

Appropriating Form: A Comment on Summers, How Law Is Formal and Why It Matters

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APPROPRIATING FORM: A COMMENT ON SUMMERS, "HOW LAW IS FORMAL AND WHY IT MATTERS"

Deborah A. DeMott†

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INTRODUCTION

My Article addresses a question raised by Professor Summers's account of the formal character of legal rules and the significance of form within a legal system. At several points his Article refers to "appropriate form," a concept that is not explicitly defined or distinguished from form *simpliciter*. My inquiry concerns the significance and operation of appropriate form as a distinctive element within a legal system. How should we evaluate whether any given rule, doctrine, or other constituent of a legal system, is appropriately formal? Is the answer to be found within form itself? Is a more formal rule always to be preferred to one less formal? And how can one best choose among rules that, by one definition or another, are comparably formal? Is it always necessary to evaluate appropriate form against an objective or criterion apart from form itself?

Professor Summers's article suggests two very different answers to these questions, one appropriating form to extra-formal considerations, and one treating form itself as intrinsically desirable. Midway in his article, in emphasizing the importance of analyzing the formal character of law's basic functional elements, Professor Summers notes that such an exercise "sharpens awareness of the distinction between appropriate and inappropriate form" and heightens awareness of choices to be made in designing and administering a system.¹ More

† Professor of Law, Duke University School of Law. I am grateful to Professor Robert S. Summers for his comments on an earlier draft.

¹ Robert S. Summers, *How Law Is Formal and Why It Matters*, 82 CORNELL L. REV. 1165, 1196 (1997).

concretely, a rule that imposes a precise speed limit embodies the formal attributes of simplicity, definiteness, and completeness. "Drive 65" is preferable to a rule that drivers drive at reasonable speeds because "the weight of policy reasoning heavily favors having some speed limit."² This argument treats form as a means to a policy-specific end. The appropriateness of form is thus an instrumental concept. A different sense of formal appropriateness emerges toward the end of the Article, in a section that introduces the inventive elements of the law, i.e., those that enable (or support) social institutions like business corporations, contracts, and wills. Form here has self-justifying qualities that detach the formal character of a rule from considerations of policy, content, or context: "it is not even possible to identify, define, and describe the goals and means that the law itself thus makes possible without at least implicit reference to law and to its appropriate form."³ My argument is that, even within these legally created constructs, form is not itself the measure of appropriate form. Form is essential, but formal character does not itself resolve the degree or the preferable variety of form. As well, in some settings at least, formal values may conflict with each other. Choice among them is inevitable.

Useful elaborations on the concept of appropriate form can be derived from relationships, transactions, and organizations in which legal form undeniably plays a basic constitutive role but in which the appropriateness of a formulation does not turn solely on its formal characteristics. My examples stem from commercial law, estate planning, agency, and corporate law. As well, these elaborations on appropriate form are relevant in other legally defined contexts, beyond the internal sphere of privately structured institutions. A basic question is the extent to which legal doctrines that are less formal should undermine the consequences of complying with specified form. That is, although form is essential to the existence of an artificially constructed person like a corporation or to the legal efficacy of a will, less formal types of legal doctrine on occasion upset or invade the province of form. In general, form bites with sharper teeth in some sectors of the legal menagerie than in others. The justifications for undermining form are related to the reasons private parties choose among alternative structures available to them, some more formal than others. In particular, the definiteness and certainty associated with form may be less attractive in some contexts than the uncertainty and indefiniteness associated with discretion. Separately, formal properties are likely to matter most when the parties to a particular relationship or transaction anticipate that it will implicate the interests of third parties, or when the parties choose a legal structure that itself

² *Id.* at 1214.

³ *Id.* at 1226.

anticipates the involvement of third parties. One of form's most significant consequences is that it enables one set of legal consequences to be readily detached from other aspects of the same underlying relationship or transaction, a capacity for separation or independence that facilitates the involvement of third parties.

