

UNOFFICIAL OFFICIAL COMMENTS

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I. INTRODUCTION

“[C]ourts take to the comments like ducks to water.”¹ In fact, other than precedent directly on point, “courts are more influenced by the Official Comments than by any other thing.”² But despite the great weight courts have given the Official Comments of the Uniform Commercial Code (UCC), the drafters of the UCC originally intended the Official Comments to carry even greater weight.³ While courts continue to give the Official Comments near-textual status, academics have debated exactly how authoritative the comments are.

This Note will argue that, under the “plain meaning” theory of statutory interpretation advanced by Justice Antonin Scalia, the Official Comments are not authoritative sources by which to interpret a statute. As a result, and like legislative history, their use to interpret text should be avoided. Indeed, the status of the Official Comments rises only to that of a respected treatise. While a treatise may be properly considered when interpreting a statute, courts and academics alike have afforded the Official Comments more authority than reason and the U.S. Constitution permit.

In Section II, this Note will briefly discuss the plain meaning theory and its Godfather, Justice Scalia. This is not an exhaustive attempt to explain the theory, but merely an overview of its fundamental aspects.⁴ As the leading proponent of plain meaning theory, Justice Scalia and his reasoning will be relied upon heavily. Furthermore, while Justice Scalia’s method of interpretation goes by many names, I will refer to it as plain meaning theory.

1. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE: SECURED TRANSACTIONS 13 (West 5th ed. 2000).

2. 1 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 1-102:10, at 1-52 (1982) (citing dozens of cases); see also Sean Michael Hannaway, Note, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 975 (1990) (“In the great majority of cases, courts cite the Comments to support the application or purpose described in them.”).

3. Hannaway, *supra* note 2, at 967.

4. For a more thorough description of plain meaning theory, see especially Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997).

While this Note is applicable to the use of official comments generally, I will narrow my focus to the Official Comments of the UCC. Section III will explain this decision and explain the particular importance the Official Comments play in the structure of the UCC as compared to other statutory schemes.

Section IV explains that this Note's application of plain meaning theory to the Official Comments is limited to those states that have not enacted the Official Comments as a part of the relevant statute.

Finally, Section V will apply plain meaning theory to the Official Comments of the UCC. In this section, I will argue that the Official Comments hold no authoritative value when interpreting the text of a statute. Accordingly, just as plain meaning theorists avoid looking to legislative intent and using legislative history to evince the meaning of a statute, so too should plain meaning theorists avoid the use of the Official Comments when interpreting the UCC.

II. JUSTICE SCALIA'S PLAIN MEANING THEORY

Justice Scalia's method of interpretation is best summarized as looking for "the original meaning of the text, not what the original draftsmen intended."⁵ Like Alexander Hamilton's search for the "common-sense[,] . . . natural[,] and obvious" meaning of the text being interpreted,⁶ Justice Scalia seeks out the "plain meaning" of the text.⁷ Some may refer to this as "strict constructionism,"⁸ but Justice Scalia explains that "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means."⁹

A hallmark of Justice Scalia's plain meaning theory is its abstention from examining legislative intent—that is, the intent of those who drafted the statute—to determine the meaning of a text.¹⁰ Indeed, he describes government by unexpressed intent

5. *Id.* at 38.

6. THE FEDERALIST NO. 83, at 462–63 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (emphasis removed).

7. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 305–06 (2001) ("The plain meaning of the text reveals Congress' intent . . ."); *Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 334 (1994) ("plain meaning off this language").

8. Scalia, *supra* note 4, at 23.

9. *Id.*

10. *Id.* at 16–18.

as “tyrannical” and that “[i]t is the *law* that governs, not the intent of the lawgiver.”¹¹ A common method to determine legislative intent is to examine the legislative history of a statute; however, Justice Scalia believes that even if legislative intent were to be considered, legislative history is not even a good indicator of legislative intent, as it is “much more likely to produce a false or contrived legislative intent than a genuine one.”¹²

Justice Scalia’s justification for relying upon the plain meaning of a statute at the sacrifice of the legislative intent and history of a statute falls into two general categories: structural concerns and practical concerns.

