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THE DEFINITION OF FIXTURE IN ARTICLE 9 OF THE U.C.C.

The article 9 fixture rules, lacking a workable definition as to when a chattel becomes a fixture, have caused much controversy with respect to the priority issue between real estate mortgagees and chattel secured creditors. This Note examines the importance of a fixture definition under article 9 and evaluates the practical difficulties of leaving such a definition to state law. After reviewing various proposed solutions, the Note concludes that by focusing on the priority rules of article 9 for handling conflicting claims by secured parties, the problem of fixture classification can be avoided.

INTRODUCTION

THE LIFE of the law is language. Justice Holmes recognized this premise when he wrote that “[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” The use of the term “fixture” in Article 9 of the Uniform Commercial Code exemplifies how the uncritical use of language shapes the law. The term fixture is used primarily in property law in real estate conveyancing, taxation, and the public condemnation of land to describe those chattels which have become, through more or less permanent attachment, part of the reality. In the context of article 9, fixture designates a category of collateral used to secure financing agreements. Article 9 distinguishes between movable, tangible collateral, termed “goods,” and intangible collateral such as accounts and copyrights. Fixtures, as distinguished from goods, are “hybrid goods” sharing “characteristics of both real and per-

4. Id. §§ 19.13-14.
5. “Collateral is property subject to a ‘security interest.’” U.C.C. § 9-105(1)(c). A security interest is an interest in property or fixtures which secures payment or performance of an obligation. Id. § 1-201(37). A security interest is created by a “security agreement” between a “debtor” and a “secured party.” Id. § 9-105(1)(f), (d), (m).
6. Id. §§ 9-105(1)(h), -106.
Whether a particular item is a fixture under article 9 is often a difficult question, which the U.C.C. drafters left for state resolution. A fixture under article 9 is generally an item of personal property which, through affixation or adaptation to real property, or by the intent of the owner, has become part of the real property, but which may be removed and again become personal property.

This Note examines article 9's use of the term fixture and suggests that, far from being the "skin of a living thought," the term has become a cloak masking the priority issue between real estate mortgagees and chattel secured creditors. This Note first reveals that under article 9, characterization of collateral as a fixture has important consequences, since it determines the manner of perfecting security interests and the priority rules governing the interests of debtors and creditors in the collateral. This Note then concludes that state law, given the task of defining fixture under article 9, is inadequate to draw the distinction between goods, fixtures, and real estate. Finally, this Note reviews various proposed solutions to the fixture problem and suggests that article 9 can provide a better law of secured transactions by eliminating the fixture classification and focusing instead on the priority rules for resolving the claims of competing secured parties.

I. Fixtures in Article 9

In the context of article 9, it is important to determine whether the collateral at issue is a fixture. The classification of collateral as a good or a fixture determines the method of perfecting the security interest and the applicable rules governing the priority of claims of competing secured creditors for that collateral. Addi-
tionally, classification of collateral as a fixture or realty determines whether the secured transaction provisions of the U.C.C. or the state's real estate mortgage laws apply. Creditors acting on a belief that their collateral is a chattel may lose their security interest if a court decides that the collateral is a fixture.

Article 9 provides special rules for perfecting security interests in fixtures. In general, a security interest in goods is perfected by filing a financing agreement with the Secretary of State for the state where the collateral is located. If the collateral is a fixture, a fixture filing must be prepared and filed in the real estate records of the county where the fixture is located.

The priority which fixture secured creditors have over other creditors is determined by the special priority rules of section 9-313 which differ from the priority rules governing other kinds of collateral. Two kinds of priority rules are provided in section 9-313. One set of rules applies to fixtures in general, and the other rules provide exceptions to these general rules. By focusing on particular kinds of fixtures, these latter priority rules are actually modifications of the general definition of fixture in section 9-313(1)(a).

The general rules first provide that perfected security interests in fixtures prevail over the interests of mortgagees of the land to which the fixtures are attached when the fixture filing is made before the mortgage is recorded. Second, if the interest in the

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17. See e.g., In re Collier, 3 U.C.C. Rep. Serv. 1076 (E.D. Tenn. 1966) (creditor perfected an interest in a "ten h.p. V.O. oil fired burner" as a fixture, but court held that the burner was "equipment," thereby leaving the creditor unsecured).
18. U.C.C. § 9-302 provides a blanket filing requirement, subject to certain exceptions. The mechanics of filing are provided for in §§ 9-401 to -408.
19. In addition to the information contained in a financing agreement, a fixture filing must contain a description of the real estate to which the fixture is attached, recite that the financing agreement is to be filed in the real estate records, and show the name of an owner of record of the real estate if the debtor does not have an interest of record. Id. §§ 9-313(1)(b), -402(5).
20. Id. § 9-313(4)(b) provides:

[When] the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate.

Id. In the words of one commentator, "Whoever gets there first, be he fixture filer or real estate interest, wins. To the swift goes the prize." T. Quinn, Uniform Commercial Code Commentary and Law Digest ¶ 913[A][3] (1978).
fixtures is a purchase money security interest, it prevails over a real estate mortgage if the fixture filing is made before the goods become fixtures or within ten days thereafter, unless the mortgage is a construction mortgage. This second requirement is "designed to protect the purchase money security interest in a fixture from prior real estate interests." Subsequent interests would be protected by the central rule of section 9-313(4)(b). The general rules accord with the principle of article 9 that the first recorded interest prevails over all others, and the general exception to that principle for purchase money security interests.

