us that Rival Claimant can prevail only to the extent

109. Harris, *supra* note 7, at 816 n.45 (preferring an argument based on § 9-203(1)(c)); cf. Dolan, *supra* note 7, at 37 (referring to the "reasonable implication of section 9-301(1)(c)" that a buyer who "could defeat a secured party, . . . should be able to defeat an unsecured party").

110. This is not to say that ostensible-ownership concerns are always irrelevant in these cases. If Rival Claimant leaves her seller (Debtor) in possession after the sale, she creates an ostensible-ownership problem that may work to the detriment of Secured Party. It would not be unreasonable to require a buyer of *X* to take possession or risk losing to someone who innocently gives value in the belief that the seller/debtor can still grant a security interest on *X*. Section 2-402(2) does not exactly adopt such a rule, but it leaves the door open for the application of non-Code law, which has traditionally taken a dim view of buyers who leave their sellers in possession without some compelling justification.

111. Professor Dolan identifies one such conflict between Article 7 and 9. He resolves it without difficulty, however, because § 9-201 specifically states that its presumption may be overcome by any inconsistent U.C.C. rule. See Dolan, *supra* note 7, at 38.

that she “gives value.” Consider what this implies for gratuitous transfers. Suppose that Debtor, observing all necessary formalities, assigns *X* to Rival Claimant *gratis*. Rival Claimant thanks Debtor for the gift and immediately takes possession of the relevant thing. A subsequent purported transferee (e.g., Secured Party) cannot claim to be misled by Debtor’s ostensible ownership, because Debtor is no longer in possession. Absent additional facts (such as Debtor’s insolvency) that would allow Secured Party to avoid the gift as a fraudulent conveyance, the assignment of *X* is a done deal. But if section 9-301(1)(c) applies in this context, Rival Claimant is in trouble. As a gratuitous assignee, she does not “give value.” If her donor (Debtor) subsequently purports to grant a security interest on *X* to Secured Party, section 9-301(1)(c) offers her no protection. Section 9-201, with its (alleged) presumption against “purchasers of the collateral,” claims another victim.

In principle, however, Debtor’s gift to Rival Claimant should be just as effective against Secured Party as it would be against a purported buyer, judicial lien creditor, or other transferee.¹¹² Unless Secured Party can identify an ostensible-ownership problem or challenge the assignment as a fraudulent conveyance, the gift to Rival Claimant finally divests Debtor of any power to transfer *X*. There is no reason to suppose that Article 9 was intended to frustrate traditional expectations concerning the effect of gifts, especially when there is no policy reason why it should. Viewed in this light, section 9-301(1)(c) is an implausible candidate to protect antecedent buyers from section 9-201.

c. Rival Claimant as Antecedent Trust Beneficiary

Debtor, which is vested with *X*, declares that it holds *X* in trust for Rival Claimant. Rival Claimant acquires a “trust beneficiary’s interest” on *X*.¹¹³ The transaction is consensual, so Rival Claimant is a “purchaser.” Under the Received View, she would be subject to the presumption supposedly established in section 9-201.

Nothing in section 9-301(1) mentions trust beneficiaries as such, so we could conclude that Rival Claimant cannot rebut the presump-

112. In general, the principle of “first in time, first in right” underlies the Code’s priority regime; it not evident why a gratuitous transferee ought to be an exception. See generally Jackson & Kronman, *supra* note 2, at 1161-64, 1178-82 (discussing interplay of first-in-time principle and Code’s notice-filing system).

113. A more traditional analysis might view *X* as splitting into “legal *X*” and “equitable *X*,” with the latter being assigned to Rival Claimant. I find it less confusing to regard Rival Claimant as simply acquiring an encumbrance on *X*. It would be possible, however, to adopt the other conception without affecting the substance of my critique.

tion in favor of Secured Party. This would render a trust beneficiary's interest vulnerable to any security interest that the trust grantor¹¹⁴ might subsequently grant to a third party. It is unlikely that the Code was intended to undermine the position of trust beneficiaries in this way. If it were, the drafters or their contemporaries would have commented on their radical innovation. Yet there is no suggestion that anyone thought that Article 9 posed a threat to antecedent trust beneficiaries.

Proponents of the Received View have two main lines of defense. First, they can argue that section 9-301(1)(c), which plainly protects certain *buyers*,¹¹⁵ legitimately extends to other types of purchasers, including trust beneficiaries. Here I would agree: there is no reason for section 9-301(1)(c) to protect buyers but not other types of purchasers.¹¹⁶ I contend, however, that section 9-301(1)(c) protects only *subsequent* purchasers. The Received View demands that section 9-301(1)(c) be applied in favor of *antecedent* purchasers, which requires that "an unperfected security interest" be read as including a security interest that has not even attached by the time of the grant to the trust beneficiary (or other purchaser).

Even if we accept this dubious interpretation, serious problems remain. Under section 9-301(1)(c), Rival Claimant prevails against Secured Party only if she gives value for her interest and takes possession of the relevant thing. Only rarely does a trust beneficiary acquire her interest for value; it is also unusual for her to obtain possession of the trust *res*. Is it plausible that section 9-301(1)(c) would require a trust beneficiary to do both of these things to protect herself from a subsequent purported secured party? Why should the trust beneficiary have to "give value" to ensure that her interest will stand up

114. For convenience, I assume that the grantor is the trustee. The analysis is similar when the trustee is a third person.

115. Section 9-301(1)(c) also applies to "transferees in bulk," but there is no need to consider them separately in this context.

116. An exception must be made for purchasers who are secured parties: they are governed by §§ 9-301(1)(a) and 9-312(5). See U.C.C. § 9-301 cmt. 4 (1987) (paragraphs (1)(c) and (1)(d) deal with purchasers other than secured parties).

Despite the Code's apparent intention to deal with all purchasers (other than secured parties), the persons actually mentioned in §§ 9-301(1)(c) and 9-301(1)(d) are only a subset of possible purchasers. For example, nothing in Article 9 protects a subsequent innocent lessee for value from an unperfected security interest. The chattel mortgage acts, in contrast, typically included the catch-all term "purchasers," which encompassed all transferees except judicial lien creditors. Such a provision would improve Article 9.

New § 2A-307(2) attempts to fill this gap as regards lessees, although it does so by introducing the anomalous idea that a prior-in-time secured party can "take subject to" a lease that has not yet attached. It would be more accurate to say that the lessee "does not take subject to" an existing but unperfected security interest.

against a subsequent transferee? Assuming that the grantor was solvent and did not intend to defraud its creditors, why should the fact that the transfer to Rival Claimant was gratuitous render her interest vulnerable to Secured Party?

The possession requirement makes a bit more sense. If the Debtor retains possession after creating a trust in favor of Rival Claimant, Secured Party faces a classic ostensible-ownership problem. But it is unlikely that section 9-301(1)(c) is supposed to deal with this problem, because the law of trusts already does so much more plausibly. For centuries, trust law has followed a simple rule in disputes between a trust beneficiary and a subsequent transferee, including a subsequent secured party: the subsequent transferee prevails only if he is a good-faith purchaser for value.¹¹⁷ If the beneficiary has already obtained possession of the trust *res*, eliminating the ostensible-ownership problem created by the attachment of her encumbrance, the subsequent transferee will not be deemed a purchaser in good faith. This is reminiscent of section 9-301(1)(c), which requires the buyer (or trust beneficiary, let us assume) to take possession. But trust law further holds that a subsequent transferee with knowledge of the beneficiary's interest does not qualify as a good-faith purchaser, even if the beneficiary has not yet taken possession of the *res*.¹¹⁸ Section 9-301(1)(c), in contrast, does not require that the *secured party* take without knowledge. Rules that ignore actual knowledge are not uncommon in Article 9, so we cannot dismiss application of section 9-301(1)(c) on that ground alone. Yet the statute's failure to impose a "no-knowledge" requirement on the subsequent transferee can easily lead to conflict with trust law, which demands that the transferee be an innocent purchaser.

Another conflict can arise because trust law requires that the subsequent transferee be a purchaser *for value*.¹¹⁹ This ensures that the subsequent transferee invoking the protection of the rule can demonstrate detrimental reliance on the grantor's (or other trustee's) ostensible ownership of the trust *res*. Section 9-301(1)(c), however, does not require that the subsequent transferee (Secured Party) give

117. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 284 (1957); GEORGE T. BOGERT, TRUSTS § 165 (6th ed. 1987).

118. See RESTATEMENT (SECOND) OF TRUSTS §§ 288, 291 (1957). Knowledge of sufficient facts to put the transferee on notice that a beneficiary's interest may have attached can satisfy the knowledge requirement. See *id.* § 297; AUSTIN W. SCOTT & WILLIAM F. FRATCHER, IV SCOTT ON TRUSTS §§ 297-97.9 (4th ed. 1988).

119. See RESTATEMENT (SECOND) OF TRUSTS §§ 298-305 (1957); BOGERT, *supra* note 118, § 165. In a few cases where the donee has significantly changed his position to his detriment before receiving notice that the interest in question is subject to the trust, subsequent donees may also take free of an existing trust. SCOTT & FRATCHER, *supra* note 118, § 302.6.

value;¹²⁰ instead, it demands that the *trust beneficiary* do so. This requirement is inconsistent not only with trust law, which imposes no such requirement, but also with the rationale for imposing a value requirement in the first place.

These conflicts and anomalies all originate in the attempt to use section 9-301(1)(c) to “protect” an antecedent trust beneficiary from section 9-201. If we restrict section 9-301(1)(c) to cases involving subsequent trust beneficiaries, then it is perfectly reasonable that the trust beneficiary should have to give value and take without knowledge of the prior transfer. At the same time, it is understandable that no such requirements are imposed on the secured party, who is the initial transferee. The Received View of section 9-201, which encourages us to invoke section 9-301(1) on behalf of antecedent transferees, thoroughly warps understanding of these elementary priority rules.¹²¹

2. ARGUMENT UNDER SECTION 9-312(5)

Consider a situation in which Rival Claimant is a competing secured party. As an antecedent transferee, Rival Claimant takes her security interest on *X* before Secured Party takes his security interest on *X*. It is unclear how this situation would be analyzed under the Received View of section 9-201. If a security interest is effective against both antecedent and subsequent purchasers, Rival Claimant’s security interest is effective against Secured Party and Secured Party’s security interest is effective against Rival Claimant. This is a strange sort of presumption: it applies in favor of, as well as against, both parties to the dispute.

Be this as it may, the Received View generally yields the correct results in particular disputes between two secured parties. The contestants will both look to Article 9 to determine their relative priority. This is the correct course because one of the secured parties must be a

120. It is true that, before a security interest can attach, the secured party must “give value” for the encumbrance. See U.C.C. § 9-203(1)(b) (1987). The Code’s definition of what it means to “give value,” § 1-201(44), is more liberal than traditional trust law’s. For example, the mere existence of a debt owed to the secured party is enough to make a security interest given “for value” under the U.C.C. See *id.* § 1-201(44)(b) (1987). But a transfer to secure an antecedent indebtedness would not be a transfer “for value” under traditional trust principles. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 304 (1957). Someone can thus be a secured party under Article 9 without being a purchaser for value under trust law.

121. It goes too far to claim that traditional trust law is incorporated into the Code via § 1-103’s reference to the “principles of . . . equity.” If § 9-301(1)(c) means what the Received View says it does, it qualifies as a “particular provision of this Act [i.e., the U.C.C.]” and therefore *displaces* older law. Trust law is therefore unavailable to “supplement” an analysis under Article 9 until we show that section 9-301(1)(c) is not intended to apply to these cases.

subsequent purchaser relative to the other.¹²² In the Subsequent-Transferee Scenario, Rival Claimant is the subsequent secured party; it is she who needs protection from section 9-201. In Antecedent-Transferee cases, *Secured Party* is the subsequent “purchaser of the collateral.” Either way, Article 9 supplies both the baseline rule and the relevant exceptions. This eliminates the possibility of conflict with non-Code law and ensures that the rule applied to resolve the dispute will be the right one, the first-to-file-or-perfect test.

3. ARGUMENTS UNDER SECTION 9-203(1)(C)

If an antecedent transferee doing battle with a secured party finds no solace in the priority rules set out in sections 9-301(1) and 9-312(5), she may try to use section 9-203(1). This section provides that a purported security interest does not attach and is “not enforceable against the debtor or third parties” unless three conditions are met. One of these, stated in section 9-203(1)(c), is that the person purporting to grant the security interest must have “rights in the collateral.” Rival Claimant’s argument under section 9-203(1)(c) is that the initial transfer from Debtor to Rival Claimant leaves Debtor without the “rights in the collateral” that are necessary if Secured Party is to acquire a security interest in the subsequent transaction. If this argument succeeds, the purported security interest is unenforceable against Rival Claimant. The antecedent transferee (Rival Claimant) therefore overcomes section 9-201’s alleged presumption in favor of the secured party.¹²³

This argument sounds straightforward, but section 9-203(1)(c) is actually one of Article 9’s most problematic provisions. Controversies involving section 9-203(1)(c) usually come up in disputes between a purported secured party and an antecedent transferor to the debtor, so it is more convenient to examine the “rights requirement” in connection with the Antecedent-Transferor Scenario.¹²⁴ Still, I offer three observations concerning section 9-203(1)(c)’s possible application in favor of antecedent transferees.

First, Rival Claimant’s argument is strongest when Rival Claimant is an antecedent *assignee*. If Debtor sells or donates *X* to Rival Claimant, Debtor is divested of that interest, which makes it intui-

122. Actually, the possibility also exists that the conflicting encumbrances will attach to *X* simultaneously. In that case, neither secured party is a subsequent transferee. I do not deal in this paper with “ties”, which do not fit any of my scenarios, although it would not be difficult to propose a solution.

123. See Harris, *supra* note 7, at 816-17 (applying a similar analysis in favor of antecedent buyers).

124. See *infra* Part V.

tively plausible for Rival Claimant to claim that Debtor lacks "rights in the collateral" when it subsequently purports to encumber *X* in favor of Secured Party. In antecedent-assignee cases, section 9-203(1)(c) could operate as a substitute for the Vestedness Rule.¹²⁵

This leads to difficulties, however, because section 9-203(1)(c) does not say that only an *assignment* of *X* will deprive Debtor of "rights in the collateral." The Code fails to define this crucial phrase,¹²⁶ thereby allowing an antecedent *encumbrancer* to argue that she, too, is entitled to invoke section 9-203(1)(c) against a subsequent secured party. Suppose, for example, that Debtor grants Rival Claimant a security interest on *X*. Debtor then purports to grant Secured Party a competing security interest on *X*. Rival Claimant argues that the attachment of her security interest in the first transaction left Debtor with insufficient "rights in the collateral" to permit Secured Party's purported interest to attach in the second transaction. Rival Claimant would then be entitled to prevail even without perfecting. Obviously, this cannot be right. If we accepted Rival Claimant's argument under section 9-203(1)(c), the elaborate system of priority rules in section 9-312 would be unnecessary.¹²⁷ We may not really know what "rights in the collateral" means, but section 9-203(1)(c) must be satisfied even when *X* is already encumbered by a security interest.

If Rival Claimant holds a judicial lien on *X* rather than a security

125. I should point out that a different analysis results when *X* relates to accounts or chattel paper. Section 9-102(1)(b) declares that Article 9 "applies . . . to any sale of accounts or chattel paper"; in the same vein, "security interest" is defined in § 1-201(37) to include "any interest of a buyer of accounts or chattel paper which is subject to Article 9." The Code, in effect, commands us to recharacterize sales of such interests as encumbering transfers. The seller of title to an account is treated as granting the buyer a security interest on that title, which means that a subsequent purported transfer of title presents no problem under the Vestedness Rule. Because the initial transfer is deemed to create a security interest, the conflict with the subsequent transferee presents a conventional dispute between a secured party (the original "buyer" of title to the account) and a subsequent transferee.

126. Section 1-201(36) does not define "rights"; it merely observes that the term "includes remedies." The definition of "collateral" in § 9-105(1)(c) as "the property subject to a security interest", is similarly unhelpful. The 1962 version of Article 9 appears, at first sight, to be more useful. It specifies that "a debtor has no rights" respecting various sorts of *things*—crops, fish, "contract rights," etc.—until those things come into (legal) existence. U.C.C. § 9-204(2) (1962). This rule does not affirmatively tell us when a debtor acquires the requisite "rights." Instead, it holds that the debtor cannot have "rights" until the thing in question reaches (so to speak) legal maturity. The rules contained in the 1962 version of U.C.C. § 9-204(2) were deleted in 1972.

127. Accepting Rival Claimant's argument also would contradict § 9-311, which affirms that, notwithstanding attachment of a security interest, "[t]he debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, *creation of a security interest*, attachment, levy, garnishment or other judicial process) . . ." (emphasis supplied). The presence of a security interest must not prevent a second security interest from attaching.

interest, her argument under section 9-203(1)(c) cannot be dismissed so automatically. Accepting Rival Claimant's assertion that attachment of her judicial lien deprives Debtor of the "rights" necessary to support a subsequent security interest would not render section 9-301(1)(b) a nullity. Section 9-301(1)(b) could continue to govern disputes between a secured party and a subsequent judicial lien creditor, while section 9-203(1)(c) would deal with antecedent judicial lien creditors.

