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## ¿The Twain Shall Meet¿: A Real Property Approach to Article 9 Perfection

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## “THE TWAIN SHALL MEET”:<sup>\*</sup> A REAL PROPERTY APPROACH TO ARTICLE 9 PERFECTION<sup>†</sup>

### ABSTRACT

*In an era of boundless access to information, a group of rogue citizens is waging an antigovernment war of attrition. Trading firearms for securities documents, the Sovereign Citizens are wreaking havoc on a system designed to foster justice for all. By manipulating the infirm process of securing credit, these domestic terrorists threaten to topple the American legal and economic systems.*

*The ability to secure debt is essential to the health and growth of a modern global economy. As the contours of lending transactions become increasingly complex, commercial law must adapt to address the mounting problem of fraudulent filings. Article 9 of the Uniform Commercial Code facilitates the creation of security interests in personal property. The American Law Institute and the National Conference of Commissioners of Uniform State Laws on occasion revisit and amend the Uniform Commercial Code to ensure its continued effectiveness.*

*The drafters must turn their attention to the infirmities of Article 9 of the Uniform Commercial Code. While Article 9 allows creditors to perfect their interests in personal property with ease, its prescribed methods have proven vulnerable to abuse. The instrument perfecting a creditor’s rights in collateral requires no authentication, and Secretaries of State retain no discretion to invalidate even facially fraudulent filings. The Sovereign Citizens have seized upon this weakness in Article 9. Their campaign of paper terrorism has devastating consequences for the victims, necessitating an amendment to the Uniform Commercial Code.*

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<sup>\*</sup> In his celebrated piece, *The Ballad of East and West*, Rudyard Kipling artfully illustrates the transcendental ties that bind peoples of distant nations and cultures. See Rudyard Kipling, *The Ballad of East and West* (1889), reprinted in THE CAMBRIDGE EDITION OF THE POEMS OF RUDYARD KIPLING 225 (Thomas Pinney ed., 2013) (“Oh, East is East, and West is West, and never the twain shall meet . . .”). Much like Kipling’s East and West, the realms of real property and personal property are ostensibly distinct. But as is the eventual fate of the bard’s eastern and western heroes, the traditions of real and personal property law, the metaphorical “twain,” inevitably shall meet. Indeed, they must for the sake of preserving the economic value of secured credit arrangements.

<sup>†</sup> This Comment received the 2014 Mary Laura “Chee” Davis Award for Writing Excellence.

*This Comment argues that the drafters should borrow from real property traditions to lend validity to the process of perfecting an interest in personal property. By requiring the creditor to file an authenticated, acknowledged security agreement in conjunction with a financing statement, Article 9 could protect victims from the subversive activities of Sovereign Citizens. Ultimately, this Comment will demonstrate that the benefits of such a revision far outweigh the costs. The victims and the taxpayers should no longer be forced to subsidize this troubling trend in commercial law.*

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## INTRODUCTION

“Edward, a Living Soul in the Body of the Lord, of the House of Israel,” and “Elaine, a Living Soul in the Body of the Lord, of the House of Israel,” as the Browns identified their names on court filings, cited themselves as “the court” and “the judge” in an order purportedly directing a clerk to dismiss a criminal case against them.<sup>1</sup> Judge Steven McAuliffe of the United States District Court for the District of New Hampshire promptly rejected these filings, but that did not signal the end of this bizarre tale.<sup>2</sup>

The Browns, hailing from Plainfield, New Hampshire, contested criminal proceedings against them for alleged failure to pay income tax.<sup>3</sup> A jury convicted both Browns of federal tax violations, leading to sentences of just over five years.<sup>4</sup> The couple refused to surrender to the authorities, leading to a nine-month ordeal ending in a standoff reminiscent of a classic Spaghetti Western showdown.<sup>5</sup> Holed up in their New Hampshire home with a considerable stockpile of weapons and explosives,<sup>6</sup> the Browns continued to resist and issue militant threats against the U.S. Marshals tasked with their arrest.<sup>7</sup> As undercover Marshals finally entered the Browns’ home after months of careful planning, Edward met them at the door armed with a handgun and an assault rifle.<sup>8</sup> In time, he calmed down and invited the Marshals inside to join him and Elaine (also armed with a handgun).<sup>9</sup> Even after their ultimately safe

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<sup>1</sup> Margot Sanger-Katz, *One Judge Enough in Brown Case: Tax Resisters’ Attempt to Order Dismissal Fails*, CONCORD MONITOR, Apr. 14, 2007, at B01, available at <http://www.concordmonitor.com/article/one-judge-enough-in-brown-case>. Before this twisted chapter unfolded, the husband and wife were known as Edward and Elaine Brown. *Id.*

<sup>2</sup> *Id.*

<sup>3</sup> *United States v. Brown*, 669 F.3d 10, 14–16 (1st Cir. 2012).

<sup>4</sup> *Id.* at 14.

<sup>5</sup> In the final scene of *The Good, the Bad and the Ugly*, Blondie (The Good), played by Clint Eastwood, finds himself in a tuel with Angel Eyes (The Bad) and Tuco Ramirez (The Ugly). THE GOOD, THE BAD AND THE UGLY (United Artists et al. 1966). The gunslingers stare each other down in a moment of palpable tension just before the culmination of an epic competition for a cache of Confederate gold. *Id.* What transpires is a feat of cinematographic genius.

<sup>6</sup> FBI’s Counterterrorism Analysis Section, *Sovereign Citizens: A Growing Domestic Threat to Law Enforcement*, FBI LAW ENFORCEMENT BULL., Sept. 2011, at 20, 23, available at <http://leb.fbi.gov/2011/september/leb-september-2011>.

<sup>7</sup> *Brown*, 669 F.3d at 15. At one point Edward ascended a tower erected above the house with a .50 caliber rifle. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

apprehension, the Browns fought tooth and nail to overturn their convictions and sentences, which then included over thirty years of jail time.<sup>10</sup>

The uncanny tactics the Browns employed to evade prosecution and sentencing are, unfortunately, not uncommon.<sup>11</sup> They are the hallmark behaviors of a large, loose network of individuals termed “Sovereign Citizens.”<sup>12</sup> Though their means and motivations may vary, these extremists share a common trait: distrust of government.<sup>13</sup> Sovereigns like the Browns engage in a vast range of illegal activity, from falsifying drivers’ licenses to impersonating law enforcement.<sup>14</sup> Though the Browns turned to more militaristic means, many Sovereign Citizens attempt to disrupt government activities by engaging in fraudulent activities collectively known as “paper terrorism.”<sup>15</sup> By filing false or frivolous documents with courts and other government offices, they wreak havoc upon the legal system.<sup>16</sup>

One of the most worrisome types of paper terrorism is the filing of fraudulent financing statements, a phenomenon that has surged in recent years.<sup>17</sup> The financing statement, a creature of the Uniform Commercial Code (UCC),<sup>18</sup> is a document that allows creditors to establish their interest in personal property used as collateral in a secured loan.<sup>19</sup> Though this scheme facilitates the extension of credit, and thus economic growth,<sup>20</sup> Sovereign Citizens have abused it in an effort to further their subversive goals, chief of

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<sup>10</sup> *Id.* at 16.

<sup>11</sup> See FBI’s Counterterrorism Analysis Section, *supra* note 6 (describing various examples of similarly subversive activity by Sovereign Citizens, including that of Jerry and Joseph Kane). The Kanes, a father and son Sovereign Citizen extremist duo, opened fire on and killed two law enforcement officers simply because the officers engaged them in a routine traffic stop. *Id.* at 20.

<sup>12</sup> *Id.*

<sup>13</sup> See *id.* (“[S]overeign citizens’ . . . believe that federal, state, and local governments operate illegally.”).

<sup>14</sup> *Id.*

<sup>15</sup> Thompson Smith, Note, *The Patriot Movement: Refreshing the Tree of Liberty with Fertilizer Bombs and the Blood of Martyrs*, 32 VAL. U. L. REV. 269, 273–74 (1997).

<sup>16</sup> *Id.* at 274.

<sup>17</sup> NAT’L ASS’N OF SEC’YS OF STATE, STATE STRATEGIES TO SUBVERT FRAUDULENT UNIFORM COMMERCIAL CODE (UCC) FILINGS 4–5 (2014), available at <http://www.nass.org/reports/surveys-a-reports/> (follow “Report: State Strategies to Subvert Fraudulent Uniform Commercial Code Filings” hyperlink under “2014 NASS Surveys & Reports”).

<sup>18</sup> U.C.C. § 9-310(a) (2014).

<sup>19</sup> See *Bellamy’s Inc. v. Genoa Nat’l Bank (In re Borden)*, 361 B.R. 489, 495 (B.A.P. 8th Cir. 2007) (defining “perfection” as the process by which a creditor puts the public on notice of its security interest in a debtor’s personal property).

<sup>20</sup> See GERARD McCORMACK, SECURED CREDIT UNDER ENGLISH AND AMERICAN LAW 15 (2004).

which is to thwart the functioning of a federal government they refuse to recognize as legitimate.<sup>21</sup>

While filing a fraudulent financing statement does not necessarily create a bona fide security interest in personal property without an underlying security agreement, these false filings are not benign.<sup>22</sup> First, the fraudulently filed statement clouds the title to the victim's property, making it difficult for her to obtain credit or sell property.<sup>23</sup> Second, when a victim subsequently learns of the encumbrance on her property, she must incur the substantial legal fees associated with removing the false statement.<sup>24</sup> In one particularly striking instance, Rusty Wofford spent over \$100,000 in legal fees fighting Richard McLaren, a notable Sovereign Citizen, in Texas courts.<sup>25</sup> And the damage is not limited to the individual victims, as these voluminous filings can quickly congest a court system, wasting precious public resources.<sup>26</sup>

Though states have taken measures to remedy this growing problem,<sup>27</sup> the UCC drafters have yet to establish a uniform, superior solution.<sup>28</sup> Instead of leaving the various state legislatures to continue their fragmented approaches, the drafters should amend Article 9. These amendments should adopt aspects of the real property approach and apply them to perfection of security interests in personal property. Specifically, Article 9 should require the party filing the financing statement to attach the underlying security agreement, thereby giving filing offices an expedient means of verifying a statement's authenticity. Imposing recordation of the security agreement should serve as a screening tool without imposing costs of extensive pre-filing review as is required by current state pre-filing provisions. Such an *ex ante* approach would remedy the problem rather than leaving victims alone to resuscitate their financial reputations in the courts of law. This real property approach to perfection

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<sup>21</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 4.

