

**EXPLAINING HOW TO READ:
HOW THE TEXTUALISM WARS
AFFECT ADVOCACY AND JURISPRUDENCE**

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EMPLOYMENT HISTORY

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EDUCATION

J.D. with highest honors, The University of Texas School of Law, 2001.
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B.A. in Theater, with high honors, University of Florida, 1993.

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Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization.

Recognized by Chambers USA for excellence in Texas Appellate Law since 2020, and consistently named a Texas “Super Lawyer” and “Best Lawyer In America” in Texas Appellate Law.

Named in 2023 to the “Texas Appellate CLE Hall of Fame” for having won the Helen Cassidy Award for best CLE presentation at the State Bar of Texas Advanced Civil Appellate Seminar five years in a row.

Member of the State Bar of Texas Pattern Jury Charge Oversight Committee (2026-) and Committee for Business, Consumer, Insurance & Employment (2017-2026), led the rewrite of Chapter 108 on Piercing the Corporate Veil and served on the committee that reorganized and redrafted Chapter 102 on Contracts.

State Bar of Texas Appellate Section, Council Member (2024-) and Law School Liaison Committee Chair (2020-).

Member of the Texas Bar Foundation and Texas Bar College.

SELECTED RECENT LEGAL EDUCATION PUBLICATIONS AND PRESENTATIONS

Ethics Rules for Amicus Briefs or, Hey, Maybe We Should Adopt Some Ethics Rules for Amicus Briefs, 2025 SBOT Advanced Civil Appellate course, published in *The Appellate Advocate* (Winter 2026).

Judicial Disqualification and Recusal, 2024 SBOT Advanced Civil Appellate course and SBOT online presentation, 2025 Texas Bar College Summer School, and other events, published in *The Appellate Advocate* (Winter 2025).

Judges as Historians: Bruen's New Rules, 2023 SBOT Advanced Civil Appellate course, published in *The Appellate Advocate* (January 2024).

The Ten Cases Every Trial Judge Should Know, 2022 Harris County Civil Judges Retreat, 2023 TACTAS meeting and 2023 Texas Association of Defense Counsel retreat.

Mandamus and Jurisdiction After Panda Power, 2022 SBOT Advanced Civil Appellate course.

Getting and Keeping Appellate Jurisdiction, 2021 SBOT Advanced Civil Appellate course and 2022 SBOT Advanced Civil Trial course, winner of the 2022 Helen Cassidy Award.

Anti-SLAPP in the Oil Patch, 2020 SBOT Oil and Gas Law course.

Charging the Jury on Piercing The Veil, 2020 SBOT Advanced Civil Appellate course, winner of the 2021 Helen Cassidy Award.

Mootness in Texas, 2019 SBOT Advanced Civil Appellate course, winner of the 2020 Helen Cassidy Award.

Crafting the Final Judgment, 2018 SBOT Advanced Civil Appellate course, published in *The Appellate Advocate* (Winter 2018), and winner of the 2019 Helen Cassidy Award.

Hot Topics In Interlocutory Appeals, 2017 SBOT Advanced Civil Appellate course and 2019 SBOT Texarkana Main Event course, winner of the 2018 Helen Cassidy Award.

Finding Our Way Through Findings Of Fact, 2013 SBOT Advanced Civil Appellate Practice Course.

SELECTED INTERESTS AND SERVICE

Distance Runner, participating in ultramarathons and marathons including the Comrades Ultramarathon and the New York City, Berlin, London, Tokyo, and Houston Marathons, among others.

Awarded Black Belt in Taekwondo (1999, 2012).

Fundraiser for World Vision, a prominent charity that builds water infrastructure in impoverished areas and works with governments to fight famine.

South Main Baptist Church Deacon, Sunday School teacher and member of finance and personnel committees.

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EXPLAINING HOW TO READ: HOW THE TEXTUALISM WARS AFFECT ADVOCACY AND JURISPRUDENCE

Laymen tend to think it is easy to read. To appeal to these laymen, judges proclaim their intent to simply “call balls and strikes” by reading legal texts plainly.¹ And surely people of a certain age will remember a President embarrassing himself by protesting that “it depends upon what the meaning of the word ‘is’ means.”² The objection that words do not have clear meanings may be true in a poetic sense, but it feels like evasion in everyday life.³

Textualism insists that words must be given their plain, straightforward meaning, even when those words make up a contract, statute, or other legal document. The principle seems sound, but it fails to predict outcomes. Over the last fifteen years, judges have increasingly insisted that they are following strict textualist principles even as they disagree on the result of the case. Indeed, in the most recent and highly contentious United States Supreme Court cases (discussed below), the justices bicker over which side is showing the *most* fealty to strict textualism.

Amid this unpredictability, one source of textualist authority rises above all others—READING LAW: THE INTERPRETATION OF LEGAL TEXTS, by Justice Antonin Scalia and Bryan Garner. That 2012 book firmly explains the foundations of modern textualism through a series of short chapters titled “Sound Principles of Interpretation” and “Thirteen Falsities Exposed.” Yet recently, courts have taken textualism much farther than Scalia and Garner did in 2012. Indeed, from the perspective of the 2025-2026 Term of the Texas and United States Supreme Courts, READING LAW appears shockingly modest in the scope of its admonitions and prohibitions.

This paper examines how advocates can explain to courts “how to read”—that is, how to apply textualist

principles in ways that support their desired outcome. It draws almost exclusively from recent cases from the Texas Supreme Court and the United States Supreme Court. These cutting-edge opinions demonstrate that textualism is far from rigid and seldom leads to predictable results, which enables advocates on both sides of a case to simultaneously proclaim their adherence to textualist dogma while arguing for opposite results.

In identifying the many ways in which judges have applied textualism to achieve contradictory results, I have no interest in social media chatter (or even judicial opinions⁴) accusing some judges of hypocritically bending these rules to achieve a foreordained result. Such rhetoric is *inaccurate*, *unhelpful*, and *boring*. The case law tells a much more compelling story. The good-faith application of textualist rules leaves plenty of room for earnest disagreement, and ample opportunities for skilled advocates.

Accordingly, this paper will examine these recent cases to discern which strategies work in the real world. Textualism leaves a lot of room for lawyers to work—but only if you know the battlefield.

I. LEARN THE NEW TEXAS RULES OF CONTRACT INTERPRETATION.

The logical starting point is Texas’s rules for textual interpretation. In recent years, the Texas Supreme Court tightened the rules of statutory and contract construction—⁵sometimes even more tightly than READING LAW. Nevertheless, advocates can still work within these narrowed straits by changing the way they frame their arguments.

A. *Coker v. Coker* set out the rules for contract interpretation in Texas.

Texas’s rules for textual interpretation have been established for many decades, but they were usefully

¹ See Charles Fried, *Balls and Strikes*, 61 EMORY L. J. 641 (2012) (discussing the impact of Chief Justice Roberts’s rhetoric at his confirmation hearing).

² Grand Jury Testimony of Bill Clinton, reported by the Associated Press (Sept. 21, 1998), archived at https://archive.nytimes.com/www.nytimes.com/specials/star/r/testimony/clinton_6.html (“It depends upon what the meaning of the word is means. If is means is, and never has been, that’s one thing. If it means, there is none, that was a completely true statement.”). Google suggests that President Clinton’s actual words are often mangled (he didn’t say “what the meaning of ‘is’ is,” which is funnier)—but they weren’t that much better in the original transcript.

³ Consider G.K. Chesterton’s observation that “Every time one man says to another, ‘Tell us plainly what you mean?’ he is assuming the infallibility of language: that is to say, he is assuming that there is a perfect scheme of verbal

expression for all the internal moods and meanings of men. Whenever a man says to another, ‘Prove your case; defend your faith,’ he is assuming the infallibility of language: that is to say, he is assuming that a man has a word for every reality in earth, or heaven, or hell.” G.K. Chesterton, G.F. WATTS (1904). All of which is lovely, and true... and still one yearns to respond with the meme, “Sir, this is a Wendy’s.” Lawyers know that language serves a *function* beyond mere musings.

