The Business Lawyer at 75 and Secured Transactions
Under Article 9 of the Uniform Commercial Code

By Jonathan C. Lipson and Steven O. Weise*

In honor of the seventy-fifth anniversary of The Business Lawyer (TBL), we reviewed the roughly 400 papers published in TBL on secured transactions since inception, in 1946. We find that, while TBL has always provided excellent coverage of secured credit, earlier works were more likely to focus on questions of policy than those published more recently, which tend to be more technical. This is curious, both because secured transactions have been the subject of sometimes ferocious academic debates in other journals about their distributive effects, and because TBL often includes policy-oriented scholarship in other business-law fields (e.g., corporate governance). We argue that TBL should actively seek papers on secured credit policy, in part because technologies like distributed ledgers may threaten to render all secured transactions . . . academic.

The birth and development of the modern law of secured transactions loosely tracks the birth and development of The Business Lawyer (“TBL”), the peer-reviewed law journal published by the Business Law Section of the American Bar Association (“Section” and “ABA,” respectively).1 Seventy-five years ago—when TBL began publication—the law of what we call today “secured transactions” was a morass of different laws and different names for the same substantive transaction. As Grant Gilmore—the first reporter for what would become Article 9 of the Uniform Commercial Code (“UCC”)—famously observed, “[t]he specialized devices

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1. For those unfamiliar with it, the Section is “the premier community for business law professionals,” comprising about 30,000 members around the world. See About Us, Am. B. Ass’n: Bus. L. Sec., https://www.americanbar.org/groups/business_law/about_us (last visited Sept. 6, 2019). TBL is published quarterly by the Section and has a readership of about 40,000. See The Business Lawyer, Am. B. Ass’n: Bus. L. Sec., https://www.americanbar.org/groups/business_law/publications/the_business_lawyer (last visited Sept. 6, 2019).

In the interest of full disclosure, the authors of this essay have had extensive experience with the Section and TBL. Among other things, both have published with TBL and sit on TBL’s editorial board. The views expressed here are their own, and not necessarily those of the Section, TBL, or their respective employers.
which grew up in this country—the trust receipt, the factor’s lien, the equipment
trust, the bailment-lease and so on” created a “state of almost intolerable complex-
ity” in the late nineteenth and early twentieth centuries.2

Since then, and within TBL’s first decade, Article 9 of the UCC was developed,
debated, and enacted in Pennsylvania in 1954 on a trial basis. TBL played a critical
role in this process, providing a forum to debate and develop policy and process
issues that concerned practitioners and scholars of the time, educate lawyers about
the new law, and help them remain current in developments in practice under it.

We have undertaken an unscientific review of the roughly 400 articles, essays,
reports, and surveys published in TBL since its inception which involved secured
transactions in some meaningful way, identifying the ten that have had the most
“impact” as defined by unique citation counts.3 We find that while secured
transactions have remained a salient topic throughout, the character of TBL’s
consideration of secured transactions matters has changed. In the early years,
writing in TBL on secured transactions often reflected debates about important
policy issues—in particular, the “distributive” effects of a law such as Article
9, meaning its effects on third parties with claims against or interests in the
debtor.4 Recently, by contrast, TBL has tended to focus on technical matters
of practice or interpretation, leaving policy debates about Article 9 to other ven-
ues—mostly law-school-published academic journals.

At one level, this is not surprising. As Article 9 became law and matured, many
practitioners may have come to believe there was simply less policy to debate,
though technical problems would persist. Yet among legal academics, the distribu-
tive effects of secured transactions have been controversial. Some worry that sec-
cured creditors externalize risks of loss to “non-adjusting” creditors (e.g., small
trade creditors and tort claimants) of a shared debtor; others believe that the ben-
efits of secured financing more than outweigh the costs. Perhaps the most concrete
example came in the run-up to the 1999 revisions to Article 9 when in 1996,
Elizabeth Warren (then a law professor) proposed that Article 9 be amended to
include a “carve-out” from all-assets secured transactions to protect unsecured
creditors in the event of a debtor’s bankruptcy.5 While that proposal never
came to fruition, it and the question to which it responded—“Should an entity
debtor be permitted to fully encumber its assets?”—was debated vigorously.

But that debate did not occur in TBL.6 Similarly, asset securitization—a deri-

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2. GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 2.1, at 25 (1965).
3. Our methodology is summarized in Appendix A.
5. Memorandum from Elizabeth Warren, Leo Gottlieb Professor of Law, Harvard Law School, to
6. The only mention of the debate we found in TBL appeared in the compendium of resources
evaluated by the Select Advisory Committee on Business Reorganization (“SABRE”) when it consid-
ered proposals to amend the Bankruptcy Code. Select Advisory Committee on Business Reorganization
(SABRE): Annotated Lists of Resources, 57 Bus. Law. 245, 325 (2001) [hereinafter SABRE Annotated Re-
sources] (addressing a topic entitled “Special Consideration or Carve-Out for Unsecured Creditors,
Involuntary Creditors”). Of the twenty-one sources cited in the SABRE bibliography on that topic,
form of financing whose merits and role in the 2008 financial crisis have been debated by legal academics.\textsuperscript{7} While \textit{TBL} has published important papers on technical and doctrinal aspects of those transactions, policy debates about securitization—"Is it a form of (good) 'alchemy'\textsuperscript{8} or (bad) 'judgment proofing'\textsuperscript{9}—largely occurred outside \textit{TBL}. More recently, legal academics have grown concerned that secured creditors wield too much power in chapter 11 bankruptcies.\textsuperscript{10} Again, while this has been debated vigorously, \textit{TBL} has remained on the sidelines. Although it publishes excellent surveys and technical analyses, \textit{TBL} appears—wittingly or not—to eschew discussion of some of the most important and basic questions about secured transactions.

One could draw several inferences from this apparent trend. First, \textit{TBL} readers may not have had sufficient interest in these debates to warrant coverage. We think this unlikely. The "security" of security interests is a vital question for a wide range of business lawyers: many practitioners have opinions about the force and effect of secured transactions on their practices and in the market. Second, one might believe that those who write for (and perhaps those who read) \textit{TBL} are largely of one mind about these policy questions (e.g., there is no merit to worries about the power of secured creditors). We think this too is unlikely. For every secured transaction important enough to justify paying a lender's counsel, there will also be a borrower's counsel. Policy decisions about secured credit affect the clients of both in different ways.