Structurally, the constitutional process of enacting legislation forbids the use of legislative intent and history and requires reliance upon the meaning of the actual text when construing a statute. As Professor Laurence Tribe described it:

If an Act of Congress would be deemed to mean X but for some body of extratextual evidence adduced to show that one or more lawmakers in the House or Senate hoped, expected, assumed, or feared that the enacted text would instead achieve Y, then giving binding legal effect to that body of evidence so as to *transmute* X into Y would, in a fairly strong sense, circumvent the only process by which, under Article I of the United States Constitution, federal legislation may be enacted.¹³

Under Professor Tribe’s example, a majority has spoken only to X, yet some attempt to attribute the force of law to a position, Y, expounded by only a few. Not only does this undermine the majority requirement necessary to pass legislation, but Justice Scalia expresses grave doubt about whether the details set forth in a committee report—a common way to adduce legislative history—ever “come to the attention of, much less are approved by,¹⁴ the house which enacts the committee’s bill.”¹⁵ The reason

11. *Id.* at 17.

12. *Id.* at 31–32.

13. Laurence H. Tribe, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, *supra* note 4, at 74.

14. Indeed, committee reports are so thoroughly ignored by legislators that references to cases could be, according to Justice Scalia, inserted [into the committee report], at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.

why “[i]t is the *law* that governs, not the intent of the lawgiver”¹⁶ or any other source that may claim to evince that intent is because it is only “the law” that has traveled through the constitutionally prescribed rigors of lawmaking. It is only through those rigors that a bill can earn the constitutional safeguards necessary to achieve the force of law. On the other hand, varying sources of legislative history are only along for the ride, able to avoid the rigors the statutory language must go through. Consequently, the constitutional safeguards necessary to endue these alternative sources with the force of law simply do not exist. The result of these structural deficiencies is a method of interpretation inconsistent with democratic theory and the principle that we have a government of laws, not of men.¹⁷

Practically, the reliance upon legislative intent and history to interpret a statute has its own unique set of problems. As Justice Scalia described it, “the quest for the ‘genuine’ legislative intent is probably a wild goose chase anyway. In the vast majority of cases I expect that Congress *neither* . . . intended a single result, *nor* . . . [thought] about the matter at all.”¹⁸ Indeed, the fact that legislators vote on laws for many different reasons—because it is good policy, to make amends with a faction of his party, to earn votes for another bill, as a favor, or for a host of other political reasons—makes it impossible to determine what the collective “intent” of several hundred legislators actually is.¹⁹ The use of legislative history to adduce that intent is more likely to confuse what that intent actually was, not to clarify it; thus, legislative history suffers from a certain level of “indeterminacy.”²⁰ Because of these problems, reliance on legislative intent allows judges to reach whatever conclusion they want, like “entering a crowded

Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring).

15. Hirschey v. Fed. Energy Regulatory Com., 777 F.2d 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring); see also Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 620 (1991) (Scalia, J., concurring) (explaining that committee reports do “not necessarily say anything about what Congress as a whole thought”).

16. Scalia, *supra* note 4, at 17.

17. JAMES B. STAAB, THE POLITICAL THOUGHT OF JUSTICE ANTONIN SCALIA (2006); see also Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.”).

18. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

19. Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting).

20. Conroy, 507 U.S. at 519.

cocktail party and looking over the heads of the guests for one's friends."²¹ Thus, judges become makers of law, not interpreters of law.

III. THE IMPORTANCE OF THE OFFICIAL COMMENTS

Drafters' comments to a statutory scheme are not unusual.²² This Note's criticism of the UCC's Official Comments is applicable to the very idea of official comments generally.²³ However, this Note will focus its criticism on the UCC's Official Comments. More so than most other official comments, the Official Comments to the UCC were specifically designed to play an important role in the interpretation of the UCC. This feature magnifies the problem from which most official comments suffer and makes the UCC an ideal vehicle through which to explain the problem.