⁴ See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 779 (2026) (Kagan, J., dissenting) (“The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the ‘major questions doctrine’ magically appear as get-out-of-text-free cards.”).

⁵ I use em-dashes because that is the way I was trained, and I believe in them, and I am of a certain age. I did not rely on AI for any part of this paper or presentation.

compiled in the oft-cited⁶ 1983 Texas Supreme Court decision *Coker v. Coker*.⁷ *Coker* thus provides a good starting point for any brief (or CLE paper) discussing a contract-interpretation dispute. The rules *Coker* states remain good law, but also provide a point of contrast for the Texas Supreme Court cases that would follow. *Coker* declares the following principles, all of which are cornerstones of textualism and embraced by READING LAW:

- “In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument.”⁸
- “To achieve this objective, courts should examine and consider *the entire writing* in an effort to harmonize and give effect to *all the provisions* of the contract so that none will be rendered meaningless.”⁹
- “No single provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument.”¹⁰
- “If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law.”¹¹
- “Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered.”¹²

These primary principles of contract interpretation remain effective today.

B. Straining against ambiguity and the role of “secondary rules of construction”

Coker also seemingly approves of the old principle that so-called “secondary rules of construction” can be used to resolve apparent conflicts if there is no way to read the contract in a way that harmonizes all its provisions.¹³ That is, *Coker* includes some of the more minor canons of construction that the Court once called “secondary rules,” in contrast to the primary rules that would be used in the first instance to determine if contractual text is subject to only one reasonable interpretation. *Coker* conspicuously cites early-Eighties cases for these propositions even though older Texas Supreme Court authorities exist.¹⁴

These “secondary rules” are default assumptions about how the drafters meant for the text to be construed, and they serve as tie-breakers when the court cannot determine the drafters’ intent from a more straightforward (and holistic) reading of the words alone. They include the notion that one should “give[] effect to written or typewritten provisions over printed provisions” and “give[] effect to an earlier over a later provision.”¹⁵ Another such tie-breaker—omitted from *Coker* but found throughout American jurisprudence—is the *contra proferentem* rule that contracts should be construed against the drafter. Texas courts insist this is a rule “of last resort and plays no role in making a fact finding about what the parties intended,”¹⁶ and moreover, only comes into play where the contract is ambiguous.¹⁷

These “secondary rules” deserve careful examination in light of modern jurisprudence. One could easily argue that unclear language in a contract should be submitted to the factfinder for interpretation, not subjected to “secondary rules” applied by a judge. Viewed in this way, the “secondary” rules could be implemented as jury argument and not as legal rules that compel the court to conclude the text can only be read in one way. One might also try to frame

⁶ Westlaw identifies 9,283 citations as of this writing.

⁷ 650 S.W.2d 391, 393 (Tex. 1983).

⁸ *Id.* (citing *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968) and *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980)).

⁹ *Id.* (emphasis in *Coker*) (citing *Universal C.I.T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 158 (1951)).

¹⁰ *Id.* (citing *Citizens Nat’l Bank in Abilene v. Texas & P. Ry. Co.*, 136 Tex. 333, 150 S.W.2d 1003, 1006 (1941) and *Myers v. Gulf Coast Minerals Management Corp.*, 361 S.W.2d 193, 196 (Tex. 1962)).

¹¹ *Id.* (citing *Universal C.I.T. Credit Corp.*, 243 S.W.2d at 157 and *R & P Enterprises*, 596 S.W.2d at 519).

¹² *Id.* (citing *R & P Enterprises*, 596 S.W.2d at 518).

¹³ See *id.* (citing *Ogden v. Dickinson State Bank*, 662 S.W.2d 330 (Tex. 1983)). While *Coker* does not use the term “secondary rules of construction,” it cites some of those secondary rules with approval. *Id.* The label “secondary rules” comes from *Southland Royalty Co. v. Pan Am. Petroleum Corp.*, 378 S.W.2d 50, 57 (Tex. 1964).

¹⁴ *Id.*

¹⁵ *Southland Royalty*, 378 S.W.2d at 57, citing *McMahon v. Christmann*, 157 Tex. 403, 303 S.W.2d 341, 344 (1957) and *Benskin v. Barksdale*, 246 S.W. 360, 363 (Tex. 1923).

¹⁶ *Thrive Academy v. Mitchell*, No. 15-24-00060-CV, 2025 WL 2857333, at *4 (Tex. App.—15th Dist. Oct. 9, 2025, pet. denied) (quoting *GTE Mobilnet of S. Tex. Ltd. P’ship v. Telecell Cellular, Inc.*, 955 S.W.2d 286, 291 (Tex. App.—Houston [1st Dist.] 1997, writ denied)).

¹⁷ *Piranha Partners v. Neuhooff*, 596 S.W.3d 740, 749 (Tex. 2020).

“secondary rules” as admissible “surrounding circumstances” or “trade usage,” in the sense that the drafters knew of and relied on these canons of construction as default rules that would prevent any supposed ambiguity in the text.¹⁸ If so, it is certainly not self-evident that this specialized usage should be determined by a court as a matter of law, or applied as a mechanical rule, rather than by a jury as a matter of disputed fact.¹⁹

In 2020, the Court held that courts must reject canons of construction that are “arbitrary,” “default,” or “rigid” and “mechanical,” and which “appear[] nowhere in the text.”²⁰ In *Piranha Partners v. Neuhoff*, the Court expressed reluctance to give weight to older rules governing deeds and assignments, including the rules that deeds must be construed to “confer upon the grantee the greatest estate that the terms of the instrument will permit,” “to reject any alleged exception, reservation, or limitation that is not expressly and clearly stated in the written document,” and “to resolve any doubts against the party who drafted the document.”²¹ While the rule that a deed should be resolved against the drafter “might” apply after the court finds the deed ambiguous, that rule cannot be used to determine whether the agreement is ambiguous in the first place.²² *Piranha Partners* thus follows a long tradition of cases holding that courts must “reject[] mechanical rules of construction” in construing conveyances of mineral interests.²³

Nevertheless, those “mechanical rules” seem to be *necessary* in current Texas jurisprudence. In 2023, the Court twice held that courts must avoid finding ambiguity if at all possible. “*Whenever possible*, courts must assess adverse arguments and resolve a text’s meaning as a matter of law.”²⁴ “Concluding that a legal instrument is insolubly ambiguous must always come *after* a court has exhausted all the traditional tools of interpretation and still cannot reach a definitive conclusion about the meaning conveyed by the text.”²⁵ And even when the Court concedes that some texts are

so ambiguous they cannot be interpreted by a court as a matter of law, the Court nevertheless frames this conclusion as a last resort: “Courts should endeavor to give meaning to the text without too hastily finding ambiguity, but there may be times in which no other choice remains.”²⁶ Abstract principles of “textualism” do not compel this rule, because the rule begs the question of who shall construe the text according to textualist principles. The rule that ambiguity is a last resort reflects a policy determination about the relative role of judges and juries.

It is unclear, then, whether these “secondary” or “mechanical” rules will find new life as a way for courts to fulfill their duty to avoid a finding of ambiguity if at all possible. After all, using these “secondary” rules would be the most certain way for a Texas court to fulfill its duty to avoid finding ambiguity “whenever possible.” And to that end, the Court has applied certain secondary canons of construction in recent years, as have some of the courts of appeals.²⁷

The wise advocate, therefore, will continue to debate these “secondary” or “mechanical” canons of construction. Depending on which side of the argument one takes, an advocate might stress either that the rules serve a valuable tie-breaker function to avoid ambiguity, or that they are mere “arbitrary” or “mechanical” rules that “appear nowhere in the text” and must be rejected under *Piranha Partners*.

Even without a policy determination that courts should strain to avoid finding ambiguity, tie-breaker rules make perfect sense in many circumstances. In statutory interpretation, for example, the factfinder has no business trying to “interpret” a confusing statute.²⁸ And in some contract-construction problems, policy reasons require the use of default bright-line rules. For example, courts apply a rule that an insurance policy will be construed against the insurer, but they do so only after finding ambiguity, and for policy reasons arising from the imbalance in that commercial

¹⁸ And on this topic, see much more below.