While I maintain that section 9-301(1)(b) protects only subsequent judicial lien creditors, I reject the idea that disputes involving antecedent judicial lien creditors are covered by section 9-203(1)(c). To establish such a position, Rival Claimant would first have to argue that attachment of her judicial lien deprives Debtor of the necessary "rights." However, we have already determined that attachment of a *security interest* would not deprive Debtor of the required "rights." In their basic structure and function, security interests and judicial liens are nearly identical, so it is hard to justify such disparate findings regarding their effects on Debtor's "rights."

Accepting the position that antecedent judicial lien creditors are covered by section 9-203 also creates a conflict with non-Code law. Results under section 9-203(1)(c) should be consistent with local lien law. As we have seen, however, an antecedent judicial lien creditor will typically be subordinate to a subsequent secured party who takes for value and without notice before the sheriff levies. To avoid conflict, Debtor's "rights in the collateral" must satisfy section 9-203(1)(c) in exactly those circumstances in which local lien law permits the Secured Party to defeat Rival Claimant. Given the variability of local lien law, this is impossible unless having "rights in the collateral" simply means that the secured party would prevail under local lien law. Having gone this far, why not admit that local lien law, not Article 9, governs the dispute?

Finally, there is the complication that section 9-203(1)(c) makes "rights" a prerequisite to enforcing a purported security interest against anyone, including the debtor. If the mere presence of Rival Claimant's lien were sufficient to prevent Secured Party's purported security interest from attaching, this would protect Rival Claimant, but it would be fatal to Secured Party. An appropriate analysis should allow Secured Party a *junior* encumbrance, rather than no encumbrance at all. Protecting Rival Claimant should not render the security interest unenforceable *against Debtor*. Reliance on section 9-203(1)(c), however, yields precisely this result.

B. *The Origins of Section 9-201*

The Received View of section 9-201 generates a variety of textual and substantive problems when Rival Claimant is an antecedent transferee. The U.C.C. rules that might protect antecedent transferees simply fail in these circumstances. Given that these same rules protect *subsequent* transferees, the Received View must be mistaken. Despite its broad phrasing, section 9-201 should not be read to make a security interest effective against *antecedent* transferees.

I now turn to the affirmative statement of my thesis, namely, that section 9-201 simply codifies the Encumbrance Rule as that baseline applies in favor of secured parties and against subsequent transferees. It is important to consider what Grant Gilmore, the principal drafter of Article 9, and Peter Coogan, an early and astute commentator, had to say about section 9-201 and conflicts involving an antecedent transferee. The record is sparse, which is itself significant, and requires explanation. Nevertheless, it supports my contention that section 9-201 was not intended to depart from the sort of analysis that would have been made under the chattel mortgage acts. This is important because the old acts, which contain language very similar to section 9-201's, dealt exclusively with a secured party's struggle against subsequent transferees. If Gilmore and Coogan, the two preeminent early commentators on Article 9, found nothing remarkable in section 9-201, there is little reason to think that we should either. Viewing section 9-201 as codifying the Encumbrance Rule means that it is an important provision, but in no sense revolutionary.

1. ARTICLE 9 AND THE "AFFIRMATIVE APPROACH"

Section 9-201 did not attract much attention when the Code was under consideration in the 1950s and '60s and little has been written about its origins. If the adherents of the Received View are correct to suppose that section 9-201 establishes a presumption good against all the world, they must explain why contemporaries failed to comment on this striking innovation. The chattel mortgage acts did not recognize a universal presumption in favor of a secured party, so adoption of a universal presumption in the U.C.C. should have excited controversy, or at least comment. Nevertheless, the first generation of Code commentators was largely silent regarding section 9-201.¹²⁸ If their

128. Early commentary does not suggest that section 9-201 was intended to expand the scope of Article 9 relative to the chattel mortgage acts. There were extensive discussions of the deficiencies of chattel mortgages and other security devices, but the lack of a *universal* presumption in favor of the secured party was never presented as a problem. See, e.g., Allison Dunham, *Inventory and Accounts Receivable Financing*, 62 HARV. L. REV. 588, 590-97, 599-

reticence counts for anything, it indicates that section 9-201 was not understood to play the role that the Received View assumes it does.

In an early article, Peter Coogan observed that section 9-201 "was intended to reverse the negative approach typical of chattel mortgage statutes."¹²⁹ Typically, the chattel mortgage acts declared a security interest "ineffective" or "void as against" certain persons unless it was properly perfected.¹³⁰ The "negative approach" taken by the acts is manifested in their declaration that a security interest would *not* be effective against certain subsequent transferees—a legacy of the animus against nonpossessory security interests that had been a feature of Anglo-American law since the sixteenth century. Reversing this "negative approach" was simply a matter of a rephrasing the old acts.¹³¹ Instead of stating that security interests are "void" unless certain conditions are met, section 9-201 declares security interests "effective" unless certain conditions are *not* met. The task of specifying these conditions is left to a separate set of priority rules, principally sections 9-301(1) and 9-312(5).

The drafters' shift to an "affirmative approach" may have lifted the spirits of secured parties, but there is nothing to indicate that this new approach was intended as a substantive innovation.¹³² If the purpose of section 9-201 had been to make security interests effective against persons other than the "subsequent purchasers" and "creditors" named in the chattel mortgage acts, it would have been appropriate for Coogan to have mentioned it. He might have announced, with appropriate fanfare, that section 9-201 transcends the limited approach of the chattel mortgage acts by adopting a universal pre-

601 (1949); Grant Gilmore & Alan Axelrod, *Chattel Security: Part I*, 57 YALE L.J. 517, 529-38 (1948); Francis Ireton, *The Proposed Commercial Code: A New Deal in Chattel Security*, 43 U. ILL. L. REV. 794, 805-18 (1949); Homer Kripke, *The "Secured Transactions" Provision of the Uniform Commercial Code*, 35 VA. L. REV. 577 (1949); Homer Kripke, *Chattel Paper as a Negotiable Specialty Under the Uniform Commercial Code*, 57 YALE L.J. 1209, 1210-12 (1950); Karl Llewellyn, *Problems of Codifying Security Law*, 13 LAW & CONTEMP. PROB. 687 (1948); Marvin Schwartz, *Pennsylvania Chattel Security and the Uniform Commercial Code*, 98 U. PA. L. REV. 530, 537-41 (1950).

129. Coogan, *supra* note 8, at 7 (1963) (citing New Jersey and New York lien law, as well as the California Civil Code as representative of his position).

130. *See supra* note 54.

131. *Cf.* Peter F. Coogan & John Bok, *The Impact of Article 9 of the Uniform Commercial Code on the Corporate Indenture*, 69 YALE L.J. 203, 236 (1959) ("Section 9-201 . . . creates a presumption of validity, and represents a reversal of some of the older chattel security laws which began from the opposite approach. But it probably goes little further than to state this general principle.") (footnotes omitted).

132. However, shifting to an affirmative approach created other consequences for Article 9. The task of stating exceptions to § 9-201 was assigned to the various Article 9 priority rules. This no doubt helped them to blossom into their present state of complexity. *See, e.g.*, § 9-312(1)-(7).

sumption in favor of the secured party. However, Coogan just points to the relatively trivial reformulation of section 9-201 in "affirmative" terms.

Coogan passed up another opportunity to comment on an expanded role for section 9-201 and its consequences for antecedent transferees. In his theory of the status of "future advances" under the 1962 Code, Coogan presents a hypothetical. On January 1, Secured Party files financing statements covering Debtor's accounts, but he neither extends credit to Debtor nor takes a security interest at that time. On February 1, Rival Claimant, who has won a \$900,000 judgment against Debtor, acquires a judicial lien on Debtor's interest respecting the accounts. On February 10, Secured Party lends Debtor \$500,000 and Debtor grants him a security interest on its interest respecting the accounts. "It would seem clear," Coogan concludes, "that [Secured Party] is behind [Rival Claimant's] \$900,000 lien."¹³³

Interestingly, Coogan does not say *why* Rival Claimant should come ahead of Secured Party. Coogan just says it is "clear," as indeed it would have been under the lien law of most states.¹³⁴ Would Coogan have treated the priority issue so casually if he subscribed to the Received View of section 9-201? Because the judicial lien attaches before the security interest, Rival Claimant is an antecedent judicial lien creditor. However, the Received View holds that Secured Party presumptively is entitled to priority. How, then, can it be "clear" that Rival Claimant prevails?

Under the Received View, the answer must be found in section 9-301(1)(b). Rival Claimant would have to make the now-familiar, but still implausible, argument that "an unperfected security interest" includes a security interest that has not yet attached. Because Coogan wrote in 1963, when the Code was beginning its trek through the state legislatures, it is unlikely that he would have assumed that his audience was already familiar with, and accepted, the argument for Rival Claimant under the Received View.¹³⁵ Coogan would at least have

133. Peter F. Coogan & Nahum L. Gordon, *The Effect of the Uniform Commercial Code upon Receivable Financing—Some Answers and Some Unsolved Problems*, 76 HARV. L. REV. 1529, 1549 (1963).

134. See *supra* note 95 and accompanying text (discussing rule in date-of-levy jurisdictions).

135. Responding to Coogan a few years later, a commentator brought up § 9-301(1)(b) and suggested that it might be unsuited to deal with antecedent transferees. See John J. Creedon, *IMPACT ON LIFE COMPANIES OF THE FEDERAL TAX LIEN ACT OF 1966* 35 n.114 (1967) ("It might be argued that . . . [section] 9-301(1)(b) does not apply because the future advance problem does not involve an unperfected security interest but a non-existent security interest. Under the latter approach, the priority problem between the lien for the future advances and the lien creditor might not be decided under the Uniform Commercial Code."). Creedon's intuition was correct, although he did not link it to an interpretation of § 9-201.

cited sections 9-201 and 9-301(1)(b) and given his readers a chance to work out the implications for themselves. But he mentions neither provision in connection with his hypothetical involving an antecedent judicial lien creditor.¹³⁶ For Coogan to call Rival Claimant's priority "clear" without explanation or reference to Article 9, he must have assumed that some general principle, such as the Encumbrance Rule, mandated that result.¹³⁷ If Coogan subscribed to the Received View, he seems not to have realized it.

Grant Gilmore, the principal drafter of Article 9, had little to say about section 9-201. His monumental treatise on secured transactions, which covers over 1,300 pages, refers to section 9-201 only four times.¹³⁸ These four references contain nothing to suggest that he thought the new provision marked a departure from pre-Code law. Conversely, his discussions of pre-Code law do not suggest that section 9-201 was any kind of watershed.¹³⁹ Gilmore, who was fond of revolutions, certainly would have celebrated the revolutionary implications of section 9-201 if he had thought there were any to celebrate.¹⁴⁰

Still, there is a passage in the treatise that I find troubling. Presenting Coogan's theory concerning future advances, Gilmore describes a situation in which Coogan would regard Rival Claimant as having acquired a judicial lien before Secured Party's security

136. Contrast this with Coogan's explicit discussion of the steps necessary for a security interest to "be good against *subsequent* lien creditors." See Coogan, *supra* note 8, at 3 (emphasis added).

137. We should also consider Coogan's passing reference in another early article to non-Code law that "governs the relationship between judgment creditors and transferees of the debtor's property"—i.e., local lien law. Peter F. Coogan, *Intangibles as Collateral under the Uniform Commercial Code*, 77 HARV. L. REV. 997, 1033 (1964). Criticizing a proposed amendment to Article 9 then under consideration in California, Coogan observed that "there may be difficulty reconciling the [proposed] provision with existing [lien] law. . . ." Here Coogan demonstrated his awareness of non-Code law governing judicial liens (he even cited New York's date-of-delivery statute) and his sensitivity to the possibility of conflict between this law and Article 9. In warning against the California amendment, Coogan was apparently confident that no conflict existed between local lien law and the *existing* provisions of Article 9. In particular, he must not have shared the concern of Professors Ward, Carlson, and Shupack that § 9-301(1)(b) could clash with local lien law. Coogan's attitude would not have made sense if he had thought § 9-201 applies against antecedent judicial lien creditors.

138. See 2 GILMORE, *supra* note 1, at 1387.

139. See 1 GILMORE, *supra* note 1, §§ 2.1 - 2.5; 10.1 - 10.2.

140. An impressionistic survey of other early commentary suggests that § 9-201 did not appear revolutionary at the time. See, e.g., Leon M. Cooper, *New Wines in New Bottles: The Uniform Commercial Code and the California Law of Chattel Security*, 27 S. CAL. L. REV. 265 (1954); Richard D. Cooper, *Effect of Article 9 of the Uniform Commercial Code Upon Chattel Mortgages in Kentucky*, 47 KY. L.J. 94 (1958); HENSON, *supra* note 108; Note, *California Chattel Security and Article 9 of the Uniform Commercial Code*, 8 UCLA L. REV. 812, 820 (1961).

interest was able to attach. Gilmore concluded that it is “obvious” that the judicial lien creditor takes priority.¹⁴¹ In reaching this result, Gilmore might simply have relied on the fact that the security interest attached after the judicial lien—as I believe Coogan did. But he goes further than this, noting that the security interest was unperfected until it attached. This is troubling because it sounds like a step in the argument that “an unperfected security interest” includes a *nonexistent* security interest—an argument that an antecedent judicial lien creditor must make in order to bring herself under section 9-301(1)(b).

Gilmore does not mention section 9-301(1)(b), but he seems to hint at some such rationale for Rival Claimant’s priority over Secured Party in Antecedent-Transferee cases. I think he did not fully consider the implications of his observation regarding Secured Party’s unperfected status. This would not be too surprising, because he was presenting what seemed to be a relatively minor step in *Coogan’s* general argument about future advances. Gilmore went on to reject Coogan’s theory, contending that Rival Claimant was in fact a *subsequent* judicial lien creditor.¹⁴² This rendered moot the question of how an *antecedent* judicial lien creditor could prevail against a subsequent secured party. Under these circumstances, Gilmore’s dictum concerning the relationship between attachment and perfection of security interests does not indicate a serious intellectual commitment on his part.

Gilmore’s omission of an explicit discussion of section 9-201 and its effect on the scope of Article 9 is a more significant indication of how he understood the situation. If either Gilmore or Coogan had subscribed to the Received View of section 9-201, they would have commented on its divergence from the system of the chattel mortgage acts. Their silence on this point makes sense, however, if we recall Coogan’s observation that the purpose of section 9-201 was simply to promote a more “affirmative” view of secured transactions.

Nothing in the move away from the “negative” approach of the chattel mortgage acts to the “affirmative” approach of section 9-201 required any change in the *class of persons* to whom the statute would apply. There is no reason to assume, as the Received View does, that the persons mentioned in section 9-201 (“purchasers of the collateral” and “creditors”) were intended to be any different from the “subsequent purchasers” and “creditors” featured in the chattel mortgage acts. Section 9-201 presumes that a security interest is effective

141. 1 GILMORE, *supra* note 1, § 35.6.

142. *See id.*

against these persons; in contrast, the typical chattel mortgage act presumed that a security interest was void as against them. Although there are some differences between the conditions under which the respective presumptions can be rebutted, both regimes are motivated by concern about the ostensible-ownership problems facing subsequent transferees.

When we recognize Article 9's relation to the chattel mortgage acts, we can see that "purchasers of the collateral" is coextensive with "subsequent purchasers" under the acts. This provides the historical basis for excluding antecedent purchasers from the scope of section 9-201, even though the phrase "purchasers of the collateral" contains no explicit temporal qualification.¹⁴³ Thus we conclude that applying section 9-201 against antecedent purchasers exaggerates the scope of Article 9—a result I have already reached on pragmatic and textual grounds.

Similarly, I contend that the term "creditors" in the chattel mortgage acts is coextensive with "creditors" in section 9-201. My thesis, however, is that section 9-201 applies only to *subsequent transferees*; the term "creditors," although seemingly generic, really refers only to subsequent *judicial lien* creditors. This sounds like a radical re-interpretation: a creditor, as such, is not a transferee, still less a "subsequent" transferee. We must turn to the jurisprudence of "creditors" under the chattel mortgage acts to find the justification for my narrow reading.

2. THE EXTENSION OF "CREDITORS": REVISITING THE RULE OF *KARST V. GANE*

My claim that the chattel mortgage acts applied not to creditors generally, but rather to subsequent judicial lien creditors only, may surprise anyone who remembers *Karst v. Gane*.¹⁴⁴ Decided by the New York Court of Appeals in 1893, *Karst* was long famous for declaring that the New York chattel mortgage act protected "antecedent creditors."¹⁴⁵ Although this seems further to undermine my thesis, *Karst*, as well as the statutes that followed it,¹⁴⁶ actually *supports*

143. Actually, the fact that § 9-201 speaks of "purchasers of the collateral" implies that the purchasers in question are subsequent transferees. Only after a security interest has attached is it appropriate to describe the targeted interest as "the collateral." See U.C.C. § 9-105(1)(c) ("collateral" means "the property subject to a security interest"). Prior to attachment, we should call it "the intended collateral." Professor McDonnell makes a related point in his discussion of attachment under § 9-203(1)(b). See Coogan & McDonnell, *supra* note 7, §§ 2.08[1],[2] (1991).

