WRITINGS ON THE MARGIN OF AMERICAN LAW: COMMITTEE NOTES, COMMENTS, AND COMMENTARY

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I. INTRODUCTION

In United States v. Stinson\(^1\) the Eleventh Circuit held that unlawful possession of a firearm by a felon is, for sentencing purposes, categorically a "crime of violence."\(^2\) After this decision by the Court of Appeals, the Federal Sentencing Commission revised the commentary to Section 4B.1(2) of the sentencing guidelines by adding a sentence stating that "[t]he term ‘crime of violence’ does not include the offense of unlawful possession of a firearm by a felon."\(^3\) Stinson then petitioned for rehearing, arguing that the change in commentary should be given retroactive effect. Upon rehearing, the Eleventh Circuit noted that "[t]he Commission’s amendment did not alter the actual text of section 4B1.2; instead, it merely changed the commentary. The text of section 4B1.2 was exactly the same in October 1989, when appellant committed his offense, as it is now."\(^4\) The Court of Appeals did not decide the retroactivity issue, but instead held that it simply was not obliged to follow the commentary.\(^5\) In reversing the Eleventh Circuit’s decision, the Supreme Court held that "[t]he Circuit’s] conclusion that the commentary now being considered is not binding on the courts was error."\(^6\)

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1 943 F.2d 1268 (11th Cir. 1991).
2 Id. at 1273.
4 United States v. Stinson, 957 F.2d 813, 814 (11th Cir. 1992) (per curiam).
5 Id. at 815.
6 113 S. Ct. at 1917.

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The Supreme Court's remarkable deference to commentary in
Stinson is yet another example of the ever increasing authority
courts accord a comparatively new kind of legal material. These
writings typically take the form of "committee notes," "comments,"
or "commentary," (as in Stinson), all of which share two important
characteristics. First, they are the product of experts employed to
draft rules of procedure, statutes, sentencing guidelines, or similar
materials for possible governmental enactment. Second, although
these notes, comments, and commentary are not enacted, they bear
such a close relationship to the enacted rules, statutes, and
guidelines that they appear, at least in a metaphorical sense, on
the very margin, or between the lines, of American law.7

The chief practical issue posed by these glosses is what weight
courts should give to them. A more general question is whether
this product of American law reform is a desirable addition to our
stock of legal materials. Briefly stated, my answers are that courts
should assign little, if any, weight to these examples of gloss and
that these materials are not a desirable addition to American
jurisprudence. In this Article I will seek to justify these conclu-
sions, which are certain to be controversial because American
courts have taken to these materials "like ducks take to water."8
Despite this enthusiastic judicial response, little has been written
about this new class of legal materials, and particular forms of
gloss have attracted very little prior attention.9

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7 In fact, most publications place notes, comments, or commentaries immediately
following the specific rule or guideline to which they relate. See, e.g., the Advisory
Committee notes to FED. R. CIV. P., reprinted in FEDERAL CIVIL JUDICIAL PROCEDURE AND
RULES 17-233 (West 1993); comments to the 1990 text of the U.C.C., reprinted in UNIFORM
COMMERCIAL CODE: OFFICIAL TEXT, 1990 (West 1991); and commentary to FEDERAL
SENTENCING GUIDELINES, reprinted in FEDERAL SENTENCING GUIDELINES MANUAL 11-394
(West 1993).

8 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 4, at 12 (3d ed.
1988) (student ed.). The quotation refers to judicial use of the comments to the U.C.C., but
as will be seen from Parts III and IV of this Article, the same could be said of judicial
response to the notes of the Civil Rules Committee and the commentaries of the United
States Sentencing Commission.

9 One article and one note have been devoted to U.C.C. comments: Robert H. Skillton,
Some Comments on the Comments to The Uniform Commercial Code, 1966 WIS. L. REV. 597
(1966), and Sean M. Hannaway, Note, The Jurisprudence and Judicial Treatment of the

Brief discussion of U.C.C. comments can be found in WHITE & SUMMERS, supra note 8, § 4,
at 12-14 (3d ed. 1988) and Shael Herman, Llewellyn The Civilian: Speculations on the
These marginal writings date back to the occasional, brief "Commissioners' notes" prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL); however, the modern origin of gloss occurred about fifty years ago with the work of Charles Clark who was then reporter to the Federal Advisory Committee on Civil Rules. This beginning was modest, with the Advisory Committee specifying that Clark's notes "have no official sanction, and can have no controlling weight with the courts. . ." By 1947, however, the approach of the Committee (with Clark still acting as reporter) changed dramatically, and the notes took on an authoritative stance, strikingly illustrated by a series of notes offered without any accompanying proposed rule changes.

The development of gloss also received important support from Karl Llewellyn, who argued as early as 1933 that comments should accompany proposed uniform laws. Two decades later, Llewellyn became chief reporter for the Uniform Commercial Code project, and included in the 1949 draft text of the Code a provision that the Official Comments "may be consulted by the courts to determine the underlying reasons, purposes and policies of this Act and may be used as a guide in its construction and application". Eventually, the drafters amended this provision and ultimately dropped


11 See infra part II (discussing Clark's role on Rules Committee; describing evolution of notes).

12 Letter from Karl Llewellyn to John Vorhees (December 1933), cited in Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 165 (1941).


14 This provision remained intact until the spring of 1950, U.C.C. § 1-102(2) (Proposed Final Draft 1950), but was revised within a year. See U.C.C. § 1-102(3)(f) (Proposed Final Draft No. 2, 1951); U.C.C. § 1.102(3)(f) (Official Draft 1952).
it. Nevertheless, the comments that Llewellyn and associate chief reporter Soia Mentschikoff wrote for Articles 1 and 2 took authoritative stances which command attention. The Sentencing Commission set a new standard for gloss by producing, under the general rubric of "commentary," four varieties of marginal writing: "statutory provisions," "application notes," "background," and "historical notes."

These writings ought to have either formal or functional justification if they are to be used authoritatively by courts. Justice Kennedy's opinion in Stinson provides a useful starting point for considering a formal justification of marginal writings, and gives some help in considering functional tests. The Kennedy opinion employs three analogies that are useful in testing the formal sufficiency of marginal writings. In my view, these marginal writings do not fit any of Justice Kennedy's analogies and therefore lack formal justification. Two of Justice Kennedy's analogies are drawn from administrative law and suggest that marginal materials evince an early commitment to expertise which is now discredited. The traditional functional argument for marginal writing contends that the production and distribution of these expert views promotes uniformity. Uniformity, however, is a goal that suffers from contemporary criticism by commentators on commercial and procedural law and is generally less important in federal contexts because of Supreme Court review. Justice Kennedy's administrative analogies do help focus on a functional risk posed by these

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17 See, e.g., infra note 135 (displaying examples of Sentencing Commission's use of commentary).


19 See infra notes 183-190 and accompanying text (discussing critique of goal of uniformity).
writings, which is that the very limited agenda of the bodies which produce gloss may invite special interests to seek private benefits through the content of marginal writings. Recent analysis of private groups which produce gloss suggests a very similar risk of interest group influence. Judicial reliance on marginal writings may block important public benefits which are predictable from independent judicial action.

II. COMMITTEE NOTES

During June 1934, Congress approved the Rules Enabling Act which provided that the Supreme Court "shall have the power to prescribe, by general rules, for the district courts . . . practice and procedure in civil actions. . ." A year later the Court established an Advisory Committee with the mission of proposing uniform civil rules. Charles Clark, then dean of the Yale Law School, was appointed reporter for the committee and work began almost at once. In May, 1936, the Advisory Committee published a preliminary draft of the rules in order to obtain comments from judges and lawyers. A "[n]ote," which typically provided information about the rule's antecedents, accompanied each proposed rule in the preliminary draft. The exact origin of

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21 Burbank, supra note 20, at 1132.


23 Id. at 775. For an account of the lobbying by Clark that led to his appointment as reporter, see Stephen N. Subrin, Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules, in JUDGE CHARLES EDWARD CLARK 115, 132-38 (Peninah Petruck ed., 1991); see also Robert G. Bone, Mapping the Boundaries of A Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules, 89 COLUM. L. REV. 1, 80 (1989) ("Charles Clark was perhaps the single most important figure in the drafting of the 1938 Federal Rules of Civil Procedure and one of the most active participants in the ultimately successful campaign for their adoption."). Edson Sunderland and a staff including James William Moore rendered significant drafting assistance to Clark. Id. at 81 n.261.


25 See, e.g., id. at 2 (containing note to proposed Rule 2), 9-10 (containing note to proposed Rule 4), 11-12 (containing note to proposed Rule 5).
this note format is unclear, but several probable sources exist. Likely precursors include the Commissioners on Uniform Laws early proposals, which were occasionally accompanied by “Commissioners’ notes.” The style of the Commissioners’ note is generally similar to the earliest “Notes” authored by Charles Clark, and both seem intended to describe sources and, sometimes, to predict consequences. Another possible model is the early restatement format employed by the American Law Institute. These restatements included “comments” as well as “illustrations,” which were

25 Id.


29 See Notes to the Rules of Civil Procedure for the District Courts of the United States at vii, reprinted in Rules of Civil Procedure for the District Courts of the United States (with Index and Notes to the Rules) 215 (1939) (“Notes to the Federal Rules of Civil Procedure were prepared by the Reporter, Dean Clark, and his staff. . .”).