Instead, a more plausible explanation appears to be that the work and communities of practitioners and academics have grown apart since 1946 for reasons that reflect the increasing complexity, specialization, and "disciplinary" nature of academia.\textsuperscript{11} Academics who might care about secured credit policy do not appear to view \textit{TBL} as the place to raise and explore these issues, and practitioners appear to be content with analyses of incremental developments in the law and techniques of secured transactions. Because \textit{TBL} largely depends on the unsolicited submission of articles, this view would result in fewer articles on policy subjects.


9. Lynn M. LoPucki, \textit{The Death of Liability}, 106 Yale L.J. 1, 24 (1996) ("Asset securitization is both a substitute for borrowing and a powerful new strategy for judgment proofing.").


11. Lynn M. LoPucki, \textit{Dawn of the Discipline-Based Law Faculty}, 65 J. Legal Educ. 506, 509 (2016). This may connect to a larger hostility sometimes expressed toward academics. Chief Justice Roberts has commented, "What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law," Bryan A. Garner, \textit{Interviews with United States Supreme Court Justices}, 13 Scribes J. Legal Writing 1, 37 (2010).
This may reflect an equilibrium with which we are satisfied. But if it does, then *TBL* may miss out on what promise to be important debates about the future of secured transactions, including whether technological developments in financial services and systems ("fintech") render Article 9 of the UCC as quaint and irrelevant as the old factor's lien acts that dotted the legal landscape seventy-five years ago. *TBL's* preeminence depends in part on its role in presenting and framing important debates about business law policy. Debates over the nature, role, and reach of Article 9 of the UCC—including whether it serves any purpose in a fintech world—should be part of *TBL*. Practitioners and academics are each better off having a deeper understanding of one another's views and concerns.

This essay, written in honor of the seventy-fifth anniversary of *TBL*, has five brief parts. Part 1, "Formative Years" (1946–62), looks at *TBL's* role in the development, promulgation, and initial enactment of Article 9. Part 2, "The Age of Tinkering and Tribulation" (1962–99), looks at the years leading up to the 1999 amendments to Article 9 as well as emerging academic debates about secured transactions—none of which appeared in *TBL*. Part 3, "Perfecting Perfection" (1999–present), summarizes *TBL’s* recent coverage of secured transactions, noting again the absence of policy debate. Part 4 briefly discusses the *TBL* articles that have had the greatest "impact" by citation count and observes that they have little to do with secured transactions policy. Part 5 concludes by explaining why *TBL* should include debates about secured transactions policy, using as an example the rise of fintech.

1. **1946–62: Formative Years**

The early years of *TBL* were also the formative years of Article 9 of the UCC, the period in which the latter was conceived, articulated, and initially adopted. The Section played a prominent role in the development and promulgation of the UCC generally, and this work—and debates about it—often appeared in *TBL.*

*TBL* provided extensive coverage of two basic tensions underlying debates about Article 9, reflecting questions of uniformity and distribution. Although debates about the former (uniformity) have largely been resolved by UCC Article 9, debates about the latter have not.

The first major mention in *TBL* of the law that would become Article 9 appeared in Volume 5 in the *Report of the Committee on Recording or Notice Filing of Accounts Receivable*. This was one of many lamenting the Supreme Court's 1943 opinion in the infamous *Klauder* case, which held that unperfected assignments of accounts receivable within four months of the debtor's bankruptcy were avoidable by a bankruptcy trustee for the assignor/debtor under section 60 of the Bankruptcy Act.

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12. See generally Robert Braucher, The Legislative History of the Uniform Commercial Code, 58 COLUM. L. REV. 798, 800 (1958) ("From the beginning the Section of Corporation, Banking and Business Law of the American Bar Association took an interest in the Code project.").

13. 5 BUS. LAW. 153 (1949) [hereinafter Accounts Receivable Report].

The reasoning would be familiar to us today. The Bankruptcy Act at the time gave a bankruptcy trustee the power to avoid any transfer (including an assignment of accounts) that was not good against a bona fide purchaser.\textsuperscript{15} Under Pennsylvania law at the time, a “bona fide purchaser” of accounts would take priority over a prior assignment of the same accounts unless the earlier assignment had been perfected through “notification” of the assignment (problem: the mechanism for providing such notification was unclear).\textsuperscript{16}

The court recognized the outcome was potentially “harsh” because of the “large magnitude” of “non-notification accounts” financing.\textsuperscript{17} Non-notification accounts financing—an assignment of accounts receivable to a particular creditor without recorded or actual notice to the obligor on the account or to other creditors of the assignor—was important but problematic. On one hand, Justice Jackson observed, assigning accounts was interpreted as a sign of financial embarrassment at the time, which may have led customers and creditors to refuse further dealing with the borrower, thus counseling a certain degree of secrecy. “The borrower and the lender on assigned accounts receivable,” Justice Jackson noted, “thus have a mutual interest in not making the transaction known.”\textsuperscript{18} On the other hand, this very secrecy may fool other creditors into extending credit to a debtor that was not, in fact, creditworthy. The “secrecy” of the lien on accounts receivable as collateral would have the “effect of inducing others to go along with the borrower in ignorance where they would not do so if informed.”\textsuperscript{19}

Congress had enacted section 60 of the Bankruptcy Act to combat “secret liens,” which would include unrecorded assignments of accounts, and its language

A preference is a transfer, as defined in this Act . . . , of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy it shall be deemed to have been made immediately before bankruptcy.

\textsuperscript{11} U.S.C. § 96(a) (1940) (repealed 1978).
\textsuperscript{15} See discussion at supra note 14.
\textsuperscript{16} See \textit{In re Phillips' Estate}, 55 A. 213, 216 (Pa. 1903). Pennsylvania later provided by statute that notice of the assignment on the assignor's books would protect the assignee. 69 PA. CONS. STAT. § 561 (1941) (repealed 1953).
\textsuperscript{17} \textit{Corn Exch.}, 318 U.S. at 437-38 (recognizing that its "construction of the Bankruptcy Act] is capable of harsh results, and it is said that it will seriously hamper the business of 'non-notification financing,' of which the present case is an instance. This business is of large magnitude and it is said to be of particular benefit to small and struggling borrowers. Such consequences may, as petitioners argue, be serious, but we find nothing in Congressional policy which warrants taking this case out of the letter of the Act." (footnotes omitted)).
\textsuperscript{18} \textit{Id.} at 440.
\textsuperscript{19} \textit{Id.} at 441.
was clear and unforgiving.\(^{20}\) If the commercial community wanted a different outcome, it would require political action—legislation—which would, in turn, import policy debates about whether and (if so) how the law should be amended.