¹⁹ See *Barrow-Shaver Resources Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 485 (Tex. 2019) (“When consideration of evidence as to industry custom and usage is appropriate, it is a question of fact for the jury, and it is the province of the jury to weigh witness credibility”); RESTATEMENT (SECOND) OF CONTRACTS § 222(2).

²⁰ *Piranha Partners*, 596 S.W.3d at 747.

²¹ *Id.* at 746-49.

²² *Id.* at 749.

²³ See *Hysaw v. Dawkins*, 483 S.W.3d 1, 8 (Tex. 2016) (gathering cases); see also *infra* (discussing *Hysaw* in depth).

²⁴ *U.S. Polyco, Inc. v. Texas Business Central Lines Corp.*, 681 S.W.3d 383, 389 (Tex. 2023) (emphasis added).

²⁵ *Id.* at 389 n.1 (emphasis in original).

²⁶ *Van Dyke v. Navigator Grp.*, 668 S.W.3d 353, 365 (Tex. 2023).

²⁷ *Wal-Mart Stores, Inc. v. Xerox State & Local Solutions, Inc.*, 663 S.W.3d 569, 588 n.89 (Tex. 2023) (citing the rule that the earlier prevails over the later); *Houston Exploration Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 472 (Tex. 2011) (noting that the Williston treatise declares the general rule that handwritten and typewritten terms prevail over printed terms, as part of a longer discussion of the problems presented by parties’ edits to preprinted forms); see also, e.g., *Russell v. Sadler*, No. 01-24-00843-CV, 2026 WL 1655935 (Tex. App.—Houston [1st Dist.] June 9, 2026, no pet. h.) (explaining that the earlier term prevails over the later, citing *Coker*).

²⁸ But see *infra* (discussing cases holding that sometimes courts must allow a statute to be nonsense if the statutory text is nonsense).

relationship.²⁹ And in certain business contexts, one can understand the need for swift resolution of disputed text by a court, rather than a slower and less-predictable resolution by a jury.³⁰

C. Ambiguity often, but not always, forecloses summary judgment.

What if the court reluctantly determines that the contract is ambiguous? Must it *always* go to a jury for decision?

Coker also recites the rule that “[w]hen a contract contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue.”³¹ The Court has repeated this rule over the years.³² But while this rule seems like a truism, it imperfectly describes the effect of the *summary judgment* rules, not the effect of a textualist approach to contract construction.

Long before *Coker*, the Texas Supreme Court acknowledged in *Brown v. Payne* that the construction of an ambiguous contract is a question of law for the court *if the parol evidence is undisputed*.³³ Interestingly, a very recent Fifth Circuit summary opinion by Judge Don Willett rejected the appellant’s argument that *Coker*’s recitation of the rule disfavoring summary judgment had overruled *Brown*. That case merits a brief discussion—as much for its remarkable facts as for its resolution of a potential conflict in old Texas Supreme Court case law.

In *20100 Eastex, L.L.C. v. Saltgrass, Inc.*,³⁴ the contract was drafted by the same person who executed the agreement on behalf of *both* signatories, and his testimony about his own intent was uncontroverted.³⁵ While the appellant argued that the ambiguity must be submitted to a jury under the rule in *Coker*, the Fifth Circuit held, “[n]o jury could improve upon the

testimony of the man who wrote the contract and executed it for both parties.”³⁶

Questions linger—about the process if not the result. The opinion emphasizes the total lack of any evidence on the other side of the scale, due to the uncommon fact that the drafter signed for both sides of the deal.³⁷ But a jury could have disbelieved the drafter’s testimony about his own subjective intent—“the jury is free to disbelieve a witness though she is neither impeached nor contradicted.”³⁸ The result would be an absence of evidence on *both* sides of the equation. What then? Perhaps the *Coker* “secondary rules” could be called into service,³⁹ but under current dogma the proper time for those rules is *before* finding an ambiguity exists, and not afterward. Yes, I am quibbling about the details, but this is a paper about the details.

D. In Texas, parol evidence cannot be used to create an ambiguity.

Texas long ago adopted the rule that extrinsic evidence cannot be used to create an ambiguity where none exists in the text. Though the rule was imperfectly stated in earlier cases, the Texas Supreme Court clearly stated it in 1941 in *Lewis v. East Texas Finance Co.*:⁴⁰

If a written contract is so worded that it can be given a certain or definite legal meaning or interpretation, it is not ambiguous. *It follows that parol evidence is not admissible to render a contract ambiguous, which, on its face, is capable of being given a definite certain legal meaning.* This rule obtains even to the extent of prohibiting proof of circumstances surrounding the transaction when the instrument involved, by its terms, plainly and clearly discloses the intention of the parties, or is so worded that it is not fairly

²⁹ *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118-19 (Tex. 2015).

³⁰ The Uniform Commercial Code similarly states that, in the context of negotiable instruments, “if an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over both, and words prevail over numbers.” TEXAS BUS. & COM. CODE § 3.114. This UCC statute merely restates some of the old “secondary rules” from Anglo-American jurisprudence, but one can also imagine the need for tie-breaker rules when construing documents (like negotiable instruments) that business expects to be *immediately* enforceable.

³¹ *Coker*, 650 S.W.2d at 394, citing *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1980).

³² See, e.g., *Rosetta Resources Operating, LP v. Martin*, 645 S.W.3d 212, 219 (Tex. 2022); *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003).

³³ 176 S.W.3d 306, 308 (Tex. 1943).

³⁴ ___ F.4th ___, No. 25-20421, 2026 WL 1947950 (5th Cir. July 6, 2026).

³⁵ *Id.* at *3-4.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *King v. Cardinal Services, Ltd.*, No. 21-40562, 2022 WL 4007284, at *4 (5th Cir. Sept. 2, 2022) (quoting *Tatum v. Huddleston*, 711 S.W.2d 367, 369 (Tex. App.—Texarkana 1986, no writ)).

³⁹ See, e.g., *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979) (holding that “great, if not controlling, weight should be given by the court to the interpretation placed upon a contract of uncertain meaning by the parties themselves”). The Brief of Appellee brought this case to the Fifth Circuit’s attention, but the court did not rely on it.

⁴⁰ 136 Tex. 149, 146 S.W.2d 977, 980 (1941); see also *Universal C.I.T. Credit Corp.*, 243 S.W.2d at 157.

susceptible of more than one legal meaning or construction.⁴¹

The Texas Supreme Court has applied this rule ever since. Indeed, the Court strenuously reiterated it in several recent cases discussed below.

But before moving on, we should pause to note that this Texas rule is neither universal nor self-evident. Courts can and have rejected the Texas rule as illogical or half-baked, and accordingly, they allow the use of parol evidence to prove the existence of a latent ambiguity.

For example, California firmly holds to the rule that parties may use extrinsic evidence to prove the existence of a latent ambiguity in a contract, *even where the judge concludes that the contract is unambiguous on its face*.⁴² In the foundational case, the California Supreme Court reasoned that it would be presumptuous for judges to claim to have universal knowledge of the meaning of all texts: “The exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression. This belief is a remnant of a primitive faith in the inherent potency and inherent meaning of words.”⁴³ “A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.”⁴⁴

In addition to this somewhat condescending argument, the California Supreme Court more helpfully explained that the rule applied in Texas is circular:

Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract, these terms must first be determined before it can be decided whether or not extrinsic evidence is being offered for a prohibited purpose. The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms. That possibility is not limited to contracts whose terms have

acquired a particular meaning by trade usage, but exists whenever the parties’ understanding of the words used may have differed from the judge’s understanding.⁴⁵

California recognizes a sensible limit to this rule—that the “offered evidence” must be “relevant to prove a meaning to which the language of the instrument is reasonably susceptible.”⁴⁶ Texas will return to this principle as well. (*See infra*.)