144. 32 N.E. 1073 (N.Y. 1893).

145. *Id.*

146. See, e.g., CAL. CIV. CODE § 3440 (Kerr 1906) (repealed 1963) ("Every transfer of

my contention that "creditors" referred exclusively to subsequent judicial lien creditors.

Let me begin with the most obvious objection to my thesis: The chattel mortgage acts often declared unperfected security interests void as against "creditors," not just "judicial lien creditors." This is true—at least as regards the older statutes¹⁴⁷—but the notion that the statutes protected creditors in general is mistaken. For it was horn-book law that a creditor, as such, *lacked standing* to invoke the chattel mortgage acts against a secured party.¹⁴⁸ This is only common sense, because an unsecured creditor has no proprietary interest in her debtor's property that can come into conflict with a security interest.¹⁴⁹ The court in *Karst* had no quarrel with this principle, which it specifically mentioned.¹⁵⁰ The court's statement that the New York statute protected "antecedent creditors" did not relax the requirement that the "creditor" become a judicial lien creditor in order to contest the security interest.

What, then, did the Court of Appeals mean when it said that "antecedent creditors" were within the ambit of the New York act? Here it is necessary to understand a peculiar feature of the older chattel mortgage acts. In certain situations, the older statutes declared a security interest void as against a subsequent judicial lien creditor who acquired her lien *after* the security interest had been perfected.¹⁵¹ This could happen if the secured party waited an "unreasonably" long time (e.g., more than ten days) to cure the ostensible-ownership problem created when he initially acquired his nonpossessory security interest. If the secured party waited too long to perfect, a post-perfec-

personal property . . . is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by . . . change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession . . ."); *cf. id.* § 2957 ("A mortgage of personal property is void as against creditors of the mortgager and subsequent purchasers and encumbrancers of the property in good faith and for value. . .").

147. It is worth noting that all chattel mortgage acts "drafted in this century have protected only lien creditors and purchasers." 1 GILMORE, *supra* note 1, § 16.3. In those jurisdictions, there would be no statutory argument that creditors, as such, are beneficiaries of the recording acts.

148. *See, e.g.,* 1 JONES, *supra* note 54, §§ 245-47; *cf.* 3 GARRARD GLENN, MORTGAGES, DEEDS OF TRUST, AND OTHER SECURITY DEVICES AS TO LAND § 368.1, at 1514 & n.4 (1943); *id.* at § 369.

149. *But cf.* Julie S. Karchin, Note, *Fraudulent Conveyance as a Property Right*, 9 CARDOZO L. REV. 843, 844 (1987) (contending that unsecured creditors who have a power to avoid a transfer under fraudulent conveyance law "are in fact secured creditors").

150. The "creditor" in *Karst* had obtained a judicial lien before bringing suit—and had done so *after* the security interest attached—and was therefore a subsequent judicial lien creditor. *See Karst*, 32 N.E. at 1075.

151. *See* 1 GILMORE, *supra* note 1, § 16.3 (describing pre-Code law).

tion judicial lien creditor could take priority by showing that she had extended credit to the debtor during the period of the secured party's unreasonable delay. In other words, judicial lien creditors who had lent "in the gap"—i.e., after the security interest attached but before it was perfected—could win exemption from the Encumbrance Rule even though they acquired their liens after the secured party had cured the ostensible-ownership problem. While rules protecting "gap lenders" are unfamiliar to those of us raised on Article 9,¹⁵² they were not particularly remarkable in their day.¹⁵³

Karst is famous for its resolution of a different question: If a secured party was guilty of unreasonable delay in perfecting, was his security interest also vulnerable to a post-perfection judicial lien creditor who extended credit *before* the security interest attached? *Karst* answered in the affirmative, holding that the judicial lien creditor prevailed even though she lent "before the gap."¹⁵⁴ The court reasoned that a creditor's detrimental reliance on a debtor's ostensible ownership during the gap period did not necessarily have to take the form of a decision to extend credit.¹⁵⁵ A creditor who lent before the security interest attached might "be lulled into security, and forbear the collection of [her] debts at maturity, by the apparent unencumbered possession and ownership by the debtor of property covered by an undisclosed [security interest]."¹⁵⁶ The fact that the creditor lent "before the gap" did not eliminate the possibility that she detrimentally relied on the debtor's ostensible ownership at some time during the gap period. It is a mistake, *Karst* concluded, to deny gap protection to a post-perfection judicial lien creditor on the ground that she extended credit before the security interest attached.¹⁵⁷

Viewed from this perspective, *Karst*'s holding regarding "antecedent creditors" is not inconsistent with my claim that the acts protected only subsequent judicial lien creditors. The decision certainly

152. Cf. UCC § 9-301 cmt.3 (1987) (§ 9-301(1)(b) "rejects the rule applied in many jurisdictions in pre-Code law that an unperfected security interest is subordinated to all creditors, but requires the lien obtained by legal proceedings to attach to the collateral before the security interest is perfected.").

153. There was, however, controversy about whether a trustee in bankruptcy, in her guise as a hypothetical judicial lien creditor, could claim to have extended credit "in the gap." In a famous but mistaken decision, the Second Circuit said that she could. See *Constance v. Harvey*, 215 F.2d 571 (2d Cir. 1954), *cert. denied*, 348 U.S. 913 (1955). The Supreme Court set matters right in *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603 (1961). Present §§ 544(a)(1) and (a)(2) remove any doubt by specifying that the hypothetical judicial lien creditor "extends credit to the debtor at the time of the commencement of the case."

154. *Karst v. Gane*, 32 N.E. 1073 (N.Y. 1893).

155. *Id.* at 1074.

156. *Id.*

157. *Id.*

did not abandon the requirement that a creditor obtain a judicial lien. Rather, it allowed post-perfection judicial lien creditors who lent either "in the gap" or "before the gap" to prevail against a secured party who waited too long to perfect. This is not the same as holding the act applicable to *antecedent* judicial lien creditors. Nor would such a holding make sense under the rationale of *Karst*, because a creditor who acquired a judicial lien before the security interest attached would have little, if any, occasion to rely to her detriment on a *later* ostensible-ownership problem. *Karst* focused on the effects of unreasonable delay on *subsequent* lienholders.¹⁵⁸ Such a restrictive reading of *Karst* is consistent, moreover, with subsequent accounts of the decision. Gilmore, for example, never suggested that the decision made a tardily recorded security interest vulnerable to an antecedent judicial lien creditor, despite the fact that an antecedent judicial lien creditor is necessarily also an "antecedent creditor."¹⁵⁹

The use of the term "creditors" in the chattel mortgage acts, then, implied a good deal less than met the eye: even *Karst*'s "antecedent creditors" turn out to have been subsequent judicial lien creditors. Cases involving *antecedent* judicial lien creditors were beyond the scope of the chattel mortgage acts and would have been governed by local lien law. Otherwise, the courts would have had to deal with conflicts between the acts and the laws governing judicial liens. The absence of evidence of such conflicts suggests that the division of labor between the two types of statutes was well understood at the time. The chattel mortgage acts covered subsequent judicial lien creditors; cases involving antecedent judicial lien creditors were governed by local lien law.

"Creditors" under the acts and "creditors" under section 9-201 were intended to be coextensive. In both cases, the term refers to *subsequent judicial lien creditors*. Contrary to the Received View, section 9-201's declaration that a security interest is "effective . . . against creditors"¹⁶⁰ does not mean that a security interest is enforceable against a creditor who acquires a judicial lien *before* a security interest

158. *Id.* at 1075 (If there is no delay in recording, there is "no ground upon which *subsequent* lienholders could question the validity of the mortgage.") (emphasis added); *id.* ("The filing, under these circumstances, would be immediate, and make the mortgage valid, as against liens *subsequently* acquired.") (emphasis added).

159. In a similar vein, *Karst* observed that an antecedent purchaser "would stand on his paramount right, and needed no protection . . . against a subsequent mortgagee." *Id.* at 1073 This "paramount right" would be the antecedent purchaser's priority under the Vestedness or Encumbrance Rules. It would be the *subsequent mortgagee* who would need protection.

160. U.C.C. § 9-201 (1987).

attaches. Hence, there is no need to invoke section 9-301(1)(b) to bail out such creditors.

C. *Conclusion: The Limited "Comprehensiveness" of Article 9*

The proponents of the Received View cannot achieve sensible and consistent results when Rival Claimant is an antecedent transferee. This demonstrates, from a pragmatic perspective, that section 9-201 should not apply in Antecedent-Transferee cases despite the Code's use of the apparently generic phrases "purchasers of the collateral" and "creditors." A review of the historical origins of section 9-201 leads to the same conclusion. Section 9-201 was intended to apply to the same persons who were the subject of the acts—"subsequent purchasers" and "creditors." The term "creditors," although apparently unqualified, referred only to subsequent judicial lien creditors. Even in light of *Karst v. Gane*, the chattel mortgage acts dealt exclusively with subsequent transferees. The same is true of section 9-201 of the U.C.C.

A restrictive reading of section 9-201 relieves the pressure to bring Antecedent-Transferee cases under the priority rules of section 9-301(1) or the attachment rule of section 9-203(1)(c). It also eliminates conflict with non-Code law. Substantively, this is all to the good, because the exceptional rules of Article 9 are inadequate to deal with ostensible-ownership problems created when Rival Claimant is an antecedent transferee.

But a restrictive reading has its price: we must abandon the comforting idea that all the law that matters to security interests can be found, neatly packaged, in Article 9. This is bound to meet resistance, for it seems contrary to the entire project of making secured transactions part of the U.C.C. The comments to Article 9 open with the declaration that the statute "sets out a *comprehensive* scheme for the regulation of security interests in personal property and fixtures."¹⁶¹ Under the Received View, this means that every (or nearly every) conflict between Secured Party and Rival Claimant is resolved by Article 9 — a state of affairs that would render the law relating to secured transactions uniform from coast to coast. Local lien law would continue to govern disputes between a judicial lien creditor and a subsequent buyer or between two judicial lien creditors, but it would not apply to disputes between a judicial lien creditor and a subsequent secured party. Most of us are unfamiliar with the details of lien law across the fifty states. But every commercial lawyer can recite section

161. *Id.* § 9-101 cmt. (1987) (emphasis added).

9-301(1)(b). If I am right about section 9-201, these lawyers—or at least their associates—will occasionally have to make an extra visit to the library.

In what sense, then, is Article 9 “comprehensive”? The Code’s accomplishment is one of consolidation. Before Article 9, each state had its own law of secured transactions¹⁶²—rules governing (1) the attachment and perfection of security interests; and (2) the relative priority of secured parties and subsequent transferees. To make matters worse, the rules within a state typically varied depending on the collateral involved.¹⁶³ Results under Article 9 sometimes vary as a function of collateral type, but now the rules are stated in a single statute. Formerly, a state might have had three or four independent statutes and as many sets of public files giving notice of a security interest.¹⁶⁴ The drafters were justifiably proud of the simplification achieved by Article 9, even though the statute (like its predecessors) deals “only” with disputes involving a subsequent transferee. “Comprehensive,” it turns out, is a relative term.

V. THE ANTECEDENT-TRANSFEROR SCENARIO: (PURPORTED) SECURED PARTIES VERSUS ANTECEDENT TRANSFERORS

In contrast to the two previous Scenarios, Antecedent-Transferor cases open with *X* vested in Rival Claimant, not Debtor. Two transactions follow. First, Rival Claimant grants Debtor some *limited* interest respecting *X*. This limited interest—call it “*L*”—might be a leasehold interest on *X*, a security interest on *X*, a trust beneficiary’s interest on *X*, or any other sort of interest that takes *X* as its target.¹⁶⁵ In the second transaction, Debtor (now vested with *L*) purports to grant the secured party a security interest, not on *L*, but on *X* (which is still vested in Rival Claimant). Suppose, for example, that Rival Claimant grants Debtor a leasehold interest on title to a drill press; Debtor then purports to grant Secured Party a security interest on

162. See, e.g., statutes discussed *supra* note 146 and accompanying text.

163. See U.C.C. 9-101 cmt. (1987).

164. Cf. *id.* (Article 9 “supersedes prior legislation dealing with such security devices as chattel mortgages, conditional sales, trust receipts, factor’s liens and assignments of accounts receivable.”).

165. Although *L* may well be an encumbrance on *X*, it need not be. I use “encumbrance” to refer to the interests that are presumptively enforceable against a transferee of *X* under the Encumbrance Rule. But certain types of interests relating to *X*—e.g., a contractual option to buy *X* from someone on a certain date—are not generally enforceable against transferees of *X*. If Helen sells title to her car to Isaac, he will probably take that title free of Jay’s option to acquire title to the car. Although it does not “run with” *X*, the option is nevertheless a potential *L*—i.e., a limited interest respecting *X* that may *itself* be encumbered in favor a secured party.

title to the press. Rival Claimant’s limited transfer to Debtor precedes Debtor’s attempt to create a security interest, so Rival Claimant is an “antecedent transferor.” If Debtor defaults on its obligation to Secured Party, can Secured Party enforce his (purported) security interest on title to the press?

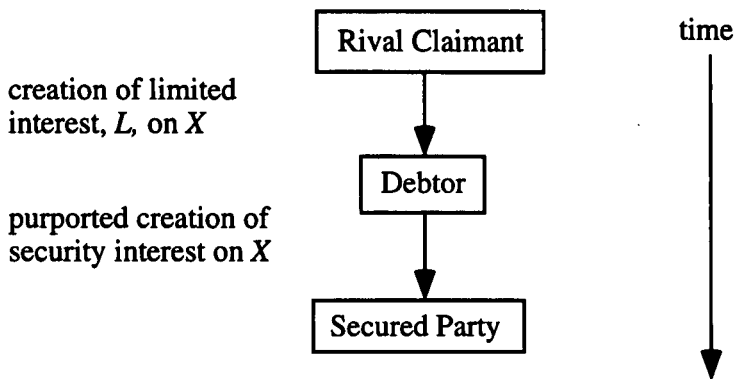


Figure 3: Secured Party v. Antecedent Transferor

Adherents of the Received View offer two very different approaches to this question, both of which I contest on analytical and substantive grounds. I begin with the fact that section 9-201 presumes a security interest to be effective only against “purchasers of the collateral and . . . creditors.”¹⁶⁶ This does not apply to antecedent transferors, who, *as transferors*, are neither “purchasers” from, nor “creditors” of, their transferees. Another argument for the secured party—that priority is conferred by section 9-203(1), which deals with attachment—also fails. Nevertheless, practically everyone assumes that section 9-201 applies in Antecedent-Transferor cases. I argue that this assumption can be traced to prevailing views of the structure of secured transactions—in particular, to misconceptions regarding the way security interests relate to competing property claims and to the “things” that are their ultimate foci.

Next, I turn to the details of the analyses that have developed under the influence of the Received View. There are two main approaches to Antecedent-Transferor cases. The first—the “quantitative analysis”—treats the “size” of *L* as the critical variable in determining whether Secured Party will prevail against Rival Claimant. I argue that the quantitative analysis is internally inconsistent, that it leads to conflicts with non-Code law, and that it fails to explain why the size of Debtor’s interest should be so important in these cases.

166. U.C.C. 9-201 (1987).

The second approach—the “qualitative analysis”—de-emphasizes section 9-203(1)(c) and tries to open the door for the application of non-Code law. While I support this program, I believe it cannot succeed so long as it takes section 9-201 as its starting point.

My own proposal rejects both the Received View of section 9-201 and the prevailing understanding of what happens in a secured transaction. Cases involving antecedent transferors should be analyzed using the property-transfer baselines—specifically, the Vestedness Rule—and any exceptional rules relevant under the circumstances, whether or not these rules are part of the U.C.C. My proposed analysis can perhaps be reconciled with the phrasing of present section 9-203(1)(c), but I favor revising the “rights requirement” and related provisions to reflect a more precise understanding of the structure of secured transactions and their place within general property-transfer law. Accordingly, I offer new statutory language that avoids the difficulties that afflict prevailing accounts of Antecedent-Transferor cases.

A. *The Received View and Section 9-201*

The Received View presumes a security interest effective against *everyone*, including antecedent transferors. But the priority rules of sections 9-301(1) and 9-312 do nothing to protect an antecedent transferor against a purported secured party. This shortcoming has encouraged a redirection of attention to section 9-203(1)(c),¹⁶⁷ which declares that a purported security interest does not attach and “is not enforceable against . . . third parties” unless the (would-be) debtor¹⁶⁸ has “rights in the collateral.” The basic argument in favor of the antecedent transferor is that *L*, the limited interest she conveyed to the debtor, does not endow the debtor with the “rights” required by the statute. The purported security interest therefore does not attach and cannot be enforced against the antecedent transferor, who is a “third party” under section 9-203(1). When the debtor lacks suffi-

167. Section 9-203(1) provides that “[a] security interest is not enforceable . . . and does not attach unless:

- (a) the collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral . . . ;
- (b) value has been given; and
- (c) the debtor has rights in the collateral.