29 For example, similarities are shown by a comparison of the “Commissioners’ notes” appearing in the Unif. Conditional Sales Act, 2 U.L.A. (1922), with the “Notes” found in the Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia (Preliminary Draft May 1936). There are, of course, differences which this same comparison also reveals. For example, “Commissioners’ notes” are not found after each section of the Act; “Notes,” on the other hand, appear after every proposed rule. “Commissioners’ notes” are also terse, compared to Clark’s “Notes.”

30 Chief Justice Charles Evans Hughes told the American Law Institute at its fourteenth annual meeting that “[t]he Advisory Committee on Rules has drawn its spirit and organization from your example.” Chief Justice Hughes, Address before the American Law Institute (May 7, 1936), in 22 A.B.A. J. 374, 375 (1936). Twelve years earlier, ALI Director William Draper Lewis had explained that each Restatement would contain three parts: Principles of Law, Comments, and Illustrations. Each comment would include “explanations of the reasons for the Principle and the direct statements of law. . . .” William D. Lewis, Annual Report of the Director, 2 A.L.I. Proc. 11-12 (1924); see also William D. Lewis, The American Law Institute and Its Work, 24 Colum. L. Rev. 621, 625-26 (1924) (discussing purpose of comment-following principles). Herbert F. Goodrich, a professor at the University of Michigan Law School and chairman of the ALI’s committee on public relations, described the principle-comment-illustration format as “similar” to A.V. Dicey’s 1896 English treatise on conflict of laws. Herbert F. Goodrich, The American Law Institute to Date, 8 Or. L. Rev. 1, 4 (1929).
not a feature of Clark's notes.\(^{31}\)

The Advisory Committee also included notes in its report to the Supreme Court in April 1937.\(^{32}\) The style of these notes accompanying proposed rules was the same as the notes accompanying the initial draft. The Court approved the proposed rules in December 1937,\(^{33}\) and a few days later, forwarded the rules to Congress. In April 1938, the House of Representatives and the Senate resolved that "[n]otes to the Rules of Civil Procedure for the District Courts of the United States, prepared under the direction of the Advisory Committee on Rules for Civil Procedure, be printed as a House document. . . ."\(^{34}\) The document's introduction stated the following:

The notes in their revised form are now published by the Committee in order to preserve for the use of the profession material which the Reporter so industriously gathered during the two and one-half years of the Committee's service. . . . The notes are not part of the rules, and the Supreme Court has not approved or otherwise assumed responsibility for them. They have no official sanction, and can have no controlling weight with the courts, when applying the rules in litigated cases.\(^{35}\)

Congress took no other action concerning the rules, and they became effective on September 16, 1938.\(^{36}\)

After the Supreme Court approved the rules, the American Bar Association organized several institutes throughout the country to

\(^{31}\) The format described by Lewis in his 1924 Annual Report of the Director, supra note 30, remains the same today. See, e.g., RESTATEMENT (THIRD) OF TRUSTS (Prudent Investor Rule) (Proposed Final Draft 1990) (utilizing same format described in Lewis's report).

\(^{32}\) REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE (1937).


\(^{35}\) H.R. DOC. No. 588, 75th Cong., 3d Sess. vii (1938).

\(^{36}\) In the original rules, Rule 86 stated that "[t]hese rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938." H.R. DOC. No. 460, 75th Cong., 3rd Sess. 104 (1938).
introduce the new procedure.\textsuperscript{37} The first of these institutes was held at the Western Reserve University School of Law, in Cleve-
land.\textsuperscript{38} ABA president Arthur T. Vanderbilt noted in his foreword to the proceeding’s publication that the committee should direct its attention to the Advisory Committee’s disclaimer regarding the notes.\textsuperscript{39} United States Attorney General William Mitchell made a similar statement when speaking at the institute,\textsuperscript{40} and Charles Clark told the audience that the Supreme Court did not want members of the committee to write books about the federal rules because courts might give committee members’ views too much weight.\textsuperscript{41} Indeed, Clark said that he expected that the committee members would be surprised by the construction given some of the rules.\textsuperscript{42} Obviously, the expectation was a modest role for the Advisory Committee Notes.

There were important changes during the following decade. One

\textsuperscript{37} See Federal Rules Institutes Enjoying Widespread Popularity, 24 A.B.A. J. 887 (1938) (describing institutes held during summer and fall of 1938).


\textsuperscript{39} Id. at v-vi (“It is only fair to say that [Advisory Committee members have] requested that attention again be directed to the statement set forth in the Notes to the Rules . . . [that] ‘[t]hey have no official sanction, and can have no controlling weight with the courts . . .’.”).

\textsuperscript{40} Attorney General William Mitchell stated the following:
What is said here at this meeting by members of the Advisory Commit-
tee must be taken with a grain of salt, for two reasons. The first is that officially nobody but the justices of the Supreme Court know what these rules mean. We have no right to speak for them, and what they say about the rules ultimately will control.

Furthermore, I think it was Lord Bacon who said that a person who drafted a document was least qualified to interpret it, because he always had in mind what he intended to say rather than what he actually said.

\textit{Id.} at 179.

\textsuperscript{41} Specifically, Charles Clark stated as follows:
When the Supreme Court suggested that it felt it undesirable for members of the Advisory Committee to write books on the subject, it had in mind quite naturally that there might be undue weight given to expressions of opinion by members of the Committee, whereas, after all, the rules must be construed by the courts themselves.

\textit{Id.} at 195.

\textsuperscript{42} \textit{Id.} (“I expect that we members of the Committee may be surprised—as surprised as a parent perhaps is when his child grows up and grows away from him—to see some of the constructions these rules may receive. . .”).
key development was the enthusiasm exhibited by the federal courts for the committee members' views. The earliest published case citation to a note was in *John Hancock Mutual Life Insurance Co. v. Kegan*,43 a case actually decided before the rules became effective.44 The Supreme Court first cited a committee note in *Sprague v. Ticonic National Bank*,45 a case decided less than a year after the effective date of the Rules. This early judicial treatment of the notes was given strong support in January 1946 by the Supreme Court’s decision in *Mississippi Publishing Corp. v. Murphree*.46 In *Murphree*, the petitioner contended that Rule 4(f), which provides for service of process anywhere within the state where the district court is located, was inconsistent with Rule 82, which provides that the Rules “shall not be construed to extend or limit the jurisdiction of the district courts. . . .”47 The Court held that the two rules were not in conflict because Rule 4(f) addressed the problem of bringing a defendant to court while Rule 82 prohibited extension of subject matter jurisdiction. In reaching this conclusion, Chief Justice Stone wrote: “[I]n ascertaining [the Rules’] meaning the construction given to them by the Committee is of weight.”48

The second important development during this decade was the surprising interpretation of several key rules by some federal courts. The discovery rules furnish two strong examples. First, although the scope of discovery provision referred to material

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43 22 F. Supp. 326, 331 (D. Md. 1938) (discussing Committee note to proposed Rule 22 concerning interpleader in 1937 draft of proposed new rules).

44 *Kegan* was decided on Feb. 16, 1938. Id. at 326.

45 307 U.S. 161, 169-170 n.9 (1939). The Court noted that the old requirement that “a final decree in a suit in equity could be revised only during the term of court of its entry” had been abrogated by Rule 6(c). Id. The Court referred to the Advisory Committee note to Rule 6(c), which asserted that the new rule “eliminates the difficulties caused by the expiration of terms of court.” Id. at 170 n.9.


47 Id. at 443 (quoting FED. R. CIV. P. 82).

48 Id. at 444. In *Murphree*, the Committee’s “construction” of the Rules was not found in one or more notes, but instead was found in the statements of “authorized spokesmen for the Advisory Committee” at several Institutes held to explain the new Rules. Id. Subsequent courts, however, have viewed *Murphree* as a strong endorsement of the notes. See, e.g., *Schiavone v. Forte*, 477 U.S. 21, 31 (1986) (“Although the Advisory Committee’s comments do not foreclose judicial consideration of the Rule’s validity and meaning, the construction given by the Committee is ‘of weight.’”) (citing *Mississippi Publishing Corp. v. Murphree*).
“relevant and not privileged,” a number of courts construed the scope of discovery as, in effect, limited to material which would be “admissible.” Second, the Third Circuit held in *Hickman v. Taylor* that the term “privileged” included attorney work product although work product clearly was not within the traditional evidentiary concept of privilege because it does not necessarily involve a communication between a client and an attorney.

In June 1946, the Advisory Committee on Civil Rules proposed to the Supreme Court the first important amendments since the adoption of the Rules. The now familiar notes accompanied the proposal, but the character of these notes was remarkably different from that of the originals. Indeed, the report submitted to the Supreme Court by the Committee suggested in several instances that particular rules should remain unchanged, while the corresponding notes should be amended. The tone of the proposed

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49 See, e.g., Gitto v. “Italia”, Societa Anonima Di Navigazione, 31 F. Supp. 567 (E.D.N.Y. 1940) (barring “interrogatories directed to investigations made by the defendant [because they] would be hearsay and therefore inadmissible.”); Benevento v. A.&P. Food Stores, Inc., 26 F. Supp. 424 (E.D.N.Y. 1939) (holding that plaintiff suing store for injuries was not barred from discovering information regarding complaints about similar injuries because “test whether an examination before trial shall be permitted is whether or not the testimony would be admissible upon the trial of the action”); Rose Silk Mills, Inc. v. Insurance Co. of N. Am., 29 F. Supp. 504, 505 (S.D.N.Y. 1939) (barring discovery of statements secured by defendant’s investigator because the statements were “pure hearsay [the use of which] cannot be justified ‘either for the purpose of discovery or . . . as evidence.’ ”).

50 153 F.2d 212 (3d Cir. 1945).

