

Rethinking Commercial Law's Uncertain Boundaries

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Abstract: Although it is an essential part of business law, commercial law has uncertain boundaries. That uncertainty creates significant legal ambiguities and inconsistencies, confusing lawyers and courts and causing misinterpretations that disrupt commerce and reduce efficiency. This Article hypothesizes and tests possible explanations for the uncertainty, including that commercial law's development has been path dependent, ad hoc, and lacking well-defined normative purposes. The Article then analyzes what those boundaries should be, arguing that commercial law should cover all business-related transfers of property, subject to exceptions needed to reduce transaction costs and otherwise increase economic efficiency. The Article also compares its proposed boundaries to the scope of actual commercial law statutes, both to test whether those boundaries are tethered to reality and to examine whether the scope of those statutes should be modified.

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INTRODUCTION

Although scholars generally view commercial law as a separate and distinct body of law,² that view is problematic because commercial law has uncertain boundaries. Various provisions of the Uniform Commercial Code (“UCC”), for example, conflict with provisions of property and contract law.³ At the same time, the UCC excludes from codification certain commercial law concepts that derive from soft law or merchant practices.⁴ Professors Scott and Triantis thus observe that the statutory rules embodied in the UCC are “seriously under and over inclusive.”⁵

² For example, the Association of American Law Schools (AALS) lists “COMMERCIAL LAW” as a “Subject” in its index of “Law Teachers by Subject.” *See* THE AALS DIRECTORY OF LAW TEACHERS. Also, Duke Law reference librarians identified 108 “casebooks/textbooks that cover commercial law in some way.” E-mail from Jane Bahnson & Julie M. Wooldridge, Research Services Librarians, J. Michael Goodson Law Library, to the author (Jan. 5, 2023). *Cf.* Heather Hughes, *Aesthetics of Commercial Law Domestic and International Implications*, 67 LA. L. REV. 689, 718-19 (2007) (stating that the “wall between commercial law and other fields seems remarkably resilient”).

³ *See* Part II, *infra*.

⁴ The UCC almost completely excludes, for example, unsecured commercial financing. *See infra* note 12 and accompanying text.

⁵ ROBERT SCOTT & GEORGE TRIANTIS, FOUNDATIONS OF COMMERCIAL LAW 1 (2012). *Cf.* Richard Craswell, *Do Trade Customs Exist?*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 126 (Jody S. Kraus & Steven D. Walt, eds., 2000) (arguing that “when the behavior that is most efficient (or is otherwise most appropriate) depends on an entire set of situational variables, bright-line rules will be seriously over- and underinclusive”).

As this Article shows, the resulting uncertainty creates significant legal ambiguities and inconsistencies.⁶

This uncertainty reflects fundamental uncertainty about what the boundaries of commercial law itself—the body of law that the UCC purports to codify⁷—should be.⁸ For example, should commercial law cover banking and payment systems?⁹ Should it cover investment securities?¹⁰ Should it cover secured¹¹ but not unsecured¹² credit?¹³

Based on an extensive study of commercial law history and scholarship and an analysis of the functions of commercial law, this Article hypothesizes and tests a range of possible

⁶ *Cf. infra* notes 131-145 and accompanying text (discussing ambiguities and inconsistencies in commercial law that have caused massive business disruptions); Giuliano G. Castellano & Andrea Tosato, *Commercial Law Intersections*, 72 HASTINGS L.J. 999, 1004 (2020/2021) (finding that commercial law’s uncertain boundaries “spawn[] an ambiguous gap in the law that shrouds the transaction in question either partly or entirely” and that sometimes “the applicable rules and principles coalesce to form an incongruous legal framework that is either rife with internal conflicts (antinomies) or impedes the achievement of the parties’ intended outcomes”).

⁷ *Cf. Castellano & Tosato, supra* note 6, at 1008 (finding that although the expression “commercial law” has “become synonymous . . . with the legal rules contained in the Uniform Commercial Code,” this colloquialism “is emblematic of the impact of codification, rather than a conscious narrowing of the field”).

⁸ *Cf. id.* (observing that “[t]here is no established definition of commercial law”); Douglas Baird, *Bankruptcy’s Uncontested Axioms*, 108 YALE L.J. 573 (1998) (observing fundamental disagreement about the axioms of bankruptcy law).

⁹ *Cf. UCC Arts. 3* (governing “Negotiable Instruments”), 4 (governing “Bank Deposits and Collections”), 4A (governing “Funds Transfers”), and 5 (governing “Letters of Credit”). There is fundamental uncertainty about whether commercial law should cover payment systems. *Cf. Clayton P. Gillette & Steven D. Walt, Uniformity And Diversity In Payment Systems*, 83 CHI.-KENT L. REV. 499, 502 (2008) (discussing that uncertainty).

¹⁰ *Cf. UCC Art. 8* (governing “Investment Securities”).

¹¹ *Cf. UCC Art. 9* (governing “Secured Transactions”).

¹² UCC Article 9, by its terms, does not cover secured credit. Incongruously, UCC § 1-309 governs the “Option to Accelerate at Will” in both secured and unsecured loan agreements, although nothing else in the UCC purports to cover unsecured credit.

¹³ A related question is whether UCC Art. 9 (governing “Secured Transactions”) should include coverage of sales of rights to payment (*see* UCC § 9-109(a)(3)), even though such sales are not secured transactions. *Cf. infra* notes 131-133 and accompanying text (discussing the confusion that UCC subsection causes).

explanations for why commercial law has uncertain boundaries. Thereafter, it analyzes, more normatively, what those boundaries should be.

To this end, the Article proceeds as follows. Part I shows that commercial law has uncertain boundaries, focusing on UCC provisions that overlap with property and contract law or that cover substantive topics completely unrelated to commercial law. Part II then sets forth five possible hypotheses for commercial law’s uncertain boundaries, followed in each case by an analysis testing the hypothesis. Next, Part III analyzes what the boundaries of commercial law should be. Taking into account the hypotheses, this Part proposes clearer boundaries that reflect the purposes of commercial law—deducing in that process what those purposes should be. Part III also argues that commercial law’s boundaries should be subject to exceptions needed to reduce transaction costs and otherwise increase economic efficiency. Finally, Part IV compares the Article’s proposed boundaries to the scope of actual commercial law statutes, to evaluate whether those proposed boundaries are tethered to reality.

I. COMMERCIAL LAW HAS UNCERTAIN BOUNDARIES

Because law is not always consistent,¹⁴ the boundaries between bodies of law sometimes can be irregular.¹⁵ Commercial law, however, has exceptionally irregular, or uncertain, boundaries. Various provisions of the UCC, for example, overlap with property and contract law. UCC § 2-401 overlaps with property law by providing (with very limited exceptions) that each “provision of this Article [2] with regard to the rights, obligations, and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods” UCC § 9-

¹⁴ See, e.g., Christoph Engel, *Inconsistency in the Law: In Search of a Balanced Norm*, MAX PLANCK INST. FOR RESEARCH ON COLLECTIVE GOODS Preprint No. 16 (2004) (observing that “the law is not always consistent,” and arguing that should not be problematic because “consistency comes at a price”). Cf. Andrew Allan Higgins, *The Rule of Law Case Against Inconsistency and in Favour of Mandatory Civil Legal Process*, 39 OXFORD J. LEG. STUD. 725 (2019) (arguing that deciding similar questions of fact or law in multiple judicial proceedings creates a risk of inconsistent outcomes, and examining methods for avoiding inconsistency).

¹⁵ Cf. Brian Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 375 (2008) (observing that legal “pluralism” creates “multiple uncoordinated, coexisting or overlapping bodies of law”).

202 similarly overlaps with property law by providing (again, with very limited exceptions) that “the provisions of this Article [9] with regard to rights and obligations apply whether title to collateral is in the secured party or the debtor.”

UCC § 2-509 further overlaps with property law by allocating the risk of losing goods in shipment not—as under property law—to the party that owns the goods at the time of loss but, rather, based on how the goods are shipped. Even more incongruously, UCC § 2-510 overlaps with both property and contract law by allocating the risk of losing defective goods in shipment to the breaching party, even if the breach is insignificant and the parties were unaware of the breach when the goods were in transit.¹⁶

The UCC also purports to override the fundamental property law rule of *Nemo dat quod non habet*, or “No one can give what they do not have.”¹⁷ UCC § 2-403(1) provides, for example, that a “person with voidable title has power to transfer a good title to a good faith purchaser for value.” UCC § 3-305 grants certain transferees of instruments, like checks and promissory notes, greater property rights in the transferred instruments than the seller itself owned. Likewise, UCC § 9-320 provides that buyers of goods in the ordinary course of business¹⁸ take the goods free of a lien or encumbrance created by the seller of the goods.