<sup>22</sup> Smith, *supra* note 15, at 274.

<sup>23</sup> *Id.*; Mark Potok, *Texas Fighting "Paper Terrorism,"* USA TODAY, Feb. 21, 1997, at 3A.

<sup>24</sup> A.H. Belo Corporation expended \$12,500 on legal fees in a six-month battle over a fraudulent lien. Smith, *supra* note 15, at 274 n.30. County officials in Noble County, Indiana spent \$5,648 in legal fees to remove a Sovereign Citizen's fraudulent filing made in retaliation for a denied building permit. *Id.*

<sup>25</sup> Potok, *supra* note 23. According to Wofford, the litigation stretched over a period of thirteen years. *Id.*

<sup>26</sup> Sara A. Wiswall, Recent Statute, *Remedies for Removing Unlawful Liens or Encumbrances: A Response to "Paper Terrorism,"* 30 MCGEORGE L. REV. 546, 547 (1999) ("These frivolous lawsuits impose significant costs on public officials and waste valuable court time and resources.").

<sup>27</sup> See generally NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, apps. I-IV at 12-29 (summarizing in appendices state laws addressing the issue of fraudulent financing statements).

<sup>28</sup> See U.C.C. § 9-518 cmt. 3 (2014) ("This Article cannot provide a satisfactory or complete solution to problems caused by misuse of the public records.").

would also alleviate the strain Sovereign Citizen activities place on the limited resources of the courts. Ultimately, this strategy would relieve the public fisc of a pecuniary burden it ought not bear: the cost of subsidizing subversive, antigovernment tactics.

This Comment, proceeding in four parts, will demonstrate the efficacy of such an approach to perfection of security interests in personal property under Article 9 of the UCC. Though it does not suggest that the drafters should adopt the real property approach to secured credit wholesale, it does identify a particular real property strategy that would apply well in the personal property context. To wit, Article 9 should require filing of the authenticated, acknowledged security agreement in conjunction with the financing statement.

Part I will lay out the landscape of the current approach under Article 9. Section A focuses on the problematic role the Secretaries of State play as the filing gatekeepers. Section B then documents the recent rise in the problem of fraudulent financing statements, especially with respect to its potency as a Sovereign Citizen's weapon against government officials.

Next, Part II summarizes the current state approaches to fraudulent filings, noting the virtues and vices of each. Section A first explains how several states have amended their codes to afford the victim some form of post-filing expedited judicial process. Section B then summarizes state approaches to post-filing penalties against the perpetrators. Section C discusses post-filing administrative remedies, and section D finally concentrates on pre-filing administrative discretion.

Part III will ultimately demonstrate that these state remedies are inferior to a real property approach, one requiring attachment of an authenticated, acknowledged security agreement for effective perfection. Section A explains the substantial role of the authenticated security agreement in recordation of real property security interests. Applying that real property methodology, section B outlines the particular code provisions that must be updated. It will offer the drafters a blueprint for the proposed amendments to Article 9.

Finally, Part IV addresses the implications this amendment will have on the stakeholders of the secured credit system. In sections A through D, it will discuss implications for Secretaries of State, lending institutions, the court system, and the victims of fraudulent financing statements. Acknowledging the potential economic burdens this substantial amendment might impose, this Comment shows that the benefits would far outweigh the costs. The drafters

should update Article 9 to incorporate this real property approach, blazing a trail for uniformity in state commercial codes. Though real property and personal property have long represented separate bodies of law, the “twain” inevitably shall meet.<sup>29</sup>

## I. THE ARTICLE 9 APPROACH TO PERFECTION AND ITS INFIRMITIES

Though the UCC represents an impressive revision and consolidation of a complex body of commercial law, it is not a flawless model. This Part explains the Article 9 approach to perfection of security interests and the growing issues of fraud and abuse to which it has given rise. Specifically, section A discusses the perfection process and the inadequate authority Article 9 affords Secretaries of State as recorders of security interests. Section B then details the implications of this inadequacy, namely the growing incidence of fraudulent filings at the hands of Sovereign Citizens.

### A. Current Law

The Uniform Commercial Code (UCC), enacted in some form by all fifty states,<sup>30</sup> addresses a wide range of issues in commercial law.<sup>31</sup> A collaborative product of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI),<sup>32</sup> the UCC’s eleven articles cover topics including sales, leases, negotiable instruments, and securities.<sup>33</sup>

Article 9 of the UCC pertains to security interests in personal property, encompassing matters of both tangible and intangible assets.<sup>34</sup> Drafters have considered and approved various amendments and revisions to Article 9 since its inception.<sup>35</sup> Most recently, the UCC’s drafters approved the 2010 amendments to Article 9, suggesting an effective date of July 1, 2013.<sup>36</sup> The

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<sup>29</sup> See Rudyard Kipling, *The Ballad of East and West* (1889), reprinted in *THE CAMBRIDGE EDITION OF THE POEMS OF RUDYARD KIPLING* 225 (Thomas Pinney ed., 2013).

<sup>30</sup> Forty-nine states had adopted the model code by the year 1970. Louisiana became the fiftieth when it eventually enacted its own version. 1 ELDON H. REILEY, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 1:3 (3d ed. 2014).

<sup>31</sup> See *id.* §§ 1:1, 1:5.

<sup>32</sup> *Id.* § 1:3.

<sup>33</sup> *Id.* § 1:5.

<sup>34</sup> *Id.* Article 9 generally does not cover transactions involving real property and mortgages. NAT’L ASS’N OF SEC’YS OF STATE, *supra* note 17, at 30 n.8.

<sup>35</sup> REILEY, *supra* note 30, § 1:11.

<sup>36</sup> *Id.* As of this Comment’s publication, forty-nine states had enacted the 2010 amendments. *UCC Article 9 Amendments (2010)*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=>

most current UCC approach to perfection of security interests in personal property represents the dominant body of law regarding secured credit,<sup>37</sup> and as such it will be the focus of this Comment.

To give full attention to the problem of spurious financing statements, this Comment must consider the virtues of the secured transaction. Despite the troubling implications of fraudulent filings, laws allowing a creditor to secure a debt are critical to national economic growth.<sup>38</sup> A creditor seeking to enforce an unsecured obligation must surmount the costs associated with acquiring and enforcing a judgment against the debtor.<sup>39</sup> The creditor enforcing a secured obligation, however, will not endure the “sorry plight” of the unsecured creditor.<sup>40</sup> The security interest thus empowers a financial institution in its ability to lend, which in turn augments a debtor’s power to borrow.<sup>41</sup> By filing public notice of an interest in the debtor’s collateral, the creditor secures priority in a line of lenders seeking to satisfy obligations from other loans.<sup>42</sup> The utility of this arrangement ultimately flows from the manner in which increased purchasing power contributes to overall standard of living.<sup>43</sup> The solution to the issue of fraudulent financing statements must be reached in a way that preserves the economic value of the secured transaction.

While the procedural minutiae of creating security interests are beyond the scope of this Comment, the process of perfection is relevant to the rise in Article 9 fraud. Whereas “attachment” relates to the creation of a security interest, “perfection” refers to the process by which the creditor renders the security interest effective.<sup>44</sup> A creditor may perfect a security interest by possession, control, or filing.<sup>45</sup> The creditor must perfect the security interest for purposes of providing notice to others of the security interest’s existence.<sup>46</sup>

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UCC%20Article%209%20Amendments%20%282010%29 (last visited Mar. 4, 2015). Oklahoma, the lone holdout, has introduced legislation to adopt the 2010 amendments. *Id.* The 2010 amendments, however, do not affect the aspects of perfection relevant to this Comment.

<sup>37</sup> REILEY, *supra* note 30, §§ 1:3, 1:5.

<sup>38</sup> *See id.* § 2:1 (“The ability to use personal property to secure a loan enhances the power to borrow.”).

<sup>39</sup> *Id.* § 2:2.

<sup>40</sup> *Id.* § 2:6.

<sup>41</sup> *Id.* § 2:1; *see MCCORMACK, supra* note 20, at 15 (“[T]he availability of security is said to encourage lenders to make loans that would not otherwise be available . . .”).

<sup>42</sup> Lynn M. LoPucki, Arvin I. Abraham & Bernd P. Delahaye, *Optimizing English and American Security Interests*, 88 NOTRE DAME L. REV. 1785, 1785–86 (2013).

<sup>43</sup> REILEY, *supra* note 30, § 2:1.

<sup>44</sup> *Allen v. First Nat’l Bank of Monterey*, 845 N.E.2d 1082, 1085 n.6 (Ind. Ct. App. 2006).

<sup>45</sup> REILEY, *supra* note 30, § 9:19. Some security interests are subject to automatic perfection, but those scenarios are not relevant to the spurious filings here at issue. *Id.*

<sup>46</sup> *Bellamy’s Inc. v. Genoa Nat’l Bank (In re Borden)*, 361 B.R. 489, 495 (B.A.P. 8th Cir. 2007).

Once the creditor perfects, a third party may search a database for a property of interest and learn of any attached security interests.<sup>47</sup> Perfection therefore allows creditors to determine whether a prospective debtor's collateral is already subject to existing claims,<sup>48</sup> establishing a notice system for evaluating risk of potential loans.<sup>49</sup> The proper method of perfection varies depending upon the nature of the collateral used to secure the loan,<sup>50</sup> but a financing statement is the most common means.<sup>51</sup>

As it is currently written, Article 9 directs the adopting state to identify the proper office in which creditors should file financing statements.<sup>52</sup> The typical central filing office is that of the Secretary of State in each individual state.<sup>53</sup> While Secretaries of State must serve as gatekeepers for Article 9 filings, the UCC affords them inadequate power to deal with fraudulent or bogus statements.<sup>54</sup> The filing office may only refuse to give effect to a filing when it fails to meet certain procedural requirements, including legibility, fee payment, and completeness.<sup>55</sup> The language of the Code explicitly directs the Secretary of State or other filing office to accept a statement unless it fails to meet the specific requirements.<sup>56</sup> The practical effect of the UCC's language is to extend to the Secretaries of State merely "ministerial" authority over filings, even if such filings are clearly without merit.<sup>57</sup>

Herein lies the gravamen of the fraudulent filings issue. Without proper authority to filter financing statements before perfection takes effect, Secretaries of State must stand idly by and observe the catastrophe that

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<sup>47</sup> *Id.*

<sup>48</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 5–6.