I

DEFINITENESS AND THE ALLOCATION OF DISCRETIONARY AUTHORITY

My initial examples test the significance of the formal characteristic of definiteness and, to a lesser extent, its relationship to qualities of simplicity and completeness. In many of the relationships and organizations made possible by legal form's inventive effects, a basic function served by internal rules is to allocate authority to make discretionary decisions that have consequences for other parties to the relationship. As well, such rules often constrain the exercise of discretion. However simple or elaborate, governance structures assign roles and specify authority to make discretionary decisions. Consider first a loan agreement that defines the terms of a long-term relationship between a lender and a borrower. One choice the parties would make in structuring their relationship is to define conduct by the borrower that will constitute a default, and thereby enable the lender to accelerate the borrower's obligation to pay the principal amount of the loan. The simplest solution is to say nothing, in which case the borrower would default only if it fails to make interest payments or fails to perform any other obligation it has assumed under the agreement. Many lenders sacrifice simplicity to achieve greater control, if not over the borrower in all respects, at least over borrower behavior that increases the lender's risk.⁴ Toward that end, the parties' negotiations might focus on two different formal structures for the loan agreement. Loan agreement A is highly definite in that it specifies in great detail the circumstances that will constitute events of default under the agreement (e.g., failure to meet stated financial tests, sales of significant

⁴ To be sure, other mechanisms would reduce the lender's risk as well, including lending on a secured basis. The perceived riskiness of the loan would also affect the interest rate at which the lender would be willing to proceed. These mechanisms are more definite and thus more formal in structure than governance provisions for the relationship that anticipate discretionary decisions the lender will make. Lenders may be able to reduce risk with greater certainty by price-protecting (charging a higher interest rate) because governance provisions may always be incomplete. Borrowers show robust ingenuity in identifying and engaging in risk-enhancing behavior that escapes the restraints that the contractual structure imposes—an ingenuity that applicable legal norms have not suppressed. See, e.g., Victor Brudney, *Corporate Bondholders and Debtor Opportunism: In Bad Times and Good*, 105 HARV. L. REV. 1821, 1821-22, 1868-75 (1992). Price-protection is, in turn, limited in its strategic attractiveness by the borrower's financial ability to generate cash sufficient to make interest payments.

operating assets, among other things). Loan agreement *B* is simpler but not definite at all; it provides that the lender may deem itself at any time to be insecure and accelerate the loan.⁵ Loan agreement *B* constrains the lender's discretion much less than does loan agreement *A*. Loan agreement *A* provides greater certainty and definiteness; loan agreement *B* sacrifices those qualities and creates uncertainty for the borrower, thereby enhancing the lender's discretion.

Why, then, is a "deem insecure" clause not a feature in all loan agreements? The lending market is competitive, and high-credit-quality borrowers can negotiate for terms that constrain the lender's discretion. Competition among lenders for high-credit-quality borrowers means that a borrower's resistance to any lender's insistence on a "deem insecure" clause is not in itself a fatal signal of lack of credit quality.⁶ Relatedly, the borrower may be able to lower its borrowing cost if the lending relationship can be structured as a public offering of debt securities by the borrower to public investors.⁷ The lender-borrower relationship that underlies publicly traded debt securities is typified by a high degree of definiteness in its specification of the borrower's duties.⁸ Moreover, in this context, a discretionary "deem insecure" provision would not function well. Would each bondholder have an individual right to deem herself insecure? Would bondholders vote on the question? Would an indenture trustee make the determination? That the ever-inventive financing market has not evolved such a product suggests the absence of a market for it. Note that formal specification dominates the structuring of a lender-borrower relationship that anticipates the subsequent involvement of parties other than the lender and borrower, especially that of large numbers of subsequent purchasers of bonds whose identity is unknown at the time of

⁵ Under the UCC, the lender's decision to deem itself insecure is subject only to the requirement that the lender "in good faith believe[] that the prospect of payment or performance is impaired." U.C.C. § 1-208 (1995).