The right of a property owner to redeem collateral subject to a lien further illustrates the overlap. Property law would allow a debtor to redeem collateral, which it owns, by paying the debt that the collateral secures.¹⁹ UCC § 9-623 nonetheless subordinates that redemption right to the right of a contracting bidder to take ownership of the collateral.²⁰

¹⁶ The so-called “perfect tender” rule of UCC § 2-601 makes clear that a shipper of goods has breached if any aspect of the goods, no matter how insignificant, is imperfect.

¹⁷ The equivalent civil law rule is *Nemo plus iuris ad alium transferre potest quam ipse habet*, or “One cannot transfer more rights than one has to another.”

¹⁸ These are buyers who purchase goods for value, in good faith, and without knowledge that the purchase violates the rights of another person. *See* UCC § 1-201(b)(9).

¹⁹ *Cf.* UCC § 1-102(b)(35) (defining a security interest as an interest in property that “secures payment or performance of an obligation”).

²⁰ This appears to reflect the commercial law goal of facilitating transferability, which requires finality to avoid transaction costs of trying to determine when a transfer has become completed. Although real estate law has a somewhat similar rule, giving a person who has contracted to buy

The boundaries of commercial law also can be vague, including arguably unrelated topics or excluding clearly related topics. As an example of the first, the UCC covers investment securities notwithstanding that there is questionable justification for such inclusion.²¹ As an example of the second, the UCC originally excluded taking bank deposit accounts as collateral.²²

Part II next proposes and tests hypotheses for commercial law's uncertain boundaries.

II. HYPOTHESES FOR THE UNCERTAIN BOUNDARIES

Set forth below are possible hypotheses for commercial law's uncertain boundaries. Each hypothesis is tested following its articulation. The testing shows that each hypothesis contributes to explaining those uncertain boundaries.

Hypothesis 1: Commercial law has uncertain boundaries because its development has been path dependent and ad hoc.

Testing Hypothesis 1: Path dependence refers to “an outcome or decision [that] is shaped . . . by the historical path leading to it.”²³ Commercial law developed over centuries based on ad hoc merchant practices, aggregating into an informal body of path-dependent common law and

a house the right of specific performance to compel the purchase, that rule is based on a very different policy—that real estate is unique. *See, e.g.,* Pinkowski v. Calumet Tp. of Lake County, 852 N.E.2d 971, 981–82 (Ind. Ct. App. 2006) (“Courts readily order specific performance with regard to real estate purchases because each piece of real estate is considered unique, without an identical counterpart anywhere else in the world.”).

²¹ *See infra* notes 33-36 and accompanying text.

²² *See* UCC § 9-104(1) (1996). This exclusion apparently reflected bank lobbying. *See, e.g.,* Jason M. Ban, *Deposit Accounts: An Article 9 Security Interest*, 17 ANN. REV. BANKING L. 493, 502-04 (1998).

²³ Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 603–04 (2001).

“soft law” rules²⁴—often referred to as the “law merchant” or *lex mercatoria*.²⁵ As merchant practices changed over time, the boundaries of commercial law have become somewhat fluid—and hence, uncertain.²⁶

The lack of agreement on the nature and sources of *lex mercatoria* has exacerbated that uncertainty.²⁷ Some interpret *lex mercatoria* to mean the common law governing commercial transactions in their jurisdiction.²⁸ Others equate *lex mercatoria* with transnational commercial law and treat all cross-border sources of commercial law as within its purview, including public international law, international conventions, and rules of international organizations that impact commercial transactions.²⁹ Still others consider *lex mercatoria* to be a set of general principles and customary rules referred to or elaborated in the framework of international trade, without reference to a particular national system of law.³⁰

Path dependence can create uncertain and anomalous boundaries.³¹ This can explain, for example, the inclusion of investment securities (such as corporate bonds or shares of stock) in

²⁴ Roy Goode, *Is the Lex Mercatoria Autonomous?*, in *COMMERCIAL LAW CHALLENGES IN THE 20TH CENTURY* 75-78 (Jacob Ziegler, Ross Cranston, & Jan Ramberg, eds. 2007).

²⁵ *Cf.* UCC § 1-103(b) (referencing the law merchant as covering commercial law not specifically codified in the UCC).

²⁶ David Frisch, *Commercial Law’s Complexity*, 18 *GEO. MASON L. REV.* 245, 249 & 299 (2011).

²⁷ Tamanaha, *supra* note 15 (arguing that the development of *lex mercatoria* from “private law-making activities . . . can generate uncertainty or jeopardy for individuals and groups in society who cannot be sure in advance which legal regime will be applied to their situation”).

²⁸ *See, e.g.*, Ralf Michaels, *The Re-state-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 *WAYNE L. REV.* 1209, 1231-32 (2005).

²⁹ Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 *ICLQ* 747, 748 (1985); Goode, *supra* note 24, at 75 (referring to Lando’s view on the scope of *lex mercatoria*).

³⁰ Berthold Goldman, *The Applicable Law: General principles of law - the lex mercatoria*, in *CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION* 113, 116 (Julian D. M. Les, ed. 1986); Goode, *supra* note 24, at 75 (referring to Goldman’s view on the scope of *lex mercatoria*).

³¹ *Cf.* Jonathan C. Lipson, *Price, Path & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation)*, 3 *BERKELEY BUS. L.J.* 59, 64–65 (2005) (explaining how path dependence shapes lawyers’ closing-opinion practices in “non-economic” and “inefficien[t]” ways).

the UCC.³² Although there is questionable justification for such inclusion,³³ investment securities are nonetheless included³⁴ because they had been included in earlier commercial legislation.³⁵ Their inclusion persists even though that earlier legislation has been repealed.³⁶

Hypothesis 2: Commercial law has uncertain boundaries because it encompasses broad and vaguely defined tasks,³⁷ such as increasing the progress and efficiency of commerce and incentivizing cooperative and acceptable behavior among parties for a utilitarian benefit.³⁸

Testing Hypothesis 2: The task of increasing the progress and efficiency of commerce is ambiguous for at least two reasons. First, commerce itself is not well defined. It can include the “exchange of goods or services among two or more parties,”³⁹ or the “exchange or buying and

³² See *supra* note 21 and accompanying text.

³³ The UCC focuses primarily on the sale of goods and the transfer of collateral, making it odd that it also particularly covers investment securities. Normatively, this Article argues that commercial law *should* cover all business-related transfers of property. See *infra* notes 85-90 and accompanying text. Even given that broader scope, however, the UCC’s inclusion of investment securities would still be anomalous because that inclusion goes beyond transfers of property per se. Cf. PREFATORY NOTE TO 1994 REVISION OF UCC ARTICLE 8, part III.B (Notes on Scope of Article 8) (noting that revised Art. 8 “deals with some aspects of the rights and duties of parties who transfer securities”).

³⁴ See UCC Art. 8 (“Investment Securities”).

³⁵ WILLIAM TWINNING, KARL LLEWELLYN AND THE REALIST MOVEMENT 331 (2 ed. 2012).

³⁶ *Id.* Cf. E-mail from Henry Gabriel, Professor of Law, Elon University School of Law, to the author (Jan. 13, 2023) (observing that although “article 8 . . . just doesn’t fit into the rest of the UCC,” it “got tossed into the UCC to keep it out of the hands of the feds”).

³⁷ Although all law has some degree of vagueness (see, e.g., Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509 (1994); Timothy Endicott & Michael J. Spence, *Vagueness in the Scope of Copyright*, 121 L.Q. REV. 657, 665 (2005)), these commercial law tasks are exceptionally vague.

³⁸ TWINNING, *supra* note 35, at 335-36 (noting that the UCC was founded “not only on a faith in the capacity of the business community for satisfactory self-regulation within a framework of very broadly drafted rules, but also on a faith in judges to make honest, sensible, commercially well-informed decisions once they have been given some baselines for judgement”). Cf. *Introduction*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW, *supra* note 5, at 1 (stating that economic efficiency “is the dominant theoretical paradigm in contemporary . . . commercial law scholarship”).

³⁹ INVESTOPEDIA, “Commerce,” available at <https://www.investopedia.com/terms/c/commerce.asp>.

selling of commodities,”⁴⁰ or, more generally, “the activity of exchanging products, goods, and services for financial gain.”⁴¹ Should commercial law cover goods, services, and/or commodities? This Article later proposes, more broadly, that commercial law should cover virtually any business-related transfer of property.⁴²

The task of increasing the progress and efficiency of commerce is also ambiguous because, whatever commerce means, many things might arguably contribute to increasing its progress and efficiency. For example, should commercial law cover money and payment systems that are used to pay for the sale of goods, services, or commodities?