There are several other priority rules which exempt certain fixtures from the general rules. "Ordinary building materials incorporated into an improvement on land" may never be the subject of a security interest under article 9, because they are deemed to be realty. "[R]eadily removable factory or office machines or readily removable replacements of domestic appliances" also are exempt from the special filing requirements for fixtures. Additionally, if the debtor has a right to remove the fixture—for example, a tenant installs a fixture and the lease permits its removal when the lease expires—the fixture secured creditor prevails over

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21. A purchase money security interest arises when the seller retains an interest in the collateral to secure part or all of its purchase price or to secure a loan which was made to finance the purchase of the collateral. U.C.C. § 9-107.

22. *Id.* § 9-313(4)(a) provides:
A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where (a) the security interest is a purchase money security interest, the interest of the encumbrancer or owner arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate.

23. *Id.* § 9-313(6) provides:
Notwithstanding paragraph (a) of subsection (4) but otherwise subject to subsections (4) and (5), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.


25. A perfected security interest in fixtures has priority over the conflicting interest of an encumbrancer or owner of the real estate where . . . the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate . . . .


27. U.C.C. § 9-313(2).

28. *Id.* § 9-313(4)(c).
the mortgagee even if the fixture security interest is unperfected.\textsuperscript{29} In the first draft of the present section 9-313, these rules were part of the definition of fixture, but to make the definition easier to read, the rules were made priority rules in the final draft.\textsuperscript{30} Thus, the term fixture, which the Code purported to define by reference to state law,\textsuperscript{31} actually is defined in part by the priority rules of section 9-313.

In light of the different treatment accorded fixtures and other collateral, one would expect the U.C.C. to have defined fixture carefully. The opposite, however, is true. One of the drafters of the current version of article 9 remarked that the U.C.C. leaves the term fixture "intensely undefined."\textsuperscript{32} Rather than define fixture, section 9-313(1)(a) states that "goods are ‘fixtures’ when they become so related to particular real estate that an interest in them arises under real estate law."\textsuperscript{33} In light of the disarray of state law defining fixtures, this definition is tantamount to no definition at all\textsuperscript{34} and is contrary to the express U.C.C. policy that the commercial law in the states adopting the Code be uniform.\textsuperscript{35}

The decision to leave fixtures "intensely undefined\textsuperscript{36} was made only after two decades of experimentation and dissatisfaction with various attempts at definition. The predecessor of article 9, Article 7 of the Uniform Conditional Sales Act (UCSA),\textsuperscript{37} discarded the term fixture and spoke instead of "goods attached to the realty . . . which can be removed without material injury to the realty."\textsuperscript{38} Whether this vague test would have proven suitable will not be known because few states enacted the UCSA, and courts of those states which did adopt the Act interpreted it nonuniformly.\textsuperscript{39} General dissatisfaction with the UCSA and the

\textsuperscript{29} Id. § 9-313(5)(b).
\textsuperscript{31} U.C.C. § 9-313(1)(a).
\textsuperscript{32} Kripke, \textit{The Review Committee’s Proposals to Amend the Fixture Provisions of the Uniform Commercial Code}, 25 \textit{Bus. Law.} 301, 304 (1969). Professor Kripke was an Associate Reporter for the Review Committee.
\textsuperscript{33} U.C.C. § 9-313(1)(a).
\textsuperscript{34} See notes 64-85 \textit{infra} and accompanying text.
\textsuperscript{35} U.C.C. § 1-102(2)(c).
\textsuperscript{36} Kripke, \textit{supra} note 32, at 304.
\textsuperscript{37} \textit{UNIFORM CONDITIONAL SALES ACT} § 7 (Act withdrawn 1952).
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} Kleps, \textit{Uniformity Versus Uniform Legislation: Conditional Sale of Fixtures}, 24 \textit{CORNELL L.Q.} 394, 403-10 (1939). It should be noted, however, that the language of Article 7 of the UCSA was adopted in the sales article of the U.C.C. in preference to the term
need for a comprehensive modern commercial code led to the U.C.C.'s development in the late 1940's and early 1950's.40

Following the UCSA's example, early drafts of the U.C.C. avoided the use of fixture and its common law interpretations.41 During the revisions of the U.C.C. following its consideration by the New York State Law Revision Commission in 1956, however, the term was reintroduced without any apparent reason or conscious deliberation.42 The revised section read:

The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metal work and the like and no security interest in them exists under this Article unless the structure remains personal property under applicable law. The law of this state other than this Act determines whether and when other goods become fixtures. This Act does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.43

The 1962 and 1966 revisions of the Code left this definition untouched.