My discussion assumes that the first two conditions have been satisfied; all that is at issue is the requirement that the debtor have “rights in the collateral.”

168. Actually, there is no need to speak of a “would-be debtor” because I use “debtor” to refer to the person who *purports* to grant a security interest on *X*. Someone who does not succeed in this effort is nonetheless a “debtor.” See *supra* note 11.

cient “rights,” the alleged presumption in favor of the purported secured party is overcome.

Before examining the difficulties that plague this argument and its variations, consider two more fundamental questions. Does section 9-201 apply against antecedent transferors in the first place? If not, does section 9-203(1) provide Secured Party with an independent basis for claiming priority over Rival Claimant? Contrary to the Received View, the answer to both these questions is “no.” Attempts to protect Rival Claimant using the “rights requirement” are, I submit, misguided from the outset.

1. ARE ANTECEDENT TRANSFERORS EITHER “PURCHASERS” FROM, OR “CREDITORS” OF, THEIR TRANSFEREES?

Section 9-201 declares a security interest effective “between the parties [to the security agreement], against purchasers of the collateral and against creditors.”¹⁶⁹ Rival Claimant is not a “party” to the security agreement between Debtor and Secured Party.¹⁷⁰ If Secured Party is to prevail under section 9-201, he must do so because Rival Claimant is either a “purchaser of the collateral” or a “creditor.” Yet a transferor, as such, is neither.

In the Antecedent-Transferor Scenario, Rival Claimant transfers *L* to Debtor. This is the opposite of purchasing an interest from Debtor. Hence, section 9-201 cannot make a security interest effective against Rival Claimant on the theory that she is a “purchaser of the collateral.”¹⁷¹ While there are transactions—most notably, conditional sales—in which an antecedent transferor comes within the grasp of Article 9, the Code accomplishes this by recharacterizing the transferor as a transferee.¹⁷²

169. U.C.C. 9-201 (1987).

170. Section 1-201(29) defines a “party” as “a person who has engaged in a transaction or made an agreement within this Act.” The definition distinguishes a “party” from a “third party,” but fails to define that latter term.

171. The Code defines “purchaser” in § 1-201(33) as a “person who takes by purchase.” Section 1-201(32) defines “purchase” as including “taking by sale, discount, negotiation, mortgage, pledge, lien, issue or re-issue, gift or any other voluntary transaction creating an interest in property.” The core definition of “purchaser” as the beneficiary of a transfer made with the consent of the transferor is standard in commercial law and bankruptcy. *See, e.g.*, 11 U.S.C. § 101(43) (Bankruptcy Code’s definition of “purchaser” as “transferee of a voluntary transfer.”).

It is irrelevant that Rival Claimant may have purchased *X* from some *fourth* person. If it mattered, we would have to treat differently cases in which Rival Claimant became vested with *X* other than by purchase—e.g., by finding the relevant chattel on the street, growing the chattel herself, or taking *X* by judicial process. Such a distinction has no historical or substantive foundation.

172. The transferor is viewed as purchasing a security interest from her transferee (the

Intuitively, it does not seem that Rival Claimant becomes a "creditor" simply by granting *L* to Debtor. But the point deserves a closer look. Because Rival Claimant has granted Debtor a *limited* interest on *X*, she necessarily retains certain rights against her transferee. Do these rights make her a "creditor" of her transferee?¹⁷³ Suppose, again, that *L* is a leasehold interest on title to a drill press. Rival Claimant has a right that Debtor surrender the press at the end of the lease term, but this hardly makes Rival Claimant a "creditor" of the lessee. Two considerations determine Rival Claimant's status vis-a-vis Debtor: (1) Rival Claimant remains vested with title to the press, which carries with it a right to possession; and (2) this right is in abeyance so long as Debtor's leasehold interest is in effect. Rival Claimant has a "proprietary" right against Debtor. In this respect, her right to take possession of the drill press upon termination of the leasehold is no different from, say, Smith's proprietary right that Jones stay off Smith's land. We do not say that Smith is Jones's "creditor," even though Jones "owes" Smith a duty (a "proprietary duty") not to enter the land. In the leasehold situation, Debtor has a proprietary duty to surrender the press at the end of the lease term. Rival Claimant has a proprietary right that Debtor do just that, but Rival Claimant is not Debtor's "creditor" on that account. Creditors have "personal" rights against their debtors. While a distinction

conditional buyer): A purported "retention . . . of title by a seller of goods notwithstanding shipment or delivery to the buyer . . . is limited in effect to a reservation of a 'security interest.'" § 1-201(37). "Reservation" is a term of art drawn from traditional conveyancing. It describes a transaction in which *A* transfers *X* to *B*, and *B* immediately "grants back" to *A* some limited interest relating to *X*. *A* "reserves" the limited interest, though *B* granted it to him. See, e.g., Willard v. First Church of Christ, Scientist, 498 P.2d 987, 989 (Cal. 1972) ("A reservation allows a grantor's whole interest . . . to pass to the grantee, but reverts a newly created interest in the grantor."); 4 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY § 972 (1939). Because the transfer back to *A* occurs with *B*'s consent, *A* is a "purchaser" from *B*. When § 1-201(37) limits the effect of the conditional seller's attempt to retain title to the reservation of a security interest, it is telling us to view *A* as having assigned title to *B*, who then grants *A* back a security interest on that title. A dispute between *A* and a subsequent secured party, a subsequent judicial lien creditor, or a subsequent buyer is then a controversy between two *transferees*. As such, it is governed by the Encumbrance Rule and falls within the scope of section 9-201.

173. The Code is characteristically unhelpful to those seeking to define such a basic notion as "creditor." Section 1-201(12) says only that "creditor" includes "a general creditor, a secured creditor, a lien creditor and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity and an executor or administrator of an insolvent debtor's or assignor's estate." U.C.C. 1-201(12) (1987). The Bankruptcy Code is somewhat more helpful. It defines "creditor" basically as someone with a "claim." 11 U.S.C. § 101(9). "Claim" is defined broadly to include "any right to payment," 11 U.S.C. § 101(4)(A), and "any right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(4)(B). This comes close to the idea of "personal rights" mentioned in the text.

between proprietary and personal rights permeates commercial law, contemporary analysts seem reluctant to recognize it, presumably because they are wary of lapsing into formalism.¹⁷⁴ Yet, it is hardly possible to analyze existing legal materials without admitting a distinction between “owning” and “being owed.”¹⁷⁵

If we acknowledge this difference, we find no statutory basis for applying section 9-201 against an antecedent transferor. We should not extend “creditor” to include antecedent transferors as such, unless we have convincing evidence that the drafters of Article 9 intended to abrogate the long-standing and fundamental distinction between creditors and owners. It would be within the power of the Code to abolish the distinction between personal and proprietary claims, but nothing in the Code suggests that it has actually done

174. Professor Andrew, for example, cautions against relying on a distinction between “contract rights” and “property rights,” because the terms may merely be labels. See Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding “Rejection”*, 59 U. COLO. L. REV. 845, 924 (1988). I would add that “contract rights” are just one instance of what I am calling “personal rights,” which include non-proprietary claims not based on a contract or other agreement. A familiar example is a tort victim’s (personal) right to compensation from her tortfeasor.

175. Professor Westbrook, paraphrasing Churchill, observes that “the property-contract distinction is the worst possible, except for all the others.” Jay L. Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227, 260 (1989) (footnote omitted). To avoid controversial associations, Westbrook proposes referring to proprietary (i.e., “property”) rights as “Interests in the Thing Itself.” *Id.* at 258-59. Westbrook, like Andrew, speaks of “contract rights” when he presumably means personal rights.

The introduction of a new term—“Interests in the Thing Itself”—may be unnecessary. Lawyers in other parts of the English-speaking world regularly invoke the idea of “proprietary” (or “real”) rights without falling into formalism. See, e.g., PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 49-50 (1985); LORD GOFF & GARETH JONES, THE LAW OF RESTITUTION 55-56, 60-63 (3d ed. 1986); GOODE, *supra* note 39, at 77-78; ROYSTON M. GOODE, PROPRIETARY RIGHTS AND INSOLVENCY IN SALES TRANSACTIONS 1-3, 10, 42 (1985); Royston M. Goode, *Ownership and Obligation in Commercial Transactions*, 103 LAW. Q. REV. 433, 433-41 (1987); David Stevens, *Restitution, Property, and the Cause of Action in Unjust Enrichment: Getting by with Fewer Things (Part I)*, 39 U. TORONTO L.J. 258, 290-95 (1989).

To avoid misunderstanding, I should note that I fully accept Hohfeld’s fundamental insight that *all* rights are rights against persons and are in that sense “personal.” See WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (1919). But that is not the issue here. Our legal system frequently treats some rights (which it calls “personal”) differently from others (which it calls “proprietary”). Bankruptcy law is an outstanding example. See, e.g., DOUGLAS G. BAIRD & THOMAS H. JACKSON, *CASES, MATERIALS AND PROBLEMS ON BANKRUPTCY* 218-19, 317 (2d ed. 1990) (bankruptcy law respects “property rights” asserted against the debtor or the debtor’s estate); Stevens, *supra*, at 290-92 (discussing “the bankruptcy advantage” enjoyed by proprietary claims in Anglo-Canadian law). A Hohfeldian will insist that even “proprietary” rights are rights against persons, but she need not deny that these rights receive special treatment. The Hohfeldian point is that the *justification* for special treatment (assuming there is one) cannot be based on the conventional distinction between rights “against persons” (“in personam”) and rights “against things” (“in rem”).

so.¹⁷⁶

True, a transferor may *also* have a personal claim against the transferee and thus be a "creditor" in the usual sense. In a leasehold situation, for example, the lessee will probably have undertaken to pay rent, an obligation not inherent in a lessee's interest. The promise to pay rent endows the lessor with a personal right against the lessee, but this status is not essential to the lessor's rights *qua* lessor. Suppose a philanthropist leases title to a refrigerator to an orphanage for one year without charging rent. The philanthropist is a lessor with a right to get the machine back after a year, but this is a proprietary right; the orphanage is not "indebted" to the philanthropist. Even if the lessor is no philanthropist, she is not necessarily a "creditor." Suppose she demands \$1,000 as rent, which the orphanage pays in advance. This is a commercial transaction, but it does not result in the orphanage actually owing a debt to the lessor. The orphanage must surrender the refrigerator at the end of the term, but the lessor is not the orphanage's "creditor." Even in cases in which the duty to pay rent is concurrent with the leasehold, the lessor's proprietary rights should be distinguished from her personal claim for rent.

I therefore reject any contention that section 9-201 applies, even *prima facie*, against antecedent transferors. If an antecedent transferor is subject to a security interest purportedly granted by her transferee, it must be on other grounds.

2. DOES SECTION 9-203(1) SUPPLY AN INDEPENDENT BASIS UPON WHICH A SECURED PARTY CAN ASSERT PRIORITY?

Conventional analysis of Antecedent-Transferor cases has traditionally focused on how section 9-203(1)(c) can "protect" antecedent transferors.¹⁷⁷ This is understandable in cases where Debtor's "rights in the collateral" do not exceed the statutory threshold (whatever that may be). In that event, section 9-203(1)(c) tells us, the purported security interest is *not* enforceable against Rival Claimant. We can then resolve the dispute without having to face the more fundamental question of whether section 9-201 applies against Rival Claimant in

176. Professor Nickles reaches a similar conclusion in cases where the antecedent transferor is a conditional seller, i.e., where he retains title to goods pending full payment by the conditional buyer. "The term 'creditor' is defined by the Code, but not so broadly as clearly to include such sellers." HILLMAN ET AL., *supra* note 4, § 18.01[2], at 18-5 n.16. Nickles says that there is a "possible problem with relying on [U.C.C. § 9-201]" as the basis for the purported secured party's priority against the conditional seller. *Id.* (emphasis added). I think the problem is clear and present in *any* attempt to enforce a secured party's purported security interest against an antecedent transferor.

177. See quantitative analysis, *infra* Part V.C.1.

the first place. But whenever we decide Debtor's "rights" *are* sufficient to permit attachment, the issue becomes unavoidable. If section 9-201 does not make a security interest effective against antecedent transferors, what is the basis for awarding Secured Party priority over Rival Claimant?

One might simply assume that section 9-203(1) *itself* confers priority on Secured Party. The idea would be that, because Secured Party *loses* when Debtor's "rights" are *insufficient*, he must *win* when section 9-203(1)(c) is satisfied. But this line of reasoning is a non sequitur.¹⁷⁸ Section 9-203(1)(c) states that the purported security interest is not enforceable against "third parties" unless Debtor has "rights in the collateral." This is equivalent to saying that a security interest is enforceable only if it attaches.¹⁷⁹ Attachment, in other words, is a *necessary* condition to enforcement of the security interest against Rival Claimant. Secured Party, however, must establish that attachment is a *sufficient* condition. Yet nothing in section 9-203 allows the inference that a security interest can be enforced against Rival Claimant simply because it has attached. If we wish to know against whom a security interest is "effective," we must consult section 9-201, not section 9-203(1).

From a structural perspective, it makes sense that section 9-203(1) does not provide an independent ground of priority. The class of persons mentioned in section 9-203(1)—"the debtor or third parties"—includes all the persons named in section 9-201 ("parties [to the security agreement], . . . purchasers of the collateral and . . . creditors"). If section 9-203(1) independently conferred priority on Secured Party, what would be the point of section 9-201? Moreover, if section 9-203(1) were the source of Secured Party's priority, shouldn't it include an "except-as-otherwise-provided" clause, like the one appearing in section 9-201? Certainly, the drafters intended the exceptional rules in sections 9-301(1) and 9-312 to have *some* effect!

It is conceivable that the drafters misdrafted section 9-203(1) and included section 9-201 by mistake. But I find it more reasonable to conclude that section 9-203(1) does not itself provide secured parties

178. Specifically, it is the fallacy of "affirming the consequent." See Andrew J. McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 774-75 (1988). Grant the following proposition: If it is 1:00 a.m., it is dark outside. I now observe that it is dark outside. Can I validly infer that it is 1:00 a.m.? No—perhaps it is 2:00 a.m. Perhaps it is noon, but I am making my observation at the North Pole in January. Maybe there is a solar eclipse. Maybe the sun has died.

179. On the logical equivalence of "Not-P unless Q" and "P only if Q," see, e.g., RICHARD C. JEFFREY, *FORMAL LOGIC: ITS SCOPE AND LIMITS* 54-55 (1967). Of course, "P only if Q" is not equivalent to "Q only if P."

with a basis for asserting priority against third parties. If Secured Party enjoys priority over Rival Claimant *under Article 9*, it must be because section 9-201 says he does. But section 9-201's refers only to "purchasers" and "creditors." Antecedent transferors are not mentioned and consequently have no reason to fear Article 9.¹⁸⁰

B. *The Prevailing Conception of the Structure of a Secured Transaction and Its Contribution to the Received View*

If the case for applying section 9-201 against antecedent transferors is so weak, why does the Received View dominate analysis of these cases? An explanation lies in the way most courts and commentators conceive of the interests of Rival Claimant, Debtor, and Secured Party and of how these interests relate to the things (cars, copyrights, and so on) that are their common focus.

My discussion has consistently presented security interests, leaseholds, judicial liens, and other encumbrances as attaching to *other interests*—not to the things to which those interest ultimately relate. But conventional usage does not observe this distinction, especially when the targeted interest is the relatively comprehensive interest known as "title." A leasehold interest "on title to the computer," for example, is for most people just a leasehold interest "in the computer." This common perception pervades Article 9, which speaks of security interests "in" various tangible¹⁸¹ and intangible¹⁸² things. It also appears in the use of "collateral," a term I have so far refrained from using. Article 9 abstractly defines "collateral" as "the property subject to a security interest,"¹⁸³ but it assumes that this property can have a location¹⁸⁴ and be the subject of possession.¹⁸⁵ The reference is

180. This is not to say that an antecedent transferor never has to worry about security interests created under Article 9. These security interests may prevail under *other law*. See *infra*.

181. Section 9-102(1)(a), for example, provides that Article 9 applies to any transaction "intended to create a security interest in . . . goods," which are defined, with certain exceptions, in § 9-105(1)(h) as "*things which are movable* at the time the security interest attaches." (Emphasis added.)

182. Similarly, § 9-102(1)(a) makes Article 9 applicable to transactions "intended to create a security interest in . . . accounts," which are defined in § 9-106 as "*any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper*" (emphasis added).

183. *Id.* § 9-105(1)(c) (1987).

184. See, e.g., *id.* § 9-103(1)(b) (1987) (referring to "the law of the jurisdiction where the collateral is"); *id.* § 9-103(1)(d) (1987) (referring to collateral being "brought into and kept in this state while subject to a security interest perfected under the law of the jurisdiction from which the collateral was removed").