This was an invitation the Section accepted and on which \(TBL\) reported. As Milton Kupfer, a prominent Section member, later recounted:

Since the Section initiated the proposal for the amendment, which became effective on March 18, 1950, of Section 60a of the Bankruptcy Act, and participated actively in its sponsorship throughout its course, it seems appropriate that the first issue of The Business Lawyer should contain a brief explanatory article upon it.\(^{21}\)

But amending the bankruptcy law alone would not be sufficient because the underlying state law remained in disarray, a jumble of different statutes that provided different rules for differently denominated transactions, which nevertheless had the same underlying economic function: to secure payment or performance of an obligation due to a creditor.\(^{22}\) This disarray was made worse by the fact that the Supreme Court had occasionally intervened in ways that were destabilizing to commercial credit markets, perhaps the most notorious example of which was the (pre-\(TBL\)) case of \(Benedict v. Ratner.\)\(^{23}\) To harmonize and stabilize the law would require coordinated effort, which the Section, the American Law Institute ("ALI"), and the National Conference of Commissioners of Uniform State Laws ("NCCUSL") sought to provide by "rewriting, in statute form, . . . our entire body of mercantile law."\(^{24}\) The merits of this effort—which would result in the UCC—were developed and debated in \(TBL.\)

Initially, for example, concerns about non-notification financing—the nub of the dispute in \(Klauder—\)led to resistance. The Section's Committee on Recording

\(^{20}\) Id. at 439 ("Whatever advantages may inhere in non-notification financing which might have made Congress reluctant to jeopardize it, the system also has characteristics which make it impossible for us to conclude that it is to be distinguished from the secret liens Congress was admittedly trying to reach.").


\(^{22}\) As one Philadelphia practitioner later observed of this period, "The pre-Code situation in Pennsylvania was typical of other states, where there was a hodgepodge of the Uniform Sales Act, the Negotiable Instruments Act, a bank collection act, the Uniform Warehouse Receipts, Bills of Lading, and Stock Transfer Acts, and on security there were at least five statutes plus some common law devices." Murdoch K. Goodwin, \textit{Significant Decisions Interpreting Article 9 of the Uniform Commercial Code}, 8 Bus. LAW. 777, 777 (1963).

\(^{23}\) In \textit{Benedict}, Justice Brandeis, writing for a unanimous court, held that a sale of future accounts receivable was not a true sale but instead a disguised financing and therefore a fraudulent conveyance void against the assignor's bankruptcy trustee. \textit{Benedict v. Ratner}, 268 U.S. 353, 361-63 (1925) ("[The assignment was fraudulent] because of dominion reserved. It does not raise a presumption of fraud. It imputes fraud conclusively because of the reservation of dominion inconsistent with the effective disposition of title and creation of a lien.").

or Notice Filing of Accounts Receivable, “after study of the question,” reported to the ALI and NCCUSL that in its opinion the “credit consumer who employs his accounts as collateral for loans would, in the large majority, be opposed to recording or notice filing of accounts receivable.” Of course, Article 9 went on to do just that, notwithstanding this opposition.

By 1951, the Section had formed a “Committee on the Proposed Commercial Code,” which reported that, while the Section Council needed more time to study the proposal, the proposal reflected a dramatic departure from, and improvement on, existing commercial law:

[T]here is probably more legislative pioneering in Article 9 of the Code on Secured Transactions than in any other Article. . . . [N]o attempt has previously been made to integrate the rules of law governing these various security devices into one statute. Recognizing the great variety in which these security devices have developed historically, the many inconsistencies between them in concept and result and the fact that on analysis, there are a number of factors constant in all security devices, your Committee believes that the attempts to include in a single Article of the Code basic rules for all security devices affecting movable and intangible property is well worthwhile. The Committee considers it possible that if the Code is completed and generally enacted, Article 9 may well prove to be one of the most useful Articles in it.

There were, however, distributive concerns even then, articulated as questions about the breadth of Article 9. J. Francis Ireton, a prominent practitioner, observed that the UCC was meant “to regulate security interests only to the extent necessary to protect the security as against third parties and to clearly define rights as between the security holder and such third parties.” But foreshadowing freedom-of-contract concerns, which animated the full-priority debates, Ireton worried that “[w]hen the Code steps down to regulate rights and liabilities between the lender or time seller on the one hand and the borrower or time buyer on the other hand, then it ceases to be a regulation of a security, and it then becomes police regulation.”

28. Excerpts from Letter of J. Francis Ireton to Judge Herbert F. Goodrich and Others Dated April 24, 1950, 6 Bus. Law. 133, 134 (1951) [hereinafter Excerpts from Letter of J. Francis Ireton]. The May 1951 issue of TBL contained excerpts of correspondence between members of what was then the Editorial Board for proposed Article 9 and interested legal actors:

This report was prepared through the medium of correspondence between the members of the committee without the benefit of any committee session at which ideas could have better been exchanged. It has been filed with the Section on Corporation, Banking and Business Law of the American Bar Association, and was considered by the Council of the Section without either approval or disapproval. In authorizing its release to third persons, the Council and the Section do so for the sole purpose of furthering knowledge and stimulating discussion and with complete reservation of judgment as to the necessity of such a Code and with respect to its detailed provisions and as to the individual and general statements made in the report.