<sup>49</sup> Whether a previous creditor has already attached and properly perfected an interest in the collateral will affect the prospective creditor's priority for purposes of reaching that asset in the case of debtor default or insolvency. *See In re Holladay House, Inc.*, 387 B.R. 689, 694 (Bankr. E.D. Va. 2008) ("The filing of a financing statement in the appropriate UCC filing office is designed to give notice to third parties of the existence of the lien.")

<sup>50</sup> *State ex rel. Wagner v. Amwest Sur. Ins. Co.*, 790 N.W.2d 866, 870 (Neb. 2010) (citing NEB. REV. STAT. U.C.C. § 9-310 (2001)).

<sup>51</sup> REILEY, *supra* note 30, § 9.19 n.40.10. The UCC provides that a creditor may file a financing statement before extending any credit to the debtor. *Wagner*, 790 N.W.2d at 870.

<sup>52</sup> U.C.C. § 9-501 (2014).

<sup>53</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 5.

<sup>54</sup> *See id.* at 6 ("The office does not have the authority to verify the accuracy or the validity of documents when they are filed, even if they are blatantly fraudulent.")

<sup>55</sup> U.C.C. § 9-516(a)–(c).

<sup>56</sup> *Id.* § 9-520.

<sup>57</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 6.

inevitably flows from a fraudulent financing statement.<sup>58</sup> These spurious filings pose the risk of substantial harm for the victims.<sup>59</sup> Though the false statement does not in fact create a security interest in the named property,<sup>60</sup> it may nonetheless affect the victim's financial health and ability to obtain credit.<sup>61</sup> In addition, false encumbrances impose upon the victim the costs and frustrations of removal by judicial proceeding.<sup>62</sup>

The UCC approach to perfection also falls short in the remedies it offers to victims of spurious financing statements. For a debtor named in a fraudulent filing, the only options are the information statement and the termination statement.<sup>63</sup> The named debtor may submit an information statement to show his intention to challenge the financing statement, but this does not render the statement invalid.<sup>64</sup> Instead, it merely puts the public on notice that the named debtor disputes the substance of the financing statement.<sup>65</sup> Likewise, the termination statement does not purge a financing statement from the public record.<sup>66</sup> A termination statement affirms that the original financing statement is invalid.<sup>67</sup> But Article 9 compels the filing office to maintain the financing statement in the public record for one year after it lapses,<sup>68</sup> and potential creditors may not notice the termination statement when they search the electronic records.<sup>69</sup> Article 9 does allow for civil remedies in connection with fraudulent filings,<sup>70</sup> and some states impose additional criminal penalties.<sup>71</sup>

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<sup>58</sup> See Juliet M. Moringiello, *Revised Article 9, Liens from the Fringe, and Why Sometimes Signatures Don't Matter*, 10 WIDENER J. PUB. L. 135, 138–39 (2001) (explaining that groups routinely filing fraudulent liens “wreak havoc”).

<sup>59</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 3.

<sup>60</sup> Moringiello, *supra* note 58, at 139.

<sup>61</sup> See *PaineWebber Inc. v. Nwogugu*, No. 98 CIV. 2441 (DLC), 1998 WL 193110, at \*4 (S.D.N.Y. Apr. 22, 1998) (finding that the mere notice of a security interest in the plaintiff's property was itself sufficient to incur irreparable harm).

<sup>62</sup> Robert Chamberlain & Donald P. Haider-Markel, “*Lien on Me*”: *State Policy Innovation in Response to Paper Terrorism*, 58 POL. RES. Q. 449, 450 (2005).

<sup>63</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 6.

<sup>64</sup> *Id.*

<sup>65</sup> See U.C.C. § 9-518 cmt. 2 (2014).

<sup>66</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 6.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; see U.C.C. § 9-519(g).

<sup>69</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 6.

<sup>70</sup> Article 9 provides general damages for noncompliance, including recovery for loss from “debtor's inability to obtain, or increased costs of, alternative financing.” U.C.C. § 9-625(b). The victim may also recover statutory damages when a perpetrator “files a record that the person is not entitled to file.” *Id.* § 9-625(e).

<sup>71</sup> See, e.g., TEX. PENAL CODE ANN. § 37.101 (West 2011) (making it a felony to knowingly file a fraudulent financing statement).

These ex post facto causes of action, however, do not alleviate the damage done to those named in fraudulent statements.<sup>72</sup> As there are readily apparent shortcomings in the UCC approach to perfection both at the time of filing and after the financing statement takes effect, an effective solution to this growing problem must include an ex ante element.

Despite its deficiencies, the Article 9 approach to secured debt serves to further vital economic interests in an era where growth is so dependent upon credit.<sup>73</sup> For its ability to increase both lending and borrowing power, secured debt is “said to be the oil of the economy and the engine of economic growth.”<sup>74</sup> The current UCC approach to perfection, however, is an ineffective means of furthering this economic interest. An effective solution will preserve the value of the secured transaction while combating the fraudulent filing before it wreaks havoc upon the purported debtor.

Section B of this Part will address in detail the consequences of the ineffective UCC procedures for perfection by filing. In particular, it will document the recent rise in fraudulent filings, especially those against state and federal government officials in connection with the Sovereign Citizen movement. It will detail the manner in which Sovereign Citizens abuse the Article 9 system and the common types of filings they execute.

### *B. The Recent Rise in Fraudulent Filings*

Though the sources of and motivations behind fraudulent financing statements may vary widely, the majority of the filings are thought to be the efforts of a subversive antigovernment movement called the “Sovereign Citizens.”<sup>75</sup> Perhaps fueled by the growing availability of communicative

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<sup>72</sup> The civil remedies for statutory damages provided for in Article 9 only allow the debtor to recover up to \$500 from the noncomplying filer. U.C.C. § 9-625(e). Even criminal penalties including incarceration have in some cases proven insufficient to deter future fraudulent filings. See Robert Kolb, *Bogus Liens in New Hampshire: Proposed Remedies and Deterrents*, N.H.B.J., Autumn 2005, at 36, 36. Ghislain Breton filed fraudulent financing statements against attorneys and court officials after an unfavorable judgment in divorce proceedings. *Id.* Despite serving eighteen months in jail for his filings, he continued to retaliate by threatening to file more liens against the judge and prosecutors. *Id.*

<sup>73</sup> See REILEY, *supra* note 30, § 2:1.

<sup>74</sup> MCCORMACK, *supra* note 20, at 15.

<sup>75</sup> See NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 4.

platforms in the Internet age<sup>76</sup> and the prevalence of electronic filing,<sup>77</sup> the incidence of fraudulent filings has increased in recent years.<sup>78</sup> This section will introduce the Sovereign Citizens movement and describe the ways in which its subscribers are abusing Article 9 procedures.

### 1. *The Sovereign Citizen Movement*

While false Article 9 filings have increased dramatically in recent years,<sup>79</sup> the sociopolitical theories behind these actions have been prevalent for decades.<sup>80</sup> The most recent iteration of this phenomenon is the so-called “Sovereign Citizen” movement, a “loose network” of Americans opposing the influence of government in their lives.<sup>81</sup> Sovereign Citizens believe that federal and state officials conspire to suppress the rights of the body politic out of loyalty to a clandestine legal system that allegedly discards the ordinary common law structure.<sup>82</sup> It is difficult to estimate accurately the proliferation of this movement, mostly due to its lack of central leadership.<sup>83</sup> Based on Internal Revenue Service data regarding tax protestors, however, scholars posit that there may be as many as 300,000 Sovereign Citizens in the United States today.<sup>84</sup>

The movement’s lack of organization, however, does not indicate a lack of influence. The Federal Bureau of Investigation considers Sovereign Citizens to be a “domestic terrorist movement.”<sup>85</sup> The FBI expects the movement to grow

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<sup>76</sup> See FBI’s Counterterrorism Analysis Section, *supra* note 6, at 21.

<sup>77</sup> See Lynn M. LoPucki, *Computerization of the Article 9 Filing System: Thoughts on Building the Electronic Highway*, LAW & CONTEMP. PROBS., Summer 1992, at 5, 15–17 (describing the implications of increased reliance on electronic filing systems).

<sup>78</sup> NAT’L ASS’N OF SEC’YS OF STATE, *supra* note 17, at 4.

<sup>79</sup> John Gale, Secretary of State of Nebraska, indicated that there is no exact count available, but false filings are clearly on the rise. *All Things Considered: Liens By ‘Sovereign Citizens’ A Headache for State Officials*, (Nat’l Pub. Radio broadcast Aug. 26, 2013) (comments of John Gale, Sec’y of State of Neb.), available at <http://www.npr.org/templates/story/story.php?storyId=215838773>.

<sup>80</sup> Chamberlain & Haider-Markel, *supra* note 62, at 450 (“Patriot groups have their origin in the *Sheriff’s Posse Comitatus* anti-tax and anti-government movement of the 1970s.”); *Sovereign Citizens Movement*, S. POVERTY L. CENTER, <http://www.splcenter.org/get-informed/intelligence-files/ideology/sovereign-citizens-movement> (last visited Mar. 4, 2015) (identifying the origins of the sovereign citizens movement as a conspiracy theory regarding the “common law” legal system).

<sup>81</sup> NAT’L ASS’N OF SEC’YS OF STATE, *supra* note 17, at 4.