51 Id. at 222-23.


53 U.S. SUPREME COURT REPORT OF THE PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 24-29 (1946) (Note accompanying Rule 23); id. at 58-59 (Note accompanying Rules 43 and 44); id. at 72 (Note accompanying Rule 55); id. at 85 (Note accompanying Rule 64); id. at 90 (Note accompanying Rule 69). Judge Clark used this technique again in 1955, when he included in a Committee report a Note explaining why the Committee had decided not to propose a change to Rule 8(a)(2), which required “[a] short and plain statement of the claim showing that the pleader is entitled to relief . . . .” U.S. SUPREME COURT REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18-19 (1955). The note began, “Rule 8(a)(2) is retained in its present form. This Note is appended to it in answer to various criticisms and suggestions for amendment which have been presented to
notes is authoritative, with its apparent aim being to correct what
the Committee and Clark viewed as erroneous constructions given
to the Rules. For example, the proposed notes rejected prior
readings of "relevancy" as "admissibility," and the Third Circuit's
decision in Hickman v. Taylor was rejected for extending the
concept of privilege to attorney work product. For Charles Clark
and the Advisory Committee, the notes apparently had become an
instrument of public policy. It is plausible that Clark's inspiration
to change stemmed from the Supreme Court's "surprising" judicial
treatment in Mississippi Publishing, an opinion that ascribed
"weight" to Committee Notes just months before announcement of
the 1946 proposals. Clark, by 1946 a judge on the Second Cir-
cuit, proceeded to demonstrate what he believed to be correct
usage of the notes. In at least two cases decided during 1947,
Clark cited a 1946 Committee note before the 1946 amendments
came effective, at least once provoking the reproval of his
occasional nemesis, Jerome Frank.

Since 1947, federal courts have cited the notes thousands of times
and often accorded them great weight. Committee notes to Rules
23(b)(3), 15(c), and 3 are among those most heavily relied upon by
the courts. For example, there were virtually no Rule 23(b)(3) class
actions in mass tort litigation for two decades because of a
particularly assertive note prepared at the time of the 1966 revision
of Rule 23. The note provided that "[a] 'mass accident' resulting

the Committee." Id. None of the 1955 proposals of the Advisory Committee was adopted.
54 U.S. SUPREME COURT REPORT OF THE PROPOSED AMENDMENTS TO RULES OF CIVIL
PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 35 (1946).
55 Id. at 44-47.
citing Advisory committee Note to proposed Rule 54(b)); Clark v. Taylor, 163 F.2d 940, 944
n.7 (2d Cir. 1947) (same).
58 The Supreme Court adopted the amendments at the end of 1946. Order, 329 U.S. 843
(Dec. 27, 1946). They were forwarded to Congress on January 3, 1947. 329 U.S. 842 (1946)
(copy of Attorney General's letter of submittal). The amendments did not become effective,
59 Clark, 163 F.2d at 951 n.12 (1947) (Frank, J., dissenting) ("I cannot agree with the
suggestion, twice made by my colleague Judge Clark ... that the amendment of Rule 54(b)
... has a bearing on cases decided before its effective date.").
at 603 (1988).
injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways."\textsuperscript{61} There is recent discussion of a major revision of Rule 23,\textsuperscript{62} partly, some have suggested, to eliminate decisively the lingering effect of this note.\textsuperscript{63}

The practice under Rule 15(c), prescribing the relation back of amendments, was dramatically affected by the decision in \textit{Schiavone v. Fortune}.\textsuperscript{64} In that case the Court relied on another particularly assertive note\textsuperscript{65} to determine that an amendment changing a defendant would not relate back unless the new party had notice of the action "within the applicable limitations period."\textsuperscript{66} Although the Rule itself did not refer to the statute of limitations, the note provided that an amendment would relate back if, within the applicable limitations period, the party brought in by amendment, first, received such notice of the institution of the action—the notice need not be formal—that he would not be prejudiced in defending the action, and, second, knew or should have known that the action would have been brought.

\textsuperscript{61} Id. at 211. For a description of how this note was developed, see Judith Resnik, From "Cases" to "Litigation," 54 LAW & CONTEMP. PROBS. 5, 7-15 (1991).
\textsuperscript{63} Id. at 26. The editors state:
So why the push for a substantial overhaul of Rule 23 now? Apparently the asbestos litigation, which has clogged the federal courts for years with hundreds of thousands of individual cases, provides the main impetus. And apparently certain judges, particularly Judge Sam Pointer of the Northern District of Alabama, who is the current Chairman of the Advisory Committee on Civil Rules, have concluded that there must be some way to handle these massive mass tort cases at least partially on a class action basis.

\textit{Id.}
\textsuperscript{64} 477 U.S. 21 (1986).
\textsuperscript{65} Id. at 30-31 (citing 1966 Advisory Committee note to FED. R. CIV. P. 15(c)).
\textsuperscript{66} Id. at 31.
against him initially had there not been a mistake concerning the identity of the proper party.\textsuperscript{67}

This outcome resulted in a 1991 amendment to Rule 15(c),\textsuperscript{63} adopting a practice that was plausible under the Rule language in force when \textit{Schiavone} was decided, and in fact quite similar to the construction proposed by the losing party in \textit{Schiavone}.\textsuperscript{63}

In \textit{Walker v. Armco Steel Corp.},\textsuperscript{70} the Court drew an inference from the omission of material from a note. The case involved the question of whether Rule 3, which provides that the filing of a complaint marks the commencement of an action, also provides for the tolling of a state statute of limitations by such a filing. Justice Marshall, relying in part on the \textit{failure} of the note to assert "that Rule 3 was intended to serve as a tolling provision,"\textsuperscript{71} concluded that "there is no indication that the Rule was intended to toll a state statute of limitations."\textsuperscript{72}

The note format that Judge Clark perfected is also employed in federal criminal procedure,\textsuperscript{73} appellate procedure,\textsuperscript{74} and bank-
ruptcy procedure. As with civil procedure, the courts have enthusiastically accepted the Committee notes. In the Watergate

Chief Justice Stone's letter postponing publication observed that

'[t]he Court's study of the proposed Criminal Rules has been without the aid of annotations such as were submitted to us with the first draft of the Civil Rules, which would appear to be needful to enable us to understand adequately many features of the rules both in point of form and substance."


The Committee responded to the Court by proposing notes which accompanied the two preliminary drafts that were published. See id. at 133 (First Preliminary Draft); IV DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 1 (Second Preliminary Draft). However, the final Committee Report had no notes. VII DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE 11 (Final Report). Then, virtually as a second project, the Committee turned to the preparation of what it referred to as "new Notes." Id. at 233. Not surprisingly, under these circumstances, the Committee included a strong disclaimer: "The Notes are not to be regarded as part of the Rules. They have been prepared without supervision or revision by the Supreme Court, and are not approved or sponsored by the Court. They have no official sanction and are intended merely as suggestions and guides." Id.

74 See Advisory Committee notes to FEDERAL RULES OF APPELLATE PROCEDURE, FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 308-352 (West 1993);

75 See Advisory Committee notes to FEDERAL RULES OF BANKRUPTCY PROCEEDING, BANKRUPTCY CODE, RULES AND FORMS 533-770 (West 1994). The Committee Notes to the Federal Rules of Evidence are categorically different because the Rules of Evidence were the result of positive legislative action and all of the original notes were available to Congress at the time the Rules were enacted. WEINSTEIN'S EVIDENCE MANUAL vii-xi (1987). As such, those notes are quite similar to ordinary legislative history. In Tome v. United States, 115 S. Ct. 696, 702 (1995), Justice Kennedy, writing for himself and three other justices, described the notes to the Rules of Evidence as "a useful guide in ascertaining the meaning of the Rules." Not surprisingly, Justice Scalia, although concurring in the judgment, wrote separately to object to Justice Kennedy's endorsement of the Notes. Id. at 706. Justice Scalia's critique would apparently extend to notes relating to materials not enacted by Congress.

It is the words of the Rules that have been authoritatively adopted—by this Court, or by Congress if it makes a statutory change . . . . The Notes are, to be sure, submitted to us and to the Members of Congress as the thoughts of the body initiating the recommendations . . . but there is no certainty that either we or they read those thoughts, nor is there any procedure by which we formally endorse or disclaim them. That being so, the Notes cannot, by some power inherent in the draftsmen, change the meaning that the Rules would otherwise bear.

Id.