Id. at 133.
29. Id. at 134–35.
On April 6, 1953, a “test” version of the UCC was signed into Pennsylvania law and became effective July 1, 1954.30 Carl Funk, chair of the Section’s Committee on State Banks, observed in a report that the UCC “has generated considerable differences of opinion as to its merits in general and as to the merits of particular provisions.”31 His report “was not going to engage in those debates,” however, but instead was “merely [to] tell you what the experience of our own bar and our own bankers has been in operating under the Code.”32 The report was positive:

Strangely enough—maybe not so strangely—they had some sense of appreciation of the fact that they had only one act to look at rather than a number of acts with amendments and a lot of pamphlets to keep before them. Those of you who are familiar with the mysterious way in which Pennsylvania statutes are brought out, to the mystification of everyone but a Pennsylvania lawyer, will appreciate this feeling.33

Some time passed, and some changes were made, before other states began to enact the UCC. But this they did, and by 1961, Funk (along with Walter Malcolm) was able to report on recent or pending enactments in Massachusetts, Connecticut, Illinois, and Ohio, among others.34 “Hence,” they told TBL readers, “the Uniform Commercial Code is a matter of paramount current interest to all persons having concern with the commercial law in the United States.”35 This was for good reason. In Pennsylvania, they noted, “Article 9 has had the most profound effect upon commercial transactions,” because, among other reasons, it radically simplified the law by bringing all security devices under one conceptual heading; by creating a single, simple notification system; and by abolishing the prescriptions of Benedict v. Ratner.36

But not all states shared Pennsylvania’s enthusiasm. New York, in particular, had doubts. In 1960, Homer Kripke, a prominent practitioner and contributor to the UCC, excoriated the New York Law Revision Commission, whose study of the UCC “can best be described as a series of proceedings in rem with the several sections of the Code as defendants, not represented by counsel.”37 According to Kripke, New York had demanded a “perfect” law, a standard which the UCC would not satisfy.

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31. Funk, supra note 30, at 57.
32. Id.
33. Id. at 76 (providing remarks of Paul A. Mueller).
35. Id.
36. Id. at 539–40.
37. Homer Kripke, The Modernization of Concepts Under Article 9 of the Uniform Commercial Code, 15 Bus. Law. 645, 653 (1960). In a footnote, he observed that “[t]he cases might have been denominated ‘State of New York ex rel. Staff of Law Revision Commission v. See.—of the Uniform Commercial Code,’ and the atmosphere at times seems to have been similar to that in such in rem cases as United States v. Two Barrels of Dessicated Eggs, 185 F. 302 (D. Minn. 1911),” thus showing that TBL could be both informative and humorous. Id. at 653 n.44.
One can only think wistfully of the opportunity for our generation that was presented really to codify a body of modern commercial law, if during the drafting period the Code had received the sympathetic cooperation of large big-city law offices and bankers' groups. But conceding that the Code is not perfect in its present form, one can assert confidently that it stacks up very favorably against the preexisting body of law in any state, and the existing body of law in any non-Code state.\textsuperscript{38}

Still, the New York Commission had concluded in the 1950s that New York should not enact the UCC without "extensive revision."\textsuperscript{39} Notably, New York's resistance to the UCC apparently had comparatively little to do with Article 9, which was the subject of only a few New York-focused adjustments.\textsuperscript{40} According to one history, "the principal impetus behind the great majority of the New York modifications was the earnest effort of the New York Commissioners on Uniform State Laws to meet the criticisms of the bankers of New York City speaking collectively through the New York Clearing House Association (CHA)."\textsuperscript{41} It would appear that most objections and adjustments involved the payment and securities-related provisions—in particular, Articles 3, 4, and 8.

Given New York's central role in commercial finance and law, the NCCUSL and ALI "had little choice but to go along."\textsuperscript{42} Thereafter, the UCC was revised, and as a result, the 1957 Official Text—with slight modifications in 1958 and 1962—was soon widely enacted, becoming the law in forty-nine states, the District of Columbia, and the U.S. Virgin Islands by 1968.\textsuperscript{43}

1962 was thus an important year in the early life of the UCC and the close of its formative period. That was the year New York enacted the UCC (with a delayed effective date of 1964).\textsuperscript{44} Perhaps equally important, the NCCUSL and ALI

\textsuperscript{38} Id. at 653.
\textsuperscript{40} Norman Penney, New York Revisits the Code: Some Variations in the New York Enactment of the Uniform Commercial Code, 62 COLUM. L. REV. 992, 1013 (1962) ("Aside from variations with respect to filing, there were only two sections of article 9 in which notable changes were made."). Penney elaborated:

Many criticisms made by the Clearing House Association resulted in changes embodied in the 1956 Recommendations and ultimately in the 1958 Official Text. When it was learned that enactment of the Code would be sought in the 1962 legislature, the CHA formed subcommittees of bankers and their counsel to re-examine and re-evaluate articles 3, 4, 5, 8, and 9 of the 1958 Official Text. This CHA study culminated in a report, dated December 1, 1961, which included new suggestions as well as some criticisms advanced in 1954. The report contained a series of thirty-nine "changes essential to the Code," each supported by specific amendatory language and a statement of the "Reasons for Changes," some of which were fairly well elaborated while others were quite cryptic. The report also included an "Annex B" containing additional, but apparently nonessential, change proposals.

\textsuperscript{41} Id. at 993 (internal footnote omitted).
\textsuperscript{42} Id. at 992-93.
\textsuperscript{44} 1962 N.Y. Sess. Laws ch. 553 (McKinney) (effective Sept. 27, 1964).
created a "permanent editorial board" for the UCC ("PEB") whose job would be to promote uniformity in enactment. PEB participants now include an ABA Advisor appointed by the Section.

The formative years of TBL and Article 9, 1946–62, were marked by efforts to identify and debate policy issues animating the need for, and the goals of, Article 9 of the UCC. To be sure, even in this early era, there was considerable interest in purely practical matters. TBL articles on secured transactions often took the form of testimonials from practitioners on the benefits of adopting Article 9. Policy debates in TBL about the effects of secured transactions on third parties—whether good or ill—were, however, largely a product of this era and not later ones.


After New York adopted the UCC, the wind was at the statute’s back. This may have left those who read and wrote for TBL believing that there was little Article 9 policy left to debate. As early as 1962, TBL was focusing on statutory “remnants” of the UCC. In 1963, the first of the annual surveys on the UCC appeared in TBL, and these have become an important feature—one which may signal a certain stability in the law, and perhaps to TBL readers, debates about it.

This was, in Professor Charles Mooney, Jr.’s words, an era of “tinkering.” Often, this tinkering reflected efforts to advance or repel state-specific variations to the UCC. This tinkering has remained a perennial issue in the UCC because the statute is, after all, intended to be “uniform” across states. Despite this goal, by 1970, there were alleged to be nearly 500 “nonuniform gremlins” in the forty-nine states that had enacted the UCC.

But debates about UCC policy like those that appeared in the formative era largely disappeared from TBL. This is not, however, because there were no debates about secured credit. Quite the contrary. Beginning in the late 1970s,
debates about secured transactions policy became a cottage industry among legal academics, but these debates appear not to have occupied the pages of TBL.