<sup>82</sup> *Sovereign Citizens Movement*, *supra* note 80.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> FBI’s Counterterrorism Analysis Section, *supra* note 6, at 21. FBI reports indicate that Sovereign Citizens have a history of violence against law enforcement, often leading to deaths in the line of duty. *Id.* at 20, 22–23. Though the FBI research recognizes Sovereign Citizens’ lack of central organization, it also

as Sovereign Citizens promote their activities through online literature and nationwide seminars.<sup>86</sup> The recent economic downturn may also be a factor contributing to the rise in Sovereign Citizen activities.<sup>87</sup> Their subversive tactics are not limited to peaceful means, and the FBI fears violent clashes with law enforcement.<sup>88</sup>

Though they occasionally employ violent tactics,<sup>89</sup> the main vehicle by which Sovereign Citizens further their agenda is through a campaign of “paper terrorism.”<sup>90</sup> This strategy can include frivolous court filings, false tax statements, and, of course, fraudulent liens.<sup>91</sup> These filings place a strain not only on the named debtors but also on the courts and government agencies processing the paperwork.<sup>92</sup> Their filings tend to employ hallmark linguistic and stylistic choices, such as biblical references, names written in all capital letters, signatures followed by the words “under duress,” and personal seals.<sup>93</sup> Of particular relevance to this Comment is the common practice by which fraudulent filers, in the financing statement, identify the debtor as a “transmitting utility.”<sup>94</sup> Under Article 9, transmitting utility financing statements remain open indefinitely, ensuring that the encumbrance will not automatically expire.<sup>95</sup>

## 2. Types of Fraudulent Financing Statements

Not all fraudulent financing statements are filed with the same purpose. The main types of fraudulent filings—authentication filings, strawman filings,

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highlights the fact that they operate under common core beliefs. *Id.* at 21. Even when law enforcement officials apprehend Sovereign Citizens for their various crimes, the perpetrators continue their subversive tactics while incarcerated. *Id.* at 23. Many fraudulent filers, in fact, are prisoners seeking retaliation for their sentencing. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 5.

<sup>86</sup> FBI's Counterterrorism Analysis Section, *supra* note 6, at 22.

<sup>87</sup> *Id.* at 21.

<sup>88</sup> *Id.* at 20, 22–23.

<sup>89</sup> See *Sovereign Citizens Movement*, *supra* note 80 (detailing five incidents of violence between Sovereign Citizens and law enforcement officials).

<sup>90</sup> “Paper terrorism refers to the multitude of illegitimate documents that [Sovereign Citizens] file with courts and attempt to pass off as legitimate.” Smith, *supra* note 15, at 274 n.28.

<sup>91</sup> *Sovereign Citizens Movement*, *supra* note 80.

<sup>92</sup> FBI's Counterterrorism Analysis Section, *supra* note 6.

<sup>93</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 4.

<sup>94</sup> Paul Hodnefield, *States Ring in New Year by Amending UCC Article 9*, COM. L. NEWSL. (ABA Section of Bus. Law Comms. on Commercial Fin. & Unif. Commercial Code, Chicago, Ill.), Winter 2009, at 70, 70, available at <http://apps.americanbar.org/buslaw/committees/CL190000pub/newsletter/200901/all.pdf>.

<sup>95</sup> If the financing statement is allowed to remain open indefinitely, its potential for damage to victims is without temporal limitation. See *id.* at 70–71.

and harassment filings—arise from unique theories and motivations.<sup>96</sup> Crafting an effective solution to the Article 9 filings problem requires an understanding of the policy choices raised in these different scenarios.<sup>97</sup>

The authentication filing is an effort to imbue other fraudulent securities documents with a façade of bona fides. Sovereign Citizens often attempt to “authenticate” other spurious documents by filing them in conjunction with a similarly fraudulent financing statement.<sup>98</sup> The authentication filing thus is the fraudulent financing statement itself.<sup>99</sup> Their purpose in filing this statement is to generate an appearance of legitimacy regarding the other fraudulent documents, misleading potential creditors searching title to the victims’ property.<sup>100</sup>

The strawman filing presents a curious legal philosophy based on a complex ideology known as “redemption theory.”<sup>101</sup> Perpetrators of these strawman financing statements believe that the United States Treasury Department keeps a secret account for each citizen, retaining in each a certain amount of funds reflecting the citizen’s perceived earning potential.<sup>102</sup> This theory, which has gained traction despite its delusional foundations,<sup>103</sup> is premised on the belief that the government began using citizens as collateral after abandoning the gold standard.<sup>104</sup> Purportedly, the federal government creates an account reflecting each citizen’s net worth for use in trade agreements with other countries.<sup>105</sup> Sovereign Citizens believe they can free that money from the so-called “strawman” account by filing UCC financing statements.<sup>106</sup>

The most troubling type of fraud is the harassment filing, whereby Sovereign Citizens file retaliatory financing statements in response to some

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<sup>96</sup> NAT’L ASS’N OF SEC’YS OF STATE, *supra* note 17, at 4.

<sup>97</sup> *See id.* (arguing that states can more effectively deal with bogus filings if they understand the motivations behind them).

<sup>98</sup> *Id.* at 5.

<sup>99</sup> *See id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Sovereign Citizens Movement, supra* note 80.

<sup>103</sup> *See* Daniel Lessard Levin & Michael W. Mitchell, *A Law Unto Themselves: The Ideology of the Common Law Court Movement*, 44 S.D. L. REV. 9, 39 (1999) (“[N]o legally educated person would endorse the beliefs of this movement . . .”).

<sup>104</sup> FBI’s Counterterrorism Analysis Section, *supra* note 6, at 21.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 21–22.

injustice they allege they suffered at the hands of a government entity.<sup>107</sup> These harassment filings create the impression that the victim's property is subject to some sort of security interest, affecting his ability to sell property or obtain credit.<sup>108</sup> Harassment filings may target members of the judiciary, corporations, government officials, lending institutions, and prosecutors.<sup>109</sup> The victims of all types of filings must bear the costs of removing the fraudulent statement, enduring an expensive and time-consuming ordeal.<sup>110</sup> The consequences victims face are stark, calling for a solution to address the inadequacies embodied in the UCC Article 9 approach to perfection.

Part II of this Comment will highlight strategies currently in force to address the growing problem of fraudulent financing statements. It will first explain the drafters' failure to take action in the UCC itself. Then sections A through D will summarize the categorical approaches state legislatures have adopted. Part III, however, will propose a uniform solution that should replace these disjointed state strategies.

## II. STATE RESPONSES

NCCUSL and the ALI acknowledged the growing issue of fraudulent filings in their most recent Article 9 comments<sup>111</sup> but ultimately suggested that the UCC would not provide an adequate solution.<sup>112</sup> Directing the states to craft their own legislative responses to this admittedly thorny issue, the drafters recommended post-filing remedies as more effective than a scheme granting Secretaries of State more pre-filing discretion.<sup>113</sup> The National Association of Secretaries of State (NASS) and the International Association of Commercial Administrators (IACA) released a joint report in 2006 endorsing the

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<sup>107</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 4–5. Prisoners are increasingly filing financing statements in retaliation for sentencing. *Id.* at 5.

<sup>108</sup> *Id.* at 5.

<sup>109</sup> *Id.* at 4–5.

<sup>110</sup> *Id.* at 3, 5.

<sup>111</sup> U.C.C. § 9-518 cmt. 3 (2014).

<sup>112</sup> *Id.* (“This Article cannot provide a satisfactory or complete solution to problems caused by misuse of the public records.”).

<sup>113</sup> Curiously, the UCC comments offer this proposition without justification, leaving the observer to wonder what makes a post-filing remedy more effective than pre-filing discretion. *Id.* (“A summary judicial procedure for correcting the public record and criminal penalties for those who misuse the filing and recording systems are likely to be more effective and put less strain on the filing system than provisions authorizing or requiring action by filing and recording offices.”).

recommended post-filing approach.<sup>114</sup> NASS, however, eventually found that fraudulent filings continued to increase even after many states implemented the recommended post-filing remedies.<sup>115</sup> Additionally, NASS raised concerns that the post-filing remedies continued to burden victims and courts.<sup>116</sup> These concerns prompted NASS to release its most recent report urging state authorities to consider pre-filing remedies.<sup>117</sup>

As NASS noted in its report, state legislatures have responded by amending their own versions of the commercial code.<sup>118</sup> Though it now endorses a pre-filing solution, the NASS has released research indicating that state provisions are fragmented in their strategies.<sup>119</sup> All measures reflect progress toward a more feasible approach to perfection, but the NASS has not identified a clearly superior or uniform solution.

The current state provisions generally fall into four categories: (1) post-filing administrative relief, (2) post-filing expedited judicial relief, (3) enhanced penalties, and (4) pre-filing administrative discretion.<sup>120</sup> Sections A through D of this Part will discuss these categories in turn, with special attention to the efficacy of each approach. Ultimately, however, this Comment will demonstrate that disjointed state solutions are inferior to a uniform approach incorporating real property aspects, which NCCUSL and ALI should endorse in the next iteration of Article 9.

#### *A. Post-Filing Expedited Judicial Relief*

Following the recommendations of UCC drafters and the NASS/IACA joint task force,<sup>121</sup> some states adopted provisions allowing victims of

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<sup>114</sup> JOINT TASK FORCE, NAT'L ASS'N OF SEC'YS OF STATE & INT'L ASS'N OF COMMERCIAL ADMINIS., "BOGUS" UCC DOCUMENTS 9–13 (2006) [hereinafter "BOGUS" UCC DOCUMENTS] (recommending legislative and administrative language allowing for expedited judicial processing, criminal penalties, and civil causes of action in relation to fraudulent "strawman" and "harassment" filings).

<sup>115</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 7.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 3.

<sup>118</sup> *Id.* For an overview of recent state legislation protecting against false encumbrances, see NAT'L CONFERENCE OF STATE LEGISLATURES, 2010–2013 LEGISLATION REGARDING PROTECTIONS AGAINST FALSE OR FRAUDULENT LIENS (2013).

<sup>119</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 7.