185. See, e.g., *id.* § 9-203(1)(a) (purported security interest does not attach unless the debtor has signed a security agreement or "the collateral is in the possession of the secured party"); *id.* § 9-207(1) (secured party "must use reasonable care in the custody and preservation of

plainly to things, not to interests respecting things.

This conception has important consequences in the analysis of Antecedent-Transferor cases. The idea of a security interest "in the computer" suggests that there is an *unmediated* relationship between Secured Party and the thing. In much the same way, Rival Claimant's title and Debtor's leasehold are viewed as interests "in the computer." This usage suggests that the three contending interests occupy the same conceptual plane and have a common intersection "in the computer." The Antecedent-Transferor Scenario then seems to involve a tug-of-war in which the computer is pulled in three directions at once. Focusing on the contest between Rival Claimant and Secured Party, it is natural to ask whether the leasehold interest is "stronger" than the security interest or vice versa.

If we characterize the conflict between Rival Claimant and Secured Party this way, we would expect Article 9 to tell us—explicitly—which of the contending interests prevails. This gives the Received View the opening it needs. For if section 9-201 applies against *everyone*, not just subsequent transferees, it supplies the sort of rule we expect. The security interest, Article 9 then seems to say, is presumptively stronger than any other interest "in the computer," including *Rival Claimant's title*. Once this threshold has been crossed, the critical question appears to be whether the Code provides the antecedent transferor with a way to rebut this presumption in appropriate circumstances. I argue that it does not. The customary conception of how security interests and other proprietary claims relate to things and to each other leads us up the wrong alley.

C. *Protecting Antecedent Transferors: Two Conventional Approaches*

Courts and commentators offer Rival Claimant two principal ways to rebut the supposed presumption against antecedent transferors. These approaches rely on section 9-203(1)(c)'s requirement that Debtor have "rights in the collateral."¹⁸⁶ The fact that neither

collateral in his possession"); *Id.* § 9-304(1) (subject to some exceptions, security interest in money or instruments can be perfected only by the secured party's taking possession).

186. Professor Harris has proposed a third approach, which does not depend on § 9-203(1)(c). According to Harris, § 9-201 is subject to § 2-403(1), which "makes clear that a purchaser of a limited interest acquires rights only to the extent of the interest purchased." See Harris, *supra* note 7, at 865; see also *id.* at 811 n.26. On this reading, § 2-403(1) codifies the Vestedness Rule as it applies against a purported secured party asserting an encumbrance on an interest relating to goods. But Harris has been misled by the ambiguity of the phrase "purchaser of a limited interest." Harris assumes that it refers to a purchaser of an *X* that is something less than title. On this reading, an assignee of a leasehold interest is a "purchaser of a limited interest," and the assignee "acquires rights only to the extent of the interest

approach is successful helps to show that the Received View is wrong in assuming that section 9-201 applies against an antecedent transferor.

1. THE QUANTITATIVE ANALYSIS

Recall the hypothetical where Rival Claimant grants Debtor a leasehold interest *L* on title to a computer. Under the prevailing conception, Secured Party can get a security interest "in the computer," but only if Debtor has "rights in the computer." If the rights requirement is simply a requirement that Debtor have *some* "rights," Secured Party is home free: everyone will admit that Debtor, vested with a leasehold interest "in the computer," has *some* "rights in the computer." In fact, Debtor's "rights" seem to pass the test no matter how small *L* happens to be. This, however, implies that Secured Party defeats Rival Claimant in *every* Antecedent-Transferor case, a result that no one is willing to accept. To avoid this, it is necessary to hold that section 9-203(1)(c) demands that Debtor have *more* than "some rights." The issue thus becomes whether Debtor's "rights" are "sufficient" under the statute.

To assess the sufficiency of Debtor's "rights," we weigh or measure *L* against a standard supposedly established by section 9-203(1)(c). Although this process need not involve numerical evaluations, it nevertheless focuses on *how big L* is. Under this "quantitative" analysis, Rival Claimant can win even if it is clear that Debtor has *some* "rights in the collateral": Debtor's "rights," while real and identifiable, may not be big enough to satisfy section 9-203(1)(c).

The quantitative analysis is linguistically plausible, given the draft-

purchased [i.e., the leasehold]." But § 2-403(1) could instead be referring to someone who purchases an encumbrance (which *is* a "limited interest") on an *X* that may *or may not* be a limited interest. On this second reading, someone who takes a security interest on title to a drill press is a "purchaser of a limited interest" even though the targeted interest (title to the press) is not itself a "limited interest." Under this interpretation, § 2-403(1)'s declaration that "a purchaser of a limited interest acquires rights only to the extent of the interest purchased" is a platitude, not a codification of the Vestedness Rule.

A moment's reflection confirms that we are dealing with a platitude. Section 2-403(1) starts by declaring that a "purchaser of goods acquires all title which its transferor had"—language that suggests that the transferor's entire interest is *assigned* to the purchaser. To remove any doubt that a transferor can grant only *limited* interest if he so desires, the statute adds the qualification that "a purchaser of a limited interest acquires rights only to the extent of the interest purchased." This is confirmed by the Official Comment, which explains that a "contract of purchase is of course limited by its own terms as in a case of a pledge for a limited amount or a sale of a fractional interest in goods." § 2-403 cmt. 1 (1987). Accordingly, I think Professor Harris is mistaken to suppose that the "limited interest" language in § 2-403(1) lets an antecedent transferor rebut section 9-201's alleged presumption in favor of a (purported) secured party.

ing of Article 9. Yet, despite its persistent popularity with the courts, the quantitative analysis cannot withstand close scrutiny.

a. Omission of the Relevant Threshold

To judge from the existing literature, it is difficult to assess the relative "sizes" of the various "L's" with which a debtor may be vested.¹⁸⁷ Even worse, no one really knows how big *L* must be to be big enough. Article 9, as its principal drafter observed, "does not specify the quantum of 'rights' which a debtor must have in collateral to support a security interest."¹⁸⁸

This omission is surprising. Antecedent-Transferor cases require us to determine whether the debtor's "rights" are sufficient, but we are not told what constitutes sufficiency. Contrast this to Article 9's exquisitely detailed treatment of Subsequent-Transferee disputes.¹⁸⁹ Why, if section 9-203(1)(c) deals with Antecedent-Transferor cases, is Article 9 so cryptic about the meaning of "rights in the collateral"?¹⁹⁰ The courts have attempted to define the requisite threshold, but the resulting jurisprudence is implausibly complex.¹⁹¹

187. For heroic attempts to summarize the state of the case law, see CLARK, *supra* note 4, ¶ 2.04; Coogan & McDonnell, *supra* note 7, § 2.08; HILLMAN ET AL., *supra* note 4, ch. 18; Steven W. Sanford, *Debtor's Rights in Collateral as a Requirement for Attachment of a Security Interest Under the Uniform Commercial Code*, in COOGAN ET AL., *supra* note 4, ch. 4B; WHITE & SUMMERS, *supra* note 4, § 22-6; Ralph C. Anzivino, *When Does a Debtor Have Rights in the Collateral Under Article 9 of the Uniform Commercial Code?*, 61 MARQ. L. REV. 23 (1977); Joseph W. Turner, Note, *Rights in the Collateral Under U.C.C. § 9-203*, 54 MO. L. REV. 677 (1989).

188. 1 GILMORE, *supra* note 1, at 353. Section 9-204(2) of the 1962 Code attempted to determine the earliest *date* on which a debtor could have "rights in" certain types of things. For example, a debtor could not have "rights . . . in fish until caught," U.C.C. § 9-204(2)(b) (repealed 1972), or "in an account until it comes into existence." *Id.* § 9-204(2)(d). These rules focused on the process by which a legally recognized "thing" comes into being; strictly speaking, this would establish the earliest date on which *anyone* could have an interest respecting that thing. Nevertheless, knowing the earliest date on which a debtor could possibly have "rights in" a thing still did not explain how big those "rights" had to be to satisfy § 9-203(1)(c).

Former § 9-204(2) was deleted in 1972. According to the revisers, it was "eliminated as unnecessary and in some cases confusing. Its operation appeared to be arbitrary, and it is believed that the questions considered are best left to the courts." *Id.* § 9-204 reasons for 1972 change.

189. See § 9-301(1)(a)-(d), § 9-312(1)-(7).

190. Gilmore was content to observe that something "less than full 'legal title' [would] do" for purposes of § 9-203(1)(c), including the "special property interest" that a would-be buyer acquires as soon as goods are identified in a contract for sale. 1 GILMORE, *supra* note 1, at 353. Although Gilmore made no effort to identify the critical threshold, his dictum is a favorite with the courts. See, e.g., *Merchants Bank v. Atchison (In re Atchison)*, 832 F.2d 1236, 1238 (11th Cir. 1987); *State Bank of Young America v. Vidmar Iron Works, Inc.*, 292 N.W.2d 244, 249 (Minn. 1980); *Chrysler Corp. v. Adamic, Inc.*, 208 N.W.2d 97, 104 (Wis. 1973).

191. Coogan & McDonnell, *supra* note 7, § 2.08.

b. Conceptual Complications

Despite doctrinal confusion, the courts have generally managed to achieve results similar to those obtaining under pre-Code law. In the computer hypothetical, for instance, Debtor's default would not have empowered Secured Party to sell Rival Claimant's interest (title). Yet, Secured Party would have been able to sell Debtor's interest (the leasehold) and credit the proceeds against the secured debt.¹⁹²

Commentators agree that Article 9 should reach the same or similar results.¹⁹³ The quantitative analysis, however, is unable to deliver the goods. Assume that Debtor, which has a viable leasehold interest "in the computer," defaults on its secured obligation. Secured Party forecloses and purports to auction off "the computer"—more accurately, title to the computer. The conventional way to protect Rival Claimant is to argue that Secured Party's purported security interest did not attach. Under the quantitative analysis, we must find Debtor's "rights in the computer"—here, its leasehold interest—insufficient to satisfy section 9-203(1)(c).

In some situations, such a finding appears plausible. If the leasehold is scheduled to expire in just a few days, Debtor's "rights in the computer" do not seem very substantial. The same is true if *L* is a bailment interest terminable at the discretion of the bailor (Rival Claimant). These are easy cases for the quantitative analysis. But what if *L* is a leasehold with five years left to run and Debtor has paid Rival Claimant the full rent in advance? If we are still unwilling to let Secured Party sell "the computer" (i.e., Rival Claimant's title), we must hold that Debtor's "rights"—a long-term, fully paid-up leasehold interest—are again insufficient to sustain the purported security interest. This is counterintuitive. Given these facts, Debtor's "rights in the computer" look fairly substantial. It may be possible for Secured Party to show that the market for long-term, fully paid-up

192. The amount of those proceeds would have depended on many factors, the most important being whether the leasehold interest, once assigned, would have remained in force against Rival Claimant. If, by the time Secured Party enforced his security interest, the leasehold had expired or was about to expire, the right to step into Debtor's shoes would be worthless, or nearly so. Even if the leasehold had a considerable period to run, there still might be no one willing to buy it. Suppose, for example, that the leasehold was subject to termination unless the lessee (or any buyer) paid Rival Claimant rent of \$1,000 a month. If similar computers could be leased on the market for \$700 a month, there would be no bidders for Debtor's leasehold, and Secured Party's security interest would be worthless.

On the other hand, if the rent due Rival Claimant was only \$500 a month, a buyer would be willing to pay up to \$200 a month to assume the lease. If it had ten months to run, Secured Party could receive as much as \$2,000 in proceeds, which might go a long way toward satisfying Debtor's debt to Secured Party.

193. See *supra* note 187.

leasehold interests on title to the computer values such an interest almost as highly as an unencumbered title to the machine. In that case, it seems unrealistic to deny the sufficiency of Debtor's interest.

The quantitative analysis is open to another conceptual objection. In my last example, we would not permit Secured Party to sell Rival Claimant's title, but we would want him to be able to sell Debtor's leasehold interest. Secured Party's power to sell the leasehold interest depends on his having some sort of security interest—but a security interest *on what*? Under the prevailing conception, security interests attach to things, so Secured Party must have a security interest “in the computer.” This implies that Debtor's “rights in the computer” *do* satisfy section 9-203(1)(c). But this implication contradicts our explanation of why Secured Party cannot sell off Rival Claimant's title. Obviously, we cannot maintain that Debtor simultaneously does and does not have “rights in the computer” sufficient to satisfy section 9-203(1)(c).

c. Conflicts with Non-Code Law

A third problem with the quantitative analysis is its potential conflict with non-Code law. Here my objection is one of principle, because non-Code law does not do much to protect would-be secured parties from antecedent transferors. For purposes of exposition, however, imagine a dispute governed by one of the old mercantile factors acts, which are the ancestors of the U.C.C.'s rules covering consignments. Most states have repealed their acts, but the Code does not require them to do so.¹⁹⁴ Indeed, several of the Comments anticipate that the acts will remain on the books.¹⁹⁵ Pennsylvania, the first state to adopt the U.C.C., retains its factors act,¹⁹⁶ as does Massachusetts.¹⁹⁷ The challenge posed by the factors acts is not entirely theoretical. In any event, it exposes another weakness of the conventional analysis under section 9-203(1)(c).

194. The acts are not included on § 10-102(1)'s list of statutes automatically repealed by the Code. Section 10-102(1) does repeal “factor's lien acts,” but these are a completely different matter. See generally 1 GILMORE, *supra* note 1, ch. 5 (discussing factor's lien acts).

195. Official Comment 2 to § 2-236 states that “there is no intent in this Section to narrow the protection afforded to third parties in any jurisdiction that has a selling Factors Act. The purpose of the exception is merely to limit the effect of the present subsection itself, in the absence of any such Factors Act, to cases in which creditors of the buyer may reasonably be deemed to have been misled by the secret reservation [of title].” See also *id.* § 2-403 cmt. 1 (“The section also leaves unimpaired the powers given to selling factors under the earlier Factors Acts.”); *Id.* § 7-209 cmt 3.

196. PENN. STAT. ANN. tit. 6, § 201 (1963).

197. MASS. GEN. LAWS ANN. ch. 104, § 1 (1990). The statute was amended as recently as 1986. 1986 MASS. ACTS 649 (approved Dec. 24, 1986).

Assume that Rival Claimant, who manufactures electronic goods, has title to a new television set. Rival Claimant appoints Debtor, a merchant dealing in television sets, to serve as her mercantile factor; this invests Debtor with an *L* that I will call a "factor's interest." Under the factoring arrangement, Rival Claimant entrusts possession of the television set to Debtor so that Debtor can serve as her retail outlet. Debtor is authorized to display the set to its customers and explicitly empowered to sell Rival Claimant's title for \$1,000. Debtor is obligated to remit the sale proceeds to Rival Claimant, net of a \$50 commission for Debtor's services in arranging the sale.

Now, suppose that Debtor, having taken possession of the television set and put it in its showroom, borrows \$1,000 from Secured Party, to whom it purports to grant a security interest "in the television set."¹⁹⁸ A few months later, Debtor defaults and Secured Party tries to enforce his purported encumbrance by foreclosure. Rival Claimant intervenes, seeking to recover her television set. Rival Claimant argues that her arrangement with Debtor, by its terms, empowers Debtor only to *sell* her title, not to encumber it. Rival Claimant even points to specific provisions in the factoring agreement where Debtor acknowledges that it has no power to grant anyone any kind of security interest "in the television set," especially if that security interest is to secure Debtor's own obligations. Rival Claimant therefore asserts that the purported transfer to Secured Party is a nullity.

The factors acts ensured that Rival Claimant's argument would not succeed. Secured Party (or any third person, for that matter) faces an ostensible-ownership problem when he deals with Debtor, a merchant in possession of a television set that looks like any other item in its inventory. The factors acts protected Secured Party by endowing Debtor with a statutory power to transfer Rival Claimant's title to a good-faith purchaser for value, regardless of any restrictions that might appear in Rival Claimant's agreement with Debtor.¹⁹⁹ Thus, the Pennsylvania statute provides that, if a factor in possession purports to make a transfer to someone who gives new value for the

198. If the security agreement is fastidiously drafted, Debtor will purport to encumber "title to the television set." In all probability, however, the agreement will just say that Debtor grants Secured Party a security interest "in the television set." My analysis will treat the latter phrase as an attempt to express the former idea.

199. The much-imitated English Factors Act declared that "any sale, pledge, or other disposition of . . . goods, made by . . . [a factor] when acting in the ordinary course of business of a mercantile agent, shall . . . be as valid as if . . . [the factor] were expressly authorized by the owner of the goods to make the same." Factors Act, 1889, 52 & 53 Vict., ch. 45, § 2(1). Notice the fictive, or quasi-fictive component, in this rule, which determines results "as if" the factor had actual authorization to make the transfer.

transfer and takes without notice that the purported transferor is only a factor, that person "shall acquire . . . the same interest in . . . the said merchandise as he would have acquired thereby if such . . . factor had been the actual owner thereof."²⁰⁰ The statute creates an exception to the Vestedness Rule, letting Secured Party's security interest attach to Rival Claimant's title if Secured Party takes without knowledge and gives new value. This result is both fair and efficient.