76 See supra notes 43-48 and accompanying text (discussing courts' acceptance of notes accompanying rules of civil procedure).
Judge Sirica used the note to Rule 6(e) of the Federal Rules of Criminal Procedure to reject defense counsel's argument that the Rule prohibited release of a sealed grand jury report to the House Judiciary Committee.\textsuperscript{77} In \textit{Torres v. Oakland Scavenger Co.},\textsuperscript{79} Justice Marshall found support in the Advisory Committee note to Rule 3(c) of the Federal Rules of Appellate Procedure for the Court's holding that the requirement of specificity in the notice of appeal cannot be waived, even for good cause, because the note describes the requirement of the Rule as "jurisdictional" in nature.\textsuperscript{80} Similarly, in \textit{Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership},\textsuperscript{81} Justice White relied upon the Committee note to former Bankruptcy Rule 906(b) to infer that the current bankruptcy rules allowed courts to balance the interests of the parties and "accept late filings caused by inadverntence, mistake, or carelessness" when they deem such causes to be "excusable neglect."\textsuperscript{82}

\section*{III. Comments}

About the same time that Charles Clark was shepherding the development of the Committee note, another reformer, Karl Llewellyn, was undertaking a similar project. One product of Llewellyn's work was the Uniform Commercial Code,\textsuperscript{83} a set of commercial rules at least partially enacted in all fifty states.\textsuperscript{84} Llewellyn's interest in gloss apparently began with his appreciation of the vast influence that Samuel Williston exercised over the interpretation of the Uniform Sales Act which the Commissioners

\begin{itemize}
  \item \textsuperscript{78} \textit{Id.} at 1227-28.
  \item \textsuperscript{79} 487 U.S. 312 (1988).
  \item \textsuperscript{80} \textit{Id.} at 315.
  \item \textsuperscript{81} 113 S. Ct. 1489 (1993).
  \item \textsuperscript{82} \textit{Id.} at 1495.
  \item \textsuperscript{83} On December 1, 1944 the American Law Institute and the National Conference of Commissioners on Uniform State Laws formally agreed to co-sponsor a Uniform Commercial Code project with Karl N. Llewellyn as its chief reporter and Soia Mentschikoff as associate chief reporter. \textit{White & Summers, supra} note 8, § 1.
  \item \textsuperscript{84} \textit{John Honnold, Cases and Materials on the Law of Sales and Sales Financing} 5 (5th ed. 1984). Some version of the Code was adopted by every state except Louisiana as of 1987. Louisiana has since adopted portions of the Code. \textit{Id.}
\end{itemize}
for Uniform State Laws promulgated in 1906.\textsuperscript{85} Williston, draftsman of the first Sales Act, published a treatise in 1909 explaining the Act,\textsuperscript{86} and it was given great weight by the courts. Although it was published separately from the Sales Act, Williston's treatise certainly provided an example to Llewellyn of how a draftsman might prolong his influence even after the statute's enactment. Indeed, as early as 1933, Llewellyn reported, as chairman of a committee on amendments to the Uniform Negotiable Instruments Act, that

[i]t is not enough that the law should be "clear", if it is not clear to those who decide cases. It is to be remembered that the Negotiable Instruments Law was accompanied by no such inclusive commentary as accompanied the Sales Act. Thanks to Williston's commentary on the latter, it is well nigh impossible for courts to seriously misconstrue the Act; it was close to impossible to read one section without reference to other pertinent sections. Indeed, even those portions of the Act which in themselves were drafted with less adequacy had their inadequacy cured by the clear presentation in the commentary of their background and intent.\textsuperscript{87}

Given Llewellyn's long tenure as a commissioner,\textsuperscript{88} it is virtually certain that Llewellyn, like Clark, was influenced by the model of


\textsuperscript{86} \textit{Samuel Williston, The Law Governing Sales of Goods at Common Law and Under the Uniform Sales Act} (1909). Williston stated in the preface that he wanted "to explain and support the provisions of the Sales Act which [he] drafted at the instance and under the supervision of the Commissioners for Uniform State Laws." \textit{Id.} at iii.

\textsuperscript{87} Report of Committee on Amendments to Uniform Negotiable Instruments Act, in \textit{Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings} 144, 145 (1933). For a similar discussion emphasizing the importance of Williston's Treatise, see \textit{Report and Second Draft: Revised Uniform Sales Act} 7 (1941). Llewellyn was the chairman of the committee and the section of the NCCUSL that produced this report. \textit{Id.} at 32.

\textsuperscript{88} Llewellyn became a commissioner in 1926. \textit{Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings} 13 (1926).
the Commissioners’ note, which appeared as early as 1906.\textsuperscript{69} Llewellyn apparently combined the power and comprehensive character of Williston’s Sales treatise with the modest format of the Commissioners’ note to produce the model for UCC comments.\textsuperscript{90}

Llewellyn’s view that comments should accompany a commercial code surfaced during the earliest days of the project. In a memorandum, probably written in 1940, he said that comments are “an integral part of any thought about a Code.”\textsuperscript{91} An example of this belief appeared in a 1949 draft of the Code, which provided in Section 1-102(2) that “[t]he Official Comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute may be consulted by the courts to determine the underlying reasons, purposes and policies of this Act and may be used as a guide in its construction and application.”\textsuperscript{92}

\begin{quote}
\textsuperscript{69} The Uniform Sales Act was promulgated in 1906. \textit{White & Summers, supra} note 8, § 1, at 3. “The history of the first Uniform Sales Act was very much in the minds of the draftsmen of the Code.” \textit{Twining, supra} note 16, at 327. Presumably this history included an awareness that Commissioners’ notes had “been given a similar status to reports of commissions as aids to interpretation.” \textit{Id.} at 326-27.

\textsuperscript{90} \textit{Twining, supra} note 16, at 236-30. Llewellyn himself, as Reporter and thus principal draftsman of Articles 1 and 2, was responsible for drafting the comments to these two articles. As Chief Reporter, he was responsible for, among other things, advising the various other Reporters on the style and general scope of the comments to their respective Articles. \textit{Id.} at 282-283.

\textsuperscript{91} Karl Llewellyn, Memorandum re: Possible Uniform Commercial Code, in \textit{Twining, supra} note 16, app. at 527. Llewellyn indicated that judges needed such commentary to be easily accessible because of the time constraints imposed by their heavy and diverse caseloads. \textit{Id.}

\textsuperscript{92} U.C.C. § 1-102(2) (Proposed Draft May 1949). The comment adds that “subsection (2) of the present section recommends these Comments to the consideration of the courts to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction by mistake of legislative intention.” \textit{U.C.C.} § 1-102, cmt. 3 (Proposed Draft May 1949).

Llewellyn displayed his enthusiasm for comments at an early date in his draft of a Revised Uniform Sales Act, which included the following subsection:

Since uniformity of intent, construction and application is no less important to the dominant purpose of this Act than uniformity of language, the Legislature declares that the Act is adopted for the purposes and with the intent set forth in the official Comments of the Conference of Commissioners on Uniform State Laws, and that those comments are to be used as a guide in the construction and application of this Act.

\textbf{REPORT AND SECOND DRAFT: REVISED UNIFORM SALES ACT § 1-A(2) (1941)}. Although Llewellyn acknowledged the use of Williston’s treatise as an interpretive guide to the intent of the legislatures which adopted the Uniform Sales Act, he also thought it was
his effort to establish the authority of the comments, Llewellyn elevated the formal status of marginal writing to a height not sought by Clark in 1938. In essence, however, Llewellyn's move was merely an extension of the activist nature of Clark's 1946 notes.

Although Section 1-102(2) of the UCC remained intact in a 1950 draft,93 language was added to that section's comments stating that the "express reference to the comments [was intended to] preclude resort to prior drafts to ascertain intent."94 In 1951, however, Section 1-102 underwent a major overhaul.95 First, Llewellyn's specific reference to "underlying reasons, purposes and policies" was deleted.96 Second, the section added a statement indicating that if a comment conflicted with the text, then the text would control.97 Finally, the reference to prior drafts was moved to the text.98

These revisions to Section 1-102 did not remain part of the Code, largely because of the controversy resulting from the 1956 study by

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93 U.C.C. § 1-102(2) (Proposed Final Draft Spring 1950).
94 U.C.C. § 1-102 cmt. 3 (Proposed Final Draft Spring 1950). There is a possible metaphysical problem, or at least considerable irony, in defining the authority of gloss by the employment of gloss. How, the purist might ask, can the authority of material be defined by the same material since the authority of the defining material is itself at issue?
95 U.C.C. § 1-102 (Proposed Final Draft No. 2 Spring 1951). The drafters considered the revisions to § 1-102 as constituting a major change in substance. See id. at v (explaining that an "AAA" designation constitutes major change of substance). These revisions included moving the major statement regarding use of the comments by courts from § 1-102(2) to § 1-102(3). Id. at § 1-102.
96 U.C.C. § 1-102(3)(f) (Proposed Final Draft No. 2 Spring 1951). Although the term "underlying purposes and policies" still was used in § 1-102(1), (2) the concept of using the comments to identify the underlying reasons, purposes, and policies was clearly watered down. Id.
98 U.C.C. § 1-102(3)(g) (Proposed Final Draft No. 2 Spring 1951).
the New York Law Revision Commission. The Commission recommended elimination of these code provisions because they were “unnecessary and could lead to unprecedented use of the Comments to expand and qualify the text.” Although the UCC's editorial board accepted this Commission recommendation, the actual reason given for dropping the text regarding comments was curious. The Board stated that “the old comments were clearly out of date and it was not known when new ones could be prepared.” Despite this purported concern, the comments were provided with the official text of the Code the following year.

In 1962, the Permanent Editorial Board (PEB) for the Code recommended changing a number of the comments without any corresponding change in the text. The Board took similar action in 1966, including an overhaul of the comments to Section 2-207 less than five years after the First Circuit decided a famous “battle of the forms” case, *Roto-Lith., Ltd. v. F.P. Bartlett & Co.* More recently, the Board used its comment-

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99 For the Commission's findings regarding comments, see *REPORT OF THE N.Y. STATE LAW REVISION COMM'N FOR 1956*, at 25-27. See also *Panel Discussion on the Uniform Commercial Code*, 12 BUS. LAW. 49, 57-58 (Nov. 1956) (statement by Robert Pasley generally critical of Code's use of comments, and specifically critical of UCC § 102(5) & 102(b)). The New York Commission's controversial conclusion was that the UCC would not be adopted in New York. *REPORT OF THE N.Y. STATE LAW REVISION COMM'N FOR 1956*, at 57-58 (1956)).

100 *REPORT OF THE N.Y. STATE LAW REVISION COMM'N FOR 1956*, at 27.