Likewise, the task of incentivizing cooperative and acceptable behavior among parties for a utilitarian benefit is not only ambiguous but also too broad to be a unique characteristic of commercial law.⁴³ All human relationships, and thus all bodies of law, require cooperative and acceptable behavior to be successful.

Some jurisdictions attempt to deal with this vagueness by narrowly defining commercial law. German law, for example, limits the scope of commercial law to regulating transactions between merchants, and French law limits its scope to regulating specific mercantile activities.⁴⁴

⁴⁰ MERRIAM-WEBSTER DICTIONARY, “commerce,” available at <https://www.merriam-webster.com/dictionary/commerce>.

⁴¹ CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE (defining “commerce”), available at <https://www.law.cornell.edu/wex/commerce>. Cf. CAMBRIDGE DICTIONARY, “commerce,” available at <https://dictionary.cambridge.org/us/dictionary/english/commerce> (defining commerce as “the activities involved in buying and selling things”).

⁴² See *infra* notes 73-85 and accompanying text.

⁴³ Boris Kozolchyk, *Commercial Law at the End of the Twentieth Century*, in *ESSAYS ON COMPARATIVE COMMERCIAL AND CONSUMER LAW 10* (Donald B. King, ed., 1988). This task has become even broader as commercial transactions have become globalized. By the late 19th century, for example, the need for cooperative behavior intensified as industrialism increased international commercial transactions. ORKUN AKSELI & JOHN LINARELLI, *THE FUTURE OF COMMERCIAL LAW: WAYS FORWARD FOR CHANGE AND REFORM* (2020).

⁴⁴ Ewoud Hondius, *Commercial Law: Is it Special?*, in *COMMERCIAL LAW CHALLENGES IN THE 20TH CENTURY*, *supra* note 24.

So far, however, the United States envisions a much wider scope,⁴⁵ including otherwise marginal activities that could add economic value.⁴⁶

Hypothesis 3: Commercial law has uncertain boundaries to the extent it arbitrarily covers non-commercial intermediaries.

Testing Hypothesis 3: Commercial transactions sometimes involve intermediaries,⁴⁷ such as banks as issuers of letters of credit,⁴⁸ depositories such as the Depository Trust Company (DTC) as custodians of investment securities,⁴⁹ banks and broker-dealers as subsequent intermediary holders of investment securities,⁵⁰ virtual asset service providers (VASPs) for digital currency transfers,⁵¹ and trucks, railcars, ships, airplanes, and other common carriers of goods.⁵² These intermediaries primarily engage in banking, finance, or transportation, and are merely facilitators of commerce.⁵³

⁴⁵ Thus, UCC § 9-109(a)(3) incorporates the sale of rights to payment into Article 9 of the UCC in order to facilitate commercial financing transactions. *Cf.* UCC PEB COMMENTARY No. 14 (1994) (explaining why UCC Article 9 was made “applicable” to the sale of rights to payment).

⁴⁶ This Article later discusses expanding the scope of commercial law to help increase economic efficiency. *See infra* note 101 and accompanying text.

⁴⁷ Commercial intermediation originated in Ninth to Twelfth Century Arab and Jewish Mediterranean long-distance trade. It later became popular in major Italian port cities and trade centers and, from there, spread to the rest of the Western trading world. Kozolchyk, *supra* note 43, at 10.

⁴⁸ *Cf.* UCC § 5-102(a)(9) (defining an issuer of a letter of credit as a “bank or other person that issues a letter of credit”).

⁴⁹ *Cf.* Prefatory Note to UCC Art. 8 (discussing the evolution of the indirect holding system for securities, and describing the DTC as “a limited purpose trust company organized under New York law for the purpose of acting as a depository to hold securities for the benefit of its participants”).

⁵⁰ *Cf.* UCC § 8-102(a)(14) (defining securities intermediaries).

⁵¹ *Cf.* CIPHERTRACE, *What Exactly is a Virtual Asset Service Provider (VASP)?*, available at <https://ciphertrace.com/what-exactly-is-a-virtual-asset-service-provider-vasp/> (describing VASPs as money transmitters engaged in transmitting virtual currency, and observing that they sometimes are required by law to be an intermediary in order to impose “AML/CFT and other obligations”).

⁵² *Cf.* UCC Art. 2 (discussing shipment of goods by “carrier”).

⁵³ *Cf. supra* notes 39-41 and accompanying text (discussing the definitional range of “commerce”).

Nonetheless, commercial law occasionally regulates these intermediaries beyond their function as facilitators. For example, §§ 5-108 and 5-109 of the UCC regulate the rights and obligations of a bank issuing a letter of credit; § 8-109 of the UCC creates implied warranties to protect securities intermediaries; and § 8-115 of the UCC protects securities intermediaries against certain adverse claimants.

The criteria governing when such regulation applies, or how it applies, are not always obvious; indeed, they appear to be arbitrary. A possible explanation is that the UCC's coverage is intended to fill in coverage-gaps under specifically evolved non-commercial bodies of law. This Article later discusses the interconnection between commercial law and such specifically evolved other law.⁵⁴

Hypothesis 4: Commercial law has uncertain boundaries because it allows an unbounded law-making role for the business community.

Testing Hypothesis 4: Commercial law allows this law-making role in order to encourage the continued expansion of commercial practices and mechanisms through custom, usage, and agreement of the parties.⁵⁵ This law-making role, however, is unbounded and lacks normative guidance.⁵⁶ Absent that guidance, this ongoing expansion has made the boundaries of

⁵⁴ See *infra* notes 94-100 and 150-163 and accompanying text.

⁵⁵ TWINNING, *supra* note 35, at 303. See § 1-102(2) of the 1952 text of the UCC. Cf. Hughes, *supra* note 2, at 707 (observing that the UCC's Permanent Editorial Board views the UCC as responding to constantly evolving practices in the commercial world, and that the job of the drafters of the UCC is to react to this progress by codifying the rules and norms that commercial practices reflect).

⁵⁶ Cf. ALAN SCHWARTZ & ROBERT E. SCOTT, COMMERCIAL TRANSACTIONS: PRINCIPLES AND POLICIES 18 (2d ed. 1991) (arguing that “the question whether a particular business practice reflects ‘the observance of reasonable commercial standards of fair dealing in the trade’ cannot be answered by the existence of the practice itself. The evaluator must have some moral criteria, derived independently of the practice, by which to decide what practices are ‘reasonable’ and ‘fair.’”); Susan Block-Lieb, *Soft and Hard Strategies: The Role of Business in the Crafting of International Commercial Law*, 40 Mich. J. Int'l L. 433, 448 (2019) (listing the many ways that businesses exert influence over legislatures, regulators, and governments in the making of international commercial law).

commercial law somewhat fluid.⁵⁷ Additionally, business lobbying—sometimes insidiously sneaked and other times blatantly interjected into this law-making role⁵⁸—has introduced such irregularities as excluding bank deposit accounts as collateral.⁵⁹

The attempt to make commercial law more responsive to and reflective of commercial reality⁶⁰ also has introduced such vague standards as “commercial reasonableness.”⁶¹ Some scholars suggest that these vague standards cause commercial law to have, in the words of Gertrude Stein, “no there, there.”⁶²

Hypothesis 5: Commercial law has uncertain boundaries because it lacks well-defined normative purposes.

⁵⁷ Cf. *supra* note 26 and accompanying text (observing that changing merchant practices have also made the boundaries of commercial law somewhat fluid).

⁵⁸ Cf. E-mail from Henry Gabriel, *supra* note 36 (reporting that in Prof. Gabriel’s experience as the reporter for revisions of UCC Article 2, the business lobbying was “as upfront as possible”).

⁵⁹ See *supra* note 22 and accompanying text.

⁶⁰ Cf. Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765 (1996) (discussing that attempt).

⁶¹ Commercial reasonableness appears to have originated as the commercial marketplace evolved with the emancipation of the merchant class toward the end of the 18th century in Europe. Market participants now had the right to enter into contracts without having to ask for the ruler’s permission. Merchants and other market participants could determine what was reasonable or fair under the circumstances in commercial cases. Kozolchyk, *supra* note 43, at 12. Indeed, Lord Mansfield gave power to English merchants to sit as special jurors in commercial trials. *Id.* They determined that by adopting a standard of “marketplace morality”—that parties to transactions should treat the others in the same manner that any regular participant in that trade would have expected to be treated when viewing his own advantage. This behavior originally, in Roman law, was based on that ascribed to an ideal person or archetype referred to as the *bonus paterfamilias/bonus vir* (not from prototypical behavior, but from absolute or religious morality). Kozolchyk, *supra* note 43, at 10, 12-15.