⁶ Moreover, the borrower's refusal is not the sole available information that is relevant to its credit-worthiness.

⁷ See Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J.L. BUS. & FIN. 133, 137 & n.16 (1994) (reporting that borrowing through capital markets reduces borrowing costs for investment grade borrowers). Noninvestment grade borrowers that issue publicly traded junk bonds rather than borrowing from banks or other institutional lenders may not lower the interest cost of the debt. See VICTOR BRUDNEY & WILLIAM W. BRATTON, CORPORATE FINANCE 155-56 (4th ed. 1993). Indentures governing publicly traded debt securities tend, however, to contain fewer covenants than do loan agreements and note agreements for privately placed notes. For the borrower, junk-bond financing trades off interest costs against a reduction in the discretion that would otherwise be invested in the lender.

⁸ Courts resist the implication of duties upon the borrower in this context. See, e.g., *Metropolitan Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1516-22 (S.D.N.Y. 1989); *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986).

the initial loan. Loans structured to generate tradeable debt securities exemplify a context in which a high degree of formal specification has great functional significance.

II

COMPLETENESS IN FORMAL AGREEMENTS AND INFORMAL UNDERSTANDINGS

Although a contract unquestionably underlies and structures any relationship between a lender and a borrower, it may be open to question whether the written loan agreement itself completely encapsulates the norms applicable to a particular relationship. Suppose the lender makes a loan using loan agreement A, with its highly particularized definition of events of default. The borrower commits many such events—in particular, it frequently violates various financial ratios that the agreement mandates—but the lender waives each default. Is the lender's sustained pattern of conduct fairly regarded as a course of dealing that modifies the explicit rights that the agreement created?⁹ Or have the parties simply reached an extra-legal pattern of accommodation and forgiveness that should in no way restrict the lender's exercise of its explicit rights if the relationship deteriorates, the borrower commits a further default comparable to prior defaults, and the lender decides to accelerate the borrower's obligation?

The broader question is whether contract law itself should be relatively receptive to, or closed to, informal patterns of interaction among parties to a written agreement. This question looms large in the ongoing revision of UCC Articles 1 & 2, which in their current formulations are hospitable to informal interactions. That written agreements have formal characteristics does not in itself determine how exclusively they should control the resolution of disputes among the parties.¹⁰ The choice is between treating informal understandings and patterns of conduct as a parallel universe that is vulnerable to being trumped by rights defined in the written agreement, versus treating the written agreement as merely the prelude to supplementation and variation through informal means. We might consider which approach is most likely to reflect most parties' intentions, acknowledging that these may well evolve over the course of a relationship, and noting that the claims for form's dominance are weaker when the transaction itself does not implicate the interests of third parties. In-

⁹ Cf. U.C.C. § 1-205(1) (1995) (defining "course of dealing" as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct").

¹⁰ Consider in this connection UCC § 2-202, which addresses the applicability of the parol evidence rule to sales of goods. The rule does not always or automatically foreclose inquiry into whether a written instrument reflects the terms of the parties' agreement. *Id.*

formal patterns of accommodation may sometimes reflect reciprocal expectations; the parties may not expect that accommodating behavior would continue if the relationship collapses, leaving the expectation of reciprocity no longer tenable.¹¹ Moreover, contract-law doctrines that in litigation require more rather than fewer factually-specific determinations impose costs on the legal system that are borne by society more generally. To be sure, language—even when embodied in an elaborate written instrument—does not interpret itself, and disputes over interpretation can alone consume judicial resources.¹²