Many commentators expressed dissatisfaction with this definition.44 The complaints focused on the Code's willing reference to an obscure and inconsistent body of state law.45 Furthermore, when adopting the pre-1972 versions of article 9 and section 9-313, some states riddled the U.C.C. fixture definition with a myriad of nonuniform amendments.46 For example, Ohio47 and

fixture. U.C.C. § 2-107. The Official Comment notes that the term "fixture" was avoided because "of the diverse definitions of this term." Id., Official Comment 2. The drafters of article 9 recognized this discrepancy between the two articles: "Section 2-107 relates to sale of such goods; Section 9-313 to security interests in them. The discrepancies between the two sections arise from the differences in the types of interest covered." U.C.C. § 9-105, Official Comment 3. See Kock, Things Attached to Realty, 15 MERCER L. REV. 343 (1964).

42. Coogan, supra note 41, at 487. According to Coogan, the editorial board was "apparently unaware of the reasons for [the term fixture's] rejection by their predecessors." Id.
45. See notes 64–85 infra and accompanying text.
46. State legislatures have made more nonuniform changes in adopting article 9 than
Florida,\textsuperscript{48} rewrote the fixture section to achieve priorities in fixtures opposite from those prescribed by the drafters of the Code,\textsuperscript{49} and California, fearful of adding further confusion to its fixture law, deleted section 9–313.\textsuperscript{50} These actions were contrary to the Code's express goal of establishing a simple, clear, and modern law, uniform in all jurisdictions.\textsuperscript{51}

To remedy this situation, a Review Committee was appointed to rewrite article 9.\textsuperscript{52} In its first proposed draft, the committee attempted to more thoroughly define fixture by subjecting the applicable state definitions to a number of qualifications.\textsuperscript{53} This draft received a chorus of criticism as loud as that which had prompted the initial revision. Some critics objected to the retention of the term fixture,\textsuperscript{54} but a more general complaint was that
the attempted definition was too complicated to be practical.\textsuperscript{55} The committee thus abandoned the proposal, recognizing that it was "too complex, and most persons reading it do not understand it."\textsuperscript{56}

The committee's second draft, subsequently adopted in the Official 1972 version of the Code, again left the definitional problem to the states.\textsuperscript{57} The various qualifications to the state definitions in the first draft were incorporated by the second draft in special priority rules.\textsuperscript{58} The U.C.C. thus recognized these special cases, such as readily removable factory and office machines, as fixtures, but exempted them from the general rules governing fixtures. As Peter Coogan, a consultant to the drafters of the new section stated, "[w]e distinguish between what I might call soft fixtures and hard fixtures."\textsuperscript{59}

Whether this change made the new section 9-313 less complex and more understandable is unclear. The new definition parallels the pre-1972 definition by leaving the determination of fixture to state law and is subject, therefore, to the same criticisms.\textsuperscript{60} The new definition accordingly has not resulted in greater uniformity. Twenty-three jurisdictions simply have retained the pre-1972 version and of the twenty-eight jurisdictions which have adopted the 1972 version, half of them have made nonuniform amendments to section 9-313.\textsuperscript{61}

New section 9-313 has not clarified when particular collateral is a fixture. State law is no more consistent today than it was in 1966 when the committee began to revise article 9.\textsuperscript{62} In addition, the new section presents further confusion by introducing undefined terms such as "readily removable factory and office machines."\textsuperscript{63} Thus, the use of the term fixture in article 9 is as troublesome today as it was before the Review Committee first met.

\begin{itemize}
\item \textsuperscript{55} Leary & Rucci, Fixing Up the Fixture Section of the UCC, 42 TEMP. L.Q. 355, 371 n.39 (1969) (authors labeled the proposed definition a "monster").
\item \textsuperscript{56} Review Committee for Article 9, supra note 30, at 1072.
\item \textsuperscript{57} “[G]oods are ‘fixtures’ when they become so related to particular real estate that an interest in them arises under real estate law.” U.C.C. § 9-313(1)(a).
\item \textsuperscript{58} See notes 27–31 supra and accompanying text.
\item \textsuperscript{59} Panel: A Second Look at the Amendments to Article 9 of the Uniform Commercial Code, 29 BUS. LAW. 973, 983 (1974) [hereinafter cited as Panel].
\item \textsuperscript{60} Note, Making the UCC’s Fixture Section More Workable, 1971 U. ILL. L.F. 682, 688.
\item \textsuperscript{61} 3 UNIFORM LAWS ANN. 5–6 (1981).
\item \textsuperscript{62} See notes 64–85 infra and accompanying text.
\item \textsuperscript{63} U.C.C. § 9-313(4)(c).
\end{itemize}
II. THE COMMON LAW DEFINITION OF FIXTURE

Each state has a body of reported decisions distinguishing between chattels, fixtures, and realty in many contexts. These bodies of law, however, often are perplexing, complicated, and inconsistent. States disagree as to the tests to be applied in defining fixtures and the status to be accorded fixtures. Even when there is agreement as to the proper tests, the cases apply the tests inconsistently.

Property traditionally is classified as personalty, realty, or a shadowy middle category called fixtures, which is chattel for some purposes and realty for others. Land is realty and small items of furniture are personalty. Objects such as built-in appliances, furnaces, and sinks generally are held to be fixtures. Although such classification of property seems intuitively clear at the extremes, judicial experience reveals ambiguity.