One might restate California’s point as an argument against hypocrisy. Texas judges often refer to dictionaries or treatises when deciding whether text is ambiguous,⁴⁷ and yet a dictionary is just one form of parol evidence reflecting what might otherwise be called “surrounding circumstances” or “trade usage.” The two positions are probably not so far apart in practice (and even less so after *URI v. Kleberg County*, *see infra*). Texas and California would agree that dictionaries are objective evidence of a universal practice, and that evidence of the parties’ subjective intent is irrelevant. Only California will contemplate the possibility that the parties might offer *objective* evidence of usage that is nevertheless too localized or idiosyncratic to make it into a dictionary.

For example, consider the lyrics to Jay-Z’s song “Empire State of Mind”⁴⁸—“If Jeezy’s paying LeBron, I’m paying Dwyane Wade.” An uninformed judge would reasonably conclude that Mr. Carter is asserting that Mr. Jenkins has made payment to Mr. James and that Mr. Carter has made or will make payment to Mr. Wade. The words indisputably have that plain meaning in common usage. In reality, however, this is a price quotation for wholesale delivery of an agricultural commodity. Jay-Z is boasting that his business aptitude is greater than Jeezy’s, in that Jeezy must pay his suppliers \$23,000 for a kilogram of cocaine (LeBron James’s jersey number at the time was 23) whereas Jay-Z pays his supplier only \$3,000 (Dwyane Wade’s jersey number was 3). For a judge to even imagine this interpretation of the text, however, he or she would have to be familiar with both the NBA and a previous song by Jeezy, “24-23.”⁴⁹ It is not clear that Texas’s rules regarding “surrounding circumstances” would allow such evidence to be admitted—it would depend on whether one believes the extrinsic evidence (1) is

⁴¹ *Lewis*, 146 S.W.2d at 980 (emphasis added).

⁴² *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 442 P.2d 641, 644-45 (1968) (hereafter “PG&E”).

⁴³ *PG&E*, 442 P.2d at 643-44 (cleaned up).

⁴⁴ *Id.* at 644.

⁴⁵ *Id.* at 645.

⁴⁶ *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 139 P.3d 56, 60 (2006), *citing PG&E*, 69 Cal. 2d at 37.

⁴⁷ *See Epps v. Fowler*, 351 S.W.3d 862, 866 (Tex. 2011) (“[W]e consult dictionaries to discern the natural meaning of a common-usage term not defined by contract, statute, or regulation”).

⁴⁸ From *The Blueprint 3* (2009), #1 on the Billboard Top 100, over 10 million copies sold, and winner of the Grammy Award for “Best Rap Song.”

⁴⁹ And really, one would also need objective evidence to explain the meaning of Jeezy’s lyric “I used to pay Kobe but now I pay LeBron.” It’s wholesale price quotations all the way down.

objective and (2) changes the words' plain meaning. (See *infra* the discussion of *URI v. Kleberg County*.) California would allow the parties to educate the judge through extrinsic evidence of the parties' meaning, without the angst over "surrounding circumstances." I dwell on the point because we will return to it momentarily.

E. An exception that Texas lawyers drove a truck through.

In 1995, the Texas Supreme Court issued an opinion that tried to close a loophole, but ended up opening a new one. For a generation, it seemed as though one could always cite *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. CBI Industries, Inc.*⁵⁰ to get away with discussing parol evidence of subjective intent in the guise of "surrounding circumstances."⁵¹

That case concerned whether harm caused by the release of a cloud of hydrochloric acid was excluded from insurance coverage under the policy's "absolute pollution exclusion."⁵² The parties' dispute concerned an older holding from the Texas Supreme Court (*Murphy v. Dilworth*) that "a latent ambiguity arises when a contract that is unambiguous on its face is applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter."⁵³ The trial court granted summary judgment to the insurer without allowing the insured any additional discovery to search for a latent ambiguity, and the court of appeals reversed because that denial of discovery prevented the insured from discovering and presenting evidence of a latent ambiguity under *Murphy*.⁵⁴ The Texas Supreme Court reversed, holding that the discovery sought in that case would have resulted only in evidence of the parties' subjective intent, which is not admissible to create a latent ambiguity.⁵⁵

So far, so good. In explaining that holding, however, the Texas Supreme Court reiterated that it was permissible to consider how "surrounding circumstances" might demonstrate the existence of an ambiguity.⁵⁶ To be sure, the Court stated this rule while reiterating that parol evidence must wait until *after* this

test reveals an ambiguity: "The ambiguity must become evident when the contract is read in context of the surrounding circumstances, not after parol evidence of intent is admitted to create an ambiguity."⁵⁷ But the Court nonetheless held that extrinsic evidence of "surrounding circumstances" can create an ambiguity in otherwise unambiguous language. This only begs the question of what parol evidence can be labeled "surrounding circumstances."⁵⁸ A generation of clever commercial lawyers drove a truck through this loophole.

F. The Texas Supreme Court tightened the rules of contract construction.

Nevertheless, a series of Texas Supreme Court cases from 2017 to 2020 reinforced the rules against the use of extrinsic evidence in contract construction. They eliminated the liberal use of "surrounding circumstances" as an excuse for introducing parol evidence. But they also tightened the restrictions so tightly that one could fairly wonder whether reasonable arguments based on objective evidence would still be permitted.

1. *First Bank v. Brumitt: A Hasty Retreat On Third-Party Beneficiaries.*

In 2017, the Texas Supreme Court's decision in *First Bank v. Brumitt*⁵⁹ reinforced the rules against the use of "surrounding circumstances" to create an ambiguity or vary the meaning of the words in a contract. It achieved this result by denying that it had ever deviated from those rules in the first place.

In *First Bank*, the court of appeals affirmed the trial court's decision to allow the parties to introduce extrinsic evidence of the parties' intent to create a third-party beneficiary, having concluded that this was a question for the jury instead of the court.⁶⁰ That was error, the Texas Supreme Court explained, because the parties' intent to create a third-party beneficiary is "simply a contract term like any other of the contract's terms," which the court must construe as a matter of law when unambiguous.⁶¹ Because the Court

⁵⁰ 907 S.W.2d 517 (Tex. 1995).

⁵¹ I mean, the plural of anecdote is not "data," but senior litigators at my firm taught me to make the argument, and I did it with gusto. So did my opponents, when the rule favored them. "Don't hate the player, hate the game," said noted legal scholar Ice-T.

⁵² *Id.* at 519.

⁵³ *Id.* at 520 (citing *Murphy v. Dilworth*, 137 Tex. 32, 151 S.W.2d 1004 (1941) and *Bache Halsey Stuart Shields, Inc. v. Alamo Sav. Ass'n*, 611 S.W.2d 706, 708 (Tex. Civ. App.—San Antonio 1980, no writ)).

⁵⁴ *Id.* at 520-21.

⁵⁵ *Id.* at 521.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ The opinion implies that surrounding circumstances include "[t]he facts relating to the accident, the release of hydrofluoric acid as a result of that accident, and the personal injury and property damage claims allegedly resulting from that release...." *Id.* But the opinion does not claim that those are the *only* "surrounding circumstances"—only that evidence of a party's subjective interpretation of contract language would not fall within that category. *Id.*

⁵⁹ 519 S.W.3d 95, 105-110 (Tex. 2017).

⁶⁰ *Id.* at 105-06.