Form's significance increases when the context bears consequences for third parties, including third parties present in any transaction negotiated or structured through agents. To the extent contract law is relatively unreceptive to informal arrangements that are not reflected in the parties' formal agreement, it reduces the risk borne by a person who deals with others through an agent.¹³ A principal whose agent exceeds his actual authority may be bound to transactions if the agent appeared to the counterparty to be authorized on the basis of the principal's own manifestations or conduct, which include placing the agent in a position that customarily carries specific types of authority.¹⁴ Informal understandings the agent reaches with a counterparty thus may bind the principal if the agent reasonably appears to be authorized. Contractual form may help the principal reduce this risk. The written agreement between the principal and the counterparty—the lender and the borrower in my example—may provide that only the principal has authority to modify or waive compliance with terms in the written agreement. Such a provision makes the counterparty's reliance on the agent's apparent authority to waive or modify less likely to be reasonable.¹⁵ But form's effect is limited. Countervailing doctrines that are less formal, like estoppel, are applicable when the principal appears to make opportunistic use of form. A principal who constructs a business organization such that its agents

¹¹ For an argument along these lines, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996).

¹² As Professor Greenawalt's article demonstrates, even the literal meaning of straightforward language can be open to serious dispute, depending in particular on the degree to which the interpretative task should be contextualized. Kent Greenawalt, *From the Bottom Up*, 82 CORNELL L. REV. 994, 1020-22 (1997).

¹³ See Bernstein, *supra* note 11, at 1817 (discussing the benefits visited upon large grain companies by arbitrators' refusal to imply missing terms into written contracts).

¹⁴ See RESTATEMENT (SECOND) OF AGENCY § 27 cmt. a (1958).

¹⁵ A provision in the written agreement that simply requires modifications to be in writing—a gag clause—is less likely to be successful in reducing the principal's risk because it does not address the agent's apparent authority to execute written modifications or the agent's apparent authority to waive compliance with the gag clause. See, e.g., *Menard & Co. Masonry Bldg. Contractors v. Marshall Bldg. Sys., Inc.*, 539 A.2d 523, 525-27 (R.I. 1988).

appear to have authority could be estopped from using the agent's lack of actual authority as a defense.¹⁶ Were that not the case, the principal could knowingly permit its "apparent" agent to proceed with a transaction, planning all along to disavow the transaction if it later appeared disadvantageous, but to ratify and adopt the transaction if it turned out to be advantageous.¹⁷ Less formal doctrines constrain the principal's ability to exploit form by using it in a calculated way beyond its protective function.

III

THE VALUE OF UNCERTAINTY

Form itself does not explain why parties choose among alternative formulations, assuming that the formulation chosen meets basic—often very basic—legal criteria. Form, as Lon L. Fuller explained, serves a channelling function,¹⁸ but, by itself, form may explain little of interest beyond that basic choice. Some parties prefer to structure relationships to enhance uncertainty, a quality believed antithetical to form. Consider first an example from the realm of estate planning. A wealthy individual (Amy) has a devoted spouse (Bruce) and several children from a prior marriage. Amy has attained the age when it has become realistic to make provisions in anticipation of her inevitable demise. Formal legal requisites channel Amy's basic choices. For example, Amy may not use as her basic estate planning device a simple power of attorney that gives Bruce authority to dispose of her property after her death, including authority to make gifts of the property and gifts to himself. The agency that the power creates terminates upon Amy's death, which terminates Bruce's authority, including any post-mortem authority to bind Amy's estate once Bruce has notice of Amy's death.¹⁹ That the law requires Amy to use a will or a legally effective will substitute illustrates the channelling function of form; specifics of the form—like attestation—illustrate the mandated form's cautionary function as well.²⁰ But surely it cannot be that the law regarding wills is in a general sense preferable to that governing agency, or contracts, simply because it contains more formal elements. Indeed, specific formal elements—like attestation—are not self-justifying. Their justification stems from the specific context—

¹⁶ See RESTATEMENT (SECOND) OF AGENCY § 8B (1958).

¹⁷ See, e.g., *Cinema N. Corp. v. Plaza at Latham Assocs.*, 867 F.2d 135, 140-42 (2d Cir. 1989).

¹⁸ Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801-03 (1941).