⁶² See GERTRUDE STEIN, *EVERYBODY’S AUTOBIOGRAPHY* 289 (1937) (referencing her childhood home in California that no longer existed to indicate, more broadly, that something lacks fundamental meaning). Cf. SCHWARTZ & SCOTT, *supra* note 56 (using Gertrude Stein’s phrase to criticize commercial law’s vague standards).

Testing Hypothesis 5: Other than increasing efficiency,⁶³ which is itself vague,⁶⁴ the purposes of commercial law are not well defined.⁶⁵ Indeed, Professors Scott and Triantis observe that the very “normative foundations of [commercial law] are complex and remain unclear.”⁶⁶ Absent guiding principles, no body of law could have certain boundaries.⁶⁷

As tested by this Article, the foregoing hypotheses show that commercial law has uncertain boundaries due to a combination of factors. These factors include that commercial law is path dependent and ad hoc, that it encompasses broad and vaguely defined tasks, that it arbitrarily covers non-commercial intermediaries, that it allows an unbounded law-making role for the business community, and that it lacks well-defined normative purposes.

This Article next endeavors to determine what should be the boundaries of commercial law. Taking into account the hypotheses, Part III proposes boundaries that reflect the purposes of commercial law. To achieve that, Part III also derives what those purposes ought to be.

III. PROPOSING CLEARER BOUNDARIES FOR COMMERCIAL LAW

Methodology for Determining the Boundaries: What should be the boundaries of commercial law? Although there are no agreed-upon methodologies for answering this question,⁶⁸ a sensible approach is to start by focusing on this Article’s hypotheses and teasing out the implications of those that have normative relevance.

⁶³ See *supra* note 38 and accompanying text.

⁶⁴ See *supra* notes 39-41 and accompanying text.

⁶⁵ Cf. Rodney D. Chrisman, *Can a Merchant Please God? The Church’s historic teaching on the goodness of just commercial activity as a foundational principle of commercial law jurisprudence*, 6 LIBERTY U. L. REV. 453, 455–57 (2012) (observing that “there is much confusion as to the purpose[s], concept, or jurisprudence of commercial law” and arguing that scholars have not yet reached agreement about those purposes).

⁶⁶ SCOTT & TRIANTIS, *supra* note 5, at 2 (discussing the UCC as commercial law).

⁶⁷ Even with guiding principles, no body of law would be expected to have perfectly consistent boundaries. Cf. Castellano & Tosato, *supra* note 6, at 1030 (noting that “it is impossible for the totality of the rules and principles of a [legal] system to all be uniformly and consonantly aligned with its overarching guiding purposes”).

⁶⁸ Cf. Lorenz Kahler, *The Influence of Normative Reasons on the Formation of Legal Concepts*, in CONCEPTS IN LAW 81, 90 (Jaap C. Hage & Dietmar von der Pfordten eds., 2009) (citing D. Patterson, *Dworkin on the Semantics of Legal and Political Concepts*, 26 OXFORD J. LEG. STUDS.

Four of the Article’s hypotheses for commercial law’s uncertain boundaries—that the development of commercial law has been path dependent, or has encompassed broad and vaguely defined tasks, or has arbitrarily covered non-commercial intermediaries, or has allowed an unbounded law-making role for the business community—do not directly have normative relevance.⁶⁹ Only one of the hypotheses—that commercial law lacks well-defined normative purposes⁷⁰—clearly has normative relevance. Deducing what should be commercial law’s purposes would be a first step towards determining what its boundaries should be.⁷¹

Deducing Commercial Law’s Purposes: By definition, the fundamental purpose of commercial law should be to facilitate commercial transactions.⁷² That calls into question what

552, 553 (2006)) (observing “the lack of an agreed upon methodology on how to . . . define legal concepts”).

⁶⁹ These hypotheses nonetheless may indirectly have normative relevance. For example, the hypothesis that the development of commercial law has allowed an unbounded law-making role for the business community begs the question of whether that law-making role should be subject to normative guidance. *Cf. supra* note 56 (observing that that law-making role is unbounded and lacks normative guidance). The hypothesis that the development of commercial law has encompassed broad and vaguely defined tasks suggests that interpreting certain areas of commercial law requires extra-textual analysis and cannot solely rely on positive or hermeneutical analyses. *Cf. Ronald Dworkin, Hard Cases*, 88 HARV. L. REV. 1057, 1059–60 (1975) (making a similar argument for interpreting vagueness in law).

⁷⁰ *See supra* note 65 and accompanying text.

⁷¹ *Cf. Castellano & Tosato, supra* note 6, at 1007 (proposing “that the rules and principles forming [an “overlap” resulting from “a transaction or a corporate action fall[ing] concurrently within the purview of two or more commercial law branches”] should be construed to be simultaneously consistent with each other and their appertaining commercial law branches, and [arguing] that such consistency should be achieved through a ‘unity of purpose’”) & *id.* at 1029 (arguing that for a legal system to be coherent, its rules and logical deductions must have a “unity of purpose”); JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 459, at 326 (3d ed. 1858) (“The importance of examining the preamble, for the purpose of expounding the language of a statute, has been long felt, and universally conceded in all juridical discussions. It is an admitted maxim in the ordinary course of the administration of justice, that the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute.”).

⁷² *See, e.g., Adam J. Levitin, The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637, 723 (2013). *Cf. Samuel J. M. Donnelly & Mary Ann Donnelly, Commercial Law Is A Humanism*, 53 SYRACUSE L. REV. 277, 278 (2003) (arguing that

types of transactions are commercial. A theoretical answer is that commercial transactions center around business-related “deals” in which parties seek to maximize value through the transfer of property⁷³ or the provision of services.⁷⁴ Stated more simply, commercial transactions involve commercially relevant—that is, *business-related*—transfers of property or provisions of services.⁷⁵

This Article next focuses on business-related transfers of property, deferring the discussion of business-related provisions of services.⁷⁶ Although services theoretically should be as much a part of commercial law as property transfers,⁷⁷ the Article later argues that specifically evolved non-commercial law—conceding that phrase is somewhat oxymoronic in this context⁷⁸—already covers the provision of services.⁷⁹

A focus on business-related transfers of property calls into question which transfers of property are business-related. In concept, these transfers could be defined by the parties involved in the transfer, by the consideration for the transfer, by the nature or use of the property being transferred, or by a combination of these. In practice, business-related transfers of property ought to be defined by a combination.

“[c]ommercial law, most especially when it is applied by courts and practitioners to commercial transactions, is designed to facilitate the relationship between persons”).

⁷³ See, e.g., Frisch, *supra* note 26, at 261 (“At their core, commercial transactions involve ‘deals,’ the princip[al] end of which is to secure a value-maximizing exchange of property.”).

⁷⁴ Cf. *supra* notes 39-41 and accompanying text (noting that the definition of commerce generally includes the provision of services for financial gain).

⁷⁵ Cf. Tyler Creighton, *Rediscovering Linkage’s Lost Clause: Why Nonprofit Transactions Should Not Remain Beyond the Reach of Chapter 93A*, 102 MASS. L. REV. 107, 109 (2021) (discussing commercial transactions as taking place in a “business context”).

⁷⁶ Cf. *infra* notes 157-158 and accompanying text (discussing business-related provisions of services).

⁷⁷ Compare *supra* note 74 and accompanying text with *supra* note 73 and accompanying text.

⁷⁸ Using the phrase “specifically evolved non-commercial law” to reference law that already covers the provision of services is somewhat oxymoronic; to the extent such “non-commercial law” covers the business-related provision of services, it arguably should be deemed to be commercial law.

⁷⁹ See *infra* notes 95 & 157-158 and accompanying text.

One business-related trait is the consideration for the transfer, with virtually all business-related transfers of property being for monetary consideration.⁸⁰ Another relevant business-related trait is that the transferor or transferee, or both, should be a person involved in business or trade who engages in the transfer in that capacity (hereinafter, a “merchant”). This would include, for example, transfers of property from one merchant to another merchant, or from a merchant to a non-merchant (such as a sale from a merchant to a consumer), or even from a non-merchant to a merchant for resale or other use in the merchant’s business or trade.⁸¹

A possible additional business-related trait could be tied to the nature of the property being transferred. This Article has observed that traditional definitions of commerce refer to the transfer of commodities, products, or goods.⁸² In today’s world, however, those definitions are too narrow, excluding, for example, intangibles such as accounts receivable and other rights to payment as well as computer software. Rights to payment, for example, make up a significant portion of assets transferred in business.⁸³ This Article therefore does not tie business-related transfers to the nature of the transferred property; rather, it recognizes that any property—broadly defined as a bundle of rights⁸⁴—could become the subject of a business-related transfer.