Modern debates about secured transactions policy typically focus on its “distributive” effects: how are a debtor’s various stakeholders—the third parties identified by J. Francis Ireton in the formative era—affected by the debtor’s use of secured transactions under Article 9? The debate began in 1979, when Professors Thomas Jackson and Anthony Kronman, motivated by the (then-new) study of “law and economics,” argued in the Yale Law Journal that the distributive consequences of secured transactions were, in aggregate, socially beneficial. Although they cited little of the economic literature, their main claim was that secured credit was economically efficient because it reduced the risks of debtor misbehavior and thus the costs of monitoring the debtor. These cost savings would, in theory, be passed on to the debtor, who would then have more capital to use.

In 1981, Alan Schwartz, then a law professor at the University of Southern California (now at Yale University), responded to Jackson and Kronman in a provocative paper in The Journal of Legal Studies, arguing that secured transactions were not, in fact, necessarily economically efficient. The so-called Modigliani–Miller “indifference” theorem held that other things equal (and ignoring tax effects, among other things), a firm’s choice of financing should have no effect on its overall value. If secured credit were cheaper, the theory went, then unsecured credit would be more expensive, with the latter offsetting the efficiency gains of the former.

This debate took on a number of permutations, but the most significant salvo appeared in 1997, when Lucian Bebchuk and Jesse Fried, both of Harvard Law School, published The Uneasy Case for the Priority of Secured Claims in Bankruptcy in the Yale Law Journal. They argued that “in the real world[,] . . . the creation of a security interest diverts value from creditors that do not ‘adjust’ the size of their claims to take into account the effect of the loan transaction that creates the security interest, including the fact that any security interest given to the secured creditor subordinates their unsecured claims.” That is, secured credit was potentially more economically costly than had been recognized.

53. See Excerpts from Letter of J. Francis Ireton, supra note 28.
54. See generally Steven L. Harris & Charles W. Mooney, Jr., A Property-Based Theory of Security Interests: Taking Debtors’ Choices Seriously, 80 Va. L. Rev. 2021, 2023 (1994) (“Recent years also have seen the rise of scholarship that has subjected security interests to closer examination, often with the aid of economics, in an ongoing debate over whether secured credit is socially useful and, if so, how. Although the newer literature is considerably more rigorous than what came before, it sounds some familiar themes—reflecting fascination with, if not always concern about, the distributive effects attendant to the grant of security. We confess that we have shied from this debate until now.”).
55. Thomas H. Jackson & Anthony T. Kronman, Secured Financing and Priorities Among Creditors, 88 Yale L.J. 1143, 1146 (1979) (using an economic analysis to “develop a unified theory that explains several of the most important priority rules in Article 9”).
57. Id. at 7.
Into this debate jumped Elizabeth Warren, then a law professor, who argued that any revision to Article 9 should explicitly reconsider the distributive policy choices embedded in Article 9—choices which would be debated in the pages of the *Cornell Law Review* and *Virginia Law Review* but not in TBL.\(^{59}\) She famously (or infamously) proposed that Article 9 should be revised to include a “carve-out” from all-assets secured financings for unsecured creditors.\(^{60}\) The Drafting Committee solicited wide input on the proposal, which was substantially negative, rendering it “dead in the water” at the time.\(^{61}\)

There were, to be sure, non-economic critiques of Article 9 as well. In 1981, Grant Gilmore, the reporter for the original iteration of Article 9, “repented” because he worried that “the secured party can lock up all the property that the debtor now owns or ever will acquire, sit back and do nothing until bankruptcy day, and then . . . walk off with everything.”\(^{62}\) Some scholars questioned whether a security interest should be treated as an interest in “property,” as distinct from an in personam right akin to an unsecured claim.\(^{63}\) In 1985, Homer Kripke argued that economic arguments for or against secured credit took place in a “vacuum of fact,” and thus more conventional analysis—what Lynn LoPucki wryly called “law and law”\(^{64}\)—would have to suffice.\(^{65}\) These too, however, appear not to have made the pages of TBL.\(^{66}\)

Although absent from TBL, these debates mattered because by the late 1980s, there were calls to reduce the level of state variation and solve a host of problems that had arisen in practice. In 1990, the PEB established a study group (the “PEB

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\(^{59}\) Elizabeth Warren, *Making Policy with Imperfect Information: The Article 9 Full Priority Debates*, 82 *Cornell L. Rev.* 1373, 1374 (1997) (“The lack of theoretical consensus for full priority has become prominently exposed, the absence of empirical data has obviated the ability to make any concrete evaluation of the costs and benefits of secured credit, and the headlong push to enlarge on every scintilla of priority for secured creditors has intensified.”). This was one of several papers in Cornell Law School’s 1997 symposium on secured transactions. See generally *Symposium, The Uneasy Case for the Priority of Secured Claims in Bankruptcy: Further Thoughts and a Reply to Critics*, 82 *Cornell L. Rev.* 1279 (1997). In 1994, the *Virginia Law Review*’s symposium considered the nascent revision process. See *Symposium on the Revision of Article 9 of the Uniform Commercial Code*, 80 *Va. L. Rev.* 1783 (1994).

\(^{60}\) See Warren, supra note 5.

\(^{61}\) Warren, supra note 59, at 1395 (“The carve out, Professor Harris announced at the Symposium, is ‘dead in the water.’”).


\(^{63}\) James S. Rogers, *The Impairment of Secured Creditors’ Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 *Harv. L. Rev.* 973 (1983) (arguing that by preselecting particular property to be used in satisfying its claim, a secured creditor does not acquire property rights deserving greater constitutional protection than is accorded to the contractual rights of an unsecured creditor).


\(^{66}\) A search of the term ‘adv: ‘article 9’ /s ‘full priority’ /p (bebchuk schwartz warren baird)” on September 3, 2019, within Westlaw’s database for TBL produced a single result: citations to the main papers in the full-priority debate in a list of resources consulted by SABRE. *SABRE Annotated Resources*, supra note 6, at 326 (citing, e.g., Warren, supra note 59).
Secured Transactions Under Article 9 of the UCC


69. Weise is, and was in the 1990s, a member of the PEB, a former chair of the Section’s Subcommittee on Secured Transactions, and the ABA Advisor to the Article 9 Drafting Committee. See Steven O. Weise, U.C.C. Article 9: Personal Property Secured Transactions, 54 Bus. Law. 307, 344 (1998). He went on to become chair of the Section itself for the Section year 2003-04.