103 In 1961 the American Law Institute and the National Conference of Commissioners on Uniform State Laws obtained a grant from The Maurice and Laura Falk Foundation to endow the work of a permanent editorial board, and in May 1962, the board held its first meeting. *REPORT NO. 1 OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE 8-9* (1962).

104 *Id.* at 137-41. Amended comments were proposed for §§ 1-201, 2-702, 8-204, 8-301, 8-304, 8-318, 8-401, and 8-404. *Id.*


106 *Id.* at 23-24.

107 297 F.2d 497 (1st Cir. 1962). The issue in *Roto-Lith* was whether the seller had disclaimed all warranties in the sales contract under § 2-207 through an acknowledgement that was sent to the buyer. *Id.* at 500. The court held that the buyer assented to seller’s warranty disclaimer by accepting the product “with knowledge of the conditions specified in the acknowledgement.” *Id.* at 499-500. Although the text of § 2-207 was not changed in 1966, comments 1, 2, and 6 to § 2-207 were amended, and a new comment 7 was added. U.C.C. § 2-207, 1 U.L.A. 376-78 (Master ed. 1989).
making power to reject the First Circuit's holding in Szabo v. Vinton Motors.\textsuperscript{108} Today, the practice of recommending changes to the comments without corresponding changes to the text continues as an aspect of both the Article 2 and Article 9 revision projects.\textsuperscript{109}

This is, of course, the same course of action taken by Charles Clark and the Advisory Committee on Civil Rules in 1946. In its effort to establish public policy independently, the PEB has outdone even Clark's Committee by taking the further remarkable step of promulgating its own supplementary Code commentary, which "may be issued whether or not a perceived issue has been litigated or is in litigation, and whether or not the position taken by the PEB accords with the weight of authority on the issue."\textsuperscript{110}

\textsuperscript{108} 630 F.2d 1 (1st Cir. 1980). For a more complete discussion of Szabo, see infra notes 125-129 and accompanying text. In 1990, the Board responded to Szabo by approving PEB Commentary No. 1. See 3B U.L.A. 599 app. II, at 600-605 (Master ed. 1992). This commentary specifically rejected the Szabo holding which stated that a cash seller's right of reclamation is lost if not made within ten days after delivery of the goods. \textit{Id.} at 604-05. The commentary also replaced Official Comment 3 to § 2-507(2) with a new comment which states: "There is no specific time limit for a cash seller to exercise the right of reclamation." \textit{Id.} at 605. For the full text of this new comment, see U.C.C. § 2-507 cmt. 3, 1A U.L.A. (Master ed. 1989 & Supp. 1993).

\textsuperscript{109} For example, the PEB's Article 2 study group recommended a number of these types of changes in a 1990 preliminary report. See PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 2, PRELIMINARY REPORT (1990). For specific examples, see \textit{id.} at 46 (Comment 1 to § 2-104 should be revised to clarify that not all commercial buyers are 'merchants.'); \textit{id.} at 64 (comments to § 2-205 should possibly be clarified); \textit{id.} (a new comment to § 2-206 could provide working definitions of offer and acceptance); \textit{id.} at 76 (in regard to § 2-209(4), (5), "[t]he Committee recommends, at a minimum, that the concept of waiver be defined in the comments.").

Even more recently, the PEB's Article 9 study group made similar recommendations. See, e.g., PEB STUDY GROUP UNIFORM COMMERCIAL CODE ARTICLE 9 REPORT 91 (Dec. 1, 1992) (recommending that text of Article 9 should not be changed to address question of when "non-U.C.C. principles of law and equity should override otherwise applicable Article 9 priority rules," but stating that serious consideration should be given to revising the comments or issuing PEB commentary on "risks of using equitable principles to reorder Article 9 priorities . . ."). This report also suggested in a number of instances that either the text or comments should be revised. See, e.g., \textit{id.} at 18 ("[T]he Drafting Committee should revise § 9-104(a) or the official comments . . ."); \textit{id.} at 20 ("Article 9 or the official comments should be revised. . ."); \textit{id.} at 22 ("Section 9-103(2) or the official comments should be revised. . .").

More important than the unending revision and supplementation of comments on the UCC text is that none of the comments have ever been approved by a state legislature. As one writer put it, "The most obvious point about the Comments is the one which, curiously enough, is most often overlooked: The text to the Code [i]s enacted by the legislature; the Comments [a]re not."\textsuperscript{111} Even so, many official state codes reproduce the comments,\textsuperscript{112} and some of these codes also include state practice comments, which explain how adoption of the Code affected pre-existing state law.\textsuperscript{113} Counting official comments, state practice comments, and supplementary PEB commentary, courts often must wade through three levels of gloss when interpreting the Code.

Courts have cited the comments thousands of times, often affording them great weight. As with Committee notes, enthusiasm for the comments has sometimes preceded the local effective date of the Code. For example, in \textit{Application of Doughboy Industries},\textsuperscript{114} a case involving the question of whether the parties had agreed to arbitrate future disputes, the seller's form included an agreement to arbitrate, but the buyer's form did not. Although the effective date for the UCC in New York was still two years away, the court referred to the comments to Section 2-207 as "in precise point," and used them to hold that the arbitration provision did not survive as a contract term.\textsuperscript{115} Similarly, in \textit{New England Merchants National Bank v. Old Colony Trust Co.},\textsuperscript{116} a Massachusetts court followed the 1977 comments to a recommended change to Section 8-207, which establishes the rights and duties of an

\begin{footnotesize}
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  \item \textsuperscript{111} HONNOLD, supra note 84, at 12-13.
  \item \textsuperscript{113} For examples of these state practice code comments, see CAL. COM. CODE § 1101-16104 (West 1990 & Supp. 1995); IOWA CODE ANN. §§ 554.1101 to 554.10105 (West 1987 & Supp. 1994); N.Y. U.C.C. LAW §§ 1-101 to 13-105 (McKinney 1964 & Supp. 1994); VA. CODE ANN. §§ 8.1-101 to 8.11-108 (Michie 1991 & Supp. 1994). The creation of Virginia's comments are explained in id. at iii. Similarly, the creation of the California code comments are discussed in CAL. COM. CODE at iii.
  \item \textsuperscript{114} 233 N.Y.S.2d 488 (1962).
  \item \textsuperscript{115} Id. at 494-96.
\end{itemize}
\end{footnotesize}
issuer of securities even though the state had not yet adopted the change.\textsuperscript{117}

Numerous other striking examples exist of the weight accorded UCC comments. In \textit{Taylor v. Roeder},\textsuperscript{118} a Virginia court had to decide whether a note that provided for a variable interest rate not ascertainable from its face was a negotiable instrument. The text of Section 3-106 did not foreclose advertence to extrinsic sources to determine interest, but the comment to that Section described a strict "four corners" test, which the court adopted.\textsuperscript{119} The lone dissenting opinion relied heavily on the comment to Section 1-102(2)(b), arguing that the majority had failed to construe the Code in light of new commercial practices—here, the use of variable rate financing.\textsuperscript{120}

A Pennsylvania case, \textit{Kassab v. Central Soya},\textsuperscript{121} is another example of the weight accorded comments. In that case, the court, holding that vertical privity of contract was not a prerequisite for maintaining suit on an implied warranty, relied in large part on a comment to Section 2-318 to overrule one of its earlier decisions.\textsuperscript{122} At the time of the case, the text of the UCC as enacted in Pennsylvania\textsuperscript{123} suggested, at least by negative inference, that privity was a requirement for an implied warranty suit. The comment, however, clearly invited judicial development, providing that the Section "is not intended to enlarge or restrict the developing case law. . . ."\textsuperscript{124}

The First circuit provided a particularly compelling final example of judicial reliance on comments in \textit{Szabo v. Vinton Motors, Inc.}\textsuperscript{125}

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\item[\textsuperscript{117}] \textit{Id.} at 473 n.7.
\item[\textsuperscript{118}] 360 S.E.2d 191 (Va. 1987).
\item[\textsuperscript{119}] \textit{Id.} at 194.
\item[\textsuperscript{120}] \textit{Id.} at 195-96 (Compton, J., dissenting).
\item[\textsuperscript{121}] 246 A.2d 848 (Pa. 1968).
\item[\textsuperscript{122}] \textit{Id.} at 855-56.
\item[\textsuperscript{124}] \textit{Kassab}, 246 A.2d at 855-6 (citing Comment 3 to § 2-318). For a discussion of the negative inference related to § 2-318 cmt. 3, see Skilton, \textit{supra} note 9, at 616-19.
\item[\textsuperscript{125}] 830 F.2d 1 (1st Cir. 1980). \textit{See supra} note 108 and accompanying text (detailing PEB's response to Court's decision in \textit{Szabo}).
\end{itemize}
\end{footnotesize}
Szabo involved a sale to a buyer whose check was bad. At issue was the length of the period during which the seller could reclaim the goods, and whether that period ran from the date he delivered the goods to the buyer, or alternatively, from the later date on which he received actual notice that the buyer's check had been dishonored. The text of Section 2-507 did not state a specific time limitation on the seller's exercise of reclamation. The comment to Section 2-507(2), however, stated that the ten day limit, which applied to credit sales to an insolvent buyer, also applied to cash sales. The First Circuit held that this was a cash sale and that the ten day limit applied, beginning from the date of delivery.

The court noted:

We hold that the ten day limitation period contained in Comment 3 provides a more certain guide for conducting commercial transactions than the common law yardstick of "reasonableness," and that it will encourage cash sellers to make prompt presentment. Any extension of the ten day limitation period based on the realities of the commercial banking world is for the legislature, not this Court.

