
WHY (AND HOW TO) DEFINE SECURITIZATION? A SUR-REPLY TO PROFESSOR SCHWARCZ

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I. INTRODUCTION

In his brief essay, *What Is Securitization? And for What Purpose?*¹ (“*Purpose*”), Professor Steven Schwarcz does me a great honor in responding to my article, *Re: Defining Securitization* (“*Re: Defining*”), where I ask what, exactly, does the term “securitization” mean?²

As serious observers of, and participants in, securitization know, Professor Schwarcz is one of the leading authorities on the subject. His works—for both professional and academic audiences—are must-reads.³ Thus, if, as I say in *Re: Defining*, my goal was to be not the last word on this question but the first,⁴ the fact that he has written such a thoughtful response tells me I have succeeded.

Nevertheless, several of his criticisms warrant scrutiny. Unaddressed, they may leave readers misunderstanding the purpose of the definitional exercise I undertake in *Re: Defining*. Thus, I offer this brief “sur-reply” to

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1. Steven L. Schwarcz, *What Is Securitization? And for What Purpose?*, 85 S. CAL. L. REV. 1283 (2012) [hereinafter Schwarcz, *Purpose*].

2. Jonathan C. Lipson, *Re: Defining Securitization*, 85 S. CAL. L. REV. 1229 (2012) [hereinafter Lipson, *Re: Defining*].

3. See, e.g., STEVEN L. SCHWARCZ, STRUCTURED FINANCE: A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION (2d ed. 1993); STEVEN L. SCHWARCZ, STRUCTURED FINANCE: A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION (3d ed. 2003); Steven L. Schwarcz, *Securitization Post-Enron*, 25 CARDOZO L. REV. 1539 (2004) [hereinafter, Schwarcz, *Post-Enron*]; Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133 (1994); Steven L. Schwarcz, *The Future of Securitization*, 41 CONN. L. REV. 1313 (2009).

4. See Lipson, *Re: Defining*, *supra* note 2, at 1235.

Professor Schwarcz, which has four primary parts. Part II discusses the heart of our disagreement, which involves deciding which institutions—markets, legal actors, and so on—should deal with the core problem presented in *Re: Defining*: that of costly definitional complexity. Part III responds to specific criticisms Professor Schwarcz makes of my definition and shows that they may derive from differing institutional preferences or (in some cases) a misunderstanding of my goal. Part IV then assesses his alternative definition, pointing out some of its weaknesses—in particular, that it would appear to encompass transactions (like Enron’s) he has elsewhere disclaimed as securitizations. Part V then briefly reflects on the purpose of this definitional exercise. Part VI concludes.

II. INSTITUTIONAL CHOICE IN DEFINING TERMS

At bottom, Schwarcz and I differ over institutional choices and functions in defining terms in commercial finance law. By “institution” I mean the several (more or less) discrete, large-scale social constructs through which we order our affairs, such as markets, political bodies, courts, and so on.⁵ Different institutions exhibiting different dynamics can solve the same problems in somewhat different ways and thereby present options about how those problems can be solved.

Professor Schwarcz disagrees with my definition because it is “overly restrictive.”⁶ It is overly restrictive in part, he argues, because it fails to account for “dynamically changing financial markets.”⁷ Thus, he believes, the source of meaning in this context should chiefly be the market, and not

5. I use the term “institution” after Neil Komesar. *See id.* at 1237 n.29 (citing NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994); NEIL K. KOMESAR, *LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001); Neil K. Komesar, *Exploring the Darkness: Law, Economics, and Institutional Choice*, 1997 WIS. L. REV. 465; Neil K. Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981)).

6. Schwarcz, *Purpose*, *supra* note 1, at 1284, 1286.

7. *Id.* at 1284, 1294, 1298; *id.* at 1292 (“[T]he definition [of securitization] ideally should be consistent with market expectations, which help to signal whether market participants might be subject to the regulation.”); *id.* at 1294–95 (“Finally, a financial concept, such as securitization, should be defined in light of dynamically changing financial markets. Financial concepts, like securitization, are not fixed in time; they evolve in response to changing financial market conditions.”).