70. Timothy R. Zinnecker, The Default Provisions of Revised Article 9 of the Uniform Commercial Code: Part I, 54 Bus. Law. 1113, 1114 (1999) (“The most extensive changes to Article 9 have been made to the default provisions.”).

71. Boss & Veltri, supra note 49, at 1593 (“Both the bankruptcy reform process and the state law revision process would be better informed if there were cross-fertilization of ideas and coordination between the two.”).


77. As to leveraged leasing, see, for example, Charles W. Mooney, Jr., Book Review, 34 Bus. Law. 809 (1979) (reviewing Bruce E. Fritich & Albert F. Reisman, Equipment Leasing—Leveraged Leasing...
too have proved controversial—especially securitization—debates about their policy implications have also appeared elsewhere.\textsuperscript{78}

This is not to say that there was a complete lack of interest in secured transactions policy questions.\textsuperscript{79} There was ongoing consideration of the interaction between Article 9 and the Bankruptcy Code, which tends to imply an interest in distributive effects.\textsuperscript{80} But often, the analyses focused on technical issues involving a trustee’s avoidance powers, with modest discussion of the underlying policy issues.\textsuperscript{81} It is also worth noting that in this era, TBL began both a book-review feature\textsuperscript{82} and occasional efforts to summarize academic papers of substantive interest to business lawyers.\textsuperscript{83} These features—which appear today to be dormant—suggest that business lawyers were not uninterested in policy debates but may have had limited opportunities to engage in them. We suggest below ways that TBL might address this issue.

3. 1999–Present: “Perfecting Perfection”

The third era in the life of Article 9 as depicted in TBL can be characterized largely as a continuation of trends from the immediately prior era: a focus on technique, judicial developments, and some efforts toward innovation, but now less burdened by significant non-uniformity. Debates about secured transactions policy, however, all but vanished from TBL.

This too was a missed opportunity because this era saw a resurgence in concerns about the power of secured creditors in corporate reorganizations. Much of this debate echoed the earlier distributive debates, though here, the debate added the complication of a chapter 11 reorganization for the debtor. To what extent should secured creditors be entitled to control the entity’s reorganization process?\textsuperscript{84} Although Congress expected these cases to be run by entity management

\textsuperscript{78}. See Lipson, supra note 7, at 1265 (discussing flaws in securitizations and their role in the financial crisis).

\textsuperscript{79}. Panel Discussion, A Look at the Work of the Article 9 Review Committee, 26 Bus. Law. 307, 325 (1970) (providing remarks of Grant Gilmore) (“Another area of conflict has to do with relationships between Article 9 and the overriding federal policy of Section 60 of the Bankruptcy Act.”).


\textsuperscript{82}. See, e.g., Mooney, Book Review, supra note 77, at 809.

\textsuperscript{83}. Bernard G. Helldorfer, Secured Transactions, 41 Bus. Law. 1575 (1986) (reviewing Homer Kripke, supra note 65, and Thomas Jackson & Alan Schwartz, Vacuum of Fact or Vacuous Theory: A Reply to Professor Kripke, 133 U. Pa. L. Rev. 987 (1985)).

\textsuperscript{84}. Jonathan C. Lipson, The Secret Life of Priority: Corporate Reorganization After Jevic, 93 Wash. L. Rev. 631, 711 (2018) (“If a debtor’s assets are fully encumbered by a post-petition lien, it is not clear how effectively anyone other than the secured creditor can participate in meaningful decisions about the debtor’s fate.”); cf. Jay Lawrence Westbrook, Secured Creditor Control and Bankruptcy Sales: An
for the benefit of unsecured creditors, mounting evidence suggests that these cases are increasingly influenced by secured creditors. Whether that is the case—and whether that is good or bad—are the subjects of ongoing debate. But this debate does not appear to occur in TBL.

4. IMPACT ASSESSMENT

If TBL long ago abandoned efforts to debate secured transactions policy, what TBL articles on secured transactions have had the greatest effect? What, in other words, has been important enough to cite?

There are many ways to assess the “impact” of scholarship: one could consider the number of academic or judicial citations to an article; one could look at responses of public legal actors (e.g., legislation or legislative histories); and one could survey sophisticated academics and practitioners for their opinions on what articles are important. We have chosen the first of these because it is viewed as somewhat easier and more objective than other methods and is the method used by both the W&L Law Journal Rankings and others who consider such matters.86

As further explained in Appendix A, we searched for all articles in TBL involving secured transactions from inception through 2018. This produced a sample of 422 articles. We then used HeinOnline to search for citations to articles published in TBL involving secured transactions in academic articles and judicial opinions. The top ten TBL articles by citation count are depicted in Figure 1.

The first thing to notice is that none of the three citation leaders—with 200, 113, and 95 citations, respectively—are exclusively about secured transactions. Rather, the citation leader—the 1989 Report of the Committee on Corporations of the Business Law Section of the State Bar of California Regarding Legal Opinions in

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Figure 1
Top Ten TBL Articles by Citation

![Bar chart showing the top ten TBL articles by citation]

Business Transactions—is about third-party closing opinion practice. It discusses in some detail best practices for issuing third-party closing opinions in secured transactions but also discusses many other types of transactions. Given the anxiety that sometimes attaches to issuing closing opinions, it is not surprising that this is the most widely cited article in the sample. It tackles issues that are doubtless important to the daily work of business lawyers. But it does not consider more difficult questions about the effects of secured transactions (or closing opinions about them), whether good or ill.

Similarly, Personal Property Leasing: A Challenge, the second-most cited paper in the sample, discusses secured transactions only tangentially. Here, Professor Mooney explores issues in connection with personal property leasing and focuses on secured transactions to the extent that a purchase option under a lease affects the characterization of the transaction as a lease or secured financing.

Like the top two, number three in the citation tournament did not focus solely on secured transactions but instead considered structured financing techniques,
which are sometimes an alternative to or part of secured transactions.\textsuperscript{92} While this paper has been highly influential in helping lawyers identify and address issues of "true sale," it did not consider the policy implications of any given determination.