The foregoing analysis indicates that a business-related transfer of property should mean any transfer of property, for monetary consideration, to which a merchant is a party. This Article

⁸⁰ Cf. K.C.T. SUTTON, CONSIDERATION RECONSIDERED 14-15, 33 (1974) (discussing the historical development of consideration as a reciprocal basis for bargains).

⁸¹ The fact that the transferee receives the transfer of property for resale or other use in its business or trade means that the transferee is a merchant: that is, a person involved in business or trade who engages in the transfer in that capacity. See text accompanying note 81, *supra*.

⁸² See *supra* notes 39-41 and accompanying text.

⁸³ See, e.g., Bryan D. Hull, *Symposium on Revised Article 1 and Proposed Revised Article 2 of the Uniform Commercial Code: Harmonization of Rules Governing Assignments of Right to Payment*, 54 SMU L. REV. 473, 473 (2001); Minh Van Ngo, *Getting the Question Right on Floating Liens and Securitized Assets*, 19 YALE J. ON REG. 85, 153 (2002); Steven L. Schwarcz, *Intermediary Risk In A Global Economy*, 50 DUKE L.J. 1541, 1561 (2001). In structured finance deals, rights to payment are typically the transferred assets. Cf. UCC § 9-109(a)(3) (including sales of rights to payment).

⁸⁴ J See, e.g., Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57 (2013) (“For much of the twentieth century, legal academics conceptualized property as a bundle of rights.”).

will use that definition of “business-related transfer” as a starting point.⁸⁵ Next consider whether the scope of that definition should be expanded or restricted.

Regarding expansion, Professors Scott and Triantis observe that the scope of the UCC is activity-based insofar as it applies to all transactions within its jurisdiction regardless of the nature of the parties to those transactions.⁸⁶ Expanding the scope of commercial law in that way does not seem to be what Scott and Triantis intend, however; rather, their observation appears to be descriptive of the UCC’s scope and not normative about what that scope should be. If this Article were to similarly expand the scope, then commercial law would cover any transfer of property, for monetary consideration, regardless of the parties to the transfer—and thus regardless of whether the transfer were business-related. Expanding the coverage of commercial law beyond business-related transfers would be unnecessary⁸⁷ and potentially costly.⁸⁸

Nonetheless, Scott and Triantis’ observation indirectly suggests that limiting the definition of business-related transfers of property to transfers to which a merchant is a party might be too restrictive. Because the concept of “business” is not precisely defined, this Article suggests expanding the definition of a business-related transfer of property to also include a

⁸⁵ Note that this definition would slightly expand the scope of commercial law from the scope of German commercial law. *Cf. supra* note 44 and accompanying text (observing that German commercial law limits its scope to regulating transactions between merchants).

⁸⁶ SCOTT & TRIANTIS, *supra* note 5, at 2.

⁸⁷ That expanded scope would unnecessarily cover personal transactions, such as the sale of a comic book from Joe to Mary.

⁸⁸ Applying commercial law to personal transactions could result in unintended consequences if it affected those transactions in ways that the parties did not contemplate.

transfer of property that is manifestly business-related,⁸⁹ regardless of the parties thereto.⁹⁰ This would include, for example, a transfer of mortgage loans or other financial assets to a trust or other special purpose vehicle in a securitization transaction.⁹¹ Furthermore, if parties to a transfer of property are uncertain whether their transfer is governed by commercial law, they should have the right, this Article later argues, to incorporate commercial law by reference.⁹²

Considering Efficiency: Next consider whether the scope of commercial law should be restricted or expanded to address economic efficiency,⁹³ which is central to commercial law.⁹⁴ Although this Article has argued that commercial law should govern business-related transfers of property for monetary consideration, that scope might be restricted to defer to specifically

⁸⁹ A “manifestly” qualifier is often used to indicate that its object is clear or obvious. *Cf.* Or Bassok, *The Soldier as an Autonomous Weapon*, 105 CORNELL L. REV. ONLINE 233, 239–242 (2020) (discussing when soldiers have a right, and sometimes duty, to disobey orders that are manifestly unlawful); Mark J. Loewenstein, *Fiduciary Duties and Unincorporated Business Entities: In Defense of the “Manifestly Unreasonable” Standard*, 41 TULSA L. REV. 411 (2006) (discussing the “manifestly unreasonable” standard for determining when parties may limit certain fiduciary duties); Stuart M. Boyarsky, *The Uncertain Status of the Manifest Disregard Standard One Decade After Hall Street*, 123 DICK. L. REV. 167 (2018) (discussing that courts may vacate arbitral awards where the arbitrator manifestly disregards the law).

⁹⁰ The corollary of course, is that commercial law should not govern a transfer of property for monetary consideration where the transfer has nothing to do with business and does not involve a merchant.

⁹¹ *Cf.* Levitin, *supra* note 72 (generally discussing securitization transactions).

⁹² *Cf. infra* notes 147-150 and accompanying text (explaining how to incorporate commercial law by reference).

⁹³ Other considerations could be relevant to determining commercial law’s boundaries. Professors Scott & Triantis argue, for example, that because freedom of contract is a foundation of commercial law, commercial law should include a focus on correcting market failures that could limit freedom of contract, including market failures due to asymmetric information caused by grossly unequal bargaining power or due to material externalities. *See* SCOTT & TRIANTIS, *supra* note 5, at 2-3. This Article does not address issues of grossly unequal bargaining power, which generally are governed by consumer law. Nor does this Article address the extent to which externalities should limit freedom of contract, which is a universal contract-law issue that “poses major conceptual problems.” MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 20 (1993) (“[d]etermining which [material externality] impacts, if negative, are to count in constraining the ability of parties to contract with each other poses major conceptual problems”).

⁹⁴ *See Introduction, supra* note 38 and accompanying text. *But cf.* Lewis A. Kornhauser, *Constrained Optimization: Corporate Law and the Maximization of Social Welfare*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW, supra* note 5, at 87, 112 (arguing that efficiency should have a more minimal role in commercial law).

evolved non-commercial bodies of law. The following examples focus on the nature of the transferred property.⁹⁵

The sale of a building and/or land, for example, is (at least in the United States) governed by real property law,⁹⁶ which has specifically evolved to address real estate concerns.⁹⁷ Commercial law should defer to real property law insofar as it addresses those concerns. Similarly, although the UCC covers investment securities,⁹⁸ disclosure obligations regarding the sale of those securities are governed by securities law,⁹⁹ which has specifically evolved to address problems of asymmetric information. These problems result because securities are a step removed from the rights to and/or expectations of payment based on cash flows from the underlying property (or based on the securities' resale if a resale market exists). Securities law addresses asymmetric information problems by requiring adequate disclosure to transferees of the risks and benefits associated with ownership of the securities.¹⁰⁰ Commercial law should defer to securities law insofar as it addresses disclosure.

⁹⁵ These examples effectively mix positive and normative considerations, implicitly reflecting Justice Holmes' famous observation that "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (1881).

⁹⁶ See, e.g., JOSEPH RASCH & ROBERT F. DOLAN, 1 *N.Y. LAW & PRACTICE OF REAL PROPERTY* § 21:2 (2d ed. 2022). Cf. RONALD J. SCALISE JR., 2 *LA. CIV. L. TREATISE, PROPERTY* § 7:6 (5th ed. 2022) ("The distinction between real and personal property is still drawn in the United States in the light of the historical past, and real property continues to be defined as a freehold interest in land.").

⁹⁷ See, e.g., Ronald Benton Brown, *Whatever happened to the Uniform Land Transactions Act?*, 20 *NOVA L. REV.* 1017, 1020 (1996) (observing that real property law needs to address local real estate concerns, and illustrating this by showing that the types of covenants used in deeds differ significantly from state to state); Michael Madison, *The Real Properties of Contract Law*, 82 *B.U. L. REV.* 405, 465-466 (2002).

⁹⁸ See *supra* notes 32-34 and accompanying text.

⁹⁹ See, e.g., Steven A. Ramirez, *The Virtues of Private Securities Litigation: An Historic and Macroeconomic Perspective*, 45 *LOY. U. CHI. L.J.* 669, 672-73 (2014) (discussing the focus of federal securities laws on disclosure). Cf. 15 U.S.C. § 77e(c) (2012) (making it unlawful to sell, in interstate commerce, "any security, unless a registration statement [which contains appropriate disclosure] has been filed as to such security").

¹⁰⁰ Asymmetric information is a less serious concern for ordinary property that transferees can understand and, as appropriate, negotiate representations and warranties to reduce information asymmetry.