But it is difficult to reach this result using the quantitative analysis. The purported security interest can attach only if Debtor's "rights in the collateral" satisfy section 9-203(1)(c). Under the factoring arrangement, Debtor's "rights" consist of a bailment interest combined with a power to sell Rival Claimant's title. To avoid conflict with the factors act when Secured Party is a good-faith purchaser for value, Debtor's "rights" must be sufficient to permit a security interest to attach "to the television set." This is not disturbing in itself, but it is hard to reconcile with common intuitions regarding other *L*'s. As we have seen, the interest of a long-term, fully paid lessee is *not* considered substantial enough to support a security interest "in" the relevant thing.²⁰¹ Such evaluations are relatively subjective, but I suspect that most people would regard the long-term lessee's interest as "bigger" than that of a factor, who is usually no more than a bailee at will with a power of sale. If so, how can the factor's interest supply the necessary "quantum of rights" while the lessee's interest does not?

Another weakness of the quantitative analysis is the role of Secured Party's state of mind. Under the Pennsylvania act, Secured Party defeats Rival Claimant if he lends and takes his purported security interest without knowledge of the terms of the factoring arrangement.²⁰² To reproduce this result, the quantitative analysis must hold that Debtor's "rights" satisfy section 9-203(1)(c). But in an otherwise identical case, where Secured Party proceeds *with* knowledge, he loses under the act. Now the quantitative analysis must find that Debtor's "rights" do *not* satisfy section 9-203(1)(c). This is troublesome because the only difference between the cases is Secured Party's awareness in the second case of the limited nature of Debtor's "rights" under the factoring arrangement. Something is wrong if our evaluation of "how big" Debtor's interest is depends on

200. PENN. STAT. ANN. § 201 (1963); *see also id.* § 202. Note that the act refers only to pledges of merchandise—i.e., the creation of possessory security interests. Compare with Factors Act, 1889, 52 & 53 Vict., ch. 45, § 2(1) ("provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.")

201. *See supra* Part V.C.i.b.

202. PENN. STAT. ANN. tit. 6, § 201 (1963).

what Secured Party knows about that interest. To reconcile the quantitative analysis with the factors act, we must allow Secured Party's mental state to affect our assessment of the magnitude of Debtor's "rights."

One might argue that this is not a problem. When Secured Party purchases without knowledge, Debtor's "rights" are greater than when Secured Party proceeds with knowledge. After all, Debtor's "rights" now include a power that is absent when Secured Party takes with knowledge, namely a power under the factors act to encumber Rival Claimant's title in favor of a good-faith purchaser for value. The trouble with this line of reasoning is that it reduces the quantitative analysis to a formality. We are instructed to identify Debtor's "rights," weigh them, compare them to some (unspecified) Article 9 threshold, and then conclude that these "rights" are—or are not—big enough to support the purported security interest. An analysis that takes into account Debtor's power under the factors act compromises this procedure. To avoid conflict between the rights requirement and other law, the analysis must come down to the following question: Under the particular facts of this case, does some body of law endow Debtor with a power to encumber Rival Claimant's interest? If the answer is yes, the quantitative analysis *must* find *L* sufficient, no matter how negligible *L* may seem by itself. If the answer is no, *L* must be insufficient regardless of how substantial *L* appears. This undercuts any serious attempt to make attachment depend on the magnitude of Debtor's "quantum of rights." The quantitative analysis—which purports to evaluate Debtor's interest using a standard established by *Article 9*—becomes a charade.²⁰³

In any event, the quantitative analysis begs a fundamental question: Why should attachment depend on "how big" *L* happens to be? Gilmore's dictum concerning the "quantum of rights" necessary under section 9-203(1)(c) encourages quantitative thinking, but it does not explain why the *size* of Debtor's interest is relevant.²⁰⁴ Perhaps its appeal rests on the following intuition. As a rule of thumb, the bigger *L* is relative to *X*, the more likely it is that Debtor will have possession of the relevant thing. However, we know that such possession can create an ostensible-ownership problem that we may want to mitigate with an exceptional rule endowing Debtor with a power to

203. Cf. WHITE & SUMMERS, *supra* note 4, § 22-6, at 990 ("[E]quities between competing claimants may be fought out in the name of this phrase [i.e., 'rights in the collateral'] . . . In such cases, judges should be alert to the possibility that they may be deploying the phrase . . . as a priority determining device, and that the phrase was not, as such, intended to have that function." (footnote omitted)).

204. 1 GILMORE, *supra* note 1, at 353.

encumber *X*, notwithstanding that Debtor is vested only with *L*.²⁰⁵ One might argue that this justifies linking attachment under section 9-203(1)(c) to the size of *L* relative to *X*.

Such reasoning is far from convincing. If law outside Article 9 holds that Debtor has a power to encumber *X* because Debtor is vested with *L*, so be it. We should not, however, jump to conclusions simply because *L* is often a "large" interest. We should explain Debtor's power to cause a security interest to attach to *X* by pointing to the specific factor that other law deems relevant. This factor might be Debtor's possession of the relevant thing or it might be something quite different, e.g., Debtor's status as Rival Claimant's agent with actual authority to encumber *X*. If the relevant factor is present, we should apply the exceptional rule, even if *L* is a "small" interest. Conversely, in the absence of the relevant factor, we should refuse to permit attachment, no matter how "big" *L* happens to be. Determining the size of *L*, in other words, is no substitute for an inquiry into relevant law outside Article 9.²⁰⁶ Quantitative analysis, which tries to "weigh" various *L*'s to assess their sufficiency under section 9-203(1)(c), misses the point.

2. THE REFORMIST ALTERNATIVE: QUALITATIVE ANALYSIS

Some commentators object to the complexity of the "rights" jurisprudence and the unrealistic evaluations it sometimes requires.²⁰⁷ Their proposed solution is a "qualitative" analysis of Antecedent-Transferor cases. The qualitative analysis retains the conventional idea of security interests (and other encumbrances) as interests that attach directly to things. What is new is its understanding of the *consequences* of attachment. According to the reformers, attachment of a security interest should have no specific implications for anyone except the debtor. Considering the consequences for third persons, we should take into account "the *quality* of the debtor's rights in collateral, not merely their *existence*."²⁰⁸ The existence of some "rights" is necessary to permit a security interest to attach, but the quality of those "rights" ordinarily determines how the security interest will

205. See, e.g., U.C.C. § 2-403(2). Such an exceptional rule is demonstrated *supra* note 43 and accompanying text.

206. If the cost of determining the size of *L* were low and the cost of identifying and applying other law were high, it could make sense to focus on size—assuming there is a strong correlation between the size of *L* and the probability that other law will give Debtor a power to encumber *X*. But the cost of finding and applying relevant law outside Article 9 does not appear to be especially high, especially in comparison to the cost of divining the size of particular *L*'s.

207. See, e.g., HILLMAN ET AL., *supra* note 4; BAIRD & JACKSON, *supra* note 7.

208. HILLMAN ET AL., *supra* note 4, ch. 18 at 18-4.

affect competing claims.²⁰⁹ I will call this idea—that every security interest has a qualitative aspect determining how *strong* the encumbrance is against third persons—the “Potency Principle.” According to the Potency Principle, a security interest “in a thing” gives the secured party a claim to that thing, but this claim is ordinarily no stronger than the “rights in the thing” on which the security interest is founded.

Because the reformers rely on the Potency Principle to limit the consequences of attachment, they can dispense with the traditional hand-wringing about the sufficiency of Debtor’s “rights.” On the contrary, they are happy to consider *any* “rights” sufficient for purposes of section 9-203(1)(c).²¹⁰ In my hypothetical involving the computer and the leasehold, the *quantitative* analysis protects the lessor from the lessee’s purported secured party by denying that the purported security interest even attaches. Proponents of the *qualitative* analysis, in contrast, can concede that the lessee’s leasehold “rights” will support attachment. The important question—whether the security interest “in the computer” is strong enough to overcome the lessor’s title—depends on the character of the lessee’s “rights.” If the leasehold were to expire or be terminated for non-payment of rent, the lessee (Debtor) would have to surrender the computer to the lessor (Rival Claimant). Under the Potency Principle, the security interest would suffer from the same infirmity. If, on the other hand, the leasehold remains in effect, Secured Party attains a kind of limited priority against the lessor. His security interest “in the computer” is exactly as strong as the leasehold interest on which it is founded.

The qualitative analysis recognizes that the Potency Principle is subject to exceptions. In certain circumstances involving ostensible-ownership concerns, a secured party can acquire an interest stronger than his debtor’s. Quite sensibly, the reformers want such rules to apply in Antecedent-Transferor cases. In a state with a mercantile factors act, for example, Secured Party should defeat Rival Claimant if Debtor is a merchant-factor and Secured Party is a good-faith purchaser for value of the purported security interest.²¹¹ The factors act is understood here as creating an exception to the Potency Principle; specifically, it permits a security interest founded on a mere factor’s

209. Cf. BAIRD & JACKSON, *supra* note 7, at 168-70 (“The first issue, that of ‘rights in the collateral,’ invites an examination into whether the debtor has *any* rights to which a secured party may succeed. A secured party (or other property claimant) may hold (contingently) rights that are derived from the debtor but may nevertheless find that it enjoys no greater rights against the ‘owner’ of the goods than does the debtor itself.”).

210. *See id.* at 170.

211. *See supra* notes 183-84 and accompanying text.

interest to transcend its humble origins and actually defeat Rival Claimant's title to the relevant merchandise.

By introducing this qualitative dimension into the analysis, the reformers are able to surmount two major objections to the traditional approach. When we downplay the consequences of attachment per se, we can largely abandon the search for the elusive "quantum of rights" necessary under section 9-203(1)(c). At the same time, the new analysis opens the door to non-Code law, reducing the prospect for conflict and permitting Antecedent-Transferor cases to be decided under rules that take account of ostensible-ownership concerns.

While the qualitative analysis represents a major advance, it does not fully succeed, given the structure of the present Code and the prevailing conception of the way security interests relate to things. Two statutory objections illustrate the problems of measuring reform within the framework of existing Article 9.

a. What Role for Section 9-203(1)(c)?

The reformers' sensible emphasis on the quality—as opposed to the quantity—of Debtor's "rights" is manifest in their relaxed view of attachment. Professor Nickles would permit a purported security interest to attach so long as Debtor has "some transferable rights or interest with respect to the property."²¹² Professor Baird and Dean Jackson are even more lenient: Debtor's possession of the relevant thing "should itself always constitute sufficient 'rights in the collateral' to pass the hurdle of whether or not a security interest . . . has attached . . ."²¹³ This criterion would permit attachment even in situations where Debtor has traditionally been described as having "no rights," transferable or otherwise, as against Rival Claimant (e.g., when Debtor has taken possession by theft).

The liberal approach to attachment raises a question concerning the function of section 9-203(1)(c). If the threshold can be set so low, why does the Code bother to erect any threshold at all? Assuming that Antecedent-Transferor cases are to be decided under the Potency Principle (and the exceptions thereto), why should Article 9 require Debtor to have *any* "rights in the collateral," transferable or not? Indeed, why should even possession be required? Under the qualitative analysis, the fact that Debtor is a thief with "no rights" as against Rival Claimant is no reason not to let the purported security interest attach. Rival Claimant will be adequately protected by the principle that Secured Party's claim to the computer, television set, or whatever

212. HILLMAN ET AL., *supra* note 4, ch. 18 at 18-3.

213. BAIRD & JACKSON, *supra* note 7, at 170-71.

is limited by the quality of Debtor's "rights." If those "rights" are inferior to Rival Claimant's, there will be no reason for Rival Claimant to worry even if Secured Party's encumbrance *does* attach. Section 9-203(1)(c) need not establish a minimum threshold so long as we take seriously the notion that it is the quality of "rights"—not their quantity—that counts. Hence, there is no reason for Article 9 to require the debtor to have any "rights," even bare possession, as a prerequisite to attachment. Under the qualitative analysis, then, the role of section 9-203(1)(c) is unclear.

b. The Potency Principle Versus Section 9-201

By introducing a qualitative dimension into the analysis, the reformers hope to gain access to non-Code law that recognizes exceptions to the Potency Principle. But this sensible attempt to go beyond the U.C.C. cannot be reconciled with section 9-201, which clearly states that the presumption in favor of Secured Party can be rebutted only by exceptional rules that are *part of the U.C.C.*²¹⁴ If the reformers accept the conventional view that section 9-201 applies against antecedent transferors, their proposal is stymied.

Some proponents of the qualitative analysis try to meet this objection by arguing that section 9-201 was not intended to displace non-Code rules dealing with antecedent transferors.²¹⁵ I agree, but for a different reason. The problem is not that section 9-201's provision for exceptions is drafted too narrowly. Instead it lies in the assumption that section 9-201 is even relevant to disputes involving antecedent transferors. If proponents of the qualitative approach want to make non-Code law part of the analysis, they should begin by rejecting the Received View of section 9-201.

D. A Proposed Analysis

The textual, practical, and conceptual problems that dog current approaches disappear once we drop the notion that section 9-201

214. The introductory clause to § 9-201 reads: "Except as otherwise provided by this Act"

215. See Coogan & McDonnell, *supra* note 7, § 2.08[2] at 2-87 ("Article 9 does not purport to codify all the law of property. Section 9-201 does not embody a negotiability principle that automatically gives secured creditors priority over all prior legal and equitable claims to property not dealt with in Article 9.")

In a similar vein, Baird and Jackson emphasize that, "despite 9-201's bold assertion that only other provisions of the Uniform Commercial Code override it, obviously other statutory law (such as the Internal Revenue Code and the Bankruptcy Code) must be considered." BAIRD & JACKSON, *supra* note 7, at 330. They are plainly right that *federal* statutes can trump § 9-201. But how can competing *state* laws overcome the (alleged) presumption in favor of the secured party when § 9-201 specifically states that they do not?

makes a (purported) security interest effective against antecedent transferors. From this new perspective, it is apparent that Antecedent-Transferor cases can—and should—be decided by whatever law outside Article 9 speaks to the situation. We begin with the Vestedness Rule, which sets up a presumption in favor of the antecedent transferor, not the purported secured party. The burden is then on the would-be secured party—not the antecedent transferor—to adduce a relevant exception to the baseline rule. If the would-be secured party identifies an exception, he can enforce his purported security interest, whether or not the exceptional rule is contained in the U.C.C.

1. RECONCEIVING THE DISPUTE

An analysis founded on property-transfer law begins by conceiving of a security interest as an encumbrance *on another interest*. This puts an end to loose talk about security interests “in” computers, copyrights, and other “things.” Instead, we identify the specific interest (or interests) the debtor purports to encumber and apply the Vestedness Rule and its exceptions to determine the consequences of the purported transfer. Three examples will illustrate this procedure.

The first is the limiting case in which the debtor does not actually purport to encumber the antecedent transferor’s interest. Debtor and Secured Party agree that Debtor is granting a security interest only on *its* interest (*L*); they explicitly disclaim any intention to encumber *X*, the interest vested in Rival Claimant. Plainly, the Vestedness Rule poses no obstacle to Secured Party’s getting a security interest on *L*. If Debtor defaults on the secured obligation, Secured Party is empowered to sell *L*—not *X*—and apply the proceeds to the debt. This result, which conforms to pre-Code law,²¹⁶ does not require us to evaluate the Debtor’s “rights in the computer,” its “rights in *X*,” or even its “rights in *L*.” The only question is whether Debtor is vested with *L* or is otherwise empowered to encumber *L* under relevant law. There is no need to introduce a “qualitative dimension” into the analysis because we do not characterize Secured Party as having a security interest “in the computer.” By specifying that the security interest attaches to *L*, we automatically take account of the “quality” of Debtor’s interest.

As a second example, consider an Antecedent-Transferor case in which Debtor does not limit its purported transfer to *L*, but instead purports to grant Secured Party a security interest on *X*. Under the

216. Security interests on leasehold interests, for example, are commonplace in real estate finance (the “leasehold mortgage”). See, e.g., 2 POWELL, *supra* note 71, ¶ 258[1].

Vestedness Rule, the purported transfer cannot succeed: *X* is vested in Rival Claimant, not Debtor. Accordingly, Secured Party gets no security interest on *X*. But Secured Party does not come away empty handed. He will ordinarily acquire a security interest on *L*, the interest with which Debtor is actually vested. This is more straightforward, I suggest, than saying that Secured Party has a security interest "in the computer," but limited in its potency by *L*, the "rights" on which it is founded.

Finally, suppose that a statute, for example a factors act, lets Debtor encumber *X* even though *X* is vested in Rival Claimant. Under my proposed analysis, there is nothing mysterious about Secured Party's acquisition of a security interest on *X*; it follows directly from the content of the hypothetical statute. The qualitative analysis reaches the same result, but it does so by saying that the statute makes the security interest "in the computer" *stronger* than the "rights" on which it is founded. I think this can be expressed more clearly by saying that Debtor has exercised a statutory power to encumber *X* in favor of Secured Party, notwithstanding that *X* is vested in Rival Claimant.