The extremes—a plot of land and a table—fall into two distinct property classifications, but the fixture classification is blurred between the realty and personalty classifications. Fixtures are objects so affixed to the realty that it seems odd to call them personal property because they are not portable; yet, they also are so ephemeral as compared to land that it is equally disquieting to call them realty. A furnace, for example, either is cemented to the floor or held in place by its own weight and has a useful life of many years, but it nonetheless will wear out and have to be replaced several times during the useful life of the building in which it is installed.

The tests applied to determine when a particular object is a fixture vary among states. The cases reveal three general tests: (1) the relative permanence of the attachment of the object to the realty; (2) the adaptation of the chattel to the use being made of the realty; and (3) the intentions of the various interested parties.

64. "Every lawyer knows that cases can be found in this field that will support any position that the facts of his particular case require him to take. . . . There is a wilderness of authority on this question of fixtures. . . ." Strain v. Green, 25 Wash. 2d 692, 695, 172 P.2d 216, 218 (1946), (quoting Philadelphia Mortgage & Trust Co. v. Miller, 20 Wash. 607, 56 P. 382 (1899)).


66. Id. at 178-87.


68. See, e.g., Wheeling-Pittsburgh Steel Corp. v. Jefferson County Bd. of Revision, 27
to make a permanent addition to the land. The amount of damage which the realty would incur by the removal of the chattel also is considered. This last factor generally is not considered to be a separate test but is a factor to be considered in connection with one or more of the three general tests.

The applicability of these tests and the relative weight each is given varies among states and cases. The earlier cases emphasized attachment, either actual or constructive, while the more recent cases emphasize the intent of the owner or affixer of the fixture. Often courts refer to all three tests in deciding a particular case. Because the tests are vague and inconsistently applied, the results are contradictory.

Applying these tests to the furnace example, it is not clear that a furnace is either personal property or part of the realty. To the extent that the furnace can be dismantled readily and moved to another building, it is a chattel. Indeed, the furnace may be easier to move than a grand piano. The furnace, however, may be so integral to the building that it becomes part of the realty. During the winter months, a furnace may be indispensable, and the value of the building may be diminished appreciably if it cannot be heated. Finally, although a furnace could be moved to another building, the owner almost always intends to make the furnace a permanent part of the building in which it was installed originally. Prospective buyers, when inspecting the property, might ask about the condition of the furnace, but they rarely would ask if the furnace is included in the price of the property. The treatment of the

Ohio St. 2d 45, 271 N.E.2d 861 (1971); Danville Holding Corp. v. Clement, 178 Va. 223, 16 S.E.2d 345 (1941).


72. 1 G. THOMPSON, supra note 65, at 187–92.


74. See Abramson v. Penn, 156 Md. 186, 143 A. 795 (1928). Abramson, emphasizing the annexation test, ruled that gas radiators held in place by their own weight are not fixtures. In XXth Century Heating & Ventilating Co. v. Home Owners' Loan Corp., 56 Ohio App. 188, 10 N.E.2d 229 (1937), the court, emphasizing the adaptation test, held that a furnace not physically attached to the building was a fixture because Ohio's climate made it indispensable to the building's use.


furnace as permanent by the parties involved may result in the furnace being classified as a fixture.\(^77\)

The status of fixtures also varies among states. The majority rule recognizes the tripartite classification of property as being either personalty, realty, or fixtures.\(^78\) Fixtures, although a hybrid, represent a distinct class.\(^79\) The well established minority position, taken by Ohio and Massachusetts, asserts that fixtures are chattels which have been merged into the realty and, therefore, are realty.\(^80\) The U.C.C. purported to leave the definition of fixture to the states, but by treating fixtures and other chattels as separate classes of collateral, the Code adopted the majority position.\(^81\) This stance left the minority states in an anomalous position and led to nonuniformity in the versions of the U.C.C. adopted by several states.\(^82\)

Special doctrines unique to certain states, such as Pennsylvania's Assembled Industrial Plant doctrine, add to the confusion. This doctrine, an exaggerated form of the adaptation of the chattel to the realty test, states that all machinery and equipment necessary to the functioning of a particular factory are factory fixtures.\(^83\) Thus, empty beer kegs awaiting refilling at a brewery are fixtures.\(^84\) The disparate tests developed by the common law to define fixtures, and the contradictory results to which they give rise, has led one commentator to remark that "[t]he law is said to be a seamless web, but the problem of fixtures can only be called a

\(^78\) See note 66 supra and accompanying text.
\(^79\) Berry, Priority Conflicts Between Fixture Secured Creditors and Real Estate Claimants, 7 MEM. ST. L. REV. 209, 210-12 (1977).
\(^80\) Teaff v. Hewitt, 1 Ohio St. 511 (1852).
\(^81\) This position is described in U.C.C. § 9-313, Official Comment 3:
Under these concepts the section recognizes three categories of goods: (1) those which retain their chattel character entirely and are not part of the real estate; (2) ordinary building materials which have become an integral part of the real estate and cannot retain their chattel character for purposes of finance; and (3) an intermediate class which has become real estate for certain purposes, but as to which chattel financing may be preserved. This third and intermediate class is the primary subject of this section. The demarcation between these classifications is not delineated by this section.
\(^83\) 1 G. THOMPSON, supra note 65, at 241.
tangled web." 85

III. SOLUTIONS TO THE FIXTURE PROBLEM

Three broad solutions have been suggested to correct the definitional problem of fixture as used in article 9. The first solution proposes that since the definitional problem has limited practical effect, less credence should be given to academic criticism. 86 The second solution proposes that the U.C.C. adopt a definition which would supersede the common law definition for the purposes of article 9. 87 The third solution proposes that because no workable definition of fixture can be devised, the U.C.C. should be rewritten to eliminate the need to distinguish fixtures. 88 This Note will examine each of these proposed solutions.