⁶¹ *Id.*

considered extrinsic evidence of third-party beneficiaries in a 2011 decision, *Basic Capital Management v. Dynex Commercial*,⁶² the court of appeals had mistakenly concluded the issue must be a fact question for the jury.⁶³

The *First Bank* Court explained that it had never meant to give the impression in *Basic Capital* that parties could rely on extrinsic evidence of intent to create a third-party beneficiary.⁶⁴ *First Bank* explains that extrinsic evidence may not be used to create an ambiguity in an otherwise unambiguous contract, even when framed as “surrounding circumstances.”⁶⁵

The Court went to great lengths to explain that the parties and the court of appeals had misunderstood its decision in *Basic Capital*. *Basic Capital* had relied on what it called the “attending circumstances” of the transaction as well as extrinsic evidence regarding third-party beneficiaries.⁶⁶ But *First Bank* strenuously protests⁶⁷ that *Basic Capital* had only used “attending circumstances” to “inform our understanding of the unambiguous terms actually contained within the contract itself” and not to “add to, alter, or contradict the terms to which the parties had agreed.”⁶⁸ “In the same way that dictionary definitions, other statutes, and court decisions may inform the common, ordinary meaning of a statute’s unambiguous language, circumstances surrounding the formation of a contract may inform the meaning of a contract’s unambiguous language. But courts may not rely on evidence of surrounding circumstances to make the language say what it unambiguously does not say.”⁶⁹ *First Bank* emphasizes these principles were already established parts of Texas jurisprudence, and particularly relies on two other cases from 2011, the year when *Basic Capital* was issued.⁷⁰

First Bank also drew the distinction that *Basic Capital* had only referred to extrinsic evidence to *identify* the intended third-party beneficiaries.⁷¹ It had not used extrinsic evidence to determine whether the parties clearly intended to confer benefits on third parties.⁷²

First Bank fails to resolve several worrisome issues. First, despite what the Texas Supreme Court seems to think, it is not helpful to state that surrounding circumstances can be used to “inform our understanding of the unambiguous terms actually

contained within the contract itself” but not to “make the language say what it unambiguously does not say.” If the words are “unambiguous,” there is no need to resort to extrinsic evidence at all. By definition, an “unambiguous” word has only one reasonable definition. Instead, the evidence is being offered to ascertain *whether it is unambiguous in the first place*, which makes the Court’s objection circular. (Or maybe it “begs the question.”) I point out this conundrum because the Court would squarely acknowledge the problem (without resolving it) one year later in *URI v. Kleberg County*.

The Court’s formulation is more helpful when it admonishes that the extrinsic evidence cannot be used to “add to, alter, or contradict” the other contract terms. Extrinsic evidence should never be used to insert provisions that the parties wish (with the benefit of hindsight) that they had included in the contract. But whether extrinsic evidence is being used to “alter” the words or merely “inform” them will be a recurring problem in the cases below.

Second, it is not self-evident why it would be permissible to resort to extrinsic evidence to identify third-party beneficiaries, but not to ascertain whether the parties intended to benefit a third party. The failure to “identify” a third-party beneficiary would surely be strong evidence that the parties did not intend to benefit a third party in the first place. While it is theoretically possible (and apparently existed in *First Bank*), one can imagine that trial courts would face great difficulty in enforcing this boundary in other cases. Clever litigators can take advantage, by framing their arguments as “identifying” the third-party beneficiary instead of trying to change the unambiguous text of the contract (whatever that means).

2. *URI v. Kleberg County*—a primer on “surrounding circumstances.”

In 2018, the Texas Supreme Court issued its opinion in *URI, Inc. v. Kleberg County*.⁷³ *URI* stands out as a particularly well-written opinion, both in the readability of Justice Guzman’s prose and the Court’s resolution of potentially confusing issues.

⁶² 348 S.W.3d 894, 899–901 (Tex. 2011).

⁶³ *First Bank*, 519 S.W.3d at 105.

⁶⁴ *Id.* at 106–10.

⁶⁵ *Id.* at 106–10.

⁶⁶ *See id.*

⁶⁷ And methinks *First Bank* doth protest too much, for whatever that’s worth.

⁶⁸ *Id.* at 110.

⁶⁹ *Id.* (citing *Texas State Bd. of Exam’rs of Marriage & Family Therapists v. Texas Med. Ass’n*, 511 S.W.3d 28, 35 (Tex. 2017)).

⁷⁰ These cases are *Anglo–Dutch Petroleum Int’l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 449 (Tex. 2011) and *Houston Expl. Co. v. Wellington Underwriting Agencies, Ltd.*, 352 S.W.3d 462, 469 (Tex. 2011).

⁷¹ *Id.* at 109.

⁷² *Id.*

⁷³ 543 S.W.3d 755 (Tex. 2018).

a. The facts of *URI* and the resolution of the merits.

URI v. Kleberg County is critically important for its hornbook discussion of how textualism deals with the problem of “surrounding circumstances.” The facts of the case are less interesting, but worth discussing to provide some context.

URI concerns the interpretation of *spectacularly* arcane language in a settlement agreement that resolved a mining dispute. To oversimplify, *URI* could only resume its mining operations if the water in a particular water well had been “suitable” (i.e. potable⁷⁴) before *URI* started certain operations in 1988.⁷⁵ A well sample in 1985 said the water was “suitable,” but a 1987 sample said it was not.⁷⁶ Kleberg County argued that only the 1985 sample should count, for two reasons: (1) it had not known about the 1987 sample until after it executed the settlement agreement; and (2) the transcript of a Commissioner’s Court meeting proved that the County Commissioners believed that *URI* would have to restore this one well in particular, because that fact was brought to their attention by a protestor who thought this obligation was inadequate.⁷⁷

The trial court and court of appeals recognized that the settlement agreement falsely assumed that “the chemical composition of the well (such as uranium) is static,” and thus did not contemplate the possibility that samples would differ over time.⁷⁸ These courts therefore applied two rules to resolve the case in Kleberg County’s favor: (1) the transcript indicated the commissioners’ belief that the well had been “suitable”; and (2) *URI*’s reading made surplusage of the entire section, in that *URI* asserted that *no* wells had ever been suitable at the time the contract was executed, yet (a) the language assumed that *at least one* well would be restored, and (b) the parties would not have crafted such an arcane set of rules to identify these wells if none satisfied the test.⁷⁹

The Supreme Court reversed. The transcript should not have been consulted, the Court explained, because it showed only the subjective intent of the Kleberg County commissioners and not the objective meaning of any particular words in the settlement agreement.⁸⁰ And the argument from surplusage actually cut the opposite way, as the Court viewed it, because the elaborate process for determining “suitability” demonstrated that the parties did not have a preconceived notion of whether any wells had been “suitable.”⁸¹ That is, “Kleberg County bargained for a *process* in section 11.1(1)(ii), and it got just that.”⁸² And, because that process did not “place limitations on the data that may be considered,” the 1987 test could not be disregarded.⁸³ This was fatal to Kleberg County’s argument, for reasons that are not entirely clear.⁸⁴

b. *URI*’s discussion of the rules for extrinsic evidence.

URI became a foundational text of Texas textualism through its lengthy discussion of the rules for when and how a court may consider evidence of “surrounding circumstances.” It clarifies that “surrounding circumstances” may be considered, but only in the form of *objective* evidence and not evidence of *subjective* intent.

URI begins by conceding that words are imperfect, with language that gently concedes the point the California Supreme Court made above about the flexibility of language.⁸⁵ The meaning of words, the Court croons, “turns upon use, adaptation and context as they are employed to fit various and varying situations.”⁸⁶ Indeed, the opinion begins with (and returns to) a lovely bit of legal prose from Oliver Wendell Holmes on this very theme.⁸⁷ Context is necessary, therefore, and may encompass “the

⁷⁴ “[F]or use as either drinking water, livestock water, or irrigation water according to the criteria of 1.7(3) and parameters and limits set out in the Water Quality Use Limits Table in Par. 1.7 of this agreement.” See why I oversimplified?

⁷⁵ *Id.*

⁷⁶ *Id.* at 770-71.

⁷⁷ *Id.* at 760.

⁷⁸ *Id.* at 762.

⁷⁹ *Id.* at 762-63.

⁸⁰ *Id.* at 769.

⁸¹ *Id.* at 770.

⁸² *Id.* (emphasis added).

⁸³ *Id.*

⁸⁴ *Id.* The Court does not say that the 1985 data should be disregarded, or that the 1987 data prevails because it is later in time. See *id.* But the Court consistently describes Kleberg County’s arguments as requiring the court to totally

disregard the 1987 data. It appears the 1987 data simply made it impossible to construct an argument that the water was “suitable” when mining operations commenced in 1988. The Court approves of *URI*’s decision to average the 1985 and 1987 measurements because expert witnesses testified that baseline quality should be determined from several measurements, notwithstanding an industry practice of using only one. *Id.* The average of these two data points resulted in a finding that the well was not “suitable,” and the Court says there were no other tests that could have been included in the average. *Id.*

⁸⁵ *Id.* at 764.