A key concern of the UCC, as the name suggests, was—and is—the uniform application of the law.²⁴ As Karl Llewellyn—the impetus behind the initial creation of the UCC—noted: “Reasonably uniform interpretation by judges of different schooling, learning and skill is tremendously furthered if the reason which guides application of the language is the same reason in all cases.”²⁵ But at the same time, Llewellyn “viewed law as dynamic; based not on unchangeable rules, but finding its meaning from the developing customs and traditions of society.”²⁶ As a result, the UCC is a very flexible legal code that even instructs courts to liberally construe and apply the Code.²⁷

21. *Id.* (quoting Judge Harold Leventhal); Scalia, *supra* note 4, at 17–18, 36.

22. Although they are sometimes labeled differently, such as the Notes of the Advisory Committee. *See, e.g.*, FED. R. CIV. P.; FED. R. EVID.

23. With the possible exception of statutory schemes like the Federal Rules of Civil Procedure, which do not need enacting legislation because, through the Rules Enabling Act, the Supreme Court has the power to enact the Rules by itself. *See infra* note 43 and accompanying text. The author takes no positions with respect to such statutory schemes.

24. U.C.C. § 9-701 cmt. (1999) (“[U]niformity is essential to the success of this Article . . . [; otherwise,] horrendous complications may arise.”). The author notes the irony of citing the Official Comment in a Note denouncing the use of the Official Comments in interpreting the UCC.

25. WHITE & SUMMERS, *supra* note 1, at 13 (quoting Personal Papers of Karl Llewellyn, Item J. VI 1, c. 5 (1944) (unpublished manuscript on file at the University of Chicago Law School)).

26. Hannaway, *supra* note 2, at 964 (citing WILLIAM L. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 177–79 (1973)).

27. U.C.C. § 1-102(1).

These two ideas—uniform yet flexible interpretation—seem antithetical, and to some extent they are, but above all else, Llewellyn appreciated the importance of context in interpreting any text, including statutes.²⁸ To help balance these competing interests, the Official Comments were adopted. The adoption of the Official Comments helped alleviate this problem by providing uniform interpretation of the text²⁹ through three methods: (1) explaining how the section should be applied, (2) providing gap-filling provisions that suggest answers not already covered by the text, and (3) “selling” the specific section to the interpreter.³⁰ Indeed, writing shortly after the creation of the original UCC, Professor Robert Skilton explained that the drafters of the UCC specifically used the Official Comments as a guide to interpreting the UCC so that those comments could be viewed as a part of the legislative history.³¹ Because of this, the UCC is an ideal vehicle through which to examine the appropriateness of official comments more generally.

IV. ADOPTION OF THE OFFICIAL COMMENTS

This Note’s application of Justice Scalia’s plain meaning theory to the Official Comments is limited to those states that have not enacted the Official Comments as a part of the relevant statute. When the UCC was presented to the states for enactment, each state faced the decision of whether to enact (1)

28. John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 415 (2000). Despite critics’ insistence that plain meaning theory is too rigid, Justice Scalia is not opposed to using context to interpret a statute. Instead, Justice Scalia allows for “the totality of context” to take precedent “over a single word,” but only in extreme cases, such as the scrivener’s error. Scalia, *supra* note 4, at 20–21.

29. Szabo v. Vinton Motors, Inc., 630 F.2d 1, 4 (1st Cir. 1980); Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 599 (1966).

30. Skilton, *supra* note 29, at 608.

31. *Id.* at 603. There is some debate about whether official comments should generally be considered legislative history or otherwise. Compare *id.* and Sarah Howard Jenkins, *Revised Article 3: “[Revise] it Again, Sam”*, 36 HOUS. L. REV. 883, 887 (1999) (arguing that official comments should be deemed part of legislative history) and Breen, *supra* note 28, at 372 (noting that UCC conceived of Official Comments as a standardized legislative history) with *Unicomp, Inc. v. Elementis Pigments, Inc.*, 1999 WL 1995400, at *16 (D. Me., 1999) (mem. op.) (implying official comments not legislative history because not given as much weight as legislative history); see also *infra* notes 64–65 and accompanying text (discussing Llewellyn’s support of the Official Comments, but distaste for legislative intent generally, thus implying he did not view the Official Comments as evidence of legislative intent). The weight of modern authority, however, does appear to support the conclusion that official comments are a form of legislative history. Whether classified as legislative history or something else, the distinction is not important.

the entire UCC—including the Official Comments—as presented, (2) only the substantive law contained within the UCC—that is, the actual section, not the Official Comments, or (3) some assorted combination of both. Needless to say, state adoption of the UCC represents a hodge-podge of approaches.