A. Is the Problem Illusory?

Some commentators argue that criticisms which declare state law fixture definitions too confusing to be incorporated into the U.C.C. are academic because the definitions are not troublesome in actual practice. 89 In many cases, a given collateral is obviously a fixture. 90 Where it is doubtful how the collateral should be classified, creditors can, and in practice do, file their security interests both as ordinary goods and as fixtures. 91

In most cases the definition of fixture, or the absence of such a definition, is not troublesome. 92 The relative infrequency of re-

85. Kripke, supra note 44, at 51.
86. Leary & Rucci, supra note 55, at 364–73; Panel, supra note 59, at 987 (comments of Homer Kripke).
88. See notes 128–46 infra and accompanying text.
89. Leary & Rucci, supra note 55, at 364–73; Panel, supra note 59, at 987 (comments of Homer Kripke).
90. Leary & Rucci, supra note 55, at 365 n.23.
91. Bernstein, Another Look at the Article 9 Revisions—Some Specific Problems, 57 Chi. B. Rec. 289, 295 (1976). Bernstein, however, suggests that the new § 9–313 may be interpreted to forbid such precautionary duplicate filings because of the requirement of § 9–402(5) that a fixture filing state that the collateral is a fixture. Id. But see U.C.C. § 9–313, Official Comment 1: "[N]o inference may be drawn from a fixture filing that the secured party concedes that the goods are or will become fixtures. The fixture filing may be merely precautionary." Id.
92. See Coogan, supra note 41, at 487:

The demand for improvement in article 9 did not come primarily from a spate of court cases, but rather as a result of further thinking on the part of that segment of the bar and the teaching profession whose business it is to anticipate what courts will do when such cases arise.

Id.
ported cases where unclear definitions cause expectations to be defeated does not necessarily mean, however, that the definition of fixture is not problematic. The typical problem case involves a conflict between a fixture secured creditor and a mortgagee where the buyer of the fixture defaults on his or her fixture payments. In the past few decades, inflation may have masked conflicts between the two interests, since appreciated real estate provides enough equity to satisfy both claimants. A decline or leveling in real estate values, however, could revive conflicts between fixture secured creditors and mortgagees. This possibility of conflict has led Professor Gilmore to suggest that not until "we suffer another collapse on a scale that took place in the late 1920's and early 1930's" will the definition of fixture assume a sense of urgency.

The mere fact that there are separate filing requirements and priority rules for fixtures and other goods is both a burden on creditors and a trap for the unwary. If the creditor recognizes the problem, he or she can resort to time consuming and expensive multiple filings. If, however, the creditor is not aware of the problem of defining fixture, costly litigation may result. When the line between fixtures and goods is as shadowy as it is, the trap becomes more intolerable.

B. Proposed Definitions

The drafters of section 9-313 did not provide a concrete definition of fixture in article 9 because they perceived that any such definition would be problematic. If the definition purported to apply to all situations, then what was intended to be solely a commercial code also would alter state real estate law. If, however, the definition was limited to U.C.C. applications, each state would have one definition of fixture for Code purposes and another for real estate situations. This situation would result in conflicts between fixture secured creditors and mortgagees which the Code could not resolve. To avoid this dilemma, the U.C.C. incorpo-
rated each state's common law fixture definition.\textsuperscript{101}

Several writers, apparently minimizing the importance of this dilemma, have tried to draft definitions of fixture for article 9. An early attempt at drafting such a definition was made by Peter Coogan.\textsuperscript{102} Coogan proposed the following recommendations:

First, it should provide that all determinations as to whether goods remain chattels, become fixtures, or become realty be made by the court and not by the jury. Second, it should make clear that incorporation into a structure is the only manner in which goods may become realty. Third, it should provide that goods do not become fixtures unless they are affixed to the realty in some substantial way—certainly more substantially than by a simple electric cord or garden hose connection. Fourth, it should make clear . . . that goods have not become real estate merely because their removal would cause economic loss to the freehold.\textsuperscript{103}

In several respects this proposal does not improve the existing provisions of article 9. First, the provision for judicial determination of fixtures, alone, is not helpful. The question of whether something is a fixture generally is a mixed one of law and fact,\textsuperscript{104} and appellate courts have had no success developing a consistent rule for spotting fixtures.\textsuperscript{105} Second, the requirement stating that only goods incorporated into a structure become realty is not helpful when the issue is whether the structure itself, such as a prefabricated farm silo, is a fixture.\textsuperscript{106} Third, the provision requiring that the collateral be affixed in "some substantial way" is not any clearer than the present "attachment" test.\textsuperscript{107} Coogan concludes that the only safe course is to exercise an abundance of caution. If creditors are unsure whether their collateral is a fixture, they should perfect their security interest both as a chattel and as a

\textsuperscript{101} Id.