There is more at stake here than conceptual clarity. The competing analyses can generate different results. The qualitative analysts have not abandoned section 9-203(1)(c) and the notion that Debtor must have "rights in the collateral"—they simply contend that the threshold is very low. Professor Nickles, for example, regards section 9-203(1)(c) as satisfied so long as Debtor has "some transferable rights or interest with respect to the property."²¹⁷ This sounds reasonable, but it can lead to trouble. Suppose that a non-Code statute endows Debtor with a power to encumber *X*, despite the fact that Debtor has no independent interest relating to *X*—i.e., Debtor has no "rights" except the special power conferred by the statute. Proponents of the qualitative analysis will want to give the statute effect, but they can do so only by interpreting the exceptional rule itself as providing the necessary "rights." As I have suggested above, this creates a circularity. If Debtor must have certain "rights" in order to gain access to other law, we cannot invoke that other law as the source of Debtor's "rights." Hence, the fact that Debtor has no independent interest "in the computer" precludes attachment under Nickles' criterion,²¹⁸ which creates a conflict between the hypothetical statute and Article 9. An analysis under property-transfer law, in contrast, does not posit even a minimal threshold. If the statute empowers Debtor

217. HILLMAN ET AL., *supra* note 4, at 18-3.

218. *Id.*

to encumber *X*, then Debtor can encumber *X*. The fact that Debtor may have no other "rights" respecting the property *X* is irrelevant.²¹⁹

An analysis based on property-transfer law also deals easily with a situation that is problematic for Professor Baird and Dean Jackson. As we have seen, they suggest that section 9-203(1)(c)'s threshold-test is satisfied so long as Debtor has possession of the relevant thing.²²⁰ This takes care of cases in which other law bases Debtor's power to encumber *X* on ostensible-ownership concerns. But suppose a statute grants Debtor a power to encumber *X* even though Debtor is not in possession. Assuming Debtor has no other "rights," the purported security interest cannot attach, which means the hypothetical statute cannot be applied in favor of Secured Party. Baird and Jackson's analysis thus leads to a conflict between section 9-203(1)(c) and the law that gives Debtor a power to encumber *X* notwithstanding Debtor's lack of possession. It is unclear why Article 9 should prevent Debtor from using its power under other law. An analysis under property-transfer law, in contrast, easily deals with this situation: Debtor can encumber *X* because the hypothetical statute says it can. Debtor's possession (or lack thereof) may be relevant to attachment under Article 9, but only to the extent other law says it is.

2. HOW TO DEAL WITH SECTION 9-203(1)(C)

Neither the traditional nor the reformist approach resolves Antecedent-Transferor cases as effectively as an analysis based on property-transfer law. The challenge is to implement the transfer law approach in the face of the rights requirement of section 9-203(1)(c). I see three main possibilities: deletion, reinterpretation, and amendment.

a. Deleting the "Rights Requirement"

In the overall scheme of property-transfer law, the function of Article 9 is to protect certain subsequent transferees from the *Encumbrance Rule*, which would otherwise operate in favor of existing security interests. Antecedent-Transferor cases, in contrast, implicate the *Vestedness Rule*. There the issue is whether a purported secured party can overcome a baseline presumption that favors the antecedent transferor. This is a critical issue for the would-be secured party, but

219. Another problem with Professor Nickles' test is its requirement that Debtor's interest be "transferable." *Id.* Suppose that the hypothetical statute forbids Debtor to transfer its power to encumber *X*. Does this mean that Debtor lacks "rights in the collateral"? There is no reason that Debtor's power to transfer *X* should depend on whether that power is *itself* transferable.

220. See *supra* note 213 and accompanying text.

it is not Article 9's burden to resolve it. Section 9-201, after all, does not pretend to make a (purported) security interest effective against a debtor's *transferor*. Yet the prevalence of the Received View and the presence of the "rights requirement" in section 9-203(1)(c) has led to confusion. An obvious remedy is to renounce the Received View and delete section 9-203(1)(c) from the Code.

This approach is probably too austere. While Article 9 does not determine whether a debtor has a power to encumber a particular interest, it is not inappropriate for Article 9 to remind us that attachment cannot occur unless the debtor has such a power. Section 9-203(1) is a sensible place to insert such a reminder. Simple deletion of section 9-203(1)(c) is justified in theory, but may complicate matters for users of Article 9 whose understanding of the system of property-transfer law may be a bit hazy.

b. Reinterpreting Section 9-203(1)(c) as a Tautology

A second approach is to reinterpret section 9-203(1)(c) to bring it into line with analysis under property-transfer law. As a starting point, it is necessary to stipulate that the term "collateral," as used in section 9-203(1)(c) and certain other provisions, refers to interests, not things. Then we must decide what it means for a debtor to "have rights in the collateral."

One interpretation is that a debtor "has rights in" an interest only if the debtor "is vested with" that interest. On this view, section 9-203(1)(c) codifies the Vestedness Rule as it applies against someone purporting to take a security interest, just as section 9-201 codifies the Encumbrance Rule as it applies in favor of a secured party against subsequent transferees. A major problem with this approach is that section 9-203(1)(c), unlike section 9-201, does not provide for exceptions. The proposed reinterpretation will lead to conflicts with other law that creates exceptions to the Vestedness Rule. There is no reason for section 9-203(1)(c) to undermine non-Code rules that may be directed at this problem of ostensible ownership.

A more promising reading would hold that a debtor "has rights in" an interest only if the debtor has a power to create a security interest on the targeted interest.²²¹ This interpretation reduces section 9-203(1)(c) to a tautology: a debtor cannot encumber an interest unless the debtor has a power to encumber that interest. This is good news: Because we look to other law to determine whether the debtor

221. One of the earliest commentators on Article 9 considered and favored this reading. See Hogan, *supra* note 7, at 577 (discussing former § 9-204, the predecessor of current § 9-203(1)(c)).

has the requisite power, there is no longer any possibility of conflict between Article 9 and rules originating outside the U.C.C. I acknowledge that interpreting the "rights requirement" as a "power-to-encumber requirement" is linguistically tendentious. But the Code never comes close to defining "rights in the collateral," so every interpretation is open to that objection. At any rate, we have good structural and substantive grounds for adopting this interpretation, even if it is not addressed by the language of Article 9.

This new understanding of "rights" as "power to encumber" requires a reinterpretation of section 9-504(4), which deals with the effect of enforcing a security interest. The Code provides that "[w]hen collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein."²²² This language creates a problem if "rights" refers to the debtor's power to encumber the interest, rather than to the encumbered interest itself. A purchaser wants to acquire *X*, not a power to encumber *X*. Accordingly, we would have to interpret section 9-504(4) as mandating that a purchaser in foreclosure becomes vested with whatever interest is encumbered by the security interest. But here we are stretching the limits of section 9-504(4).

c. Amending Sections 9-203(1)(c) and 9-504(4) to Harmonize Them with Property-Transfer Law

Amending Article 9 may be best course. Sections 9-203(1)(c) and 9-504(4) should clearly reflect the conception that security interests attach to interests, not things. This can be achieved by dropping section 9-203(1)(c)'s current reference to "collateral" and redrafting the provision as the tautology discussed above: a security interest cannot attach to an interest unless the debtor has a power to grant a security interest on that interest. We might reformulate this by saying that attachment of a purported security interest to an interest is precluded unless the debtor is either vested with the interest or is otherwise empowered to create a security interest on the interest. The virtue of this formulation is that it reproduces the analytical sequence of property-transfer law: it begins with the Vestedness Rule and progresses to relevant exceptional rules.

Section 9-504(4) should be amended with language indicating that a purchaser in foreclosure, assuming he is a *buyer*,²²³ is invested

222. U.C.C. § 9-504(4)(1987).

223. It is possible, however, that Secured Party will "dispose of the collateral" by some means other than sale, for example by granting the purchaser a leasehold interest on *X*. See U.C.C. § 9-504(1)(1987) (secured party "after default may sell, lease or otherwise dispose of

with "the interest that is encumbered by the security interest."²²⁴ It may be helpful to spell this out: The purchaser (assuming he is a buyer) acquires not only (1) any interest of the debtor that is encumbered by the security interest; but also (2) any interest of a third person (i.e., Rival Claimant) that is encumbered by the security interest. Under the Vestedness Rule, of course, the third party's interest will not be subject to the security interest unless the debtor exercised an exceptional power to encumber that interest.

These proposals to amend Article 9 have a noncontroversial analogue in Article 2. The basic rule governing sales is stated in section 2-403(1): a purported purchaser of goods "acquires all title"²²⁵ which his transferor had or had power to transfer."²²⁶ If section 2-403(1) stated only that the purported purchaser becomes vested with the interest with which his transferor was actually vested ("all title which his transferor had"), it would be a codification of the Vestedness Rule as it applies to sales. But section 2-403(1) goes further, providing that the purchaser also becomes vested with any interest that the purported transferor "had power to transfer" (assuming that power was exercised). Article 2 does not, however, purport to lay down all the rules that may bear upon a purported sale of goods.²²⁷ Section 2-403(1), then, is a tautology. My proposal is to amend section 9-203(1)(c) to bring Article 9 into line on this point.

E. Summary

Conceiving of a security interest as an interest that attaches to a thing, rather than to some particular interest relating to the thing, impedes analysis of Antecedent-Transferor cases and encourages the misapplication of section 9-201. The jurisprudence that has grown up around the "rights requirement" is a complicated, and ultimately

any or all of the collateral."). In this case, the purchaser gets a leasehold interest on *X*; he is not invested with *X* itself. The reader can provide appropriate qualifications to deal with such situations.

224. The buyer, of course, takes the interest *free* of the encumbrance being enforced and any junior encumbrances.

225. In § 2-403(1), "title" is being used to denote whatever interest the transferor happens to be vested with, not just the relatively comprehensive interest I have been calling "title."

226. U.C.C. § 2-403(1)(1987) (reference added).

227. Official Comment 1 to § 2-403 notes that this provision "continue[s] unimpaired all rights acquired under the law of agency or of apparent agency or ownership or other estoppel, whether based on statutory provisions or on case law principles. The section also leaves unimpaired the powers given to selling factors under the earlier Factors Acts." The reference to powers of disposition created by statute, including the factors acts, is particularly significant. Such powers are not part of the U.C.C. and are distinct from the "supplementary general principles of law" whose continued application is endorsed in § 1-103. In section 2-403, at least, there is no pretense that the U.C.C. is a universal commercial code.

unsuccessful, attempt to protect antecedent transferors from security interests purportedly granted by their transferees. Understanding that section 9-201 is directed only at subsequent transferees lets us see that the invocation of section 9-203(1)(c) is a pseudo-solution to a pseudo-problem.

Shifting to an analysis under property-transfer law, we easily reach the results courts and commentators have struggled to achieve. Whether these results can be reached under the existing Code is another question. We should therefore expand the scope of current sections 9-203(1)(c) and 9-504(4) to cover cases in which other law gives a debtor the power to create a security interest on an interest that is vested in an antecedent transferor.

VI. THE SET-OFF SCENARIO: SECURED PARTIES VERSUS ACCOUNT DEBTORS

In the Set-Off Scenario, Rival Claimant and Debtor are mutually indebted. Assume, for example, that Rival Claimant owes \$100 to Debtor and that Debtor owes \$75 to Rival Claimant. Rival Claimant seeks to exercise her common-law or statutory power to “set off” the mutual debts—that is, to reduce her \$100 indebtedness to Debtor by \$75, the amount Debtor owes her.²²⁸ After the set-off, Rival Claimant will owe Debtor only \$25; Debtor will owe Rival Claimant nothing. The problems in this Scenario arise because Secured Party has a security interest on Debtor’s title to Rival Claimant’s obligation to pay \$100. By setting off, Rival Claimant reduces her debt by \$75, leaving Secured Party with a security interest on title to Rival Claimant’s obligation to pay \$25. In order to prevent this reduction in the value of his collateral, Secured Party argues that the existence of his security interest on Debtor’s title to the \$100 debt bars Rival Claimant from setting off.

To discuss this Scenario, I need to modify my terminology. Rival Claimant’s “claim,” just described, is significantly different from the “claims” we have seen in the three preceding Scenarios. When Rival Claimant tries to set off, she asserts a power to reduce the *amount* of her debt—she does not dispute that Debtor is vested with title to the debt, that Secured Party has a security interest on title to the debt, or that the security interest is senior to any other encumbrance on title to the debt. A successful set-off is analogous to other

228. Set-off is not permitted unless both debts are mature and liquidated. See Dwight L. Greene, *Deposit Accounts as Bank Loan Collateral Beyond Setoff to Perfection—The Common Law is Alive and Well*, 39 *DRAKE L. REV.* 259, 278-83 (1990). My discussion assumes that these conditions are satisfied.

transactions in which Rival Claimant reduces the amount of her obligation, for example by paying Debtor \$75 in cash or providing \$75 in services to Debtor. In none of these situations does she assert a rival claim "to" any interest. Accordingly, it is better to avoid the name "Rival Claimant." Let us rename Secured Party's antagonist "Account Debtor," a term that lacks proprietary connotations and reflects commercial usage.²²⁹ The following diagram incorporates this new terminology.

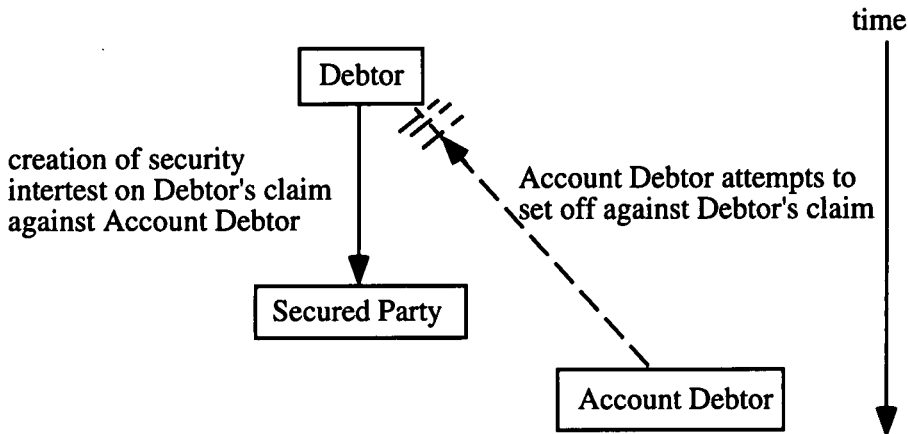


Figure 4: Secured Party v. Account Debtor

Over the past fifteen years, there has been extensive commentary on the question of whether Secured Party can prevent Account Debtor from setting off.²³⁰ Section 9-201 declares a security interest effective against "creditors,"²³¹ and Account Debtor is necessarily a creditor if she asserts a power to set off. According to the Received View, this means that Secured Party is protected against Account Debtor's attempt to reduce the amount of her obligation. Even courts and commentators that allow Account Debtor to set off agree with this interpretation of section 9-201; they ultimately contend, however, that section 9-201 does Account Debtor no harm because of section 9-104(i)'s declaration that Article 9 "does not apply . . . to any right of

229. See, e.g., U.C.C. § 9-105(1)(a) (defining "account debtor" as "the person who is obligated on an account, chattel paper or general intangible.").

230. See, e.g., Robert H. Skilton, *The Secured Party's Rights in a Debtor's Bank Account Under Article 9 of the Uniform Commercial Code*, 1977 S. ILL. U.L.J. 120 (1977); Stephen L. Sepinuk, *The Problems with Setoff: A Proposed Legislative Solution*, 30 WM. & MARY L. REV. 51 (1988); Note, *Conflicts Between Set-Offs and Article 9 Security Interests*, 39 STAN. L. REV. 235 (1986).

231. U.C.C. § 9-201 (1987).

set-off.”²³² Secured Party’s supporters, on the other hand, argue that the “exclusion” of set-offs in section 9-104(i) does not really exempt set-offs from the effect of section 9-201.²³³

In my view, the entire controversy rests on the erroneous premise that section 9-201 makes a security interest effective against “creditors.” While the language of section 9-201 says precisely that, I believe I have shown that section 9-201’s real focus is *subsequent transferees*.²³⁴ A successful set-off extinguishes all or part of Account Debtor’s obligation, but there is no “transfer” to Account Debtor. Her dispute with Secured Party lies outside the presumption established in section 9-201. As a result, Account Debtor does not need section 9-104(i)’s exclusion to block section 9-201: section 9-201 does not apply against her in the first place.

If section 9-201 does not govern these cases, what law does? As in the Scenarios involving antecedent transferees and antecedent transferors, the rights of Secured Party depend on “other law”—in this instance, the law of assignments of choses in action. Much of this law has been codified in the U.C.C., specifically, in section 9-318(1). Ironically, this means that Article 9 does actually resolve most of these cases, but that section 9-201 plays no role in the analysis!