Schwarcz seems to have mistaken my approach, arguing that I seek to define securitization only for lawmakers. *Id.* at 1291 (“Lipson recognizes the importance of at least one audience group, lawmakers . . .”). Of course, *Re: Defining* contains a fairly thorough discussion of how nonlegal actors define securitization, including regulators acting in a nonregulatory capacity (for example, as fact finders), market actors and observers, and legal academic observers. *See* Lipson, *Re: Defining*, *supra* note 2, at 1261–65. If his criticism is that I focus more attention on legal definitions than others, he is probably correct, for as an institutional matter, that is my chief (but not only) audience.

other institutional actors, such as legislatures, regulators, judges, or (presumably) legal academics.

Putting to one side the irony of this—as discussed below, Professor Schwarcz (a nonmarket actor for this purpose) has, himself, offered several definitions of the term (including in *Purpose*)⁸—the chief problem with his approach is that markets seem to make significant mistakes in this arena. They tend toward a level of financial and definitional complexity that makes clarity difficult, yet, a clear definition is imperative. As I will show below, the definition Professor Schwarcz offers here is a good example of this.

Left alone, markets only sometimes have an interest in developing clear definitions of terms that describe new technologies. Our experience with securitization suggests that this would not appear to be one of those times. If the market had gotten securitization right, I would probably not have bothered to attempt to clarify the meaning of the term. But the financial crisis tells us that the market did not get securitization right. I suspect that applying the label “securitization” to many transactions which, on inspection, differed in important ways from my more restrictive definition lulled investors and regulators into a complacency that created conditions permitting mistakes and conflicts of interest that plague us still. While the market made many mistakes having nothing to do with nomenclature, a failure to understand what the term securitization can, and should, mean likely contributed to those mistakes.

That Professor Schwarcz criticizes my institutional choice in defining securitization is somewhat surprising. One his many accomplishments was to give an early warning that complexity in financial products had the potential to create larger systemic problems.⁹ In many respects, Professor Schwarcz’s concerns have been realized. He has thus previously argued that transactional complexity (abetted by complacency and conflicts of interest) was at the root of the credit crisis.¹⁰ Because he believes financial markets are unlikely to promote the development of simpler financial products, he has argued that complexity will remain a problem warranting

8. See Schwarcz, *Purpose*, *supra* note 1, at 1288, 1295–98.

9. See Steven L. Schwarcz, *Rethinking the Disclosure Paradigm in a World of Complexity*, 2004 U. ILL. L. REV. 1, 7–8 (2004) (arguing disclosure is an inadequate “solution for the problem of inherently complex transactions”).

10. See Steven L. Schwarcz, *Protecting Financial Markets: Lessons from the Subprime Mortgage Meltdown*, 93 MINN. L. REV. 373, 379–80 n.35 (2008) (explaining, in the context of the housing market decline, that the problem was likely “investor failure to appreciate . . . disclosure[s]” given the complexity of the transactions and an incomplete understanding of the illiquidity risk).

regulatory intervention.¹¹

A key problem posed by complexity, he has argued, involves the information costs associated with understanding securitizations well enough to make intelligent decisions about them, whether as investors, regulators, or courts.¹²

When financial assets, like mortgage loans, are pooled and used to back investment securities, complexity grows. These so-called “structured” or “asset-backed” securities can be constructed from mortgage loans or virtually any other type of financial asset. . . . The markets in which financial assets and the securities based on them trade present further complexity for financial firms by creating information uncertainty. Under the “indirect holding system,” whereby virtually all debt and equity securities are traded, intermediaries such as banks and brokers hold interests in securities on behalf of investors. Issuers of securities record ownership as belonging to these intermediaries. As a result, third parties cannot readily determine who ultimately owns, and thus has credit exposure to, specific securities. . . . Complexity increases the possibility that financial institutions will fail to see, or at least fail to fully appreciate, low-probability shocks that pose a threat to their financial condition.¹³

Given this sound concern about a difficult problem, it is not entirely clear why Professor Schwarcz would challenge a definition of securitization, such as mine, that will likely reduce complexity and increase signaling clarity.