\textsuperscript{102} Mr. Coogan subsequently served as a consultant to the Review Committee which wrote the 1972 version of article 9.

\textsuperscript{103} Coogan, Security Interests in Fixtures Under the Uniform Commercial Code, supra note 44, at 1348. See Coogan, Fixture—Uniformity in Words or in Fact?, supra note 44, at 1226–27 (elaboration of original proposal).

\textsuperscript{104} See e.g., Farmers & Merchants Bank v. Sawyer, 26 Ala. App. 520, 163 So. 657 (1935).

\textsuperscript{105} See notes 64–85 supra and accompanying text.

\textsuperscript{106} See e.g., Corning Bank v. Bank of Rector, 265 Ark. 68, 576 S.W.2d 949 (1979). Corning Bank applied the annexation, adaptation, and intention tests, to uphold a finding that grain storage bins were fixtures. The bins took three days to erect and were bolted to concrete foundations but they could be unbolted and hauled away, leaving behind the foundations.

\textsuperscript{107} See note 67 supra and accompanying text.
fixture.\textsuperscript{108} Another proposal suggests that the term fixture be replaced by a new term of art based on the manner in which the chattel is attached to the realty.\textsuperscript{109} Collateral attached by means of nails, screws, bolts or "a material having a bonding strength equal" to such fasteners would be considered a fixture.\textsuperscript{110} This definition, however, is underinclusive since much machinery and equipment which is integral to real estate, although not actually nailed down, would not be fixtures.\textsuperscript{111} Moreover, the modern trend has been to depart from strict requirements of attachment. An item generally is considered to be a fixture if it is related integrally to the realty and the owner intends it to be a fixture.\textsuperscript{112} A fixture definition based on physical attachment is also overinclusive since many objects not considered to be fixtures even though screwed down would be recognized as fixtures.\textsuperscript{113} Thus, the proposed definition oversimplifies the problem by focusing only on attachment—a factor the courts already consider in determining whether goods are fixtures.\textsuperscript{114}

Professor Nathan suggests a more sophisticated, two-part test, which recognizes objects as fixtures regardless of whether they actually are attached.\textsuperscript{115} Nathan's definition would apply not only

\begin{enumerate}
\item[108.] Coogan, Security Interests in Fixtures Under the Uniform Commercial Code, supra note 44, at 1379.
\item[110.] Id. at 263.
\item[111.] See XXth Century Heating & Ventilating Co. v. Home Owners' Loan Corp., 56 Ohio App. 188, 10 N.E.2d 229 (1937). XXth Century held that a furnace is a fixture of a dwelling house, even though it is not attached to the dwelling house, because the climate makes the furnace indispensable to the building's use. Id.
\item[112.] See, e.g., Cherokee Carpet Mills, Inc. v. Manly Jail Works, Inc., 257 Ark. 1041, 1043, 521 S.W.2d 528, 530 (1975); Alwes v. Richheimer, 185 Ark. 535, 538-39, 47 S.W.2d 1084, 1085 (1932).
\item[113.] The intention of the parties and the fact that the object can be removed without damage to the building may result in machinery being held to be personal property, despite the fact that it is bolted down and connected to plumbing and electrical lines. See, e.g., In re Nelson, 6 U.C.C. Rep. Serv. 854 (D. Utah 1969); In re Kahl, 10 U.C.C. Rep. Serv. 1322 (W.D. Wis. 1972).
\item[114.] Dissatisfaction with this definition has led one group of commentators to remark, "[u]nder this formula anything which could be moved more than half inch by one blow with a hammer weighing not more than five pounds and swung by a man weighing not more than 250 pounds would not be a fixture." J. White & R. Summers, supra note 15, at 1056 n.66.
\item[115.] Goods are fixtures:
\begin{enumerate}
\item when the goods are physically attached to realty in such a way that their removal will result in substantial injury to the goods or to the real estate (apart from diminution in value of the real estate caused by the absence of the goods or any
to article 9 situations, but also to all real estate conveyancing situations. This expansion into real estate law, however, contravenes the U.C.C.'s original attempt to avoid infringing on state property law.116 Professor Nathan justifies this intrusion by arguing that real estate law and article 9 are "inextricably intertwined."117 The proposed definition also does no more than codify several of the common law tests already used to determine whether goods are fixtures—the intent of the person making the affixation and the adaptation of the fixture to the realty. In addition, the new definition gives limited guidance to the courts on the proper application of the test, thereby sacrificing uniformity.

The judiciary has recognized that the term fixture cannot be defined concretely because fixture is a label applied to a conclusion of law, not a category of actually existing objects.118 In the leading American fixture case, Teaff v. Hewitt,119 the Ohio Supreme Court ruled that property was either personalty or realty, because fixtures, as a category of property, do not exist.120 The court in Teaff stated the minority position, however, and most states try to define fixtures as though fixtures exist as a distinct category of property.121 If the courts are unable to articulate the boundaries of the fixture definition, they apply or withhold the fixture label in accordance with equitable principles.122 Thus, where disputes arise between landlords and tenants as to the ownership of the fixtures which the tenant installed, the courts, favoring the tenant, apply more liberal rules than where the dispute is between a mortgagor or a fixture secured creditor and a mortgagee.123

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Nathan, supra note 49, at 747.