Although an interesting endeavor, a state-by-state analysis of which Official Comments have been adopted as a part of the statutory language is not necessary for the purpose of this Note. Indeed, knowing whether even a majority of states have officially adopted all or some of the Official Comments is also not necessary for the purpose of this Note. Instead, the purpose of this Note is to apply plain meaning theory to the Official Comments of the UCC and to question whether the Official Comments should be used when interpreting the statute. Therefore, the exact extent to which state legislatures have enacted the Official Comments as a part of the actual statutory language is irrelevant; instead, only the fact that *some* Official Comments have *not* been officially enacted in at least *some* states is all that is relevant for this Note.

Nonetheless, the balance of authority does suggest that *most* states have *not* enacted the Official Comments as a part of their statutory law.³² Therefore, the scope of this Note is limited strictly to those Official Comments in those states that have *not* been officially adopted into statutory law. Unless otherwise stated, any reference of the Official Comments in this Note will be to those Official Comments not enacted by the states. For those Official Comments that have been enacted into law, I do not question the validity of using those Official Comments to interpret the statute.³³

32. See *Pride Hyundai, Inc. v. Chrysler Fin. Co., L.L.C.*, 369 F.3d 603, 614 (1st Cir. 2004) (“Most states . . . choose not to enact the Official Commentary to Code provisions . . .”) (citing 1 E. A. FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.9 (3d ed. 2004)); see also Timothy R. Zinnecker, *Pinzy Whimsy in the Eleventh Circuit: Reflections on In re Alphatech Systems, Inc.*, 40 GONZ. L. REV. 379, 413 n.224 (2004/2005) (“[M]ost state legislatures do not enact the official comments into law, the majority of courts view them as ‘highly persuasive authority.’”); Irma S. Russell, *Reinventing the Deal: A Sequential Approach to Analyzing Claims for Enforcement of Modified Sales Contracts*, 53 FLA. L. REV. 49, 51 n.2 (2001) (“[M]ost states do not adopt the official comments as part of the enactment of the [UCC]”); Henry Mather, *Firm Offers under the UCC and the CISG*, 105 DICK. L. REV. 31, 38 (2000) (“[I]n most states, the official comments are not enacted as statutory law”). *But see, e.g.*, Judy L. Woods, *UCC Law: Survey of 1999 Indiana Cases on the Uniform Commercial Code*, 33 IND. L. REV. 1611, 1612 (2000) (“[M]any states [have] adopted the official comments as part of their statutory enactments of the UCC”).

33. Indeed, despite still being called an “Official Comment,” that enacted “comment” is as much the law as any other part of the statute. Inasmuch as that official comment is

V. APPLICATION OF PLAIN MEANING THEORY TO THE OFFICIAL
COMMENTS

In light of courts' overwhelming reliance on the Official Comments,³⁴ the argument that plain meaning theory forbids the use of the Official Comments to interpret the UCC—or any other statute—is of particular importance. Justice Scalia expressly addressed the matter in his concurring opinion in *Tome v. United States*.³⁵ In *Tome*, the Court addressed the proper interpretation of Federal Rule of Evidence 801(d)(1)(B).³⁶ Although five members of the Court were able to agree on the Court's holding, only three other Justices—Justices Stevens, Souter, and Ginsburg—joined Justice Kennedy's reasoning that looked to the Advisory Committee Notes to the Federal Rules of Evidence to find the proper interpretation of Rule 801(d)(1)(B).³⁷ Instead, Justice Scalia wrote separately to argue that the Notes “bear no special authoritativeness as the work of the draftsmen.”³⁸ Justice Scalia argued that because the “purpose” or “intent” of the drafters of the Rule was irrelevant—the Rule “says what it says”—the Notes “bear no special authoritativeness,” despite admittedly being “persuasive scholarly commentaries.”³⁹