One may infer from this that those who read and use \textit{TBL} are not interested in secured transactions policy. But that would be wrong because as explained above, there was little scholarship in \textit{TBL} on the policy debates that occurred in the most recent eras. We cannot make any inference about the appetite for policy analysis in \textit{TBL} because, for all practical purposes, there was none. Citations to practice-oriented articles reflect the fact that practitioner-oriented content is what was available and useful to those who wrote about secured transactions. Moreover, \textit{TBL} has covered important policy debates on other business law subjects, such as corporate governance.\textsuperscript{93} There is no obvious reason policy debates about secured transactions should be different.

The takeaway thus far is fairly straightforward: Although \textit{TBL} and Article 9 began at roughly the same time, \textit{TBL}'s coverage of Article 9 distributive-policy issues vanished over time. Debates about those policies have largely occurred outside \textit{TBL}. But this begs the questions: Who cares? Why should \textit{TBL}'s potential readers want to read about policy debates in \textit{TBL}? Why should those engaged in these debates want to publish in \textit{TBL}? The next, and final, part considers some answers and what \textit{TBL} might wish to do about this in the future.

5. \textbf{Why and What Next?}

Article 9 of the UCC is considered one of the most effective pieces of legislation ever enacted, but it is also controversial because of its distributive effects: it enables a debtor to prefer one creditor over others, which may have positive or negative social consequences. Many of us take this for granted today, but this may be because policy debates about the social and economic effects of secured transactions have taken place largely outside \textit{TBL}. At the same time, \textit{TBL} rightly views itself as the nation's leading academic publication dedicated to business law. To cede debates about important policy questions to other journals is to deprive practitioners of exposure to these debates and is to deprive academics of exposure to, and interaction with, practitioners' views on, and experiences with, these matters.

The separation of policy from practice reflected in \textit{TBL}'s coverage of secured transactions can be seen as part of a larger trend toward "disciplinary" legal scholarship. As Lynn LoPucki has observed, law schools (especially elite ones) increasingly appear to prefer hiring Ph.D.s in tenure-track positions.\textsuperscript{94} But those with Ph.D.s tend to have little or no practice experience because the "Ph.D. is now a credential acquired in lieu of legal experience to qualify for a career in

\begin{footnotesize}
\textsuperscript{92} \textit{Structured Financing Techniques}, \textit{supra} note 77.

\textsuperscript{93} \textit{See Symposium on Outsourcing the Board: How Board Service Providers Can Improve Corporate Governance}, \textit{74 Bus. Law.} 285 (2019).

\textsuperscript{94} LoPucki, \textit{supra} note 11.
\end{footnotesize}
law teaching."\textsuperscript{95} This means that legal scholarship is increasingly non-legal in methodology and orientation.\textsuperscript{96} To be sure, law schools still hire practitioners as adjuncts or "professors from practice." But they are not likely to be on, or interested in, the tenure track or expected to publish scholarship. The net effect is that academics and practitioners appear increasingly siloed—disconnected from one another in ways that we think are not healthy for academics or practitioners in the long run.

This is a problem both for \textit{TBL} and its readers. For \textit{TBL}, it means that, absent a different approach, \textit{TBL}—and by inference, the Section—may have a diminished influence on future debates about secured transactions. For its readers, policy debates matter because they provide the frame in which legislative and regulatory decisions are ultimately made.

It is easy to imagine that many lawyers and practitioners in the Section are "pro-secured creditor," and that this explains the absence of debate in \textit{TBL}. But that seems unlikely. The Section has a large Business Bankruptcy Committee with many lawyers who represent borrowers. In any case, a lawyer’s type of clients or transactions hardly determines her level of interest in policy debates about the law that affects her practice.

It is equally easy to imagine that policy debates may be viewed as something of a luxury because they take precious time and energy, none of which is billable. Although we cannot prove this, we think this would be wrong too. Most people become lawyers not because of their abiding interest in technical questions about how to negotiate and document complex transactions, but instead because they care about more basic questions of policy: what can or should law do, and within private ordering, what are the boundaries of permissible agreements, and how do we decide? That these are basic questions does not make them less important to practice. If anything, maintaining some connection to them will, we think, make business lawyers better at solving today’s problems and anticipating those that are coming down the pike. Although practitioners have limited time (and patience) for academic debates about commercial-law policy, both practitioners and academics are better off if they speak to, rather than past, one another. \textit{TBL} has been, and should be, a forum in which business-law practitioners and academics do just that.

Perhaps the most concrete reason that \textit{TBL} readers and authors should care about policy debates and present them in \textit{TBL} is that developments in informational and computational technologies will dramatically affect commercial-finance practice in ways the law has barely begun to contemplate. While we are cautious in predicting the future or debates about it, we can imagine several

\textsuperscript{95} Id.; see also Lynn M. LoPucki, Disciplining Legal Scholarship, 90 Tul. L. Rev. 1 (2015); Lynn M. LoPucki, Disciplinary Legal Empiricism, 76 Mo. L. Rev. 449, 486 (2017) [hereinafter Disciplinary].

\textsuperscript{96} LoPucki, Disciplinary, supra note 95, at 451 (finding that "J.D.-Ph.D.s, prefer to collaborate with other Ph.D.s than with the holders of only law degrees, that Ph.D.s use different data sources than non-Ph.D.s to study different questions, and that Ph.D.s are less likely than non-Ph.D.s to create their own datasets").
"fintech" issues that may be relevant to business-law practitioners and academics which should therefore find a home in \textit{TBL}.  

First, consider the nature of fintech collateral. In 1946, collateral for what we would today call a "security interest" was highly likely to be goods or accounts receivable. Data and the technologies that make use of data did not exist in any commercially meaningful sense—certainly not sufficient to be collateral for a sizable number of loans. The Article 9 system thus developed around the assumption that security interests would mostly involve "goods," fixtures, and accounts receivable. 

While tangible collateral remains important, intangible collateral such as consumer and business data appear to be increasingly valuable; debtors and secured parties may wish to use such assets as collateral. 97 Although the Article 9 system could accommodate those forms of collateral—they are probably general intangibles—that system is not a perfect fit given the replicability, mobility, and mutability of such collateral, among other problems. 98 Whether and how these new types of assets should be treated as collateral will present difficult and important policy questions. 