117. Although the proposed definition would apply to conveyancing, it would not apply to other real estate applications, such as valuation for taxation. Nathan, supra note 49, at 748.


119. 1 Ohio St. 511, 524–27 (1853).

120. Id.

121. See notes 66–71 supra and accompanying text.

122. See Cosway, supra note 118, at 713.

The attempt to define fixture actually inhibits the development of priority rules for creditors with conflicting claims to the same collateral. The priority rules of section 9-313, for example, are cluttered with several qualifications to the general fixture definition. The law of secured transactions is not concerned with the definition of fixture, but with when a fixture filing is required to perfect a security interest in a particular object and when the security interest in that object will have priority over other creditors. The effort to define fixture is actually an effort to determine the applicability of the special rules of section 9-313. There would be no need for a Code reference to fixtures if the perfection requirements and priority rules for fixtures and goods were the same. The question whether an object is a fixture would become "unimportant; at most it would be an academic problem, but not a practical one."

C. Secured Transactions Without Fixtures

If the same perfection and priority rules can be applied to both fixtures and other goods under article 9, the need to distinguish fixtures from goods can be eliminated. Whether the same rules can be applied depends on reconciliation of the policies behind the separate rules. This reconciliation involves a balancing of the interests of real estate mortgagees with the interests of secured creditors. The conflict between the interests of the secured creditor and the mortgagee is exemplified by the filing requirements for perfection of a security interest. The filing requirements, designed to ensure that potential real estate mortgagees are given notice of prior interests in the putative collateral, advance the principle that prior interests about which a creditor reasonably could have known are superior to the creditor's interest. Giving notice to potential mortgagees, however, must be weighed against the burden placed on those parties expected to give notice. Included in the formula is the possibility that those parties expected to give notice will be left unsecured for unintentionally failing to give notice will be left unsecured for unintentionally failing to give

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124. See notes 27-31 supra and accompanying text.
126. Cosway, supra note 118, at 715.
127. Shanker, supra note 44, at 795.
128. Henson, supra note 54, at 195.
notice.\textsuperscript{130}

There are three possible ways of alleviating the conflict between mortgagees and secured creditors. One possible solution would require the perfection of all security interests by filing in the state real estate records. If this filing were done, classifying a collateral as a fixture would be unnecessary because the mortgagee would be on notice. This requirement would benefit the holder of the real estate interest by giving that person notice of every conflicting fixture interest. One commentator notes that such a rule would "clutter the real estate records with a jumble of information, most of which would have no connection whatsoever with real estate titles."\textsuperscript{131} A second possible solution to the conflict between mortgagees and secured creditors would require all security interests in any property under article 9 be perfected by filing in one chattel file. The mortgagee would be deemed to have constructive notice of the file. This alternative was rejected because it overburdened land title searchers.\textsuperscript{132} The third possible solution would require that some article 9 collateral be perfected by filing in the real estate records and the balance be perfected by filing in the separate chattel files.

The U.C.C. adopted the third alternative and, therefore, fixture in article 9 designates collateral perfected by filing in the real estate records which would otherwise be considered chattels.\textsuperscript{133} The drafters' decision to require the filing of fixture security interests in the local real estate records necessarily implies that they thought the need to give notice to potential mortgagees outweighed the filing burden to fixture secured creditors when the chattel is so closely related to the real estate that the mortgagee might think his or her mortgage was secured in part by the chattel.\textsuperscript{134} Section 9–313's exceptions for factory and office machines,\textsuperscript{135} however, relieve the fixture secured creditor of the filing burden where "no rational real estate lender would rely upon such collateral . . . ."\textsuperscript{136}

Fixture secured creditors must protect themselves from the possibility that their collateral will be classified as a chattel by

\textsuperscript{130} Kripke, supra note 32, at 305–06. See also Gordon, supra note 10.
\textsuperscript{131} Shanker, supra note 44, at 796.
\textsuperscript{132} 2 G. Gilmore, Security Interests in Personal Property 817 (1965).
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 817–18.
\textsuperscript{135} U.C.C. §§ 9–313(d)(c), (d), §313(5).
\textsuperscript{136} J. White & R. Summers, supra note 15, at 1060.
perfecting their security interest against other chattel secured creditors. The "workable compromise" on the real estate fixture filing consequently entails a duplicate filing for fixtures that might be chattels, thereby creating a potential trap for the unwary creditor who fails to make duplicate filings.

The fixture problem could be eliminated entirely by abandoning the tripartite classification of property. A member of the article 9 Review Committee noted that "there is no compelling reason for recognizing [fixtures as a] special category of goods; the only excuse for it is historical." Under this proposal, the fixture secured party, like the chattel secured party, needs to make only one filing in the chattel records. This unification eliminates the possibility of unwary creditors finding themselves unsecured when a fixture is classified later as a chattel.