¹⁹ See RESTATEMENT (SECOND) OF AGENCY § 120 (1958) (stating the common law position). Under the common law of agency, a principal's loss of capacity has the same effect as the principal's death. *Id.* § 122. Statutes in many states authorize the execution of durable powers of attorney, structured to survive the principal's loss of capacity.

²⁰ See Fuller, *supra* note 18, at 800.

post-mortem dispositions of property—and their functions should serve ends dictated by that context.

Beyond these basics, Amy considers two alternatives, which we shall assume are equally attractive in their tax impact on Amy's estate. In Instrument *A*, Amy leaves her property outright to specific named beneficiaries, who are Bruce and her children. In Instrument *B*, Amy leaves Bruce a life interest in her property with a power to appoint the property, as he sees fit, among her children. Instrument *B* is less definite than is Instrument *A* in its direction of the ultimate disposition of Amy's property. It may be more attractive to Amy if she wishes to induce her children to be nice—indeed to compete in niceness—toward their stepfather, Bruce.

Consider next a related example drawn from the employment context. Suppose a corporation's directors are structuring their relationship with a new Chief Executive Officer (CEO) and are considering two alternative employment agreements. Both agreements specify a fixed term and further provide that the CEO may be discharged only for cause. Agreement *A* defines "cause" in detail²¹ while Agreement *B* does not. All else being equal, the CEO is likely to be more receptive to the directors' suggestions, and perhaps likely to work harder, if Agreement *B* is chosen.²²

As these examples illustrate, uncertainty is sometimes preferable to greater definiteness because it influences behavior. Uncertainty is especially attractive when parties cannot fully specify the desired benefit in all details. This feature is evident also in selected rules of law, beyond the realm of private parties' choices, that embody general standards or principles applicable to conduct rather than particularized rules. In many bodies of private law, such norms coexist, always a bit uneasily, with the formal structures the law facilitates. In corporate law, for example, formal structures created in compliance with corporation statutes invest discretion in individual actors, most notably in the corporation's directors. Corporate law has long reflected accommodations between such formal allocations of discretion and the fiduciary duty of loyalty, which constrains the self-interested use of discretion. The specific content of the duty does not lend itself to advance specification, either in private contracts or legal rules, be-

²¹ For an example, see *Grimes v. Donald*, No. CIV.A. 13358, 1995 WL 54441 (Del. Ch. Jan 11, 1995), *aff'd*, 673 A.2d 1207 (Del. 1996).

²² Great uncertainty may be tolerable in the private employment context presupposed by this example, but not in other contexts. A criminal statute permitting indictment and trial "for cause," with no further specification, would violate the constitutionally guaranteed right to due process, which encompasses a requirement of sufficient definiteness to identify the conduct that has been proscribed. See *Jordan v. DeGeorge*, 341 U.S. 223, 230 (1950) (stating that "[t]he essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct").

cause the requirements of the duty vary with the circumstances in which the party subject to the duty exercises discretion.²³ In the corporate context, courts do not defer to the content of a decision made by a conflicted decisionmaker.²⁴ In contrast, directors' unconflicted decisions enjoy a broad protection from substantive judicial scrutiny into their merits.²⁵ Compliance with form—here the formal allocation of discretionary authority created by incorporation—does not make the decisions of a self-interested actor any more trustworthy.²⁶ Courts at times fret openly about the difficulty of determining whether any narrative of compliance with formal requirements—including those defining specific decisionmakers as independent—accurately portrays a reassuring reality or merely masks a disquieting state of affairs.²⁷ Some risk of substantive review is no doubt helpful in many instances, accompanied though it may be with costs. If it is inevitable that a court will review the merits of a transaction, awareness of that fact is likely to affect how parties structure the transaction.²⁸

IV

INDEPENDENCE ACHIEVED THROUGH FORM

As the corporate law example illustrates, within any body of private law, the consequences of compliance with form can be undermined by less formal doctrines. However, the degree of form's vulnerability to less formal doctrines is not constant. Consider the weight courts give to the legal fact of incorporation itself in the face of arguments that a particular corporation's formal existence should be disregarded. Such arguments are often directed toward the end of imposing individual liability on shareholders for obligations incurred by the corporation. Courts do on occasion pierce the corporate veil, but with much greater reluctance than they examine the substantive

²³ See Gillian K. Hadfield, *An Incomplete Contracting Perspective on Fiduciary Duty*, 28 CAN. BUS. L.J. 141, 142-43 (1997).