<sup>120</sup> *Id.*

<sup>121</sup> See "BOGUS" UCC DOCUMENTS, *supra* note 114, at 9–13 (proposing legislation allowing victims to move for special proceedings regarding allegedly invalid financing statements).

fraudulent statements to avail themselves of accelerated judicial review.<sup>122</sup> Most of these provisions allow victims to file a motion requesting judicial review of an allegedly fraudulent financing statement.<sup>123</sup> Though the state provisions achieve expedited review in different ways,<sup>124</sup> they all provide victims with speedy resolution.<sup>125</sup> Instead of waiting years to remove the cloud on title to personal property, victims in these states may only have to wait a matter of weeks.<sup>126</sup> Additionally, these laws alleviate the pecuniary burden on the victim by allowing the named debtor to file a motion for relief without imposing a fee.<sup>127</sup> This approach also obviates the need for additional resources and staff in the filing office.<sup>128</sup>

Despite the virtues of post-filing administrative relief, this approach leaves the onus upon the victim, the fraudulently named debtor.<sup>129</sup> Thus, in states allowing for this sort of relief, the victim still must invest the time and money necessary to remove the encumbrance.<sup>130</sup> Moreover, this remedy does little to further the interest in freeing congested court dockets.<sup>131</sup> The reviewing court still must rule on a motion, which will often require inspection of the financing statement, among other inquiries.<sup>132</sup> As NASS has identified,<sup>133</sup> such ex post

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<sup>122</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 9. Colorado, California, Indiana, Kansas, Maine, Minnesota, New York, Oregon, and Texas allow for post-filing expedited judicial review. *Id.* app. III at 22–24.

<sup>123</sup> *Id.* at 9; *see, e.g.*, TEX. GOV'T CODE ANN. § 51.903 (West 2013) (allowing named debtors in purportedly fraudulent financing statements to move for expedited judicial review).

<sup>124</sup> Colorado, for example, allows the filing party twenty-one days to appear and demonstrate that the financing statement is not invalid. COLO. REV. STAT. ANN. § 38-35-204(1)(a) (West Supp. 2014). The Minnesota law similarly allows a twenty-day period for contest. MINN. STAT. § 545.05 subd. 7 (2014). Kansas, on the other hand, allows the reviewing court to declare a financing statement invalid immediately upon the victim's motion without giving notice to the filing party. KAN. STAT. ANN. § 58-4301(b) (West Supp. 2014). California law allows the reviewing court to order the filing party to appear and demonstrate the validity of the lien, giving the court authority to schedule a speedy hearing provided it gives adequate notice to the filing party. CAL. CIV. PROC. CODE §§ 765.010, .030 (West Supp. 2014).

<sup>125</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 9–10.

<sup>126</sup> *Id.* at 10.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Named debtors would still likely need to bear the cost of attorneys' fees for filing the requisite motion. *Id.* Colorado, however, allows the party filing the motion to recover attorneys' fees from the fraudulent filer. COLO. REV. STAT. ANN. § 38-35-204(1)(c), (2) (West Supp. 2014).

<sup>131</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 10.

<sup>132</sup> *See, e.g.*, KAN. STAT. ANN. § 58-4301(b) (West Supp. 2014) (“The court’s findings may be made solely on a review of the documentation or instrument attached to the motion . . .”).

<sup>133</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 3 (“The legal expenses that are involved can run thousands of dollars, and the process can take months, or even years. Restoring damaged credit histories can take even longer.”).

approaches to the issue of fraudulent financing statements fall short in furthering the interests of the victim.

### *B. Post-Filing Penalties*

Several states focused on deterrence, criminalizing the act of filing a spurious financing statement.<sup>134</sup> While most states make a first offense a misdemeanor, Minnesota and Texas have gone so far as to make such filings a felony.<sup>135</sup> Others allow at least a civil cause of action against violators.<sup>136</sup> These sorts of ex post remedies certainly play a pivotal role in preventing fraudulent filings, but they still force the victim to endure needless injury. Though these remedies aim to deter Sovereign Citizens and other perpetrators from employing this tactic, NASS findings indicate that they have not effectively quelled the rising tide of spurious encumbrances.<sup>137</sup> Further, deterrence theory often rests on the assumption that criminals will act rationally,<sup>138</sup> but whether Sovereign Citizens act rationally in furthering their antigovernment ends is, at best, debatable.<sup>139</sup> Though post-filing penalties are certainly necessary to solving this thorny issue, they are by no means sufficient.

### *C. Post-Filing Administrative Remedy*

A post-filing administrative remedy allows Secretaries of State to invalidate financing statements already filed.<sup>140</sup> States have adopted various approaches to affording the Secretary of State this greater post-filing discretion.<sup>141</sup> These approaches tend to vary based on the breadth of discretion

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<sup>134</sup> Alabama, Arkansas, Florida, Georgia, Illinois, Maine, Michigan, Minnesota, New York, North Dakota, South Carolina, Tennessee, Texas, Utah, Virginia, and West Virginia criminal codes prohibit fraudulent filings. *Id.* app. IV at 24–29.

<sup>135</sup> *Id.* at 10.

<sup>136</sup> At least twenty states provide for civil penalties against anyone filing a fraudulent financing statement. *See id.* app. IV at 24–29.

<sup>137</sup> *Id.* at 7 (finding that fraudulent filings have risen significantly the past few years).

<sup>138</sup> Phillip J. Cook, *Research in Criminal Deterrence: Laying the Groundwork for the Second Decade*, 2 CRIME & JUST. 211, 211 (1980).

<sup>139</sup> *See* J.J. MacNab, 'Sovereign' Citizen Kane, INTELLIGENCE REP., Fall 2010, at 12, 16, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/fall/sovereign-citizen-kane> (detailing the efforts of one Donna Lee Wray, a sovereign citizen who filed over ten court documents regarding her refusal to pay for a \$20 pet license in Pinellas County, Florida).

<sup>140</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 9.

<sup>141</sup> Alabama, Illinois, Michigan, Mississippi, Montana, Nebraska, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Virginia, Washington, and West Virginia have adopted post-filing administrative remedy measures. *Id.* app. II at 16–21.

they afford the administrator.<sup>142</sup> Whereas North Carolina and Montana laws grant Secretaries of State broad discretion to invalidate financing statements that appear fraudulent, more specific provisions identify the particular grounds upon which an administrator may void the record.<sup>143</sup> These grounds often include the presence of hallmark characteristics common to Sovereign Citizen filings.<sup>144</sup> Where the laws allow the Secretary of State to remove or invalidate the statement, they usually require that the administrator provide the creditor notice and opportunity to respond.<sup>145</sup>

Such post-filing administrative remedies may be valuable in that they will allow victims to remove fraudulent statements without resort to the courts.<sup>146</sup> This strategy of course will not only save the victim time and money but will additionally help preserve judicial resources.<sup>147</sup> It also offers a method simpler than filing a motion for judicial review, further lightening the burden on named debtors.<sup>148</sup> These provisions, however, suffer from the same deficiencies as those plaguing the above-mentioned ex post approaches. The named debtor likely will have no knowledge of the spurious statement until after she has suffered injury.<sup>149</sup> Victims will not seek administrative remedies until after they have been adversely affected in a transaction related to their personal property.<sup>150</sup> Additionally, imposing this greater responsibility upon Secretaries of State will effectuate a need for greater resources in the filing office.<sup>151</sup> Ultimately, the state will need to expend greater funds to support these extra tasks, which raises concerns about responsible use of the public fisc.<sup>152</sup>

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<sup>142</sup> Compare N.C. GEN. STAT. ANN. § 25-9-518(b1) (West Supp. 2014) (allowing the Secretary of State to void a financing statement if it “finds that the record was wrongfully filed”), with W. VA. CODE ANN. § 46-9-516(b)(3)(E) (West Supp. 2014) (allowing the Secretary of State to void a financing statement only in specified circumstances, including when it lists the same name for debtor and creditor, when the debtor claims to be a transmitting utility, and when the statement names a public official).

<sup>143</sup> NAT’L ASS’N OF SEC’YS OF STATE, *supra* note 17, at 9.

<sup>144</sup> See W. VA. CODE ANN. § 46-9-516(b)(3)(E); see also NAT’L ASS’N OF SEC’YS OF STATE, *supra* note 17, at 4.

<sup>145</sup> NAT’L ASS’N OF SEC’YS OF STATE, *supra* note 17, at 9. See MONT. CODE ANN. § 30-9A-420(1) (West 2009) (“[T]he filing officer may reject the submission or remove the filing from existing files after giving notice and an opportunity to respond to the secured party and the debtor.”); W. VA. CODE ANN. § 46-9-516a(e) (directing the administrator to initiate a formal proceeding and publish notice in the official register).

<sup>146</sup> NAT’L ASS’N OF SEC’YS OF STATE, *supra* note 17, at 9.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> See *id.* at 8.

<sup>152</sup> *Id.* at 8–9.

#### D. Prefiling Administrative Discretion

Some states have addressed the fraudulent filing problem by granting the Secretary of State greater discretion to identify and bar the submission of facially invalid financing statements.<sup>153</sup> There are at least fifteen states currently allowing some sort of broad prefiling discretion in the filing office.<sup>154</sup> As with the post-filing administrative remedy provisions, these laws vary based on the amount of discretion they grant the Secretary of State.<sup>155</sup> North Dakota, for instance, only allows the Secretary of State to reject statements listing the same name for the debtor and the creditor.<sup>156</sup> This provision would be effective against the strawman filing but would do little to prevent sovereign citizens from making harassment filings.<sup>157</sup> A more effective strategy broadens the scope of the Secretary of State's discretion, allowing the administrator to reject filings on various grounds.<sup>158</sup> South Carolina, for example, grants the Secretary of State the authority to reject a filing when it lists the same name for creditor and debtor, appears to be filed for the purpose of harassing, or describes collateral not covered by the UCC.<sup>159</sup>

The value of such prefiling approaches lies in their ability to prevent a fraudulent filing from ever taking effect.<sup>160</sup> This sort of administrative discretion would eliminate the burden that spurious statements place on their victims.<sup>161</sup> The costs and frustrations associated with removing the encumbrance could be completely avoided.<sup>162</sup> The less obvious benefit of such

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<sup>153</sup> *Id.* at 8.

<sup>154</sup> *Id.* Alabama, California, Colorado, Idaho, Illinois, Indiana, Michigan, Mississippi, Montana, Nebraska, North Dakota, North Carolina, Ohio, Oregon, South Carolina, Texas, Virginia, Washington, and West Virginia have enacted provisions allowing for prefiling discretion. *Id.* app. I at 12–15.

<sup>155</sup> *Id.* at 8.

<sup>156</sup> N.D. ADMIN. CODE 72-01-02-06 (2015).