Thus, the First Circuit announced the curious view that the comment merited weight and should only be changed by legislation, even though the comment itself had never been enacted.

IV. COMMENTARY

The United States Sentencing Commission, created in 1984 and authorized to promulgate guidelines for sentencing in criminal cases decided in the United States District Court, furnishes the most recent and perhaps the most aggressive example of the use of

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125 Id. at 2.
127 Id. The 10-day limitation on credit sales is contained in § 2-702. Id. at 3 n.1.
128 Id. at 4.
129 Id.
marginal writing. The statute provided that the Commission should draft guidelines and submit them to Congress and that the guidelines would take effect within six months unless changed by congressional action. This same provision applied to guideline amendments, which the original legislation clearly contemplated. The statute also authorized "general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in Section 3553(a)(2) of title 18. . . ." The Commission began its work in 1986, and the first guidelines (and policy statements) took effect November 1, 1987.134

The Sentencing Commission set a new standard for the use of gloss. In addition to the guidelines and policy statements, the Commission issued "commentary" which typically included the following subcategories: "statutory provisions," "application note," "background," and "historical note." There was no mention in the original statute of either "commentary" or of the four subcatego-

134 FEDERAL SENTENCING GUIDELINES MANUAL 1 (West 1993).
135 See, e.g., UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL [hereinafter U.S.S.C.] § 2E1.3 commentary (1993) (Violent Crimes In Aid of Racketeering Activity). The Commentary was issued in the following format:


Application Notes:
1. If the underlying conduct violates state law, the offense level corresponding to the most analogous federal offense is to be used.
2. If the offense level for the underlying conduct is less than the alternative minimum base offense level specified (i.e., 12), the alternative minimum base offense level is to be used.

Background: The conduct covered under this section ranges from threats to murder. The maximum term of imprisonment authorized by statute ranges from three years to life imprisonment.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 143).

Id.
ries. In 1987, several weeks after the guidelines became effective, Congress amended the statute by adding the following clause after the first sentence: "In determining whether a [mitigating] circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."\(^{135}\) The intention of the amendment apparently was not to clarify the status of commentary, but rather to shield Commission records and members from subpoena in criminal cases.\(^{137}\)

In an action evocative of Llewellyn's failed attempt to establish a formal role for marginal writing, the Sentencing Commission included in the original guidelines a guideline addressing the significance of commentary.\(^{138}\) This statement regarding commentary declared:

The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. See 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline. As with a policy statement, such commentary may provide guidance in assessing the reasonableness of any departure from the guidelines.\(^{139}\)


\(^{138}\) U.S.S.G. § 1B1.7 (1993).

\(^{139}\) Id. at § 1B1.7 commentary (1993).
In addition to this guideline, there is a commentary addressing the significance of commentary.\textsuperscript{140} The commentary on commentary provides, in part, that

[i]n stating that failure to follow certain commentary “could constitute an incorrect application of the guidelines,” the Commission simply means that in seeking to understand the meaning of the guidelines courts likely will look to the commentary for guidance as an indication of the intent of those who wrote them. In such instances, the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter.\textsuperscript{141}

Shortly thereafter, the Sentencing Commission began changing commentary without making corresponding changes to related guidelines, a practice that replicated the 1946 action of the Rules Committee and Charles Clark. In January of 1988, three months after the guidelines became effective, the first set of amendments was issued in a new manual. These revisions contained numerous amendments to commentary without change to the corresponding guidelines.\textsuperscript{142} The practice of amending commentary without changing guidelines has continued since 1988.\textsuperscript{143} In \textit{Stinson v. United States},\textsuperscript{144} one of these changes was instrumental in bringing questions about the status of commentary to the Supreme Court.\textsuperscript{145}

\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.} at app. C1.
\textsuperscript{143} \textit{See, e.g., U.S.S.G. § 2A3.2 (1989) (Criminal Sexual Abuse of a Minor (Statutory Rape) or Attempt to Commit Such Acts) (amendment of November 1, 1989, changing the Background Note); U.S.S.G. § 1B1.3 (1990) (Relevant Conduct (Factors that Determine the Guideline Range)) (amendment of November 1, 1990, changing the Application Note); and U.S.S.G. § 2A2.1 (1993) (Assault with Intent to Commit Murder; Attempted Murder (amendment of November 1, 1991, adding an Application Note)).}
\textsuperscript{144} 113 S. Ct. 1913 (1993). Prior to \textit{Stinson}, a clear pattern of according much weight to the commentaries had emerged. \textit{See United States v. Anderson}, 942 F.2d 606, 612-614 (8th Cir. 1991) (collecting and discussing the cases). In \textit{Anderson}, the court concluded, “[w]e believe that the weight of the commentary must fall somewhere in between that of ordinary legislative history and that of the guidelines themselves.” \textit{Id.} at 610.
\textsuperscript{145} \textit{See supra} notes 1-6 and accompanying text.
In the Stinson opinion, Justice Kennedy discussed several options for the proper treatment of commentary. One suggestion was “to treat commentary as a contemporaneous statement of intent by the drafters or issuers of the guideline, having a status similar to that of, for example, legislative committee reports or the advisory committee notes to the various federal rules of procedure and evidence.” Justice Kennedy rejected this analogy, however, writing that “[q]uite apart from the usual difficulties of attributing meaning to a statutory or regulatory command by reference to what other documents say about its proposers’ initial intent, here, as is often true, the commentary was issued well after the guideline it interprets had been promulgated.” Justice Kennedy continued, “It seems inconsistent with this process for the Commission to announce some statement of initial intent well after the review process has expired.”

Kennedy also rejected an analogy to an administrative agency’s construction by the rulemaking process of a federal statute that the agency administers. He declared that “[c]ommentary . . . has a function different from an agency’s legislative rule. Commentary, unlike a legislative rule, is not the product of delegated authority for rulemaking, which of course must yield to the clear meaning of a statute.”

The analogy adopted by Justice Kennedy was that “commentary [should] be treated as an agency’s interpretation of its own legislative rule.” He continued by stating,

Thus, the guidelines are the equivalent of legislative rules adopted by federal agencies. The functional purpose of commentary (of the kind at issue here) is to assist in the interpretation and application of those rules, which are within the Commission’s particular area of concern and expertise and which the Commission itself has the first responsibility to formulate and announce. In these respects this type of commentary is akin to an agency’s interpretation

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113 S. Ct. at 1918.
147 Id.
148 Id.
149 Id.
150 Id. at 1919.
of its own legislative rules. As we have often stated, provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation."\(^{151}\)

Application of this rationale led the Court to decide that the court of appeals had erred in holding that the revised commentary was not binding.

V. ANALYSIS

I wish at this point to consider both formal and functional justifications for marginal writings. The analogies suggested by Justice Kennedy in *Stinson* are certainly useful for considering a formal justification for gloss, and they offer some help in considering functional issues.

A. FORMAL TESTS

The first possibility suggested by Justice Kennedy was the analogy to legislative history.\(^{152}\) This perspective is difficult to apply to gloss because these writings fit awkwardly as legislative history. The first difficulty arises from the authorship of the notes, comments, and commentary. The authors of marginal material are neither authorized to enact law nor engaged in the enactment process, even in the sense that legislative or congressional staff members are a part of the legislative process. The second difficulty is the relationship between the gloss and persons who do have authority to enact law. If persons with authority routinely reviewed and discussed these writings, perhaps some use could be made of the legislative history analogy. But early committee notes

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\(^{151}\) *Id.* (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

\(^{152}\) *Id.* at 1918 ("We do not think it helpful to treat commentary as a contemporaneous statement of intent by the drafters or issuers of the guideline, having a status similar to that of, for example, legislative committee reports or the advisory committee notes to the various federal rules of procedure and evidence").
were partially excluded from the approval process\textsuperscript{153} and some of the comments to the UCC were written after legislative enactment.\textsuperscript{154} In addition, commentaries to the sentencing guidelines do not require congressional presentation in connection with the mandatory review of guidelines and policy statements.\textsuperscript{155} The third difficulty common to all three analogies is the remarkable practice of changing gloss even though persons with legislative authority neither propose nor take related action. Here not even the pretense exists that the material is prepared in anticipation of some act of authorization.\textsuperscript{156} These materials clearly fall outside the concept of legislative history, and these events imply a character for marginal writing distinctly different from legislative history.

The difficulty with this analogy is instructive because it leads to Judge Frank H. Easterbrook's "question of legitimacy,"\textsuperscript{157} an issue which he discussed in connection with materials ordinarily classified as legislative history—those materials actually or formally produced by persons with enacting authority. Marginal writing is even more difficult to legitimize because the authors lack authority to enact legislation and ordinarily, there is no formal relationship between authorship and enacting power. Easterbrook argued that the "intentions" of legislators are not "the law" because

\textsuperscript{153} See H.R. Doc. No. 588, 75th Cong., 3d Sess. vii (1938) (stating that Notes are not part of Rules of Civil Procedure).

\textsuperscript{154} Report No. 1 of the Permanent Editorial Board of the Uniform Commercial Code 10, 137-141 (1962). Amended comments were proposed for §§ 1-201, 2-702, 8-204, 8-301, 8-304, 8-318, 8-401, and 8-404. Id.

\textsuperscript{155} Nevertheless, the Commission apparently has submitted changes in commentary to Congress. Letter from William W. Wilkins, Jr., Chairman of United States Sentencing Commission, to all recipients of the Guidelines Manual (October 15, 1992), in Federal Sentencing Guidelines Manual at XXIII (West 1993).