⁸⁶ *Id.* (citing *California Dep’t of Mental Hygiene v. Bank of Sw. Nat’l Ass’n*, 163 Tex. 314, 354 S.W.2d 576, 579 (1962)).

⁸⁷ *Id.* at 757, 764. Justice Holmes’s quote is “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

circumstances present when the contract was entered.”⁸⁸

So what evidence of “circumstances” may be introduced? Again, the Court repeats the old rule that a court may use “extrinsic evidence of the facts and circumstances surrounding the contract’s execution as an aid in the construction of the contract’s language, but the evidence may only ‘give the words of a contract a meaning consistent with that to which they are reasonably susceptible, i.e., to “interpret” contractual terms.’ That is true even if doing so reveals a latent ambiguity in a contract’s terms.”⁸⁹

The opinion eventually acknowledges the obvious tension in this rule:

Allowing that surrounding circumstances may *reveal* a latent ambiguity seems conceptually at odds with the proscription against employing extrinsic evidence to *create* an ambiguity. But to say extrinsic evidence may not create an ambiguity but may reveal one means only that “[t]he ambiguity must become evident when the contract is read in context of the surrounding circumstances, not after parol evidence of intent is admitted to create an ambiguity.”⁹⁰

This restatement of the problem clarifies nothing, so the Court provides an example—a contract requiring delivery to “the green house on Pecan Street.”⁹¹ Extrinsic evidence may be introduced to reveal the fact that there are two green houses on Pecan Street, but not to prove a intent to deliver to the *blue* house, or to add additional constraints not in the text “such as delivery by 5:00 pm or only on Sundays.”⁹² The Court also discusses the contrasting holdings in two earlier Texas Supreme Court cases, one that resembles the two-green-houses problem⁹³ and one (*National Union!*) that resembles the delivery-by-5:00-pm problem.⁹⁴ The

Court also reiterates its statement in *Brumitt* that surrounding circumstances may be used “in the same way that dictionary definitions, other statutes, and court decisions may be used.”⁹⁵

All of these simplistic examples involve *objective* evidence, and the Court finally comes out and says it. “[O]nly circumstantial evidence that is objective in nature may be consulted.”⁹⁶ Objective evidence may include “the commercial or other setting in which the contract was negotiated,” or “trade custom.”⁹⁷ “Trade usage” would be permissible to explain that a word has a certain objective definition within an industry.⁹⁸ And the Court added that “[f]acts attending the execution may or may not shed light on contract meaning and may or may not cross the parol-evidence line,” and cited several cases that fell on either side of that line.⁹⁹ If you think that sounds unhelpful, you are correct. The Court then concedes that “a certain degree of latitude is inherent in the inquiry” before repeating the older bromides as what it claims are an “abundantly clear” set of “absolute limits on the use of surrounding circumstances.” Of course, if those older rules had been “abundantly clear,” the *URI* opinion would have been much shorter.¹⁰⁰

URI does not follow some of the threads of its own logic, but advocates should be tenacious. Take the implications of Justice Guzman’s “green house on Pecan Street” example. If there are two green houses on Pecan Street, there may indeed be a latent ambiguity in the words of the contract. But this is also the classic example of the doctrine of *mistake*,¹⁰¹ and perhaps the winning argument is to try to change the words of the contract instead of fighting over their meaning. You can use extrinsic evidence to do that.¹⁰² One could also argue that the parties’ practices resulted in a novation or modification of the text. And if the parties did not have the same understanding of a material provision of the contract, they may very well have not had a meeting

⁸⁸ *Id.* (citing *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996)).

⁸⁹ *Id.* at 765 (quoting *Sun Oil Co. (Del.) v. Madeley*, 626 S.W.2d 726, 731 (Tex. 1981) and *Nat’l Union Fire Ins.*, 907 S.W.2d at 521)).

⁹⁰ *Id.* at 765 (quoting *Nat’l Union Fire Ins.*, 907 S.W.2d at 520) (emphasis added).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Gallagher Headquarters Ranch Development, Ltd. v. City of San Antonio*, 303 S.W.3d 700 (Tex. 2010).

⁹⁴ *Nat’l Union Fire Ins.*, 907 S.W.2d at 520.

⁹⁵ *URI*, 543 S.W.3d at 767 (quoting *First Bank*, 519 S.W.3d at 110).

⁹⁶ *Id.* at 768.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 768 & n.72.

¹⁰⁰ I can still hear UT Law professor Russell Weintraub admonishing us that the statement “it is clear that” *always* means “it is *not* clear that....” Otherwise, you would simply make your supposedly clear statement. Such writing tics would spur him to exclaim, “[t]hat’s where the horse is buried!”

¹⁰¹ The famous first-year-Contracts case concerns a contract for shipment on the vessel *Peerless* from Bombay to Liverpool. The parties did not know there were *two* vessels by that name, both departing Bombay for Liverpool, but arriving in different months. *Raffles v. Wichelhaus*, [1864] EWHC Exch. J.19.

¹⁰² “When mistake is alleged, we may consider extrinsic evidence of intent in determining whether to enforce a deed.” *Myrad Properties, Inc. v. LaSalle Nat’l Bank Ass’n*, 300 S.W.3d 746, 751 (Tex. 2009).

of the minds in the first place. All that is to say, arguments about ambiguity may signal that the parties need to dig deeper or argue differently—or diagnose a more fundamental problem with the case.

At any rate, *URI* shed new light on the ongoing problem of “surrounding circumstances.” But it did not put an end to it. It did not even last a year.

3. *Barrow-Shaver*—a divided Court restricts trade usage.

The gracious unanimity of *URI v. Kleberg County* lasted one year, until a fractured Texas Supreme Court released *Barrow-Shaver Resources Company v. Carrizo Oil & Gas, Inc.*¹⁰³ in 2019. The Court fractured 5-3-1 on how “trade usage” should be implemented in a strict textualist framework.

The facts of *Barrow-Shaver* are relatively straightforward. A farmout agreement said that Barrow-Shaver could not assign or transfer its rights without the “express written consent of Carrizo.”¹⁰⁴ Does that mean Carrizo cannot unreasonably withhold that consent? The text of the agreement does not say that. A previous draft had included the caveat “...which consent shall not be unreasonably withheld,” but that was deleted during negotiations.¹⁰⁵

Barrow-Shaver asked Carrizo to consent to a lucrative opportunity to assign its rights, and Carrizo withheld its consent as leverage to try to force Barrow-Shaver to buy out its interest.¹⁰⁶ At trial, the court allowed the jury to hear evidence of a trade custom that consent cannot be unreasonably withheld in farmout agreements, but excluded evidence that these parties deleted an “unreasonably withheld” provision during negotiations.¹⁰⁷ The jury found that Carrizo breached the contract, committed fraud, and tortiously interfered with the contract, and awarded \$27,690,466.86 in damages.¹⁰⁸ The court of appeals reversed, concluding that the farmout agreement’s silence meant that Carrizo had the right to withhold its consent for any reason or no reason at all.¹⁰⁹ It also held that the trial court should have admitted evidence of the different drafts of the contract, because they were “surrounding circumstances” that should have been considered.

The Texas Supreme Court affirmed the judgment. Five justices (in an opinion written by Justice Green) held the contract put no restrictions on Carrizo’s absolute right to withhold its consent, and that the trial court properly excluded evidence of prior negotiations.¹¹⁰ Three justices (in an opinion written by Justice Guzman) would have affirmed the trial court’s decisions. In their view, the jury properly considered evidence of trade usage (so sufficient evidence supported the verdict), and the trial court properly excluded evidence of prior negotiations.¹¹¹ Justice Boyd wrote a separate dissent to split the difference—it was correct to let the jury hear evidence of trade usage, but error to exclude the evidence of prior negotiations.¹¹² In light of this fracturing of the Court on textualist doctrine, it is interesting to recall that Justice Guzman wrote *URI* and Justice Boyd wrote *First Bank*.

a. The majority gives meaning to the silence.