<sup>157</sup> Because of the redemption theory underlying the strawman filing, perpetrators often list the same name for secured party and debtor. See FBI's Counterterrorism Analysis Section, *supra* note 6, at 22 ("In essence, [the perpetrator] is extorting money from the U.S. Treasury Department."). The harassment filing, however, is not exacted with the intention of acquiring personal gains. NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 4–5. Rather, such filings are made with the intention of retaliating against a government official or another entity and thus will list that official or entity as the debtor on the financing statement. *Id.*

<sup>158</sup> *Id.* at 8.

<sup>159</sup> *Id.*; see also S.C. CODE ANN. § 36-9-516(b)(8), (9) (Supp. 2014).

<sup>160</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 8.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

an approach is that it preserves the “integrity of the public record,”<sup>163</sup> allowing Secretaries of State to carry out their duties more effectively.<sup>164</sup>

These apparent benefits, however, must be weighed against the harms that the prefiling approach might present. In order to exercise its expanded discretion before placing a financing statement in the public record, the Secretary of State and attendant staff must expend greater resources to review filings with more exacting scrutiny.<sup>165</sup> The costs associated with this effort could be substantial.<sup>166</sup> Aside from the cost of staffing the filing office adequately to handle these extra responsibilities, the Secretaries of State will also have to bear the expense of sending notice by mail to the filing party.<sup>167</sup>

To require the state, and ultimately its taxpayers, to bear the costs of prefiling discretion in such a way is in effect to subsidize the reprehensible activities of the Sovereign Citizens. A viable solution to the fraudulent filings problem must avoid this regrettable cost shifting.

This Comment, in Part III, will demonstrate how a different approach to secured transactions in personal property, one incorporating real property filing requirements, will effectively quell this troublesome issue without burdening the state and its taxpayers. Focusing on the role of an authenticated security agreement in recordation of real property interests, it will propose a detailed amendment to Article 9 perfection provisions.

### III. THE PIVOTAL ROLE OF THE SECURITY AGREEMENT

Sovereign Citizens have seized upon the Article 9 approach to perfection of security interests, abusing the relative ease with which it allows creditors to file notice of an interest in a debtor’s personal property. The process of perfection however, represents only one procedural aspect of the secured credit system. Perfection, which is the process of putting the world on notice of the creditor’s interest in the property, is separate from the process creating the actual security

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 8–9.

<sup>166</sup> *Id.* (explaining that staff would have to be trained to flag potentially fraudulent filings and suggesting that an electronic screening system might be inadequate to carry out the task).

<sup>167</sup> Memorandum from Kelly Kopyt, Int’l Ass’n of Commercial Arbitrators, to Nat’l Ass’n of Sec’y’s of State (Jan. 22, 2010), *available at* [http://www.iaca.org/iaca/wp-content/uploads/NASS\\_Memo2.pdf](http://www.iaca.org/iaca/wp-content/uploads/NASS_Memo2.pdf) (“The filing office should not be asked to take on additional expenses during the current economic times.”).

interest.<sup>168</sup> It is only by means of “attachment” that a creditor can acquire a legitimate security interest in a debtor’s personal property.<sup>169</sup> To attach a security interest in a debtor’s personal property, a creditor must authenticate a security agreement.<sup>170</sup> The security agreement functions as a contract between the creditor and the debtor,<sup>171</sup> and the UCC prescribes certain requirements for its effectiveness.<sup>172</sup> Most notably for the purposes of this Comment, the UCC requires that the debtor authenticate the security agreement.<sup>173</sup>

Despite the beneficent intentions underlying the notice system of perfection under Article 9,<sup>174</sup> the current UCC raises a host of administrative and substantive issues. As evidenced by the fervor with which states have amended their commercial law approaches to perfection,<sup>175</sup> the Article 9 notice filing approach has failed creditors, debtors, and Secretaries of State. The solution to the fraudulent filings problem lies in the authenticated nature of the security agreement. As is required in some real property transactions, the UCC should prescribe attachment of the security agreement to the financing statement for effective perfection. More specifically, when creditors file a “Form UCC1” document, the form financing statement document provided by the UCC itself,<sup>176</sup> Article 9 should require that they submit the authenticated, acknowledged security agreement as an attachment.

Section A will briefly outline the relevant aspects of real property security agreements and explain their effect on the creditor’s interest in the debtor’s real property. Section B will then demonstrate the manner in which the UCC

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<sup>168</sup> *Bellamy’s Inc. v. Genoa Nat’l Bank (In re Borden)*, 361 B.R. 489, 495 (B.A.P. 8th Cir. 2007) (“The purpose of perfection is to give the world notice of the lien or security interest.”).

<sup>169</sup> U.C.C. § 9-203 (2014).

<sup>170</sup> REILEY, *supra* note 30, § 7:3 (“A security agreement is essential; a financing statement is not.”). A party may authenticate an agreement by signing the writing or attaching some form of electronic verification. *See* U.C.C. § 9-102(a)(7). Other circumstances may give rise to a security interest without operation of a security agreement. This Comment, however, addresses only situations in which parties create a security interest by contract.

<sup>171</sup> REILEY, *supra* note 30, § 7:3.

<sup>172</sup> U.C.C. § 9-203(b).

<sup>173</sup> *Id.* § 9-203(b)(3)(A).

<sup>174</sup> The UCC financing statement form, “Form UCC1,” is generally a one-page document that provides for uniform filing. REILEY, *supra* note 30, § 7:3. Allowing such filings avoids the costs that would be associated with requiring Secretaries of State to process nonuniform filings. *See id.* (“A copy of the actual security agreement may be filed instead of a financing statement, but this would constitute a nonuniform filing and it would be more expensive than filing a UCC1.”).

<sup>175</sup> *See generally* NAT’L ASS’N OF SEC’YS OF STATE, *supra* note 17, apps. I–IV at 12–29 (documenting recent State amendments made to combat fraudulent UCC filings).

<sup>176</sup> U.C.C. § 9-521(a).

should be amended to require attachment of a security agreement for perfection of the creditor's interest in the debtor's personal property.

#### A. *Real Property Security Agreements*

While a creditor may obtain a security interest in personal property following the prescriptions in Article 9, he may also obtain a security interest in real property as collateral.<sup>177</sup> Though state laws allow for various instruments creating a security interest in real property, a creditor traditionally creates such an interest through a mortgage.<sup>178</sup> Defined as “an interest in real property as security for performance of an obligation,”<sup>179</sup> the mortgage affords the creditor certain rights and remedies similar to those enjoyed by the secured creditor in personal property.<sup>180</sup> The real property system of secured credit is complex relative to the personal property system under Article 9, but this difference is likely due to “historical accident.”<sup>181</sup> Given the accidental nature of this branching in the law of secured credit, it is reasonable to borrow aspects from the real estate system and apply them to Article 9 for the purpose of remedying its current infirmities. The perceived barriers separating the worlds of real property and personal property, like the cultural boundaries between Kipling's East and West,<sup>182</sup> are surmountable. The fact that these systems have emerged separately thus far does not forestall their merger in this case. This Part will ultimately show the efficacy of the real property method of recordation as applied to the Article 9 personal property paradigm.

For a mortgage to create an effective security interest in the property, a creditor must record the instrument with the proper official.<sup>183</sup> The official recorder of such instruments bears a different name under the laws of the various states, but common titles include “Recorder of Deeds,” “Register of

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<sup>177</sup> See RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 1.1 (1997).

<sup>178</sup> *Id.* § 1.1 cmt.

<sup>179</sup> *Id.* § 1.1.

<sup>180</sup> See REILEY, *supra* note 30, § 2:3 (explaining that a creditor may seek satisfaction of a judgment from either real or personal property).

<sup>181</sup> LYNN M. LOPUCKI & ELIZABETH WARREN, SECURED CREDIT: A SYSTEMS APPROACH 36 (7th ed. 2012). The law of secured credit in real estate developed much earlier than the law of secured credit in personal property. *Id.* At the time the real property system emerged, the general public looked upon monetary lending with a jaundiced eye. *Id.* Since the personal property scheme developed in an era more amenable to lending practices, it abandoned many of the real property restrictions. *Id.* The drafters of the UCC, however, should revive some restrictions to combat growing Article 9 fraud.

<sup>182</sup> See Kipling, *supra* note 29, at 225 (“But there is neither East nor West, Border, nor Breed, nor Birth, When two strong men stand face to face, though they come from the ends of the earth!”).

<sup>183</sup> ROBERT KRATOVIL, REAL ESTATE LAW § 121, at 70, § 123, at 71 (6th ed. 1974).

Deeds,” and “County Recorder.”<sup>184</sup> For effective recordation, the creditor must file the actual mortgage or deed.<sup>185</sup> This method differs dramatically from the Article 9 approach to perfection, where the purported creditor must only file a UCC1 form to give notice of his interest in the collateral.<sup>186</sup> Instead of simply completing a form and filing it with the Secretary of State, a creditor with a security interest in real property must file a security agreement,<sup>187</sup> a document that requires authentication.<sup>188</sup>

Additionally, the mortgage is not valid unless the parties to the contract properly acknowledge the writing.<sup>189</sup> Some states require that any instrument conveying an interest in land be notarized.<sup>190</sup> Further, most states require that one or more witnesses acknowledge any instrument conveying interest in real property.<sup>191</sup> The real property system thus directs the creditor to file an authenticated security agreement to put the public on notice of its interest in the property.<sup>192</sup> Not only must the debtor sign the security instrument, but some other party must also attest to its validity.<sup>193</sup> Usually, this manifests as a requirement that a notary or some other official with state-issued credentials verify the identity of the debtor and give a seal of authenticity.<sup>194</sup> This is strikingly different from the Article 9 approach to perfection, which merely requires that the creditor unilaterally file an unauthenticated form with the Secretary of State.<sup>195</sup> Applying this sort of authentication protection to the personal property system would allow states to effectively quell the disturbing consequences of Sovereign Citizens’ paper terrorism activities.

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<sup>184</sup> *Id.* § 123, at 71.

<sup>185</sup> *See id.* § 121, at 70.

<sup>186</sup> REILEY, *supra* note 30, § 9:19 n.40.10.