Professor Catherine Struve, however, criticizes Justice Scalia's disregard of the Notes.⁴⁰ First, Struve criticizes Justice Scalia for, prior to and after *Tome*, frequently joining or even writing opinions that openly rely upon the Notes.⁴¹ But Justice Scalia himself even admits as much, but that “[m]ore mature consideration has persuaded [him] that [it] is wrong.”⁴² More importantly, Struve argues that the use of the Advisory Committee Notes to interpret the Rule is permissible because

equally a part of the law, plain meaning theory would require the use of this language to interpret the text of that statute—it is “the law.” See Scalia, *supra* note 4, at 17.

34. See *supra* Part I.

35. 513 U.S. 150, 167–68 (1995) (Scalia, J., concurring).

36. *Id.* at 152.

37. *Id.* at 160–63.

38. *Id.* at 167.

39. *Id.* at 167–68.

40. Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1158–69 (2002).

41. *Id.* at 1163–65 (citing *Bus. Guides, Inc. v. Chromatic Commc'ns Enters.*, 498 U.S. 533, 555 (1991); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990)).

42. *Tome*, 513 U.S. at 167 (“I have previously acquiesced in, . . . and indeed myself engaged in, . . . similar use of the Advisory Committee Notes.”).

Congress had “delegated its authority to the rulemakers,” thus rendering the bicameral objection, as well as other textualist objections to the use of non-statutory sources to interpret the text, inapplicable.⁴³ However, putting aside whatever differences there may be in how the Federal Rules of Evidence and Federal Rules of Civil Procedure were actually adopted, Struve herself admits that because the UCC requires state enactment to obtain its authority, the substantial weight that courts give the Official Comments is vulnerable.⁴⁴

Plain meaning theory’s rejection of the Official Comments of the UCC, however, is not limited to Justice Scalia’s *Tome* decision and whatever internal limits to that decision that Struve may have pointed out. Instead, the Official Comments of the UCC should be rejected as an interpretive force because they suffer from the same structural and practical deficiencies as other forms of legislative history.

*A. Structural Issues Shared by the Official Comments and Ordinary
Legislative History*

The primary problem with the Official Comments of the UCC is that they lack the constitutionally prescribed authority to be binding law.⁴⁵ The actual sections of the UCC that have been enacted by the states were approved by a majority of two houses⁴⁶ and signed into law by that state’s governor.⁴⁷ Like the federal government, this is the only process through which the statutorily enacted state version of the UCC can achieve its binding authority as law. It is by going through these constitutional rigors that the actual sections of the UCC have earned the constitutional safeguards necessary to achieve the force of law.⁴⁸ However, like other forms of legislative history, the Official Comments do not travel through this same process. For example, the Official Comments are not officially presented to both chambers for consideration and they are not voted on or

43. Struve, *supra* note 40, at 1159–61.

44. *Id.* at 1158–59.

45. See *supra* notes 13–17 and accompanying text.

46. Or, in the case of Nebraska, one house. NEB. CONST. art. III, § 1.

47. Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 247 n.97 (2004).

48. See *supra* notes 13–17 and accompanying text.

approved by a majority of members. Because of this, the Official Comments have not achieved the force of law.