III. PROFESSOR SCHWARCZ’S CRITIQUE

Schwarcz nevertheless does offer critique. While I am perfectly happy to entertain the possibility that there are better definitions than mine, Professor Schwarcz’s critique ignores the institutional implications of the definition I advance, and the (complexity-based) costs of resistance to it. He also makes claims about the use of securitization (both the transaction and the word) that appear curiously disconnected from the market, which he would treat as the principal source of definition in this context.

In *Re: Defining*, I offered the following definition of a “true”

11. Iman Anabtawi & Steven L. Schwarcz, *Regulating Systemic Risk: Towards an Analytical Framework*, 86 NOTRE DAME L. REV. 1349, 1352 (2011) (“The task [of developing a framework to regulate complex financial products] is urgent because [of] increasing complexity within the financial system.”).

12. *Id.* at 1368–69.

13. *Id.* (footnotes omitted).

securitization: “[A] purchase of primary payment rights by a special purpose entity that (1) legally isolates such payment rights from a bankruptcy (or similar insolvency) estate of the originator, and (2) results, directly or indirectly, in the issuance of securities whose value is determined by the payment rights so purchased.”¹⁴

A. INPUTS

Take first Schwarcz’s concern that I emphasize the role that primary payment rights should play in securitization. “The implicit rationale of Lipson’s limitation,” he argues, “is that primary payment rights are inherently stronger than nonprimary payment rights. But he does not explain why relative weakness should be a normative basis for definitional distinctions.”¹⁵

Not so. Primary payment rights are important to a normatively preferable definition of securitization for two reasons: First, as explained in *Re: Defining*, the data speaks for itself. With the exception of real estate mortgage-backed securities (“RMBS”), transactions using primary payment rights—credit card receivables, equipment loan receivables, and so on—generally performed much better than “synthetic” securitizations, which involved merely the recycling, or “repackaging,” of existing primary payment rights.¹⁶ Primary-payment inputs resulted in more successful transactions than those that relied on less direct inputs.

This fact of financial performance then leads to a terminological question: Would one rather “securitization” be associated with transactions that were losers (like collateralized debt obligations) or winners (like auto-loan receivables)? In an oddly “big-tent” move, Professor Schwarcz would apparently sweep all such transactions under the same definition, even though it would seem that fundamental differences in the transactional proximity investors had to primary payment rights correlated to transactional performance. This is so although transactional distance increases complexity and the likelihood of loss.

Second, and more important, the real question is not whether particular assets are strong or weak as a financial matter. Instead, the question is about meaning. Schwarcz is correct that primary payment rights can also be quite weak—thus the performance of certain RMBS—but the strength he has in mind is financial. The strength that concerns me is

14. See Lipson, *Re: Defining*, *supra* note 2, at 1233.

15. See Schwarcz, *Purpose*, *supra* note 1, at 1285.

16. See Lipson, *Re: Defining*, *supra* note 2, at 1247–56.

definitional. A simpler, more restrictive definition is stronger because it excludes more complex transactions, such as CDOs.

This is not to suggest that we should ban CDOs or other complex transactions. Rather, it suggests that transactions that take the general form of “true” securitizations, which I describe in *Re: Defining*,¹⁷ are now probably sufficiently well understood and cognitively manageable so as to be distinct from more complex, bespoke transactions (like CDOs) that share certain attributes with securitization, but which should not be understood as securitizations for the reasons I advance in *Re: Defining*. Thus, the label used for one transaction form should differ from the label used for others.

Professor Schwarcz also questions my examples of CDOs and Enron’s transactions as not being securitizations.¹⁸ This is curious, as Professor Schwarcz has argued vigorously elsewhere that Enron’s transactions were not securitizations.¹⁹ Admittedly, he does not argue affirmatively here that they were securitizations. Indeed, he (mistakenly) claims that “there were so many basic distinctions between them that few, if any, market participants regarded those transactions as securitizations.”²⁰ Rather, he argues that their weakness was due to something else that should not go to any shared understanding of what these transactions were.²¹

As discussed in *Re: Defining*, Professor Schwarcz has attempted to distinguish Enron’s deals from securitization on normative grounds having little to do with the specific elements of the transactions. He ignores the reality that Enron’s deals would have satisfied many legal definitions of, or pertinent to, securitization—including the one he advances in *Purpose*—

17. See *supra* note 14 and accompanying text.

18. See Schwarcz, *Purpose*, *supra* note 1, at 1285 (“Moreover, I question Lipson’s examples of CDOs and Enron’s structured financings as being distinct from securitization because they did not rely on primary payment rights and thus had weaknesses.”).