²⁴ See, e.g., *Marciano v. Nakash*, 535 A.2d 400, 403-04 (Del. 1987).

²⁵ See PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01 (Proposed Final Draft 1992).

²⁶ Cf. FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 152 (1991) (stating that the trustworthiness of the decisionmaker is a factor in the relative likelihood of erroneous decisions).

²⁷ See William T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 BUS. LAW. 2055 (1990) (examining independent committees of outside directors that are appointed when a corporation is for sale); see also *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788-89 (Del. 1981) (stating that the court has discretion to determine whether to accede to the recommendation of the special litigation committee, despite committee's compliance with procedural requirements, because the result may otherwise not satisfy the spirit of the requirements).

²⁸ See, e.g., *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937-38 (Del. 1985) (stating that the structure of the merger transaction established fair detailing).

merits of decisions made by self-interested directors.²⁹ Why the variation? Perhaps shareholders' limited liability—truly achievable only through the formal channels created by a corporation statute or other comparable legislation³⁰—is more closely tied to the central or defining elements of the legal form itself. That is, the point of corporation legislation is to create an entity separate from the legal personality of its owners, not to facilitate self-dealing by persons in control of the entity. To characterize the point of a legally constructed form may require giving form some independent significance, separate from the more instrumentally oriented factors that bear upon the appropriateness of the form. For example, it would not be intelligible to speak of a "corporation" that is not in any sense a legal person separate from its owners.

Commercial law, similarly, varies in the extent to which the consequences of complying with a specified form are invulnerable to challenge on less formal grounds. Consider the marked differences between Article 2 of the UCC, which deals with sales of goods, and Article 5, which deals with letter of credit transactions. Under Article 2, a buyer's duty to accept and pay for goods is contingent on many

²⁹ For an empirical examination of veil-piercing, see Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991). Professor Thompson's study found no cases in which courts pierced the veil to impose liability on shareholders in a publicly held corporation. *Id.* at 1047. Courts are more likely to pierce the veil when the plaintiff's claim is a contract claim than when it is a tort claim. *See id.* at 1058.

³⁰ Some commentators have claimed otherwise. *E.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 41 (1991) (stating that "[i]f limited liability were not the starting point in corporate law, firms would create it by contract"). To be sure, firms could try to replicate through contract the consequences of members' limited liability, but it is hard to see why such a contract would bind a nonparty. Ambitious accounts of corporate law in the contractualist style are antiformalist, at least on this point. For a further elaboration of this point, see Deborah A. DeMott, *Trust and Tension Within Corporations*, 81 CORNELL L. REV. 1308, 1312 n.18 (1996) (book review).

The broader significance of form within the law applicable to business organizations is open to question. Consider in this light the flexibility that contemporary corporation statutes afford shareholders to vary through agreement the norms otherwise applicable to their relationship. Some courts have been willing to treat shareholders' noncompliance with mandatory statutory formalities as insignificant when the content of the parties' agreement is clear and the agreement induced detrimental reliance. *See, e.g.*, *Zion v. Kurtz*, 405 N.E.2d 681, 685 (N.Y. 1980) (disregarding the failure to comply with the statutory requirement that the content of shareholder agreement be stated in a close corporation's certificate of incorporation). Should courts be hospitable to oral shareholders' agreements, given that corporation statutes impose a writing requirement? *See, e.g.*, DEL. CODE ANN. tit. 8, § 350 (1995). A closely related question is the significance to be given to informal interactions and patterns of conduct. *See supra* text accompanying notes 10-12. It is noteworthy that, under at least some statutes, a limited liability company does not require a written operating agreement, *see, e.g.*, UNIF. LIMITED LIABILITY CO. ACT § 103(a) (1995), while it has long been possible to structure a partnership relationship without a written partnership agreement. *See* UNIF. PARTNERSHIP ACT § 6 (1914). Even if the dominant contemporary vision of the corporation is increasingly contractualized, that fact does not establish the extent of connection between contemporary contract law and business associations law, nor does it answer all questions about the appropriate role of form.