<sup>187</sup> KRATOVIL, *supra* note 183, § 124, at 71, § 128, at 73.

<sup>188</sup> Article 9 no longer requires a debtor’s signature on the financing statement. U.C.C. § 9-509 cmt. 3 (2014). A security agreement creating an interest in personal property is a formalized contract between the creditor and the debtor. REILEY, *supra* note 30, § 7:3.

<sup>189</sup> KRATOVIL, *supra* note 183, § 128, at 73.

<sup>190</sup> *See, e.g.*, 21 PA. STAT. ANN. § 42 (West 2001) (requiring acknowledgment by two or more witnesses for effective recordation); OHIO REV. CODE ANN. § 5301.01(A) (West Supp. 2014) (“The signing shall be acknowledged . . . before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgement and subscribe the official’s name to the certificate of the acknowledgement.”).

<sup>191</sup> LOPUCKI & WARREN, *supra* note 181, at 145. Connecticut, Georgia, Louisiana, and South Carolina all require witnesses for such instruments. *Witness Requirements for Deeds and Mortgages*, PAW FIN. & NOTARY SERVICES (Jan. 25, 2011), <http://www.pawnotary.com/kb/2-4.html>.

<sup>192</sup> KRATOVIL, *supra* note 183, § 128, at 73.

<sup>193</sup> LOPUCKI & WARREN, *supra* note 181, at 323.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*; REILEY, *supra* note 30, § 9:26.

*B. Recording the Security Agreement with the Financing Statement*

As Article 9 is currently written, a Sovereign Citizen may abuse the notice filing system with relative ease, acquiring a UCC1 form and naming his target in the appropriate blank. The ALI and NCCUSL must revise Article 9 to facilitate a uniform solution to this growing problem. By instead requiring creditors to file the underlying security agreement in conjunction with the financing statement, the drafters could quell the rise of fraudulent filings and give Secretaries of State another weapon in the battle against Sovereign Citizens and paper terrorism.

The operative language should appear in UCC § 9-502, which prescribes the minimum requirements for effectiveness of a financing statement.<sup>196</sup> Subsection (a) of that provision provides that “a financing statement is sufficient only if it: (1) provides the name of the debtor; (2) provides the name of the secured party or a representative of the secured party; and (3) indicates the collateral covered by the financing statement.”<sup>197</sup> In addition to these elements, this section should require a fourth: an appended copy of the authenticated, acknowledged security agreement.<sup>198</sup> As is required under state law for recordation of an interest in real property, Article 9 should require filing of the underlying security agreement.<sup>199</sup> This section should require that the underlying security agreement be both “authenticated” as defined in UCC § 9-102(a)(7)<sup>200</sup> and acknowledged by a notary, witnesses, or some other official as is prescribed in state mortgage recordation laws.<sup>201</sup>

In addition, the drafters should update UCC § 9-502(d), which allows the creditor to file a financing statement before the security agreement is made.<sup>202</sup>

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<sup>196</sup> U.C.C. § 9-502 (2014) (entitled “Contents of a Financing Statement; Record of Mortgage as Financing Statement; Time of Financing Statement”).

<sup>197</sup> *Id.* § 9-502(a).

<sup>198</sup> Not all collateral requires perfection by filing a financing statement, as it may sometimes be achieved automatically, by possession or delivery, and by control. *See id.* §§ 9-309, 9-312 to 9-314. Since the impetus behind this Comment is the deleterious effects of the fraudulent UCC1 filing, such means of perfection are beyond the scope of the argument. Any suggested changes to Article 9 with respect to the effectiveness of a financing statement should not affect other means of perfection.

<sup>199</sup> “Security agreement” is defined as “an agreement that creates or provides for a security interest.” *Id.* § 9-102(a)(74).

<sup>200</sup> *Id.* § 9-102(a)(7) (“‘Authenticate’ means: (A) to sign; or (B) with present intent to adopt or accept a record, to attach . . . with the record an electronic sound, symbol, or process.”).

<sup>201</sup> *See* OHIO REV. CODE ANN. § 5301.01(A) (West Supp. 2014) (requiring acknowledgment by a judge, clerk of court, county auditor, county engineer, mayor, or notary public).

<sup>202</sup> U.C.C. § 9-502(d) provides, “A financing statement may be filed before the security agreement is made or a security interest otherwise attaches.”

To preserve the economic incentives inherent in the secured credit arrangement, the drafters should not deprive lenders of this ability to file a financing statement prior to executing a contract with the debtor.<sup>203</sup> Instead, the language of that provision should prescribe that, if the creditor seeks to file a financing statement in advance of creating a security agreement, it must acquire an authenticated, acknowledged statement of permission from the debtor.<sup>204</sup> Finally, the next iteration of Article 9 should include failure to append a security agreement or other statement of the debtor's permission as additional grounds for rejection of a financing statement under § 9-516(b).<sup>205</sup>

The requirements of authentication and acknowledgement are not foreign to the Article 9 system. In some Article 9 secured credit arrangements, a debtor offers a third-party account as collateral.<sup>206</sup> The creditor in such an arrangement may collect payment directly from the third party, the "account debtor."<sup>207</sup> But to exercise that collection right, the creditor must send authenticated notification to the account debtor.<sup>208</sup> Additionally, Article 9 requires that parties submit acknowledged affidavits to be eligible to enforce certain collection and enforcement rights.<sup>209</sup> These proposed amendments, requiring authentication and acknowledgment, thus would not represent a radical departure from the established commercial law traditions. Indeed, it would merely apply requirements already contemplated in other UCC provisions.

Moreover, courts have long interpreted the definition of "security agreement" to require more formality than what is readily apparent from the plain language of the UCC.<sup>210</sup> While the UCC defines "security agreement" merely as "an agreement that creates or provides for a security interest,"<sup>211</sup> courts have required some sort of written documentation of the agreement.<sup>212</sup>

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<sup>203</sup> See MCCORMACK, *supra* note 20, at 15.

<sup>204</sup> Under this Comment's proposed amendments, this authentication may be in the form of an affidavit or a contract. The statement should include a means of contacting the debtor so that the filing office can verify that party's assent.

<sup>205</sup> U.C.C. § 9-516(b) provides seven administrative reasons for rejecting a filing. This additional requirement would be the eighth.

<sup>206</sup> See, e.g., *Marine Nat'l Bank v. Airco, Inc.*, 389 F. Supp. 231, 232 (W.D. Pa. 1975) (finding that the bank took a security interest in the debtor's accounts receivable).

<sup>207</sup> See U.C.C. § 9-406(a).

<sup>208</sup> *Id.*

<sup>209</sup> See, e.g., *id.* § 9-607.

<sup>210</sup> *Drown v. Perfect (In re Giaimo)*, 440 B.R. 761, 768 (B.A.P. 6th Cir. 2010).

<sup>211</sup> U.C.C. § 9-102(a)(74).

<sup>212</sup> *Drown*, 440 B.R. at 768.

In the recent case of *Drown v. Perfect*, the bankruptcy appellate panel, in finding that the creditor had a valid security interest in the debtor's property, noted that the debtor had acknowledged the underlying security agreement in the presence of a notary.<sup>213</sup> The court went further to explain that requiring acknowledgment in the presence of a notary is an important requirement for validity of security agreements.<sup>214</sup> The acknowledgement, the court reasoned, prevented the filing of false liens.<sup>215</sup> Acknowledgement and certification from a notary or other official is clearly commonplace in the creation of security interests and would quell the rise of fraudulent filings.

Furthermore, it is standard practice for a creditor to obtain permission from the debtor before filing a financing statement. In the "prototypical" secured transaction, an institutional lender will file a financing statement soon after negotiating a credit arrangement.<sup>216</sup> Before doing so, however, the creditor usually has the debtor sign an authorization to file a financing statement.<sup>217</sup> The proposal requiring a creditor to obtain permission from the debtor to file a financing statement prior to executing a contract clearly does not represent a dramatic departure from common lending practices. The requirements contemplated in the amendments proposed herein are neither foreign nor onerous. They merely apply existing UCC requirements and lending norms to the perfection process. Moreover, requiring creditors to comply with these familiar terms is absolutely necessary in light of the abuse arising from the infirmities in the current Article 9 approach.

Though they feasibly incorporate common practices, these substantive amendments to Article 9 will nonetheless present a host of implications for all stakeholders in the secured credit regime. Part IV of this Comment will address the way these adjustments will affect Secretaries of State, lending institutions, the court system, and the victims of fraudulent filings. Ultimately, it will demonstrate that the benefits of this additional filing requirement far outweigh any costs.

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<sup>213</sup> *Id.* at 771.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> See LOPUCKI & WARREN, *supra* note 181, at 131–32.

<sup>217</sup> See *id.* at 132.

#### IV. IMPLICATIONS OF THE PROPOSED ARTICLE 9 AMENDMENTS

The UCC represents a colossal effort to lend uniformity and predictability to a historically robust body of commercial law.<sup>218</sup> Embodied in its articles is recognition of security's power to spur economic growth.<sup>219</sup> Any change to the mechanics of secured transactions in personal property will be of consequence to a number of interested entities. Though the Article 9 revisions proposed herein will likely meet initial opposition from some stakeholders, this Comment will demonstrate the ultimate utility of its approach. By requiring creditors to attach an authenticated, acknowledged security agreement in conjunction with a financing statement, the drafters of Article 9 can effectively combat the troubling paper terrorism movement. This novel approach to perfection would give victims relief from Sovereign Citizen attacks without shifting the costs to the taxpaying public. Furthermore, it would alleviate the considerable damage caused by fraudulent filings without compromising the economic value of the Article 9 system.

The following sections of this Comment will address the implications this amendment will have for the various stakeholders. Section A will discuss considerations for Secretaries of State. Section B explores potential concerns for lending institutions and other creditors. Section C points out the benefits this approach will have for the court system. Most importantly, section D explains the benefits that the victims of fraudulent filings stand to enjoy from this necessary amendment.

##### *A. Implications for Secretaries of State and Other Filing Offices*

As the gatekeepers of the perfection process, Secretaries of State are a central focus of the proposed Article 9 revisions. The current version of Article 9 gives no discretion to filing offices, forcing them to give effect to even blatantly fraudulent financing statements.<sup>220</sup> By revising Article 9 to require recordation of a security agreement, the drafters can extend to Secretaries of State an additional tool to combat the campaign of paper terrorism.