19. See, e.g., Schwarcz, *Post-Enron*, *supra* note 3, at 1550–52; Lipson, *Re: Defining*, *supra* note 2, at 1270.

20. Schwarcz, *Purpose*, *supra* note 1, at 1286. I show that it was common to refer to Enron’s transactions as securitizations, even as Professor Schwarcz may have wished it were not so. See Lipson, *Re: Defining*, *supra* note 2, at 1271 nn.133–34 (citing authorities characterizing Enron’s transactions as “securitizations”).

21. Oddly, Professor Schwarcz argues that the weaknesses of Enron’s deals “resulted . . . from Enron assuming that there was little, if any, correlation between the value of merchant assets being guaranteed in those transactions and the price of Enron stock supporting those guarantees. When the stock price and merchant-asset value *coincidentally fell*, those transactions failed, causing Enron’s collapse.” Schwarcz, *Purpose*, *supra* note 1, at 1285–86 (emphasis added) (footnotes omitted). There was, however, nothing “coincidental” about this deflation. Bankers panicked when they learned that Enron had, in essence, hoodwinked them by creating transaction structures that recycled underlying asset values. See Lipson, *Re: Defining*, *supra* note 2, at 1268–71.

and that it appears many observers did view them contemporaneously as securitizations. Schwarcz instead has argued that they should not have been treated as securitizations because they were infected by financial accounting manipulation and conflicts of interest.²² But, of course, those are ex post conclusions about problems with the transactions, not what the transactions were. Many transactions (for example, mergers and acquisitions) could suffer similar infirmities. We would not say that the presence of conflicts somehow changes the definition or meaning of the transaction.

B. STRUCTURE

Professor Schwarcz also believes my definition is overly restrictive because it includes legal isolation: “When the originator is of investment-grade quality, however, many securitization transactions do not necessarily achieve such legal isolation,” he argues.²³

There are several responses. First, and as I acknowledge in *Re: Defining*, this is probably correct to the extent that certain types of transactions originated by insured depositaries or government-sponsored entities (like Fannie Mae) did not expose investors to the risk of the originator’s “bankruptcy” in a conventional sense. That said, as also noted in *Re: Defining*, other mechanisms exist (such as implicit government guarantees or regulation) to provide investors comfort that sales of assets from such entities will nevertheless be unaffected by the financial distress of the originator, whether it is in bankruptcy or not.

Professor Schwarcz may be correct that not every securitization is supported by a lawyer’s “true sale” opinion—those are most likely found in cases involving originators who could be debtors under the Bankruptcy Code—but that is not what my definition contemplates. My definition is oriented around the role that isolation of the assets from the originator, however achieved, plays in the development of this transaction form. Isolation (like that created through the proper use of special purpose entities) contributes to the financial quality of the inputs because the inputs should be unburdened by the originator’s credit quality. If, as prominent observers claim, legal isolation is the “holy grail” of securitization, it is hard to see why it is not important to the definition of a true securitization.²⁴

22. Lipson, *Re: Defining*, *supra* note 2, at 1270–71.

23. Schwarcz, *Purpose*, *supra* note 1, at 1286.

24. See Lipson, *Re: Defining*, *supra* note 2, at 1240 n.39 (quoting Peter V. Pantaleo et al.,

C. OUTPUTS

Professor Schwarcz also criticizes my definition for the way it envisions the output end of a securitization. Mistaking financial weakness for definitional weakness, he argues that

Lipson himself does not pursue the logic of his distinction [between primary and nonprimary payment rights], applying it solely to inputs (payment rights) and not to outputs (securities). The output side of securitization often consists of multiple, sometimes numerous, classes (or “tranches”) of securities, each class having relative priority of repayment compared to other classes and, in certain cases, being repayable from specific cash flows (such as interest-only or principal-only securities). This type of tranching can create weaknesses.²⁵

I “do not pursue the distinction,” as Schwarcz puts it, because he focuses on the wrong one. The problem here is not that certain tranches of securities (outputs) may be financially weak, by which Professor Schwarcz presumably means “risky.” We know that the junior tranche (the last in order of priority to be paid) will probably be riskier than a senior tranche. That is not necessarily a problem, and legitimate securitizations can certainly do this. Rational purchasers of junior tranches would probably accept that risk if they felt the purchase price was appropriate, and they understood the risk they were taking.