The majority held that Carrizo could not have breached the contract as a matter of law. The text of the contract contained no restriction on Carrizo’s consent, so the majority would not inject one into the contract.

The majority first rejected the argument that the word “consent” could be informed by trade usage— “[n]othing in the agreement suggests that the parties intended to use the term in a technical sense; rather, the term can easily be understood according to its plain, ordinary, and generally accepted meaning—approval.”¹¹³ *This holding is the whole ballgame*, and this one sentence essentially states a new Texas rule regarding trade custom and usage. Keep it in mind because the majority moves on to address other issues before returning to the same rule later in its opinion.¹¹⁴

Having concluded that there is no restriction on Carrizo’s ability to refuse consent (because “consent” has only the meaning a layman would give it), the majority then asks whether there is any reason why that contractual silence cannot be given effect.¹¹⁵ No, it answers.¹¹⁶ The consent provision is not a material

¹⁰³ 590 S.W.3d 471 (Tex. 2019).

¹⁰⁴ *Id.* at 475-76.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 476.

¹⁰⁷ *Id.* at 477.

¹⁰⁸ *Id.* at 477-78.

¹⁰⁹ *Id.* at 478.

¹¹⁰ *Id.* at 478-96. The majority included Justices Green, Lehrmann, Devine, Blacklock, and Brown. This paper will not discuss the dispute regarding the fraud finding, but it is interesting too.

¹¹¹ *Id.* at 502-15. The dissent included Justices Guzman and Busby and Chief Justice Hecht.

¹¹² *Id.* at 515-18.

¹¹³ *Id.* at 480.

¹¹⁴ One of the things that makes *Barrow-Shaver* so difficult to follow (in my experience) is that the majority opinion makes its points once, and then makes them a second time in a slightly different way several pages later, inviting the reader to compare and contrast the two statements of what are supposed to be the same principles of law.

¹¹⁵ *Id.* at 481-82.

¹¹⁶ *Id.*

provision of the contract.¹¹⁷ And while “[a] material term that appears to be indefinite or uncertain may be supplemented or given further precision,” that principle does not apply to “a term that is immaterial or non-essential.”¹¹⁸ So the contract must be read as one that unambiguously imposes no restrictions on Carrizo’s ability to withhold its consent.¹¹⁹

The rest of the majority opinion flows easily from that conclusion. The trial court properly excluded evidence of the contract negotiations, the majority explains, because Barrow-Shaver wanted to use them to impermissibly “add to” the language of the contract.¹²⁰ And the majority repeatedly emphasizes that the parties were “sophisticated parties in this commercial oil and gas context,” which can be considered because they are the “surrounding circumstances” of the transaction.¹²¹ But “surrounding circumstances” go no further than the fact that “the consent-to-assign provision was a bargained-for exchange between the parties.”¹²²

The majority then returns to the central point highlighted earlier: the word “consent” can be understood by a layman so it cannot be “informed” by industry usage or custom. The majority concedes that “[i]ndustry custom and usage may inform the meaning of words that may carry their plain meaning in some contexts, but may also carry a special meaning in the context of a particular industry.”¹²³ And—importantly for future cases—the Court reiterates that “[w]hen consideration of evidence as to industry custom and usage is appropriate, it is a question of fact for the jury, and it is the province of the jury to weigh witness credibility.”¹²⁴

But the majority holds that the words “express written consent” are “clear,” “not susceptible to more than one meaning,” and “not industry or vocation specific.”¹²⁵ And because the consent provision is not a material provision of the agreement, it cannot be supplemented.¹²⁶ The majority’s reasoning really boils down to its concern about slippery slopes:

To supplement so clear and easily understood a provision containing “express written

consent” with extrinsic evidence, as Barrow-Shaver would have us do, would make almost every term, word, or phrase in every agreement, and any obligation not in an agreement, susceptible to litigation and ultimately a jury determination based on competing expert testimony, regardless of clarity.¹²⁷

The majority opinion criticizes the dissent for seeking to “open the door to litigating the meaning of every term in every contract and any obligation not in a contract, creating lucrative business opportunities for so-called experts in every industry and allowing juries to imply obligations to which parties did not agree.”¹²⁸ This is, of course, a chicken-and-egg problem; if the text means what Justice Guzman and the jurors say it does, then justice has been done. The Court has decided to take the case away from the jury, despite the indisputable fact that sufficient evidence supported the jury’s conclusion that the parties *did* agree to a “not unreasonably withheld” provision. It has justified its departure from Texas civil procedure because it believes the jury was bamboozled by fake experts.

The majority then adds an interesting point: “under Texas’s strong policy favoring the freedom to contract, parties are free to contract around established industry custom and usage.”¹²⁹ “Because parties may agree to contract terms that are consistent or inconsistent with industry custom and usage, evidence of industry custom and usage is not dispositive as to the parties’ intent or the meaning of the parties’ agreement. Such evidence can be informative as to the parties’ intent only when the plain language of their agreement is ambiguous.”¹³⁰ The majority is right to point out that trade custom and usage is not dispositive. However, the jury in this case returned a verdict against Carrizo.

And as always, the true question is not whether trade custom and usage can be used to resolve an ambiguity in a contract—that is well-established and thus uninteresting. The interesting question was posed in *URI*: whether trade custom and usage can be used as objective evidence of “surrounding circumstances” for

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 481. The Court returns to this point later in the opinion, relying on the RESTATEMENT (SECOND) OF CONTRACTS § 221 to emphasize that “if a contract omits a term, yet includes all the necessary terms to make the agreement enforceable, courts may *not* imply a reasonable term.” *Id.* at 487 (emphasis in original).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 483.

¹²¹ *Id.*

¹²² *Id.* at 484.

¹²³ *Id.* at 485 (citing the much-older cases *Monarch Marking Sys. Co. v. Reed’s Photo Mart, Inc.*, 485 S.W.2d 905, 906

(Tex. 1972) and *Dwyer v. City of Brenham*, 70 Tex. 30, 7 S.W. 598, 599 (1888)).

¹²⁴ *Id.* at 485 (citing *Monarch Marking*, 485 S.W.2d at 906).

¹²⁵ *Id.* at 486.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 488.

¹²⁹ *Id.* (citing *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 59 (Tex. 2016) and *Philadelphia Indem. Ins. v. White*, 490 S.W.3d 468, 471 (Tex. 2016)).

¹³⁰ *Id.*

the purpose of *informing* the meaning of a word to *reveal* a latent ambiguity.¹³¹ The *Barrow-Shaver* majority imposed a new restriction on that principle.

Finally, the majority responds to the dissent's criticism that its interpretation allows an unfair result.¹³² "[O]ur holding does not give Carrizo, or another similarly situated party, permission to extort a multimillion, last-minute payment in exchange for consent."¹³³ The majority explains that "the record does not demonstrate that happened," and cites certain evidence.¹³⁴ At the risk of belaboring the point, the jury concluded otherwise. And even more importantly, "an unfair result did not happen here" is different than arguing "an unfair result *could not* happen."

The majority could have *and should have* defended its opinion more candidly. In a system of bright-line rules, remorselessness is a feature, not a bug. It's not fair, it's *efficient*—and thus *necessary*.

Having said that, there is real gut-level appeal to the majority's insight that "...which cannot be unreasonably withheld" feels more like *adding* a term to the contract than *revealing* an ambiguity in the words that are already there. And if the Court insists on a rule that prohibits industry custom from adding terms where a contract is silent—which changes Texas law, *see infra*¹³⁵—then it makes no difference that the oil and gas industry thinks it should be able to do exactly that.

- b. The dissenting justices would allow trade usage to inform the meaning of the word "consent."