circumstances external to any written agreement the parties may have. For example, under section 2-601, the buyer may reject goods that do not in any respect conform to the contract;³¹ section 2-608 permits the buyer, under some circumstances, to revoke its acceptance of nonconforming goods when the nonconformity impairs the goods' value to the buyer;³² and even as to accepted goods, section 2-714 gives the buyer an action for damages for loss resulting from the goods' nonconformity to the contract.³³ In marked contrast, Article 5 is structured around an independence principle that substantially divorces the obligation of the issuer of the credit to make payment from disputes arising out of the underlying transaction that is financed through the letter of credit. Within Article 5, much turns on form and formal compliance; under section 5-114, the issuer's obligation to honor a draft or demand for payment largely turns on whether the supporting documentation complies on its face with the terms of the credit.³⁴

A major challenge for the revisers of Article 5 has been to solidify the independence principle while satisfying the need to specify the terms of an exception for forged documents or "material fraud" by the beneficiary of the credit against its issuer or another party, including a party to an underlying transaction with the credit's beneficiary.³⁵ A broad exception erodes the independence principle because it facilitates recasting an alleged breach of contract into an alleged fraud.³⁶ Even granting the significance of the exception, though, form determines more in the law governing letter of credit transactions than in the law governing sales of goods. Letter of credit financing by its nature implicates the interests of parties beyond those of parties to the underlying transaction to be funded through the letter of credit. Form's dominance is unsurprising.³⁷

³¹ U.C.C. § 2-601 (1995). If the contract requires or authorizes the seller's performance in installments, the buyer may reject an installment when the nonconformity substantially impairs its value and cannot be cured. *See id.* § 2-612(2).

³² *Id.* § 2-608.

³³ *Id.* § 2-714.

³⁴ *Id.* § 5-114.

³⁵ *See* 3 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 26-10, at 185 (4th ed. 1995) (noting that two years of efforts by a coauthor of the treatise to produce a definition of fraud suitable for inclusion in the statute was unsuccessful).

³⁶ *Id.* at 177-78.

³⁷ To be sure, independence principles operate in areas defined by legal doctrines that lack the degree of formal elaboration and detachment that UCC Article 5 exemplifies. A pervasive question in the law of agency is the extent to which an agent's power to bind his principal to transactions with third parties should operate independently of the agent's fiduciary duty to the principal. If the agent's conduct in undertaking the transaction contravenes his duty of obedience to the principal, his duty of loyalty, or both, should the principal be bound to the third party? In business contexts courts have long recognized that, by appointing an agent authorized to engage in transactions, the principal assumed at least some risk of liability to third parties in transactions stemming from the agent's disobe-

Form is never totally invulnerable, even in transactions and practices that seem most quintessentially formal in character. The institution of paper money—especially that not backed by gold—is a strong example of a conventional form that has social and legal meaning, and thus great economic significance, wholly divorced from physical reality. It thus represents a type of “independence principle” at work in an even more robust fashion than does Article 5 of the UCC. John Searle’s account of institutional facts treats money as a quintessential example of collective imposition of function on a physical object—a piece of paper—that could not perform the function solely on account of its physical structure.³⁸ Although it does not feature in Professor Searle’s account, legal form unquestionably plays an essential role in constituting the institution of money. Professor Searle writes of the piece of paper in question, “When the Treasury says it is legal tender, they are *declaring* it to be legal tender, not announcing an empirical fact that it already is legal tender.”³⁹ It is, of course, the Treasury’s statutory authorization⁴⁰ by Congress⁴¹ to make such declarations that legitimates them. Moreover, a facility or taste for deeming one thing to have the consequences of another may reflect a habit of mind that is peculiarly lawyer-like.