Not only do the Official Comments fail to meet the bicameral and majority requirements to obtain constitutional authority as law, but there is some doubt that the comments were even considered when the state legislature enacted the relevant statute. There seems to be some confusion on this issue. It seems likely that the Official Comments to the original draft of the UCC were not even placed before some of the legislatures prior to adopting the UCC,⁴⁹ despite the drafters' intent otherwise.⁵⁰ However, one must be careful not to conflate the fact that the Official Comments to the *original* UCC were not presented to legislatures with the idea that the comments to the *current* version of the UCC were not considered when legislatures most recently enacted the revised UCC. There is no evidence that the Official Comments were not available to the legislators who enacted the most recent versions of the UCC.⁵¹

However, regardless of whether the Official Comments were or were not available to the legislators, the question still remains whether those legislators actually took advantage of the Official Comments' presence and duly considered them.⁵² Legislators tend to focus more on the broad ideas set forth in a bill,⁵³ thus,

49. See, e.g., WHITE & SUMMERS, *supra* note 1, at 14 ("In some states the comments were not placed before the enacting body prior to adoption of the Code."); John C. Weistart, *Requirements and Output Contracts: Quantity Variations Under the UCC*, 1973 DUKE L.J. 599, 606-07 n.17 (1973) (in some states "it is highly doubtful that the Comments were laid before the legislators") (quoting A. FARNSWORTH & J. HONNOLD, CASES AND MATERIALS ON COMMERCIAL LAW 8-10 (2d ed. 1968); Skilton, *supra* note 29, at 604 ("[M]ost state legislators probably did not consider the comments when they enacted the text of the Code . . .").

50. Breen, *supra* note 28, at 372.

51. See Jenkins, *supra* note 31, at 887-88 ("Official Comments were 'clearly and prominently communicated' or were at least available to the various legislatures when the bills enacting the UCC were being considered . . .") (quoting 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 48.12 (5th ed. 1992)).

52. See *Hirschey v. Fed. Energy Regulatory Comm'n*, 777 F.2d 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring) (doubtful that details come to attention of the enacting chamber). Admittedly, there is some doubt whether some legislators even duly consider the actual *text* of a bill, yet alone any official comments that might accompany it. Nonetheless, for the sake of this Note, I will assume that legislators *do* duly consider the text of a bill, an assumption made throughout U.S. jurisprudence simply for the sake of our larger constitutional structure.

53. *Id.* It is true that the Official Comments of the UCC contain both broad statements of the purpose of the UCC and narrow details of the UCC. See *infra* note 62 and accompanying text. However, regardless of whether the Official Comments actually do provide the legislator with the broad analysis she is looking for, she is probably unlikely to look in the Official Comments for such analysis, assuming that they contain only details.

there is a good chance that regardless of the availability of the comments to the state legislators enacting the UCC, those comments were ignored. Thus, not only do the Official Comments fail to travel through the constitutional rigors necessary to achieve the force of law, but legislators may not even contemplate the Official Comments at all when enacting the actual sections of the UCC. As a result, it is improper to use the Official Comments as a source of legislative intent; therefore, they should not be used to interpret the UCC.⁵⁴

Some would argue that, under plain meaning theory, the judicial use of common law and precedent is equally susceptible to these structural deficiencies.⁵⁵ Indeed it is. Justice Scalia does not hide his concern with the common law. However, his concern rests not with whether judges can continue to develop the law outside of the confines of democratic lawmaking⁵⁶ but instead with the *attitude* of the common-law judge—that is, that judges decide a case with “the mind-set that asks, ‘What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?’”⁵⁷ The same attitudinal concern is present with the Official Comments because they are commonly used in a manner that allows judges to reach whatever conclusion that judge desires.

Similarly, Justice Scalia’s plain meaning theory makes room to accommodate the doctrine of stare decisis.⁵⁸ Justice Scalia accepts the fact that no theory of interpretation, including plain meaning theory, can “remake the world anew.”⁵⁹ Instead, where plain meaning theory “will make a difference is not in the rolling back of accepted old principles . . . but in the rejection of usurpatious new ones.”⁶⁰ Plain meaning theory is not as rigid as its critics would have it.⁶¹ Accordingly, perhaps it is too late to undo the improper use of the Official Comments in the thousands of cases that have interpreted the UCC. However,

54. *But see* Hannaway, *supra* note 2 at 985–86 (despite arguing that the Official Comments *are* authoritative, the author conflates the meaning of authoritative and persuasive).

55. *Id.* at 985.