\textsuperscript{156} There are some examples of subsequent legislative history, but all instances involve actions by persons who authorized the legislation or who have authority to change the legislation. See William N. Eskridge, Jr. and Philip P. Frickey, Cases and Materials on Legislation: Statutes and the Creation of Public Policy 752-760 (1988) (discussing and illustrating subsequent legislative history).

\textsuperscript{157} See Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. \\& Pub. Pol'y 69, 64-65 (1988) (questioning assumption that intentions are "law"; describing process of interpretation from intent as "translation from intent to law that we would find repulsive if proposed explicitly").
those intentions are not subject to the legislative process: "They must run the gamut of the process—and process is the essence of legislation." He added,

Indeed creating the structure of government, the process of legislation, was the most important achievement of the Constitution. As Madison said in Federalist No. 10, the cumbersome process of legislation is the best safeguard against error; a process through which people wrestled for power in a Republic with many loci of power was, he thought, the best way to tease public spirit out of self-interested voters.

Easterbrook's argument is a powerful one with respect to traditional legislative history, and it is obviously stronger in the case of materials produced by persons lacking legislative authority.

The second analogy examined by Justice Kennedy was "to an agency's construction of a federal statute that it administers." Justice Kennedy explained that,

Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, . . . if a statute is unambiguous the statute governs; if, however, Congress' silence or ambiguity has "left a gap for the agency to fill," courts must defer to the agency's interpretation so long as it is "a permissible construction of the statute."

Justice Kennedy found this analogy "inapposite" to commentary. The analogy is likewise inapposite to committee notes and comments, which are not produced in the course of administering a federal (or state) statute.

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158 Id. at 64.
159 Id. at 65.
161 Id.
162 Id.
The third analogy employed the principle that deference must be
given to administrative agencies' constructions of their own
legislative rules. Justice Kennedy cited five cases in which the
Court deferred to an agency's interpretation of its own rule. The
cases cited by the Court for the tradition of deference do not
suggest an adequate precedent for the application. The Sentencing
Commission, for example, is authorized to propose guidelines but
does not have the ultimate responsibility for applying these
guidelines; Congress assigns this task to the courts. It seems
proper that deference to agency interpretation can be justified only
by an agency's authority to act, rather than by some presumed
expertise in linguistics. Where the authority to issue rules is
coupled with operational responsibilities, it is plausible to conclude
that Congress intended that an agency's interpretation of its own
rules, developed in operations, should be given weight. The
primary function of the Sentencing Commission, however, is
proposing guidelines.

Similarly, no application tasks are assigned to either the Rules
Committee or the Editorial Board. Justice Kennedy's case

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163 Id. at 1919.
164 Id. The five cases are: Robertson v. Methow Valley Citizens Council, 490 U.S. 332
(1989); Lyng v. Payne, 476 U.S. 926 (1986); United States v. Larionoff, 431 U.S. 864 (1977);
(1945).
166 Appointment of Committee to Draft Unified System of Equity and Law Rules, Order
295 U.S. 774 (1935). In 1988, Congress amended 28 U.S.C. § 2073 to provide, "In making
a recommendation under this section or under section 2072, the body making that
recommendation shall provide a proposed rule, an explanatory note on the rule, and a
written report explaining the body's action, including any minority or other separate views."
28 U.S.C. § 2073(d) (1988), as added by the Judicial Improvements and Access to Justice Act
is outlined in H.R. REP. NO. 422, 99th Cong., 1st Sess. 9-11 (1985). This report states that
the notes "explain the purpose and intent of the new rule or amendment," but it does not say
whether they are to be used by the courts as an interpretive aid or as a source of legislative
history. Id. at 10.
167 See William A. Schnader, The Permanent Editorial Board For the Uniform Commercial
Code: Can It Accomplish Its Object? 3 AM. BUS. L. J. 137, 139 (1965). Schnader states,
It was the thought of the sponsors of the Code that through such a
Board, continuing to function into the indefinite future, it might be
possible to induce the states which had adopted non-uniform amend-
ments to eliminate these amendments from their Codes and it might also
be possible to persuade the states which had not yet enacted the Code to
for deference is inapposite because the "interpretation" from these bodies does not arise from the crucible of operational responsibility. Indeed, all of the cases cited by Justice Kennedy involved administrative agencies with both authority to issue rules and operational responsibilities. For example, in Bowles, the leading case, the outcome turned on the interpretation of a regulation issued by the Office of Price Administration (OPA). The OPA had many operational responsibilities, including enforcement of the statute. Incident to the latter responsibility, the Administrator issued a bulletin entitled, "What Every Retailer Should Know About the General Maximum Price Regulation." This document contained the construction which played a decisive role in the Bowles decision.

Though Justice Kennedy's analogies do not yield a formal justification for marginal writing, they do suggest a historical critique. The connection with administrative law suggests the issue of excessive commitment to expertise. Early support for the primacy of administrative law was founded on the belief that experts, free from political obligations, would best determine public policy. In 1938, James Landis described, in classic terms, the case for expertise. He wrote,

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enact it as promulgated or at least to confine the non-uniform amendments to matters relating to local litigation procedure.

*Id.*


169 325 U.S. at 417.

170 *Id.* at 410.

171 This explanation is consistent with Robert Bone's suggestion that the rhetoric of the early twentieth century procedural reform movement included "venerating professional expertise." Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure From the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 78 n.250 (1989).
The advantages of specialization in the field of regulatory activity seem obvious enough . . . . With the rise of regulation, the need for expertness became dominant; for the art of regulating an industry requires knowledge of the details of its operation, ability to shift requirements as the condition of the industry may dictate, the pursuit of energetic measures upon the appearance of an emergency, and the power through enforcement to realize conclusions as to policy.\footnote{173}

Landis also wrote that “[t]o resort under these circumstances to the device of a compact and select personnel for the discharge of these responsibilities was natural and inevitable.”\footnote{174}

Landis believed that this commitment to expertise would lead to a desirable political independence by the agency which would then guarantee successful policymaking.\footnote{175} Daniel J. Gifford wrote,

According to Landis, even agencies located in major executive departments tended to function independently in practice because only a small group of officials actually exercising day-to-day regulatory supervision fully understood the economic problems of the regulated industry. Hence, it was this group of officials that effectively responded to industry’s needs.\footnote{176}

Gifford continued,

Under the conventional wisdom, administrators were said to possess expertise developed from their experience in regulating as well as from their ability to draw on their staff of technicians. Because the public, the legislature, and the courts did not possess

\footnote{173} JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 23-24 (1938).
\footnote{174} Id. at 26.
\footnote{176} Id.
this expertise, agency judgments were said to command significant deference.\textsuperscript{177}

After World War II, criticism of the New Deal and its commitment to expertise steadily increased. In 1950, Harold Laski wrote an influential magazine article entitled, The Limitations of the Expert.\textsuperscript{178} According to Laski,

special knowledge and the highly trained mind produce their own limitations which, in the realm of statesmanship, are of decisive importance. Expertise, it may be argued, sacrifices the insight of common sense to intensity of experience. It breeds an inability to accept new views from the very depth of its preoccupation with its own conclusions. It too often fails to see round its subject. It sees its results out of perspective by making them the center of relevance to which all other results must be related. Too often, also, it lacks humility; and this breeds in its possessors a failure in proportion which makes them fail to see the obvious which is before their very noses. It has, also, a certain caste-spirit about it, so that experts tend to neglect all evidence which does not come from those who belong to their own ranks. Above all, perhaps, and this most urgently where human problems are concerned, the expert fails to see that every judgment he makes not purely factual in nature brings with it a scheme of values which has no special validity about it.\textsuperscript{179}

In 1960, James Landis reported to President-elect Kennedy on regulatory agencies and described serious failures, particularly the failure of the Federal Power Commission to solve pricing problems in the natural gas industry.\textsuperscript{180} According to Gifford,

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\item\textsuperscript{177} \textit{Id.} at 306-307.
\item\textsuperscript{178} Harold J. Laski, The Limitations of the Expert, 162 Harper's Mag. 101 (1950).
\item\textsuperscript{179} \textit{Id.} at 102.
\item\textsuperscript{180} JAMES M. LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 54-58 (Comm. Print 1960).
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\end{footnotesize}
Thus, by the 1960s, both legal scholars and organizational theorists recognized that administrators operate in a world of incomplete information and began to identify the ramifications of that fact. One significant ramification, empirically demonstrated by the pitiable performances of the FTC and FPC during the 1950s, is that administrative agencies may lack the superior planning abilities claimed by Landis in the 1930s.181

Gifford concluded, "The failure of regulatory agencies to engage in long-term planning and thereby to carry out the supervisory role over industry growth and development envisioned by Landis is in part attributable to Landis's misperceptions concerning agency expertise."182

B. FUNCTIONAL TESTS

The functional case for gloss traditionally has advanced the contention that perpetuating and distributing the views of the expert drafting group would enhance the goal of uniformity; Karl Llewellyn offered this justification.183 Moreover, the introductory comment to the UCC provides that

[u]niformity throughout American jurisdictions is one of the main objectives of this Code; and that objective cannot be obtained without substantial uniformity of construction. To aid in uniform construction of this Comment and those which follow the text of each section set forth the purpose of various provisions of this Act to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction.184

181 Gifford, supra note 175, at 318.
182 Id.
183 Karl N. Llewellyn, Why We Need The Uniform Commercial Code, 10 U. Fla. L. Rev. 367, 376 (1957).
The goal of uniformity in commercial law, however, has been seriously questioned. According to Robert Scott, "[t]aken together, these arguments challenge both the wisdom and the efficiency of the existing stock of generalized default rules used by courts and legislatures to fill gaps in incomplete contracts." Indeed, Hunter Taylor argued that the decision to seek commercial law reform by a process of state-by-state enactment rendered uniformity improbable, whatever the stated goal of the reformers. Thus, the common functional justification for UCC comments incorporates a disputed goal, perhaps rendered improbable by a decision of the reformers regarding the process of enactment.