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<sup>218</sup> See REILEY, *supra* note 30, § 1.1 (“[A] unique amalgamation of private and quasi-public bodies was created and combined to produce a series of uniform state laws.”).

<sup>219</sup> See MCCORMACK, *supra* note 20, at 15 (explaining the pivotal role security plays in “the promotion of economic growth and the facilitation of economic activity”).

<sup>220</sup> See U.C.C. §§ 9-516(b), 9-520 (2014).

For a creditor to create a valid security interest, he must acquire a security agreement with authentication from the debtor.<sup>221</sup> Though Article 9 no longer requires a debtor's signature on the financing statement,<sup>222</sup> it does require traditional formalities for the underlying contractual agreement between the creditor and the debtor.<sup>223</sup> Requiring the creditor to file this more formal agreement will aid Secretaries of State in screening malicious filings. The authentication and debtor's acknowledgment of the security agreement and its obligations lend legitimacy to the transaction.<sup>224</sup> Requiring written documents and signatures is one of the most ancient means of legitimizing a transaction,<sup>225</sup> and that requirement should extend to lend authenticity to the perfection process under Article 9. Filing office staff may more efficiently verify a financing statement when it must include a notarized security agreement, obviating the need to inspect UCC1 forms for signs of fraud. This requirement will afford Secretaries of State some measure of prefiling discretion without imposing substantial administrative costs.

Though several states have legislated to give greater prefiling discretion to Secretaries of State,<sup>226</sup> these measures come at a substantial cost.<sup>227</sup> Requiring filing office staff to inspect a financing statement for hallmarks of Sovereign Citizen activities would give rise to greater training, staffing, and data management needs.<sup>228</sup> Imposing recordation of the security agreement should serve as a screening tool without requiring such extensive prefiling discretion and review. Sovereign Citizens will no longer be able to encumber a victim's property by simply completing a UCC1 form. Instead, they will have to go to greater lengths to create a security agreement with authentication, likely including a notary's seal. Filing office staff will be able, even upon cursory review, to identify whether the attached security agreement has been properly acknowledged. This measure will not impose the substantial costs that arise from prefiling administrative discretion laws enacted by some states. The Secretary of State will simply be able to reject a filing for failing to include an authenticated security agreement. Thus, the gatekeepers of the perfection

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<sup>221</sup> *Id.* § 9-203(b)(3)(A).

<sup>222</sup> *Id.* § 9-521.

<sup>223</sup> *Id.* § 9-203(b)(3).

<sup>224</sup> Moringiello, *supra* note 58, at 152 (“The signature’s purpose of assuring formality and seriousness and its role as evidence are served by the execution of a security agreement.”).

<sup>225</sup> See Amelia H. Boss, *Searching for Security in the Law of Electronic Commerce*, 23 NOVA L. REV. 585, 597 n.36 (1999) (detailing the history and enduring relevance of the Statute of Frauds).

<sup>226</sup> NAT’L ASS’N OF SEC’YS OF STATE, *supra* note 17, app. II at 16–21.

<sup>227</sup> *Id.* at 8–9.

<sup>228</sup> *Id.*

process under Article 9 will, rightfully, assume a greater role in the screening process.

*B. Implications for the Lending Institutions and Other Creditors*

As currently written, Article 9 allows creditors to perfect their interests in personal property with extraordinary ease. The revisions proposed herein would make that process more cumbersome, a result with which lending institutions may take issue. The costs, however, are ultimately justified by the benefits of this arrangement.

The costs associated with this Comment's proposal would include the price of filing more documents with the Secretary of State. Though the filing party currently must pay a filing fee to the Secretary of State,<sup>229</sup> it is a relatively small amount.<sup>230</sup> Filing a security agreement in conjunction with the UCC1 form would require more extensive processing and thus would necessitate a greater filing fee. Further, the creditor seeking to file a financing statement before the creation of a security agreement must bear the cost of creating an authenticated instrument granting it permission from the debtor to do so.<sup>231</sup> Lenders will certainly take issue with the additional costs imposed by the proposed revisions, but change is essential in light of the troubling and growing practice of Article 9 fraud.

Under the current Article 9 approach to perfection, the victim must bear the majority of the costs to remove the cloud from title to personal property. Additionally, the court system must foot the bill for unnecessary proceedings associated with the fraudulent encumbrance.<sup>232</sup> Though requiring the recordation of a security agreement would present substantial costs for the creditors, this cost-shifting arrangement is preferable to the alternative. Lending institutions derive great value from being able to obtain a security interest in collateral, allowing them to generate more revenue from their lending activities.<sup>233</sup> By obviating the need to raise interest rates for risky

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<sup>229</sup> U.C.C. § 9-516(b)(2) (2014).

<sup>230</sup> The filing fee for a financing statement in Georgia, for example, is only \$10.00. GA. CODE ANN. § 15-6-77(f)(1)(B) (Supp. 2014).

<sup>231</sup> See U.C.C. § 9-502(d) (allowing the creditor to file a financing statement before execution of a security agreement). This Comment proposes that the creditor must obtain authenticated permission from the debtor to exercise this right.

<sup>232</sup> Wiswall, *supra* note 26, at 547 (“These frivolous lawsuits impose significant costs on public officials and waste valuable court time and resources.”).

<sup>233</sup> See MCCORMACK, *supra* note 20, at 15–16 (arguing that the availability of security encourages lenders to make loans that would otherwise be too risky).

transactions,<sup>234</sup> the security system enhances the creditor's business. The lenders, as beneficiaries of this arrangement, should be made to bear the costs associated with making it more reliable. To allow the process of perfection to continue as it currently stands would be to require the public to subsidize paper terrorism, endangering the security system and our economic health in general. Lending institutions should thus welcome this increase in cost as a means of protecting their own profitability.

### *C. Implications for the Court System*

When a victim of a fraudulent financing statement learns of the encumbrance, he must resort to the court system for relief. Depending on the state in which the perpetrator made the filing, he may seek various judicial remedies to remove the cloud on title and seek compensation from the filer.<sup>235</sup> All of these proceedings require courts to expend considerable resources, unnecessarily wasting time and money.<sup>236</sup> Additionally, the judges presiding over these proceedings often become the victims of fraudulent filings themselves,<sup>237</sup> endangering their ability to carry out their official duties with confidence and security. If the drafters accept these proposed revisions, they may alleviate the burden Sovereign Citizens are placing on the state court systems. Requiring recordation of an authenticated, acknowledged security agreement, as is the practice in real property transactions, will not only deter potential perpetrators. It will also allow Secretaries of State to screen fraudulent filings before they affect the victim and necessitate legal proceedings. Such a revision to Article 9 would ultimately benefit the court system and preserve precious public resources.

### *D. Implications for Victims of Fraudulent Filings*

The victim of a fraudulent financing statement endures the most troubling plight of all the stakeholders. The proposed revisions to Article 9 will relieve these innocent victims of the costs and frustrations associated with removing the cloud on their title from fraudulent financing statements. A victim may not

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<sup>234</sup> See *id.* at 16–17.

<sup>235</sup> The victim may seek post-filing expedited judicial relief in certain states. See *supra* Part II.A. He may also institute an action seeking damages from the perpetrator. U.C.C. § 9-625(b). Some states may also impose criminal liability upon those making fraudulent filings. See *supra* Part II.B.

<sup>236</sup> See Wiswall, *supra* note 26, at 546–47 (citing a report by the California Senate Office of Research regarding the burden Sovereign Citizen activities place on courts in that state).

<sup>237</sup> *Id.* (“Members of these groups also file lawsuits and liens against judges . . .”).

discover an encumbrance upon his property until he has already encountered trouble obtaining credit or making a transaction involving the named property.<sup>238</sup> This initial difficulty, however, is only the tip of the iceberg. Before the victim has vindicated all of his claims and restored the status of his credit history, he may expend thousands of dollars and endure years of frustrating litigation.<sup>239</sup> The only effective solution to the fraudulent filings problem is one that prevents the victim from incurring this pecuniary and emotional cost. By requiring the recordation of an authenticated, acknowledged security agreement, the drafters can promulgate a version of Article 9 that prevents fraudulent filings from ever taking effect. For the judges, law enforcement officials, government workers, and other victims affected by this growing Sovereign Citizen movement, these revisions are essential.

### CONCLUSION

Sovereign Citizens like Edward and Elaine Brown have long abused current laws to exact their unfounded revenge. Despite efforts to quell this rising tide of fraud and defiance, the states have yet to craft a uniform, effective solution to fraudulent financing statements. The Secretaries of State have made clear the need for change, and the drafters of the UCC must heed their warning. As the creators of the dominant model for state commercial law, ALI and NCCUSL must lead the charge for revision and repair.

Though the wholesale real property approach to secured credit would not lend itself to a scheme of personal property transactions, the drafters could borrow from its traditions of formal acknowledgement in conveyances to bolster the security of the perfection process. Manifest as a requirement to record an authenticated, acknowledged security agreement in conjunction with a financing statement, the revisions proposed herein would address the problem without compromising the benefits of the current Article 9 approach. Imposing the costs of this novel approach on private lenders is the only viable result, as the current scheme forces the victims and the taxpayers to bear the costs associated with removing cloud on title.

Ultimately, this proposed revision would protect the innocent victims. Those judges, prosecutors, and other government officials affected by the

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<sup>238</sup> NAT'L ASS'N OF SEC'YS OF STATE, *supra* note 17, at 9.

<sup>239</sup> Smith, *supra* note 15, at 274 n.30.

campaign of paper terrorism should no longer be left defenseless in this harrowing battle. By requiring recordation of the security agreement, the drafters can prevent filings from ever taking effect. Such an ex ante approach is crucial to effectively solving this problem. Despite the myriad attempts by states to address the issue, Sovereign Citizen activities continue to surge. Real property and personal property may appear as distinct as East and West,<sup>240</sup> but the time is nigh for their marriage. If we are to preserve the economic utility of the secured transaction, the drafters must take action to restore confidence in the Article 9 perfection process.

PATRICK H. HILL\*

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<sup>240</sup> See Kipling, *supra* note 29.

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