56. Scalia, *supra* note 4, at 12.

57. *Id.* at 13.

58. *Id.* at 139.

59. *Id.*

60. *Id.*

61. *Id.* at 20–21 (allowing for “the totality of context” to take precedent “over a single word”).

issues that are yet to be discovered and commented on by courts will inevitably arise. Further still, each time the UCC is revised and newly adopted—not to mention future unrelated statutory schemes that will make use of official comments or notes—the question arises anew of whether those comments should be used to interpret that statute. It is these areas in which plain meaning theorists should be primarily concerned.

B. *Structural Issues Unique to the Official Comments*

Beyond the structural deficiencies that plague both the Official Comments and the common-law attitude of modern judges, a unique structural deficiency of the Official Comments is found within their actual substance:

[T]he comments depart from the text in two different ways. They sometimes expand on, and therefore go beyond the text, and they sometimes restrict or narrow the meaning of the text. The explanation for this is partly political. When opponents of a draft section prevailed against the drafters, the drafters would sometimes revise the draft accordingly, *but seek to preserve the old draft in the comments.*⁶²

Therefore, according to White and Summers—who were citing Llewellyn—when judges look to the Official Comments to interpret the statute, those judges are reading into the law an idea actually rejected by a majority of the drafters of the UCC!⁶³ To draw an analogy, this is akin to the minority party in Congress—after having its legislation substantially amended (and later passed into law) by the majority—inserting into the committee reports or some other form of legislative history their defeated language of the bill, and then a judge using that defeated language in the committee report to interpret the statute. The result is obvious and shocking: the hypothetical judge would be reading the statute in a manner explicitly rejected by a majority of Congress. In this light, it is almost astonishing that any judge would rely on the Official Comments to interpret the text.

Ironically, Llewellyn turned to the Official Comments as an interpretive tool because he too *rejected* the use of legislative

62. WHITE & SUMMERS, *supra* note 1, at 13–14 (emphasis added) (citing Karl Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 782 (1953)).

63. *See id.*

intent to interpret a statute.⁶⁴ Although he did not completely dismiss the idea of legislative intent, Llewellyn feared that as a statute aged, the legislative intent would act as an anchor limiting the interpretation of a statute to how it was intended instead of allowing it to grow and adapt to developing customs and traditions.⁶⁵ Justice Scalia, in contrast, believes that looking to legislative intent allows for too *much* flexibility and that judges can hide behind legislative intent to reach whatever decision that judge desires.⁶⁶ Despite the debate over whether official comments generally are best characterized as legislative history to be used to evince legislative intent or otherwise,⁶⁷ Llewellyn's distaste for legislative intent implies that he believed that the Official Comments were not evidence of legislative intent. But if the Official Comments are not legislative history, then that makes the argument against using them to interpret a statute even stronger, as the Official Comments are even further away from the constitutional authority to make law. This peculiar irony illustrates the very fundamental difference between Justice Scalia and Llewellyn: the value of formalism. Whereas Llewellyn feared formalism and used the Official Comments to, in part, avoid the formalistic application of the text of the UCC,⁶⁸ Justice Scalia, valuing predictability of law, proclaims "long live formalism."⁶⁹

Like ordinary legislative history and intent, the Official Comments of the UCC suffer from many of the same structural deficiencies.⁷⁰ As a result, plain meaning theorists should reject the notion of using the Official Comments to evince the intent of the drafters and interpret the UCC.

C. Practical Issues in the Use of the Official Comments

Many of the practical concerns that plague the use of legislative intent and history also plague the use of the Official

64. Breen, *supra* note 28, at 384.

65. *Id.* at 384–85.

66. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring); Scalia, *supra* note 4, at 17–18, 36.

67. *See supra* note 31.

68. Breen, *supra* note 28, at 385.

69. Scalia, *supra* note 4, at 25.

70. Indeed, the Official Comments are arguably in a weaker position than normal sources of legislative history. Unlike committee reports, for example, the drafting of the Official Comments was "neither undertaken at the request of the adopting legislature, nor subject to its review." Weistart, *supra* note 49, at 606–07 n.17.