This proposal appears to disfavor the real estate mortgagee. The mortgagee would be forced to search both the chattel and the real estate files or risk the possibility that an element of the property on which he or she extended a loan, such as a furnace, is already encumbered. This argument, however, fails on several grounds. No real estate recording system ever shows all encumbrances upon real estate, such that mortgagees always have to search beyond the real estate records. The added burden of checking the chattel records is not inordinate. Indeed, the requirement that fixture filings be made in the real estate records merely is indicative of the political strength of the real estate bar, not the logic of its position. One commentator noted, "[M]any demands of mortgagees are politically and economically unrealistic . . . ." The added burden of checking the chattel records is not inordinate. Indeed, the requirement that fixture filings be made in the real estate records merely is indicative of the political strength of the real estate bar, not the logic of its position. One commentator noted, "[M]any demands of mortgagees are politically and economically unrealistic . . . ."

Arguments can be made for favoring either the chattel secured financer or the real estate mortgagee. Fixture financing is usually short-term and for the fixture's purchase price. Encouraging such financing will further the goal of modernizing the nation's housing. Real estate mortgagees, on the other hand, make the wide-

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137. See text accompanying note 66 supra.
138. Henson, supra note 54, at 195.
139. See note 132 supra and accompanying text.
141. 2 G. Gilmore, supra note 132, at 817.
142. Henson, supra note 54, at 196.
spread ownership of private homes possible, and public policy
should aim to keep home mortgages safe and dependable
investments.\textsuperscript{144} These competing demands of the chattel secured credi-
tor and the real estate mortgagee should be adjusted through clear
rules of priority, however, and not through subterfuges of defin-
tional terms.\textsuperscript{145} Vaguely defined terms such as fixture should not
be employed to avoid the resolution of such competing interests,
especially where the vagueness of terms can result in confusion
and injustice. By eliminating the definitional question, the legisla-
ture would be forced to confront the real issue: Who should be
favored when two creditors extend credit on the same
collateral?\textsuperscript{146}

\section*{IV. CONCLUSION}

Article 9 makes important distinctions in the perfection of se-
curity interest requirements and priority rules dependent on
whether the collateral is a fixture.\textsuperscript{147} Section 9–313, however, does
not define fixture—it merely refers the creditor to non-Code state
law.\textsuperscript{148} Thus, the creditor is faced with a body of confused and
nonuniform common law.\textsuperscript{149} Consequently, the creditor ex-
tending credit on collateral which arguably might be a chattel or a
fixture must make duplicate filings or risk losing his security
preference.\textsuperscript{150}

To remedy this situation, some commentators suggest that a
uniform definition of fixture be adopted.\textsuperscript{151} The details of such a
definition, however, lose their merit under scrutiny and ultimately
fail because the problem goes beyond the semantics of defining
fixture to the priority conflict among competing creditor's

\textsuperscript{144} Prather, \textit{A Savings Association View of the Review Committee's Proposals}, 25 Bus.

\textsuperscript{145} Henson, \textit{supra} note 54, at 195–96. Henson's proposed priority rule, for example,
provides that a creditor who had a perfected purchase money security interest would pre-
vail over a mortgage if the debtor had a recorded interest in the real estate. In all other
cases, the mortgagee would prevail. Henson notes that “this would leave a certain number
of problems to the economic realities of individual situations.” \textit{Id.}

\textsuperscript{146} It is interesting to note that the drafters of the 1972 version of § 9–313 made an
initial step in this direction by qualifying the definition of fixture in § 9–313(1)(a) with
special priority rules, such as the one for office and factory machines in § 9–313(4)(c). \textit{See}
notes 58–59 \textit{supra} and accompanying text.

\textsuperscript{147} \textit{See} notes 15–16 \textit{supra} and accompanying text.

\textsuperscript{148} \textit{See} notes 57–59 \textit{supra} and accompanying text.

\textsuperscript{149} \textit{See} notes 64–85 \textit{supra} and accompanying text.

\textsuperscript{150} \textit{See} note 17 \textit{supra} and accompanying text.

\textsuperscript{151} \textit{See} notes 103–17 \textit{supra} and accompanying text.
The best solution would be for commercial law to abandon the unworkable and unnecessary concept of fixture. Commercial law should, instead, focus on establishing priorities between chattel secured creditors and real estate mortgagees. When this priority issue is sublimated to the determination of a fixture definition, fixture secured financing is confused with obsolete common law distinctions. This confusion forces courts to make ad hoc fixture determinations based on equitable principles. The weighing of the policies behind this ad hoc decisionmaking should be done initially by the legislature and not be left to the uncertainties of litigation.

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152. See notes 118–23 supra and accompanying text.
153. See notes 128–46 supra and accompanying text.
154. See Henson, supra note 54, at 180:
The enactment of the Uniform Commercial Code brought about a renaissance of learning in the field of fixture law. . . . This meant that lawyers learned old-fashioned fixture law at precisely the time when its importance reached its nadir. However, since fixture law was, generally speaking, purely common law in most of the United States, the Code’s enactment provided an opportunity for endless discussions and often heated arguments which everyone or anyone could win since no one could provide definitive answers for some of the most elementary questions.

Id.

155. See notes 121–23 supra and accompanying text.