Rather, the problem is that we should have some Archimedean point to which to tether the various elements in the transaction for definitional purposes. Thus, if there is clarity about the inputs, tranching would likely be less complex, and so less problematic definitionally.

D. PRAGMATISM AND NOVELTY

By implication, Professor Schwarcz criticizes my definition of securitization because it is not as “pragmatic” as he claims his to be, and is thus perhaps misleading.²⁶ He argues that

Defining a concept in a new way “may cause misunderstanding and unwanted interpretations.” Thus, “[i]f all concerned people understand concepts A, B and C in a specific way due to their foundation

Rethinking the Role of Recourse in the Sale of Financial Assets, 52 BUS. LAW. 159, 161 (1996) (“Defining true sale is the holy grail of the securitization market . . .”).

25. Schwarcz, *Purpose*, *supra* note 1, at 1290.

26. *Id.* at 1288–89.

in . . . common practice, it is preferable to use them rather than the more abstract concept of D that contains A, B and C.”²⁷

Professor Schwarcz here misdiagnoses the problem. So far as I can tell—and as I believe I demonstrate in *Re: Defining*—“all concerned people” *do not* understand securitization “in a specific way due to [its] foundation in . . . common practice.” Quite the opposite is true. There are many different types of seemingly similar transactions lumped together as securitizations, and many different definitions of, or related to, securitization. There is, so far as I can tell, no “common understanding” among “all concerned people” (whoever that may be). Rather, there is a Tower of Babel, which we should replace with an understanding of securitization built on a pragmatic and normatively acceptable foundation.

IV. PROFESSOR SCHWARCZ’S DEFINITION

Professor Schwarcz seeks instead to offer his own definition of securitization. On his terms, it would be, “A financial transaction in which (1) [1] a special purpose entity issues securities to investors and, directly or indirectly, [2] uses the proceeds to purchase [3] rights to, or expectations of, payment, and (2) collections on the rights or expectations so purchased constitute the primary source of repayment of those securities.”²⁸

In many respects, this definition maps onto mine: both limit securitizations to financial transactions, as opposed to variants involving such nonpayment-related assets as “inventory” or “whole business” securitizations.²⁹ Both recognize the important role that special purpose entities appear to play in the structure of these transactions. Both recognize that it is the liquidated value of payment rights sold that will chiefly determine the payout on securities so issued.

But there are also important differences:

(1) “*Special purpose entity*.” While Professor Schwarcz and I agree that the use of special purpose entities is generally important to a meaningful definition of a securitization, he then makes the curious claim that the “legal isolation” of payment rights sold is not important. “[M]any securitization transactions do not necessarily achieve such legal isolation,”

27. *Id.* at 1288 (footnotes omitted) (quoting Lorenz Kahler, *The Influence of Normative Reasons on the Formation of Legal Concepts*, in 88 CONCEPTS IN LAW 81, 90 (Jaap C. Hage & Dietmar von der Pfordten eds., 2009)).

28. *Id.* For ease of exposition, I discuss the differences according to the bracketed numbers.

29. See Lipson, *Re: Defining*, *supra* note 2, at 1239.

he claims.³⁰ Neither of us defines a special purpose entity, and it is certainly possible that an SPE could exist for purposes other than to effect a true sale in this context. But, that seems highly unlikely. Rather, as noted above (and in *Re: Defining*), the question that both markets and legal actors have focused on is legal isolation of the inputs. If an SPE does not exist for that purpose, it is not clear what work it is doing in the transaction (and Professor Schwarcz does not say).