Comments to interpret the UCC. However, because of the professionalism of the UCC drafters, the practical concerns with the Official Comments are admittedly not as worrying as with other forms of legislative history. Nonetheless, the concerns do still exist.

Like the drafters of normal statutes,⁷¹ the drafters of the UCC were subject to some of the same political pressures. Similar to legislators, the drafters of the UCC had the interests of concerned parties to worry about, and, because the drafts of the UCC were voted on, there is the ever-present concern that some would vote for one provision or comment not because he favored that principle, but to garner votes for provisions or comments he thought more important. Because of this, it is near impossible to evince the intent of the drafters of the UCC by studying comments that were subject to the same political pressures present in the normal legislative process. While UCC drafters can probably be more trusted to rise above these pressures than politicians drafting legislation,⁷² these pressures exist nonetheless.

Also, like a judge's ability to pick and choose from differing sources of legislative history to reach whatever conclusion he so desires,⁷³ judges interpreting the UCC have a bevy of comments from which to choose. There are so many Official Comments to the UCC as a whole that some comments—perhaps unavoidably—contradict others.⁷⁴ Even within individual sections there are sometimes multiple comments that contradict each other or even a single comment that contradicts itself.⁷⁵ Furthermore, given the nature of the UCC—an interwoven web, constantly referencing other sections⁷⁶—the judge has the option of choosing from comments throughout the UCC to find support for his desired conclusion. Indeed, judges “have been

71. See *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting).

72. For example, a UCC drafter has a job—teaching, practicing, etc.—to which he can return. A politician, at least federally and in some states, does not have such a luxury. Turning a blind eye to these political pressures has the potential to end a politician's political career.

73. See *supra* note 21 and accompanying text.

74. See Marci Levine Klumb, Note, *Perfection of Security Interests in Intellectual Property: Federal Statutes Preempt Article 9*, 57 GEO. WASH. L. REV. 135, 137 n.20 (1988) (noting the potential contradiction between the comments of sections 9-104 and 9-302).

75. *Id.*

76. See, e.g., U.C.C. § 9-309(1) (explicitly referring reader to § 9-311 to determine perfection of purchase-money security interests in consumer goods).

relatively unconcerned with [this debate surrounding the appropriate use of the comments] and seem ready to cite any Comment which seems reasonably compatible with the text.”⁷⁷

As such, although the practical concerns surrounding the Official Comments to the UCC are muted as compared to the use of other methods of evincing legislative intent, these concerns do still exist. This too counsels against the use of the Official Comments to interpret the text of the UCC.

VI. CONCLUSION

Granted, modern American statutes are not designed to be complete but instead to act more as an overlay against the backdrop of the common law,⁷⁸ thus perhaps explaining Llewellyn’s desire for the Official Comments. Even in the best of circumstances, American statutory drafting has been criticized as especially poor.⁷⁹ While this has rendered the task of maintaining and applying a coherent theory of statutory interpretation more difficult, Justice Scalia exclaims that it has also rendered the task more important.⁸⁰ Plain meaning theory fortunately provides the tools to complete this task, and, as Godfather of the theory, Justice Scalia has brought the theory new respectability and increasing acceptance. Jurists, academics, politicians, and law students are well-versed in the basic arguments of why a judge should not look to legislative history or intent when interpreting a statute. However, although there has been some academic discussion of what the appropriate weight of official comments should generally be, there has been little discussion of how plain meaning theory should be applied to the use of official comments to interpret a statute. Moreover, judges nationwide continue to improperly attribute near-textual status to the Official Comments when interpreting the UCC. As I have shown, the use of the Official Comments to interpret the text of the UCC is incompatible with plain meaning theory, and, like a plain meaning theorist’s avoidance of legislative intent and history, so too should the Official Comments be avoided.

77. Weistart, *supra* note 49, at 606–07 n.17.

78. Mary Ann Glendon, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 4, at 97.

79. *Id.* at 95–96.

80. Antonin Scalia, *Response, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, *supra* note 4, at 143.