Second, consider the steps required to make a secured transaction effective against third parties—that is, "perfection." \"The two main approaches to achieving third-party effectiveness . . . (registration in a general security interest registry and creditor possession) . . . presuppose that the central objective is to alert third parties to the possible existence of a security right.\" 99 But, Professor Mooney recently asked, "Does this central objective continue to make sense in the year 2018?" 100 He suggests that it might, but that private rather than public registries may be the solution—an approach that would surely be controversial. 101 Among other problems, such systems might not be exclusive, might not be interoperable, might be subject to rent-seeking in the absence of competition, and—perhaps more prosaically—would reduce revenue that public registries currently generate from the filing of UCC financing statements and amendments. 102 A proliferation in registries may revive problems of dis-uniformity previously thought to have been solved by the UCC. But the benefits may exceed the costs, and so should be the subject of debate. 

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\begin{itemize}
  \item 98. Id.
  \item 100. Id. at 12.
  \item 101. Id. at 13 ("Given these attributes of registries and assuming that ostensible ownership derived from possession and appearances is not a significant concern, why not do away with public registries in favor of expanding regimes of private registries?")
  \item 102. Id. at 18 ("The principal challenge for any fintech innovations for secured transactions is overcoming the entrenched, path-dependent public registry-based systems that primarily feature generally applicable, grantor-based approaches adopted on a model of jurisdiction-by-jurisdiction government operation.").
\end{itemize}
Third, technologies such as radio-frequency identification ("RFID") and distributed-ledger technology ("DLT") may complement or displace the Article 9 filing system. Professor Christopher Bradley has argued that RFID and geolocation technologies may "disrupt" the functions of the existing UCC filing system by making it possible to identify and tag unique items on a wide and granular scale. DLT may have a similar effect by creating secure, non-centralized mechanisms for registering and transferring interests in property. As Professor Teresa Rodríguez de las Heras Ballell recently observed, "Digital-technology solutions can be applied to enhance the effectiveness of the system by perfecting transactional practice, refining institutional defects, reshaping registry models, streamlining enforcement procedures, or creating a well-functioning secondary market." Whether these systems "enhance" or "replace" the Article 9 filing system—or indeed Article 9 entirely—may be an increasingly important policy debate in the future. TBL should provide a forum for such debates.

At the same time, we suggest that TBL revive some old practices and consider new ones. In the revival category, we include abstracting academic articles of interest from traditional law reviews and perhaps reinstating book reviews. We also recommend a greater use of symposia, including on secured transactions policy. These can be an effective forum in which to bring practitioners and academics together to debate a shared question, and TBL has done them in the recent past in other business law fields. TBL can also identify and seek out articles from academics and practitioners who have an interest in policy issues rather than waiting for those articles to appear on their own. Substantive committees within the Section can designate members to monitor public digests of draft scholarship, such as the Social Science Research Network, to identify authors writing in their fields with a view toward recommending promising candidates to TBL.

To focus policy debate, we also recommend that TBL develop a richer relationship with the PEB in order to publish that group's work. There is already a model for this within the Section: the Model Business Corporation Act ("MBCA"), which is developed and maintained by the Section’s Corporate Laws Committee ("CLC"). The MBCA has been enacted in over thirty states and is subject to

103. "RFID (radio frequency identification) is a form of wireless communication that incorporates the use of electromagnetic or electrostatic coupling in the radio frequency portion of the electromagnetic spectrum to uniquely identify an object, animal or person." See RFID (Radio Frequency Identification), IoT AGENDA, https://internetofthingsagenda.techtarget.com/definition/RFID-radio-frequency-identification (last visited Oct. 19, 2019).

104. Joshua A.T. Fairfield, Bitproperty, 88 S. CAL. L. Rev. 805, 814 (2015) ("The Bitcoin protocol creates a ledger out of a series of groups of transactions, termed simply ‘blocks,’ which as a whole form a log of all transfers, termed the ‘block chain.’ The block chain is not maintained by any single entity, but instead relies on a mathematically innovative consensus model.").

105. Christopher G. Bradley, Disrupting Secured Transactions, 56 Hous. L. Rev. 965, 970 (2019) (discussing two "disruptive" technologies that can and should bring a radical shift in secured transactions: 'Internet of Things' (IoT) technologies and geolocation technologies").


107. See supra note 93.
periodic revision. Proposed revisions and amendments to the MBCA are published in TBL in order to give those with an interest in corporate law the opportunity to review and comment on proposed changes. This, in turn, enables the CLC to assess both the technical and policy implications of its work.

While the PEB is not an entity within the ABA, many of its members are active in the Section, and the Section appoints a liaison to it. Certainly, those who care about the PEB’s work would benefit from access to it through TBL. Perhaps the PEB would benefit from exposure in TBL, as the CLC does with respect to its work. While PEB reports are not policy debates themselves, they play important roles in generating and analyzing policy positions. PEB proposals may reflect the outcome of policy debates about the nature and scope of UCC Article 9—debates which have in recent years occurred elsewhere but should also appear in TBL.

CONCLUSION

There is more we could say about the future of Article 9 and the role TBL might play in it. For now, it is sufficient to close by noting that TBL’s stature and breadth give it an unrivaled capacity to generate and participate in intelligent debates about important business-law policy issues along with direct access to a broad range of business lawyers, judges, and scholars. While the practical and technical content that appears in TBL is likely to remain foremost for TBL’s audiences, we believe they and TBL would also benefit from a broader focus—one that considers not only how to use Article 9 but also what Article 9 or future analogues should seek to achieve.

APPENDIX A

Methodology

Articles from The Business Lawyer from inception through 2018 were obtained through the Hein Online ABA journal database. Using the advanced search function, articles which mentioned the terms: secured transactions, chattel mortgages, factors liens, secured credit, consumer liens, or UCC Article 9 were downloaded in pdf format. Due to constraints on the number of search terms allowed in a single query, an additional search was run for articles containing the phrases: factoring, secured loans, collateral, or secret lien. To ensure the relevance of the articles, all articles returned from the search were subsequently read.

An Excel spreadsheet was then created which contained the citation history of each article using data from Hein Online’s “ScholarCheck” citation information tool. The ScholarCheck data categorizes each citation to an article as either a(n) article, case, or ALI citation, depending on the nature of the source citing the article. The number of citations in each category was entered into three...
separate columns of the spreadsheet. Using the Excel summation function, the total citation count was calculated as the sum of all article, case, and ALI citations in the ScholarCheck database. The ten most cited articles were identified using the “Top Ten Items” conditional formatting function in Excel, which highlighted the articles with the greatest number of total citations.