The scope of commercial law might also be *expanded* to address economic efficiency.¹⁰¹ For example, commercial law could advance its fundamental purpose of facilitating business-related transfers of property¹⁰² by helping to reduce the transaction costs that could impede those transfers.¹⁰³ A serious impediment to those transfers is property law’s previously-mentioned *nemo dat* rule, that one cannot transfer more rights than one has.¹⁰⁴ Under that rule, even buying goods (such as a computer) from a store would be prohibitively expensive if, to protect its purchase, the purchaser had to perform due diligence on whether the store actually owned the computer and whether the computer might be encumbered by any third party rights. Commercial law could address these costs by overriding property law to provide a safe harbor to buyers who reasonably engage in these types of purchases. As later discussed, the UCC actually provides such a safe harbor.¹⁰⁵

Summary: In sum, commercial law should cover any transfer of property to which a merchant is a party or that is otherwise manifestly business-related. As appropriate to increase economic efficiency, commercial law’s scope should be restricted to defer to specifically evolved non-commercial bodies of law and expanded to reduce transaction costs that could impede commercial market transfers. If parties to a transfer of property are uncertain whether their transfer is governed by commercial law, they should have the right, if they wish, to incorporate commercial law by reference.

¹⁰¹ Although this Article discusses the possibility of increasing efficiency, it does not purport to analyze how those functions can best operate together to maximize efficiency. That may be a difficult, if not quixotic, task. *Cf.* Kornhauser, *supra* note 94, at 112 (arguing that even promoting efficiency “is easier to endorse than to articulate precisely”).

¹⁰² *See supra* note 72 and accompanying text.

¹⁰³ *Cf.* Castellano & Tosato, *supra* note 6, at 1008 (observing that English law scholars have long construed commercial law broadly and functionally); Steven L. Schwarcz, *Regulating Financial Change: A Functional Approach*, 100 MINN. L. REV. 1441, 1444-46 (2016). *Cf.* Robert C. Merton & Zvi Bodie, *A Conceptual Framework for Analyzing the Financial Environment*, in THE GLOBAL FINANCIAL SYSTEM: A FUNCTIONAL PERSPECTIVE 3, 4 (Dwight B. Crane et al. eds., 1995) (viewing finance from a “functional perspective” in order to understand how and why the financial system changes and how it is likely to evolve).

¹⁰⁴ *See supra* note 17 and accompanying text.

¹⁰⁵ *See infra* notes 165-166 and accompanying text.

Part IV next evaluates its proposed boundaries by comparing them to the scope of commercial law under the UCC.

IV. EVALUATING THE PROPOSED BOUNDARIES

Methodology for Evaluating the Boundaries: How should one evaluate this Article’s proposed boundaries for commercial law? In determining these boundaries, Part III already has subjected them to a normative analysis. Another means of evaluation would be to compare those boundaries to the actual scope of commercial law. This Article next does that by comparing its proposed boundaries to the scope of actual commercial law statutes, using the UCC as a principal example.

In making this comparison, the Article recognizes that “‘oughts’ cannot be derived from what is.”¹⁰⁶ In other words, the UCC, as existing law, cannot control what commercial law’s boundaries ought to be. Nonetheless, norms should at least be factually based and tethered to reality.¹⁰⁷ This Part’s comparison helps to inform whether the Article’s proposed normative boundaries are indeed tethered to reality. As part of that comparison, the Article also examines whether the UCC itself should be modified to reflect the proposed normative boundaries.

*Evaluating the Proposition that Commercial Law should Govern Business-related Transfers of relevant*¹⁰⁸ *Property:* This Article defines business-related transfers as transfers for monetary consideration (i) in which the transferor or transferee, or both, is a person involved in business or trade who engages in the transfer in that capacity¹⁰⁹ or (ii) that are otherwise manifestly business-related, regardless of the parties thereto.¹¹⁰ The UCC’s boundaries are more path dependent. For example, UCC Article 2 covers transfers of “goods”—generally meaning

¹⁰⁶ SCHWARTZ & SCOTT, *supra* note 56, citing G.E. MOORE, PRINCIPIA ETHICA 66–69 (1903) (now in the Thomas Baldwin, ed., rev. ed. 1993).

¹⁰⁷ ISAIAH BERLIN, PERSONAL IMPRESSIONS xxi (Henry Hardy, ed., 2001).

¹⁰⁸ For a discussion of what property should be “relevant,” *see infra* notes 124-128 and accompanying text.

¹⁰⁹ The Article defines such a person as a merchant. *See supra* note 81 and accompanying text.

¹¹⁰ *See supra* notes 81-90 and accompanying text.

“all things” that “are movable”¹¹¹—for monetary consideration¹¹² regardless of the nature of the parties or of the transaction.¹¹³ UCC Article 9 covers security interests (that is, transfers for security) in collateral, which means “the property subject to a security interest.”¹¹⁴ Although most security interests are likely to be business-related because secured lenders usually are merchants,¹¹⁵ Article 9 also technically covers non-business-related transactions (such as loans between family members secured by items of personal property).

The UCC is thus broader than this Article’s proposed boundaries because it is not limited to business-related transfers.¹¹⁶ The concept of commerce, however, is business-related.¹¹⁷ Logically, therefore, commercial law—and theoretically therefore, the UCC—should only cover business-related transfers.¹¹⁸ Even if the UCC were limited to that coverage, parties to a non-business-related transfer should be able to choose commercial law by reference to govern their

¹¹¹ UCC § 2-105(1).

¹¹² See UCC § 2-102 (stating that “this Article [2] applies to transactions in goods”).

¹¹³ Cf. *supra* note 86 and accompanying text (discussing the observation of Professors Scott and Triantis that the scope of the UCC applies to all transactions within its jurisdiction regardless of the nature of the parties to those transactions).

¹¹⁴ See UCC § 9-102(a)(12) (defining “Collateral”) and Off. Cmt. 1 to UCC § 9-101 (observing that Article 9 “provides a comprehensive scheme for the regulation of security interests . . .”).

¹¹⁵ Secured loans typically are made by banks or other financial firms to businesses, consumers, or other borrowers. Such secured loans would be business-related because the transferee of the collateral would be a “person involved in business or trade who engages in the transfer in that capacity,” and thus a merchant. See *supra* notes 79-81 and accompanying text.

¹¹⁶ Technically, the UCC would even apply to a casual sale of goods between friends or neighbors. Cf. *supra* note 86 and accompanying text (observing that the UCC applies to all transactions within its jurisdiction regardless of the nature of the parties to those transactions).

¹¹⁷ Cf. *supra* note 41 and accompanying text (observing that even a general definition of commerce contemplates “the activity of exchanging products, goods, and services for financial gain,” which implies a business-related exchange).

¹¹⁸ One might counter that limiting commercial law to business-related transfers could impose transaction costs to distinguish business-related and non-business-related transfers. Merchants, for example, could be acting in or out of their mercantile capacity at any given time. This Article addresses that by defining a merchant as “a person involved in business or trade who engages in the transfer *in that capacity*.” See *supra* note 81 and accompanying text (emphasis added). The Article also argues that commercial law should cover transactions that are otherwise manifestly business-related, absent a merchant being a party. See *supra* note 90 and accompanying text. Furthermore, other laws, including consumer protection laws, already may require parties to distinguish business-related and non-business-related transfers.

transfer.¹¹⁹ That would put them in the same place, contractually, *as if* the UCC were not limited to business-related transfers.¹²⁰

Finally, the proposition that commercial law should govern business-related transfers of relevant property would resolve the anomaly that the UCC almost completely excludes unsecured commercial financing.¹²¹ Under that proposition, any loan of money by a bank, finance company, or other commercial lender would be a transfer of the money by a merchant.¹²² Assuming (as this Article next argues¹²³) that money is property to which commercial law should apply, its transfer should be covered by commercial law.

Evaluating the Proposition that the relevant Property covered by Commercial Law should include all Property: This Article argues that commercial law should (at least initially¹²⁴) apply to all property, regardless of its nature.¹²⁵ The Article’s rationale is that, in today’s world, any property could become the subject of a business-related transfer.¹²⁶ The UCC’s boundaries are narrower, however; UCC Article 2 only covers transfers of goods.¹²⁷

¹¹⁹ See *supra* note 92 and *infra* notes 147-150 and accompanying text. Thus, friends or neighbors engaging in a casual sale of goods (see *supra* note 116 and accompanying text) could choose commercial law to govern their sale.

¹²⁰ Cf. *infra* notes 148-149 and accompanying text (explaining that incorporation by reference is “merely a shorthand way of drafting the contract, equivalent in legal effect to cutting and pasting the text of those rules [of law] into the pages of the contract”).

¹²¹ See *supra* note 12 and accompanying text.

¹²² See *supra* note 81 and accompanying text.

¹²³ See *infra* notes 124-130 and accompanying text.