A uniformity justification for gloss has even less plausibility in the case of committee notes and commentary. In these instances, the federal judicial system provides a mechanism which can originally provide a considerable degree of national uniformity, and, when the Supreme Court becomes involved, a very high degree of uniformity. In addition, the question of whether uniformity is a desirable goal is now debated in the context of civil rules. As with the UCC, there is a modern critique of the goal of uniformity. Robert Cover originated this point of view, and his ideas have attracted adherents. In a tribute to James Wm. Moore, Cover wrote,

There are, indeed, trans-substantive values which may be expressed, and to some extent served, by a code of procedure. But there are also demands of particular substantive objectives which cannot be served except through the purposeful shaping, indeed, the manipulation, of process to a case or to an area of law.

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156 *Id.* at 598.
159 The views of the other principal critics of uniformity are quoted and discussed in Thomas D. Rowe, Jr., *Study On Paths To A "Better Way": Litigation, Alternatives, And Accommodation*, 1989 DUKE L.J. 824, 881-82.
160 Cover, *supra* note 188, at 718.
Recently, this approach has gained considerable support from Congress by the enactment of court reform legislation that frankly encouraged diversity of process. 191

Justice Kennedy's opinion in Stinson 192 is also helpful because it suggests the similarity between the bodies that produce marginal writings and traditional administrative agencies. This relationship implies considerable risk in giving weight to these materials, a conclusion suggested by a core principle of public choice theory. 193

This Article is no place to rehearse this complex and provocative perspective, but it will suffice to say that public choice theory holds that commonly observed self-interested behavior can turn the arena of public action into a place for private gain. As Daniel Farber and Philip Frickey said, "Public choice suggests that the political process may be corrupted by special interests. If this happens, political outcomes will represent only the self-interest of factions rather than the public interest." 194 Although these principles usually are focused on legislative behavior, Glen Robinson has shown that public choice theory is a powerful perspective for analyzing administrative agencies. 195 According to Robinson, the narrow subject matter focus of agencies provides an inviting opportunity for special interests.

The myriad groups vying for a place on the legislative agenda, coupled with the structural and procedural obstacles (e.g., the committee structure rules that must be navigated), can frustrate groups in their quest for legislative action even when there is relatively weak opposition. It is small wonder that agency forums have become the premier locus of interest group activity in modern times. 196

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194 Id. at 38.
196 Id. at 79.
On the other hand, Robinson explains, the public encounters great difficulty in exerting effective influence over agency bureaucrats because citizens' demands are not monetized:

In an economic market, the public is influential in registering its demands. Preferences are easily expressed, easily aggregated, and have power commensurate with large numbers. In the bureaucratic marketplace, without the money denominator, individual citizen preferences are less easily organized into an effective unit of demand. Being unelected, bureaucrats are not compelled to be responsive to mere numbers.\(^{197}\)

The view that administrative agencies are particularly vulnerable to special interests suggests that the Sentencing Commission and the Civil Rules Committee may face similar vulnerability. The analogy to administrative agencies is quite strong in the case of these two bodies which act pursuant to congressional delegation.\(^{198}\)

ALI and NCCUSL, as private bodies, seemingly stand distant from the agency analogy. Neither Congress nor state legislatures have delegated authority to ALI and NCCUSL. Recently, Alan Schwartz and Robert Scott provided an analysis of the function of these private bodies.\(^{199}\) Schwartz and Scott employed the method of "structure induced equilibrium"\(^{200}\) to derive a model based on their examination of both ALI and NCCUSL procedures. According to Schwartz and Scott,

\[\text{[t]hese tools were developed to study typical legislatures, but their use is apt here because the ALI and NCCUSL actually do function as private legislatures.}\]

\(^{197}\) Id. at 88.


\(^{200}\) Id. at 597.
The analyst doing structure-induced equilibrium theory identifies the utility functions that participants in the legislative process maximize, specifies the institutional structures that transform participant preferences into legislative outcomes, and then shows what outcomes these preferences and structures will produce.\textsuperscript{201}

One important result from the Schwartz and Scott model is the prediction that under certain circumstances, the combined processes of institutions such as ALI and NCCUSL (referred to by Schwartz and Scott as “PLs,” private legislatures) are subject to powerful interest group influence. Their model yields the result, among others, that

\[\text{[w]hen information is asymmetric (the typical PL member/legislator is poorly informed about the consequences of proposals while other participants know these consequences) . . . when only one interest group would be affected by a PL reform proposal, the group will attempt to participate in study groups and may also lobby, thereby having a greater effect on PL outcomes than on ordinary legislative outcomes . . . .} \textsuperscript{202}\]

Another article by Robert Scott demonstrates the significance of this result. In the article, Scott points to evidence that the predicted result was realized in the current project to revise Article 9 of the UCC.\textsuperscript{203} Scott reviews in detail the recent report of the Article 9 Study Group, and argues that the content of many important revisions “substantially support[s] the interest group analysis.”\textsuperscript{204} Scott’s general conclusion is that

\textsuperscript{201} Id.

\textsuperscript{202} Id. at 609.


\textsuperscript{204} Id. at 1790 (“I argue that the expansion of purchase money security interests, the expanded conception of proceeds, and the erosion of the filing system, as well as other key proposals, substantially support the interest group analysis.”).
whether the evidence fully supports the inference of interest group influence is not entirely clear. Nevertheless, one inference is clear. The revisions reflect a dramatic escalation of the tension between the twin goals of Article 9: the maintenance of public confidence through the use of a broad-based, facially neutral filing system and the development of rules that reduce costs for particular classes of secured creditors.\footnote{205}

Scott's analysis vividly suggests the considerable risk of interest group power in private legislatures.

The cautious approach to gloss suggested by these contemporary analyses is notably consistent with the often stated doctrine that "courts do not permit opinion on a question of law. . . ."\footnote{206} The traditional rationale is that "the judge (or the jury as instructed by the judge) can determine equally well."\footnote{207} The theory, however, suggests that this traditional formulation may understate the benefits of independent judicial determination, at least in the case of civil rules, the UCC, and sentencing guidelines. The judges may provide better determinations than the Civil Rules Committee, ALI and NCCUSL, and the Sentencing Commission agencies or private legislatures because many institutional characteristics of the judiciary provide a shield from interest group influence.\footnote{208}

My proposal that courts should accord little weight to gloss would likely require more independent determinations by judges, which, in turn, might possibly benefit the public by reducing the influence of special interests. The independent views of the judiciary that are involved necessarily in the inevitable task of applying text to

\footnote{205} Id. at 1850-51.


\footnote{207} 7 Wigmore, Evidence § 1952 (Chadbourn rev. 1978). More recent formulations have focused on the concern that jurors will be confused by hearing legal views expressed by both the expert and judge. See, e.g., Marx & Co. v. Diners' Club, Inc., 550 F.2d 506, 512 (1977) ("The danger is that the jury may think that the 'expert' in the particular branch of the law knows more than the judge—surely an inadmissible inference in our system of law.").

\footnote{208} See William M. Landes & Richard A. Posner, The Independent Judiciary In An Interest-Group Perspective, 18 J. Law & Econ. 875, 886 (1975) (arguing that provisions for life tenure, limits on ex parte contacts, and prohibitions on legal standing to groups operate to shield judges from interest group influence).
facts might well serve to balance the predictable effect of interest
groups. This potentially beneficial result would surely be dimin-
hished, if not eliminated, by according weight to gloss produced
under the very same predictable conditions of influence as the text.

VI. CONCLUSION

I return here to the two questions which I posed in the begin-
nning: What weight should courts give marginal writings? And are
these materials a desirable addition to our jurisprudence? I have
already indicated my answers to these questions, but here I will
provide a more complete response based on the discussion. There
are both formal and functional reasons for my negative opinions
about marginal writings. My formal objection is that marginal
writing cannot be placed within any category of authority approved
heretofore by the processes of democratic government, and there-
fore, this material should not be given weight. In the Stinson
opinion, Justice Kennedy offered a formalistic justification for the
commentary of the Sentencing Commission, but his effort to find a
category of authority for commentary was not successful. The
existence of material which is outside the categories of accepted
authority but which may be accorded authority is not, in my
opinion, desirable for our jurisprudence.

My functional objection is twofold. First, the commitment to
expertise exemplified in gloss and justified by the goal of uniformity
seems mistaken in light of the contemporary critique of uniformity.
This argument has been stated in the commercial context, and is
now attracting considerable attention in the field of procedure. My
second functional criticism follows from public choice theory, which
suggests that the several bodies which produce civil rules, the UCC,
sentencing guidelines, and corresponding gloss on those materials,
might be vulnerable to pressure from special interest groups.
Independent judicial action in applying the rules, the UCC, and the
guidelines would, in my view, be preferable to reliance on gloss,
which may well be the vehicle of special interest influence.
Independent application decisions would likely balance predictable
special interest influence on the texts. Reasons of both form and
function suggest that courts should give little, if any, weight to
marginal writings and that gloss is not a desirable addition to our
stock of jurisprudential materials.