Examined more closely, even the quintessential example of money illustrates that form’s significance is not absolute. The symbolic and functional aspects of money are not wholly determined by form, even by legally prescribed form. However strong its conventional force, paper money can quickly lose all of its assigned or socially constructed value, and become worth no more than the paper itself. Public confidence among citizens of Zaire in their government was recently so low that money newly printed to pay soldiers reportedly could not even be given away.⁴² Apart from the government’s mani-

dient or disloyal conduct. See RESTATEMENT (SECOND) OF AGENCY § 165 (1958) (principal’s liability on transactions entered into by disloyal agent); *id.* § 161 (principal’s liability for general agent’s unauthorized acts).

³⁸ JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 41-43 (1995).

³⁹ *Id.* at 55.

⁴⁰ Under 31 U.S.C. § 5114(a), the Secretary of the Treasury must “engrave and print United States currency and bonds of the United States Government.” *Id.* § 5114(a). Subsection (b) specifies formal particulars, including the placement of “In God We Trust” where the Secretary decides appropriate. *Id.* § 5114(b). Only the portrait of a deceased individual may appear on the currency, and the individual’s name must be inscribed below the portrait. See *id.* Under § 5103, “United States coins and currency (including Federal Reserve notes . . .) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts.” *Id.* § 5103.

⁴¹ Article I of the Constitution establishes Congress’s legislative authority “[t]o borrow Money on the credit of the United States” and “[t]o coin Money, [and] regulate the Value thereof.” U.S. CONST. art. I, § 8, cls. 2 & 5.

⁴² See Howard W. French, *Hard Times for Zaire: It Can’t Give Cash Away*, N.Y. TIMES, Feb. 16, 1997, § 1, at 9 (int’l ed.).

fest financial problems, to accept payment in money it printed would symbolically attest to the government's legitimacy.

A separate consideration is whether money's conventional and functional aspects might override its formally defined requisites. Consider in this light the limitation on illustrations on United States currency contained in 31 U.S.C. § 5114(b), which prohibits using the portrait on currency of any individual who is not "deceased," a circumstance presumably to be determined as of the time the Treasury prints or releases the currency.⁴³ If the Treasury, through oversight, prints currency carrying the portrait of a living individual, is the currency money? The long-established social practice of paying debts with paper currency might continue, detached from the formal legal infirmity that, undetected, is only a tree falling unnoticed in a jurisprudential forest. Once the formal invalidity of the misillustrated currency is noticed, should persons who paid debts using it be required to pay again? If so, creditors who accepted payment and then spent the "money" themselves would be unjustly enriched. And the functional need for stability in private-sector transactions would surely dictate a curative amendment to the legislation.⁴⁴ Form would otherwise defeat function, not support or facilitate it.

CONCLUSION

Legally specified form underlies the law's inventive effects, its elements that facilitate private-sector social institutions. Form is, additionally, an essential defining element within such institutions. The examples explored in this Article illustrate that form's bite is often blunted by less formal legal doctrines that restrict its significance or attempt to regulate its abuse.

⁴³ 31 U.S.C. § 5114(b).

⁴⁴ Section 5114(b) is a prohibition imposed by statute, not by the Constitution. Thus, legislative fixes are more feasible in this situation than they are for acts that violate various of the Constitution's more formal strictures, such as the Emoluments Clause and the Incompatibility Clause. See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994) (discussing the Incompatibility Clause); John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89 (1995) (arguing that the Constitution does not permit a legislative fix to cure the constitutional disability imposed upon members of Congress by the Emoluments Clause).