The difficulties with prevailing approaches can be attributed to the fact that Article 9’s codification of “other law” is not quite complete. To avoid unacceptable results, it is sometimes necessary to look beyond Article 9 for the governing rule. This is problematic, however, if one believes that set-off cases fall within section 9-201, which recognizes only the exceptions set out in the U.C.C. Under my analysis, we can apply non-Code law—which may be identical to section 9-318(1)—with a clear conscience. It will also eliminate the confusion that plagues current approaches.

A. *The Conventional Analysis and the Conventional Dilemma*

As a general matter, someone vested with title to a chose in action can transfer that title to another person. This capacity calls for

232. U.C.C. § 9-104(i) (1987). *See, e.g.*, *Citibank v. Interfirst Bank*, 784 F.2d 619, 620-21 (5th Cir. 1986); *Bank of Crystal Springs v. First Nat’l Bank*, 427 So. 2d 968, 971 (Miss. 1983); *State Bank v. First Bank*, 320 N.W.2d 723, 725 (Minn. 1982); Skilton, *supra* note 230, at 204-05.

233. *See, e.g.*, *Southeastern Fin. Corp. v. Nat’l Bank of Detroit*, 377 N.W.2d 900 (Mich. Ct. App. 1985); *Continental Am. Life Ins. Co. v. Griffin*, 251 Ga. 412, 414, 306 S.E.2d 285, 287 (1983); *Citizens National Bank v. Bornstein*, 374 So. 2d 2, 10 (Fla. 1979); *Universal C.I.T. Credit Corp. v. Farmers Bank of Portageville*, 358 F. Supp. 317, 325 (E.D. Mo. 1973).

234. *See* discussion of the meaning of “creditors” in the chattel mortgage acts and Article 9, *supra* Part IV.B.2.

rules to govern various “proprietary” controversies—e.g., disputes between two purported assignees of title to a single chose. But the transfer of a chose in action may also affect the person who is the *obligor* with respect to the chose. Can the obligor assert against the transferee claims and defenses she enjoyed against the transferor? In particular, can she reduce her debt by setting off, even though title to her debt has been assigned or encumbered in favor of a third person? Translated into the terms of our Scenario, the question becomes: Can Account Debtor set off Debtor’s \$75 debt against her \$100 obligation even though Debtor has granted Secured Party a security interest on title to the \$100 obligation?

Conventional analysis begins, as usual, with section 9-201. Secured Party contends that his security interest is presumptively effective “against creditors” under the Code, which implies that Account Debtor is barred from setting off. Account Debtor’s standard response is to point to section 9-104(i), which states that Article 9 “does not apply . . . to any right of set-off.” This, she contends, exempts her from section 9-201, despite her status as a “creditor.” Secured Party responds by claiming that Account Debtor is carrying section 9-104(i) beyond its purpose. Security Party can point to Grant Gilmore’s famous discussion of section 9-104(i), in which he observed that the exclusion of set-offs was intended to appease pusillanimous bankers, who feared that their traditional set-off powers might be mistaken for security interests.²³⁵ The purpose of section 9-104(i)’s declaration that Article 9 does not apply to “any right of set-off” was simply to make it clear that banks (and other creditors) continue to enjoy their traditional set-off powers without having to bother with security agreements and financing statements.²³⁶

This bit of history strongly suggests that the exclusion of set-offs should not be taken literally. Recognizing that a set-off power is not a security interest implies that provisions of Article 9 dealing with the *creation* and *perfection* of security interests are irrelevant. It does not mean that set-offs should be beyond the reach of provisions dealing with *priority*. Hence, the exclusion in section 9-104(i) need not stand

235. 1 GILMORE, *supra* note 1, § 10.7, at 316.

236. Secured Party can also attack Account Debtor’s expansive reading of § 9-104(i) by observing that it cannot account for several other provision of the statute. Section 9-306(4)(d)(i) states that, in the event of insolvency proceedings, a secured party has a perfected security interest “in [certain commingled] cash and deposit accounts of the debtor,” but that this security interest is “subject to any right of set-off.” U.C.C. § 9-306(4)(d)(i) (1987). In such cases, Article 9 is being applied to a set-off, notwithstanding § 9-104(i). The same problem arises with respect to § 9-318(1)(b), which sets out circumstances in which “the rights of an assignee” of an interest respecting a chose in action are “subject to” certain set-offs. *See id.* § 9-318 cmt. 1.

in the way of our applying the fundamental rule of section 9-201. This sounds ominous for Account Debtor because section 9-201, as conventionally understood, creates a presumption that a security interest is effective “against creditors”—including a creditor attempting to set off.”

Nevertheless, Account Debtor is usually no worse off under section 9-201 than she would be under non-Code law. For even if we adopt the Received View that there is a presumption in favor of Secured Party, section 9-318(1)(b) appears to carve out an exception in favor of Account Debtor. According to this provision, “the rights of an assignee are subject to . . . any . . . defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.”²³⁷ In a set-off case, Debtor becomes an “assignor” when it grants a security interest to Secured Party (the “assignee”).²³⁸ The “account debtor”—the person who owes the relevant obligation²³⁹—is Account Debtor. Because a set-off power qualifies as a “claim or defense,”²⁴⁰ Account Debtor can set off over the objection of Secured Party, provided that her power “accrued” before she got notice of the security interest. This is not a revolutionary result. As the Official Comment observes, section 9-318(1)(b) “makes no substantial change in prior law,” which held that a transferee of an interest respecting a chose in action takes “subject to defenses or set-offs existing before an account debtor is notified of the assignment.”²⁴¹ As a result, it would seem to make little difference whether section 9-104(i) excludes set-offs from Article 9. If it does, Account Debtor’s rights should be determined under non-Code law; if it does not, the case is governed by section 9-318(1)(b). The result will probably be the same either way.

There is, however, a commercially important set of cases in which a great deal seems to depend on whether section 9-201 applies against a creditor attempting to set off. In these cases, the attempted set-off relates to Account Debtor’s obligation on a non-negotiable certificate of deposit (“NNCD”).²⁴² Suppose that Account Debtor has a banking charter and that Debtor has deposited \$100 with her in

237. *Id.* § 9-318(1)(b).

238. The Code’s notion of “assignment” is generic—it corresponds to my “transfer,” which includes both assignments and encumbrances as I have defined them.

239. U.C.C. § 9-105(a) (1987).

240. *Id.* § 9-318 cmt. 1.

241. *Id.*

242. A certificate of deposit represents a debt owed by the issuing bank to its depositor. See generally Steven L. Harris, *Non-Negotiable Certificates of Deposit: An Article 9 Problem*, 29 UCLA L. REV. 330 (1981).

exchange for a \$100 obligation evidenced by an NNCD. Debtor borrows \$75 from Account Debtor, creating a mutual indebtedness. A few months later, Debtor borrows \$150 from Secured Party; to secure repayment, Debtor grants Secured Party a security interest on title to the NNCD. Debtor fails to make an interest payment on its \$75 debt to Account Debtor, who declares the loan in default and tries to set off the \$75 debt against her \$100 debt on the NNCD. Secured Party, fearing that the value of the NNCD is about to drop to \$25, objects loudly.

Under non-Code law, Account Debtor would probably be permitted to set off if her power accrued before she was notified of the security interest.²⁴³ In view of section 9-318(1)(b), we should expect the same rule to apply under Article 9, but it seems that Account Debtor cannot invoke section 9-318(1)(b) in NNCD cases. Section 9-318(1)(b) applies to an "account debtor," which section 9-105(1)(a) defines as "the person who is obligated on an account, chattel paper or general intangible."²⁴⁴ The problem for Account Debtor is that non-negotiable certificates of deposit are classified as "instruments," and persons obligated on instruments are not included on section 9-105(1)(a)'s list. If we take section 9-105(1)(a) at face value, Account Debtor is not an "account debtor" for purposes of section 9-318(1)(b). This seems to leave Account Debtor with no way to overcome section 9-201's alleged presumption against "creditors." She cannot call on pre-Code law because exceptions to section 9-201 must be drawn from the U.C.C.²⁴⁵ According to this analysis, Secured Party *always* prevails against Account Debtor in NNCD cases.

It is unclear why Account Debtor should have the benefit of set-off in cases involving accounts, chattel paper, and general intangibles, but not in cases involving NNCDs. Indeed, it is ironic that she does not. If Account Debtor had secured the NNCD obligation by granting Debtor a security interest on title to a drill press, she would have been an obligor with respect to "chattel paper." As such, she would qualify as an "account debtor" and therefore would be able to invoke section 9-318(1)(b) as an "exception" to section 9-201. Account Debtor, in other words, would seem to fare *better* against Secured Party if she granted Debtor a security interest than if she had not. One must question why Account Debtor should have to grant a secur-

243. See, e.g., *In re Multiponics Inc.*, 622 F.2d 725, 728 (5th Cir. 1980); *Kaufman v. First Nat'l Bank*, 493 F.2d 1070, 1071-72 (5th Cir. 1974).

244. U.C.C. § 9-105(1)(a) (1987).

245. *Id.* § 9-201.

ity interest in order to preserve her set-off power as against Secured Party.

At the same time, it is hard to understand why Secured Party should prevail if he has not actually notified Account Debtor of his security interest. But that is the result if we adopt a categorical view of section 9-201 and deny Account Debtor the protection of section 9-318(1).

To avoid gratuitously awarding victory to Secured Party in such situations, some courts and commentators accept Account Debtor's expansive interpretation of section 9-104(i).²⁴⁶ If set-off issues are completely excluded from Article 9, the dispute can be settled under non-Code law, which usually provides a close substitute for section 9-318(1)(b).²⁴⁷ Account Debtor can expect to win if her set-off power accrued before she learned of Secured Party's encumbrance.

The conventional analysis leads to a dilemma. To reach substantively reasonable results in NNCD cases, we must apply non-Code law. But to do this, we must accept Account Debtor's implausibly broad reading of section 9-104(i). The alternative is to interpret section 9-104(i) narrowly and leave Account Debtor at the mercy of section 9-201. In that case, Secured Party *always* prevails, at least if the NNCD obligation is unsecured. Both these approaches are unsatisfactory, which suggests that there is something fundamentally wrong with an analysis that assumes that section 9-201 applies against a creditor attempting to exercise a power to set-off.

B. *A Proposed Analysis*

To resolve the dilemma created by conventional analysis of the Set-Off Scenario, we need only recognize section 9-201 for what it is: a codification of the Encumbrance Rule as it applies in favor of secured parties against subsequent transferees. In setting off, Account Debtor does not become Debtor's transferee. She can reduce the amount of her obligation to Debtor without denying that Secured Party has a security interest on Debtor's title to her obligation and that this security interest is "effective" against Debtor's subsequent transferees. Despite section 9-201's use of "creditors," Account Debtor's dispute with Secured Party lies outside the scope of that provision.

If section 9-201 does not apply to set-off disputes, we are free to apply whatever law does speak to the issue. When Account Debtor

246. See *supra* note 235 and accompanying text.

247. See U.C.C. § 9-318 cmt. 1 (1987).

meets the statutory definition of "account debtor," section 9-318(1)(b) determines whether she will be permitted to set off. When, as in NNCD cases, Account Debtor falls between the definitional cracks, we look to non-Code law, which is likely to be consistent with section 9-318(1)(b). Hence, we can reject Account Debtor's dubious contention that section 9-104(i) completely excludes set-offs from Article 9. Following Gilmore, we can interpret the "exclusion" of set-offs as nothing more than a statement of the obvious fact that a set-off power is not a security interest.²⁴⁸ But we need not follow courts and commentators into the difficulties that result when section 9-201 is held to apply against creditors attempting to set off.

VII. CONCLUSION: AN "OLD-NEW" ARTICLE 9

The Received View radically misconceives the scope of section 9-201 and Article 9's entire relationship to other law. Yet there should be no rush to blame the confusion on either the drafters of the statute or on its subsequent interpreters. The text of actual Article 9 frequently omits temporal and other qualifications that would establish that its exclusive subject is disputes between secured parties and subsequent transferees. But language that seems vague today would have been unproblematic to a drafting team working in the 1940s and '50s. Lawyers and academics who had spent their careers with the chattel mortgage acts would have understood the limited reference of "purchasers of the collateral" and "creditors" in section 9-201.²⁴⁹ Property-transfer law, with its characteristic pattern of baselines and exceptional rules favoring certain subsequent or purported transferees, provided the schema by which the drafters understood their world. Although the drafters of Article 9 intended to change this world, the validity of the schema was never in question. It is precisely because the schema was so strong that the actual text of Article 9 is rather careless in observing its implications.

Forty years later, the intellectual world of secured transactions is no longer dominated by the chattel mortgage acts and the concepts of

248. 1 GILMORE, *supra* note 1, § 10.7, at 316.

249. I have discovered only one explicit reference to this in the early literature. See Hogan, *supra* note 7, at 591 ("Section 9-201 does state that the security agreement is valid as against third parties except as otherwise provided in Article 9. This provision seems to be directed at third parties asserting their rights to the goods *subsequent* to the creation and perfection of the security interest.") (emphasis added). It would be more accurate to omit the reference to perfection. Section 9-201, after all, applies against subsequent transferees even if their claims arise before perfection; it is the job of the exceptional rules (Article 9's "priority rules") to protect a post-attachment, but pre-perfection, transferee. Also note that what should matter is the date on which the purported "rights to the goods" *arose*, not the date on which they were *asserted*.

traditional conveyancing. Instead, it is Article 9 itself on which every commercial lawyer cuts her teeth. The irony is that the “modern” commentator is often blind to the pervasive structural continuity between the ancient acts and Article 9. Received methodologies, which focus on Article 9 as just one more part of the U.C.C., exacerbate the problem: no amount of reflection on the text of the Code or its “underlying policies” can substitute for an accurate understanding of Article 9’s place within property-transfer law. Only through the kind of conceptual reconstruction undertaken in this paper does such an understanding become possible.

The first task, however, is to clear up the confusions in current Article 9 jurisprudence. There is no reason that working lawyers and judges should have to recapitulate our lengthy journey every time they reach for Article 9. To keep them on track, we need to remove several key ambiguities that—from our contemporary perspective, at least—vitiate the text. The best way to rehabilitate the “old” Code from the ravages of the Received View is a dose of innovation. I offer the following proposals.²⁵⁰

Section 9-201 should be revised to presume a security interest effective “against *subsequent* transferees of the encumbered interest, including subsequent purchasers and subsequent judicial lien creditors.” Such redrafting should preclude any claim that the Code creates a presumption effective against antecedent transferees, and should eliminate the pressure to enlist the Article 9 priority rules on their behalf.²⁵¹ Still, to be on the safe side, section 9-301(1)(b) should be amended to state that “an unperfected security interest is subordinate to the rights of . . . a person who *subsequently* becomes a lien creditor, but does so before the security interest is perfected.” Sections 9-301(1)(c) and (1)(d) should be redrafted to protect not just buyers, but *any* type of “purchaser” who is not a secured party. Once again, the statute should make it clear that these exceptions exist for the sake of *subsequent* purchasers. In cases involving antecedent judicial lien creditors or antecedent purchasers, we must look to law outside Article 9 and even outside the Code. The Official Comments should give some indication of this.

Because there is no danger of applying the wrong law in disputes between two secured parties, it is not strictly necessary to revise section 9-312(5)(a). Still, the fact that the first-to-file-or-perfect rule is not cast as an exception to section 9-201 only promotes confusion. I

250. The suggested language is only illustrative.

251. The use of “transferees” should also prevent the inappropriate invocation of section 9-201 against creditors attempting to set off.

have suggested how this "revision" might be achieved.²⁵² While we are at it, we should delete section 9-312(5)(b). The rule that, in a conflict between two unperfected security interests, the first to attach takes priority is superfluous; we should recognize this as the normal result under section 9-201.

What is needed in such cases is a statement in Article 9 that the security interest is effective against the person who is actually vested with the targeted interest, even if that person is not a party to the security agreement. Section 9-201 should be amended to state precisely that. Section 9-203(1)(c), in turn, should state that a security interest cannot attach unless the debtor (here meaning the person purporting to grant the security interest) has a power under applicable law to encumber the interest in question.

Amending section 9-201 to focus on the person vested with the targeted interest and subsequent transferees will also eliminate the current reference to "creditors." This will undercut any claim that a secured party is presumed to have a power to block an attempted set-off because the account debtor is a "creditor" under section 9-201. In cases involving nonnegotiable certificates of deposit, this will relieve the considerable pressure for account debtors to argue, and courts to hold, that section 9-104(i)'s exclusion of setoffs applies across the board.

There is currently movement to reexamine and possibly improve Article 9.²⁵³ While the statute should certainly be brought up to date, we also have an opportunity to answer some fundamental questions about the scope and structure of Article 9. To do so, however, we must grasp a conceptual framework that is older than the statute itself.

252. See discussion *supra* Part III.D.

253. U.C.C. art. 9 (Report of the Permanent Editorial Board Study Group, Dec. 1, 1992).