¹²⁴ Cf. *supra* notes 95-100 and accompanying text (excluding property subject to specifically evolved non-commercial bodies of law, such as real property law).

¹²⁵ See *supra* notes 82-84 and accompanying text.

¹²⁶ See *supra* note 84 and accompanying text.

¹²⁷ See *supra* note 111 and accompanying text. As this Article is going to press, however, the American Law Institute and the Uniform Laws Commission (the organizations that propose the text of the UCC) approved a final draft of a new UCC Article 12 that, if enacted by the states, would establish “ground rules for transferring property rights in certain digital assets—notably cryptocurrencies such as Bitcoin and Ether, stablecoins, and non-fungible tokens (NFTs).” See Xavier Focroulle Ménard, Andrew James Lom, & Rachael Browndorf (Norton Rose Fulbright), *Bringing the UCC into the digital age: Review of the 2022 UCC amendments and controllable electronic records* (Nov. 1, 2022), available at <https://www.nortonrosefulbright.com/en-no/knowledge/publications/8d95e2ed/bringing-the-ucc-into-the-digital-age-review-of-the-2022-ucc-amendments>.

Whereas commerce might have been limited to transfers of goods and other physically tangible commodities in past centuries, today a substantial portion of commerce includes transfers of rights to payment and other intangibles.¹²⁸ To reflect this changing reality, UCC Article 2 theoretically should be expanded¹²⁹ to cover such transfers.¹³⁰

That expansion of Article 2 also would resolve a conceptual inconsistency in the UCC that has caused massive business disruptions. UCC § 9-109(a)(3) (and its predecessor, UCC § 9-102) provide that Article 9 of the UCC applies to sales of a range of rights to payment. The goal is to have the UCC cover such sales, which otherwise would be governed by a confusing jurisprudence under the law merchant.¹³¹ Applying Article 9 to sales, however, creates an inconsistency: by its title (“Secured Transactions”), Article 9 appears to apply only to secured transactions and not to outright sales.¹³² That inconsistency has even confounded the drafters of the Official Comment that purports to explain Article 9’s application to sales.¹³³

¹²⁸ See *supra* note 83 and accompanying text.

¹²⁹ This expansion would require Article 2 to incorporate certain third-party-notice and priority-of-transfer provisions reflecting the transfer of intangibles. Cf. Steven L. Schwarcz, *Automatic Perfection of Sales of Payment Intangibles: A Trap for the Unwary*, 68 OHIO St. L.J. 273, 277-78 (2007) (discussing how a perfection-by-filing rule could be used to record transfers of intangible rights).

¹³⁰ A sophisticated UCC scholar commented that “We tried that 20 years ago [but there was] [t]oo much opposition to the revisions.” E-mail from Henry Gabriel, *supra* note 36. Cf. Henry Gabriel, *Uniform Commercial Code Article Two Revisions: The View of the Trenches*, 23 BARRY LAW REVIEW 129 (2018) (discussing that opposition, which was more concerned with the broader proposed Article 2 revisions than with revising Article 2 to cover transfers of rights to payment and other intangibles).

¹³¹ Cf. *supra* note 25 and accompanying text (explaining the law merchant) and *Automatic Perfection of Sales of Payment Intangibles*, *supra* note 129, at 277-78 (explaining the law merchant’s confusing jurisprudence on sales of rights to payment).

¹³² Cf. *supra* note 19 (explaining that a security interest in property only “secures payment or performance of an obligation”).

¹³³ Official Comment No. 4 to UCC § 9-109 says that application is needed to “avoid[] difficult problems of distinguishing between transactions in which a receivable [that is, a right to payment] secures an obligation and those in which the receivable has been sold outright. In many commercial financing transactions, the distinction is blurred.” That makes no sense because parties need not make that distinction; they simply could file low-cost financing statements to protect the transfer, whether a sale or a secured transaction. See *Automatic Perfection of Sales of Payment Intangibles*, *supra* note 129, at 278-79.

More important, that inconsistency has been confounding judges. For example, it caused the Tenth Circuit Federal Court of Appeals to mistakenly rule¹³⁴ that the application of UCC Article 9 to a sale of rights to payment prevents that sale from actually occurring, and that the most a recipient of the transfer could receive is a security interest in the rights to payment.¹³⁵ This mistaken ruling caused significant market turmoil.¹³⁶

More recently, that inconsistency caused the Eleventh Circuit Federal Court of Appeals to misinterpret § 9-406 of the UCC, which enables assignees of rights to payment to notify the parties obligated to make those payments to thereafter pay the assignee directly.¹³⁷ Ocwen, a mortgage-loan servicer, agreed to pay a law firm to help perform Ocwen's foreclosure-related services.¹³⁸ The law firm contracted to factor its rights to payment to Durham.¹³⁹ Durham then notified Ocwen to send the payments directly to Durham, not to the law firm.¹⁴⁰ Ocwen ignored the notice and continued to pay the law firm directly.¹⁴¹

The law firm then entered bankruptcy, and Durham sued Ocwen for the portion of those payments not turned over to Durham.¹⁴² The court ruled that § 9-406 did not create a right of action for Durham because that section only applies to assignments of rights to payment that constitute sales, whereas the relevant assignment of rights merely gave Durham a security

¹³⁴ See UCC PEB COMMENTARY No. 14 (1994).

¹³⁵ *Octagon Gas Systems, Inc. v. Rimmer*, 995 F.2d 948 (10th Cir. 1993), cert denied, 510 U.S. 993 (1993).

¹³⁶ See, e.g., Steven L. Schwarcz, '*Octagon Gas*' Ruling Creates Turmoil for Commercial and Asset-Based Finance, 210 NEW YORK L.J. 1 (Aug. 4, 1993).

¹³⁷ See *Durham Capital Corp. v. Ocwen Loan Servicing, LLC*, 777 F. App'x 952 (11th Cir. 2019).

¹³⁸ *Durham*, 777 F. App'x at 953.

¹³⁹ Factoring is a common arrangement whereby a party monetizes its rights to future payments by transferring them to a third party, for a discounted cash price. See Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STANFORD J. L. BUS. & FIN. 133, 144-46 (1994) (explaining factoring and distinguishing it from securitization).

¹⁴⁰ *Durham*, 777 F. App'x at 953.

¹⁴¹ *Id.*

¹⁴² *Id.*

interest therein.¹⁴³ The Eleventh Circuit erred by not recognizing that “assignments” under Article 9 of the UCC include both outright sales as well as assignments for security.¹⁴⁴ Other courts have made similar errors.¹⁴⁵ Expanding UCC Article 2 to cover the transfer of rights to payment and other intangibles would end these errors and also provide clearer guidance to the commercial law bar.¹⁴⁶

Evaluating the Proposition that Parties should have the Right to Incorporate Commercial Law by Reference: This Article proposes that if parties are uncertain whether their transfer of property is governed by commercial law, they should have the right, if they wish, to incorporate commercial law by reference.¹⁴⁷ The UCC does not explicitly allow parties to incorporate its provisions by reference. Nonetheless, certain of the UCC’s Official Comments *indirectly* suggest that may be acceptable. Comment 2 to UCC § 1-302 (“Variation by Agreement”) recognizes this

¹⁴³ *Id.* at 957–58.

¹⁴⁴ See Permanent Editorial Board Commentary on the Uniform Commercial Code, PEB Commentary No. 21: *Use of the Term “Assignment” in Article 9 of the Uniform Commercial Code* (Mar. 11, 2020) (“Some courts have interpreted the term ‘assignment,’ especially in the context of Section 9-406(a), as referring only to an outright assignment of ownership. This narrow reading of the term ‘assignment’ is contrary to the use of the term in Article 9 and the holdings of other courts and is incorrect.”).

¹⁴⁵ For example, in *In re Woodbridge Group of Companies, LLC* (*In re Woodbridge Group of Companies, LLC*, 590 B.R. 99, 102 (Bankr. D. Del. 2018), *aff’d* 606 B.R. 201 (D. Del. 2019)), Woodbridge Mortgage Investment Fund (“Woodbridge”) issued promissory notes to the Berlingers that included anti-assignment clauses, prohibiting them from assigning their rights under the notes without Woodbridge’s consent. Without obtaining that consent, the Berlingers later contracted to “sell, convey, transfer and assign” all of their “right, title and interest in and to” those notes to Contrarian Funds, LLC (“Contrarian”). *Id.* Contrarian later filed for bankruptcy and claimed the right to payment under those notes. *Id.* Woodbridge objected to that claim on the basis that it had not consented to the assignment. *Id.* The lower court ruled that the anti-assignment clauses were valid and that § 9-408 of the UCC, which overrides anti-assignment clauses, applies to transfers of security interests but not to outright sales of rights to payment. *Id.* at 109. Because the assignment of rights to Contrarian was an outright sale, the court said that the UCC did not override the anti-assignment clauses. *Id.* at 107. The appeals court upheld that lower-court decision. 606 B.R. 201, at 209-10. Both courts, however, became confused by failing to recognize that “assignments” under Article 9 of the UCC include both outright sales as well as assignments for security.