(2) “*Uses the proceeds.*” Professor Schwarcz may well be correct that securities are issued before input assets are purchased (and thus, funds to purchase the inputs are raised before the inputs are sold). But, as I note in *Re: Defining*, the important questions in the definition are not about timing. Instead, they are about the nature of the input assets, and their relationship to those securities.³¹

(3) “*Rights to, or expectations of, payment.*” This is the heart of our definitional disagreement, as it goes to the input element. Using his definition, Professor Schwarcz would have to acknowledge that both Enron’s transactions and CDOs are “securitizations” as both apparently used SPE’s to purchase “rights to, or expectations of, payment.” This is because an “expectation of payment” could certainly include the illiquid merchant assets recycled by Enron as well as the credit derivatives recycled in CDOs. It depends entirely on one’s conception of the word “expectation.” As any first-year contracts student recognizes, the term “expectation” is notoriously fluid.

It is thus a curious move on Professor Schwarcz’s part. As noted above, Professor Schwarcz has argued elsewhere that Enron’s transactions were not securitizations.³² Moreover, his response here seems uncertain as to how CDOs should be characterized. Although market-based definitions are the core of his logic, he argues at one point that “[f]ewer market participants . . . regard ABS CDO transactions as securitizations.”³³ Nevertheless, he goes on to argue that “[t]he definition of securitization . . . might also include ABS CDO transactions.”³⁴ It is difficult to see how his definition produces clarity if even he cannot decide what it covers.

30. Schwarcz, *Purpose*, *supra* note 1, at 1286.

31. See Lipson, *Re: Defining*, *supra* note 2, at 1241 n.41.

32. See *supra* note 19 and accompanying text.

33. Schwarcz, *Purpose*, *supra* note 1, at 1293.

34. *Id.*

V. THE PURPOSE OF DEFINING TERMS

Professor Schwarcz and I share the goal of developing a definition of securitization that is clearer than current definitions. He correctly observes that we “need definitional clarity in order to know how to apply and enforce the law. Unclear definitions can lead to hard-fought court battles over seemingly minor semantic issues. Having an easily applied definition of securitization may help to avoid courtroom clashes and regulatory gridlock.”³⁵

I question whether his definition will achieve this laudable goal for two reasons. First, he prefers market-based definitions of securitization. Yet, the market’s incentives to define securitization clearly are uncertain at best. To date, it would appear that many market actors preferred (or tolerated) complexity and obscurity in the use of the term. There is no obvious reason why we should expect the market to gravitate toward the clarity we both value.

Second, and more practically, his definition’s breadth with respect to inputs contributes to the conditions that got us into trouble in the first place. He may be correct that market actors have chosen to treat expectancies as inputs in securitizations. My claim is that we—in particular the legal system—should not call such transactions securitizations. They may be legitimate (or not); they may be wealth-maximizing (or not). But, if we are to take seriously the work of terminology in law, we have to think about the social consequences of the way we define terms.

A final point is that Professor Schwarcz fears that the narrowness of my definition will somehow constrain market development: “[F]inancial concept[s], such as securitization, should be defined in light of dynamically changing financial markets,” he argues.³⁶ “Financial concepts, like securitization, are not fixed in time; they evolve in response to changing financial market conditions.”³⁷

Fair enough. Nothing in my narrower definition prevents market-based innovation. Indeed, if we think about the history of the allied term “security interest,” however, it should be apparent that carefully (if narrowly) defining terms can abet market development. Students of the history of secured credit know that prior to the drafting of Article 9 of the Uniform Commercial Code, many different terms described many

35. *Id.* at 1294 (footnote omitted).

36. *Id.* at 1294–95.

37. *Id.* at 1295

different, but related, types of security devices, including the chattel mortgage, the hypothecation, the pledge, the conditional sale, and so on.³⁸ All were swept together into the single neologism “security interest” when Article 9 was developed. Abandoning the variations in favor of a single, in some ways more restrictive, definition appears not to have stanching the market’s capacity to innovate. Indeed, within about two decades of the U.C.C.’s promulgation, the market again innovated in important ways in commercial finance: it developed the “securitization.”

VI. CONCLUSION

While I challenge some of Professor Schwarcz’s priors and criticisms, I nevertheless have great admiration for his work, and deep appreciation for his willingness to engage *Re: Defining* seriously. It is only through dialogues of this sort that we will clarify the meaning of terms such as securitization.

38. See U.C.C. § 9-102 (2003); U.C.C. § 1-201(b)(35) (defining “security interest”).