¹⁴⁶ Cf. Heather Hughes, *Property and the True-Sale Doctrine*, 19 U. PA. J. BUS. L. 870 (2017) (discussing how the ongoing application of UCC Article 9 to sales of rights to payment continues to create confusion in commercial law).

¹⁴⁷ See *supra* note 92 and accompanying text.

flexibility, for example, allowing parties to vary the UCC’s provisions by “stating that their relationship will be governed by recognized bodies of rules or principles applicable to commercial transactions.”

Furthermore, general jurisprudential principles allow parties to incorporate provisions of law by reference. Technically, incorporation by reference is not even a choice-of-law rule.¹⁴⁸ Rather, it is “merely a shorthand way of drafting the contract, equivalent in legal effect to cutting and pasting the text of those rules [of law] into the pages of the contract.”¹⁴⁹ Thus, the Restatement of Conflicts of Law allows parties to choose application of a state law to govern their contractual rights and duties if “the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.”¹⁵⁰

For these reasons, this Article’s proposal that parties should have the right to incorporate commercial law by reference would not be inconsistent with the UCC. Indeed, parties currently should be able to incorporate UCC provisions by reference notwithstanding the UCC’s silence on that issue.

Evaluating the Proposition that Commercial Law should defer to Specifically Evolved Non-commercial Law: This Article argues that commercial law should defer to real property law, securities law, and other non-commercial law that has evolved to address specific concerns.¹⁵¹ The UCC likewise defers to real property law.¹⁵² That deference, however, appears

¹⁴⁸ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) cmt. c (AM. LAW INST. 1971) (stating that incorporation by reference “is not a rule of choice of law”).

¹⁴⁹ ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 23 (2018). Cf. Richard Raysman & Peter Brown, *Incorporation by Reference Provision in Related Agreement Allows for Enforcement of Warranty Disclaimer in Subsequent Software License*, Law.Com: N.Y.L.J. (May 7, 2018), <https://www.law.com/newyorklawjournal/2018/05/07/incorporation-by-reference-provision-in-related-agreement-allows-for-enforcement-of-warranty-disclaimer-in-subsequent-software-license/> [<https://perma.cc/BJF2-AJCN>] (observing that incorporation by reference is an integral concept in “traditional contracts”).

¹⁵⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) cmt. c.

¹⁵¹ See *supra* notes 95-100 and accompanying text.

¹⁵² Article 2 of the UCC, for example, addresses the sale of goods, thereby excluding real property. Article 9 of the UCC excludes security interests in real property. See UCC § 1-

to reflect lobbying by real estate lawyers who wish to preserve their sinecure of specialized expertise¹⁵³ as much as it reflects the fact that real estate law has evolved to address specific real property concerns.¹⁵⁴ The UCC also defers to securities law regarding issues of disclosure.¹⁵⁵ That deference primarily reflects that securities law has specifically evolved to address problems of asymmetric information.¹⁵⁶

The proposition that commercial law should defer to specifically evolved non-commercial law can also help to explain other seeming irregularities in the UCC's coverage. For example, the UCC does not cover services notwithstanding that the definition of commerce generally includes the exchange of services for financial gain.¹⁵⁷ In the United States, at least, a panoply of federal and state laws already specifically cover the provision of services,¹⁵⁸ reducing the need for commercial law coverage. Similarly, the UCC covers certain payment systems—such as payments made by the transfer of checks, promissory notes, and other negotiable instruments¹⁵⁹ and payments made under letters of credit¹⁶⁰—but omits coverage of most money transfers. Arguably, commercial law could cover all payment systems relating to the sale of

201(b)(35) (limiting security interests covered by the UCC to “interest[s] in personal property or fixtures”).

¹⁵³ Cf. Brown, *supra* note 97, at 1019 (stating that the second and third most frequent explanations for not uniformly codifying real property law in the United States are, respectively, that “Real property lawyers were afraid that it might hurt them economically” and “Real property lawyers did not want to learn something new.”).

¹⁵⁴ See *supra* notes 96-97 and accompanying text.

¹⁵⁵ See *supra* notes 98-100 and accompanying text.

¹⁵⁶ See *id.* More technically, that deference reflects that securities law is federal law which preempts the UCC, which is state law. See UCC § 9-109(c) (acknowledging federal preemption) & Off. Cmt. 8 to UCC § 9-109 (same).

¹⁵⁷ See *supra* notes 39-41 and accompanying text.

¹⁵⁸ See, e.g., U.S. DEP'T OF LABOR, SUMMARY OF THE MAJOR LAWS OF THE DEPARTMENT OF LABOR (describing such laws as the Fair Labor Standards Act, the Occupational Safety and Health Act, the National Labor Relations Act, the various workers' compensation statutes, the Employee Retirement Income Security Act, and many other service-related statutes), available at <https://www.dol.gov/general/aboutdol/majorlaws>. States also have enacted a wide range of statutes to cover the provision of services. See, e.g., National Conference of State Legislatures, available at <https://www.ncsl.org/aboutus.aspx> (discussing service-related statutes).

¹⁵⁹ See UCC Article 3.

¹⁶⁰ See UCC Article 5.

goods, services, or commodities.¹⁶¹ In the United States, federal law already specifically covers money transfers,¹⁶² (again) reducing the need for commercial law coverage. The UCC nonetheless covers electronic funds transfers¹⁶³ because federal law (so far) only covers consumer-protection issues relating to those transfers.¹⁶⁴

Evaluating the Proposition that Commercial Law should override other Law if needed to protect Commercial Markets: This Article argues that commercial law should override other law if needed to reduce transaction costs and otherwise increase economic efficiency, such as by protecting commercial markets. For example, it contends that commercial law should override property law's *nemo dat* rule, which would make purchases of goods prohibitively expensive because purchasers would have to perform due diligence on the seller's rights in the goods being sold.¹⁶⁵ The UCC likewise overrides property law's *nemo dat* rule,¹⁶⁶ implicitly for the same reason.¹⁶⁷

CONCLUSIONS

¹⁶¹ Cf. *supra* note 42-43 and accompanying text (asking whether commercial law should cover money and payment systems that are used to pay for the sale of goods, services, or commodities).

¹⁶² The Federal Reserve Act, for example, governs monetary policy. See, e.g., David Small & James Clouse, *The Limits the Federal Reserve Act Places on the Monetary Policy Actions of the Federal Reserve*, 19 ANN. REV. BANKING L. 553 (2000) (discussing the effect of the Federal Reserve Act on monetary policy). The Federal Reserve and the U.S. Department of the Treasury supervise money transfers. See Board of Governors of the Federal Reserve System, *What is the purpose of the Federal Reserve System?* (2016), https://www.federalreserve.gov/faqs/about_12594.htm (discussing the Federal Reserve's role in supervising the nation's payment systems); U.S. Department of the Treasury, *Role of the Treasury*, <https://home.treasury.gov/about/general-information/role-of-the-treasury> (discussing the Treasury's role in supervising financial institutions).

¹⁶³ See UCC Article 4A.

¹⁶⁴ Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 et seq. (1978).

¹⁶⁵ See *supra* notes 101-104 and accompanying text.

¹⁶⁶ See *supra* notes 17-18 & 105 and accompanying text.

¹⁶⁷ See, e.g., Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057, 1057 (1954) (observing that a good faith purchaser "is protected not because of his praiseworthy character, but to the end that commercial transactions may be engaged in without elaborate investigation of property rights and in reliance on the possession of property by one who offers it for sale or to secure a loan").

Commercial law developed over centuries in a path dependent and ad hoc manner. It also lacks clear normative purposes. For these reasons, among others, commercial law has uncertain boundaries that create ambiguities and inconsistencies. That in turn, confuses lawyers and courts, resulting in misinterpretations that cause business disruptions and reduce commercial efficiency.¹⁶⁸

This Article analyzes what commercial law's boundaries should be, deducing in that process what the purposes of commercial law should be. Based on that analysis, the Article argues that commercial law should cover all business-related transfers of property, subject to exceptions needed to reduce transaction costs and otherwise increase economic efficiency. The Article then evaluates those proposed boundaries by comparing them to the scope of actual commercial law statutes, which helps to confirm that those boundaries are tethered to reality.

¹⁶⁸ *Cf. supra* notes 134-145 and accompanying text (discussing judicial misinterpretations and resulting business disruptions).