The dissenting justices applied a fundamentally different approach. They concluded it was permissible to use trade custom and usage to reveal that the word "consent" had a latent ambiguity, and thus it was appropriate for the jury to resolve that ambiguity.¹³⁶

"[I]ndustry custom and usage informs the meaning of terms that might otherwise seem intuitive to industry outsiders," the dissenters note, and walk through many examples including the famous "baker's dozen."¹³⁷

"The Court's holding today that trade custom and usage has no applicability to terms that are 'not susceptible to more than one meaning[] and [are] not industry or vocation specific' is manifestly wrong."¹³⁸ They add:

And if industry custom and usage can inform the meaning of an ostensibly certain number, a soft term, like "consent," could also carry a commercially significant context-dependent meaning, so long as the party asserting the custom and usage can meet its burden of proving the custom and usage has such regularity of observance as to justify an expectation that it will be observed with respect to the transaction in question.¹³⁹

Responding to the majority's criticism, the dissenters restate the problem. "[T]he issue presented is what the 'agreed-to terms' mean in the first instance, and evidence of trade custom and usage is admissible for that purpose."¹⁴⁰ The dissenting justices then reiterate that trade custom and usage is a question of fact for the jury to determine, and defend the judgment as being a jury verdict supported by ample evidence.¹⁴¹

The dissent would *not*, however, allow evidence of the prior negotiations to be used as evidence.¹⁴² The fact that the parties deleted an express provision would show only the parties' subjective intent, not objective evidence of the meaning of the words on the page.¹⁴³ And alternatively, they reasoned, the exclusion of the evidence was not error because the deletion of the reasonableness limitation could have equally been because the parties agreed that Carrizo could act unreasonably, or because they believed the provision to be redundant in light of industry custom.¹⁴⁴

The dissent concludes by responding to the majority's criticism, and leveling some criticism of its own.¹⁴⁵ The justices are not imposing their own opinion on this contract; they are applying "a usage formed by the industry."¹⁴⁶ And the majority's position endorses behavior the jury found to be "unreasonable and

¹³¹ *URI*, 543 S.W.3d at 765. A lingering problem is that trade custom and usage is a question of fact, but the determination of whether a contract is ambiguous is a question of law for the court.

¹³² *Barrow-Shaver*, 590 S.W.3d at 496.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Justice Boyd notes that an older Texas Supreme Court case allowed industry custom to fill the silence in a contract. *Id.* at 515-16. The Court frequently repeated the rule that extrinsic evidence cannot be used to "add to" a contract. The question is whether industry custom and usage differs from other extrinsic evidence.

¹³⁶ *Barrow-Shaver*, 590 S.W.3d at 502-03 (Guzman, J., dissenting).

¹³⁷ *Id.* at 506-07.

¹³⁸ *Id.* at 507.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 508.

¹⁴² *Id.* at 510-11.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 511. No one cares what I think, but I found this part of *Barrow-Shaver* to be the least plausible. Like Justice Boyd, *see infra*, I would hold the deletion of an express reasonableness requirement weighs much more in Carrizo's favor—though I have also argued (rightly!) in other cases that contract language was deleted as redundant. But three Justices disagreed and concluded that the two inferences were equally likely on these facts.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (emphasis in original).

fraudulent,” and thus “nullifies the fundamental goal of farmout agreements and frustrates public policy.”¹⁴⁷ The dissent also contended that the resulting failure to develop “the minerals on the 22,000-acre Parkey tract” was “repugnant to our statewide policy to promote oil-and-gas exploration and development.”¹⁴⁸

c. Justice Boyd takes a different approach.

Justice Boyd’s dissent is much shorter and can be more easily summarized. He would allow industry custom and usage to inform the meaning of the word “consent,” or even to fill a silence in a contract (based on an older Texas Supreme Court case),¹⁴⁹ and notes that the common-law even allowed industry custom and usage “regardless of whether there appears to be any ambiguity in the words.”¹⁵⁰ He found it “unlikely” that Texas custom and usage was what Barrow-Shaver alleged it was, but recognized that sufficient evidence supported the jury’s verdict.¹⁵¹

Nevertheless, he disagreed with the dissenting justices on the admissibility of the prior negotiation evidence.¹⁵² Because industry custom and usage is a question of fact, he explained, the negotiations were necessary to ascertain whether both sides had the same understanding of the industry terms.¹⁵³ When Carrizo deleted the reasonableness requirement, therefore, that tended to show that Carrizo’s intent was inconsistent with the alleged industry custom.¹⁵⁴ He would remand for a new trial where *all* the evidence of industry custom and usage is presented to the jury.¹⁵⁵

d. So what can we use from *Barrow-Shaver*?

Because *Barrow-Shaver* states a new rule governing trade usage in Texas, one surely wishes *Barrow-Shaver* stated it more clearly.¹⁵⁶ Here is one way to rephrase it (in my words):

If a term can be understood in an “ordinary” non-technical sense, then extrinsic evidence

of trade custom or usage will not be allowed—*unless* something else *in the text of the agreement* signals the parties’ intent to rely on technical meaning.

While it is true that parties can agree *not* to follow industry custom, when will parties ever expressly signal their affirmative intent to rely on trade usage and custom? The whole point of trade usage and custom is that these practices have so thoroughly suffused the industry that they do not require explanation.¹⁵⁷ If the parties take the time to identify trade usage, they could simply define the term as they wish. So the gloomiest reading of *Barrow-Shaver* would be that trade usage and custom can only be used in Texas when it is unnecessary. Certainly, drafters should no longer assume that an unstated industry custom or usage will ever be applied.

Consider this example, which is childishly obvious but makes a good thought experiment. If a contract contains the word “dozen,” does that always mean twelve? You and I both know that bakers use the word “dozen” to mean thirteen, not because they can’t count, but because their longstanding practice of adding one more item¹⁵⁸ has become so entrenched that a customer would feel short-changed if the baker did not include thirteen. In Texas litigation after *Barrow-Shaver*, though, would a customer be allowed to argue that “dozen” means “thirteen,” or that the term “dozen” is ambiguous? After all, “dozen” is clear and does not require industry information to understand. It has a distinct meaning in the baking industry, but “dozen” is a common term and not “industry or vocation specific.”¹⁵⁹ So can a customer introduce evidence of industry custom? Is a reference to a “baker” in the contract something that “in the agreement suggests that the parties intended to use the term [dozen] in a technical sense”?¹⁶⁰ If so, why wasn’t that level of industry reference sufficient to justify the use of industry custom and usage in *Barrow-Shaver*, a case

¹⁴⁷ *Id.* at 512.

¹⁴⁸ *Id.* at 513-14. Here too, I balk at the idea that the result in this case is somehow offensive to a policy to “drill, baby, drill.” This case presents the free market determining the price of the minerals. Barrow-Shaver could develop those 22,000 acres—it just had to buy out Carrizo to do it.

¹⁴⁹ *Id.* at 515-16 (citing *Luling Oil & Gas Co. v. Humble Oil & Ref. Co.*, 144 Tex. 475, 191 S.W.2d 716, 724 (1945)).

¹⁵⁰ *Id.* at 516 (citing *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 566 Pa. 494, 781 A.2d 1189, 1193 (2001)).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ I have lost count of the number of times I have argued with groups of smart lawyers in good faith over how to describe the holding of *Barrow-Shaver*. Which, I suppose, was one of the things that spurred this paper and presentation.

¹⁵⁷ See *id.* at 516 (Boyd, J., dissenting) (“Contracts may only include industry usage or customs that are ‘so general that both [parties] are presumed to be aware of them, or that they have actual knowledge of them, to be charged with having contracted with reference to such usage and custom’” (quoting *Barreda v. Milmo Nat’l Bank*, 252 S.W. 1038, 1039-40 (Tex. Comm’n App. 1923))).

¹⁵⁸ Medieval law imposed a penalty if the dozen items fell below a set weight, so bakers included a thirteenth to guarantee they would not accidentally fall short. https://en.wikipedia.org/wiki/Dozen#Baker's_dozen.

¹⁵⁹ Cf. *Barrow-Shaver*, 590 S.W.3d at 486 (emphasis added).

¹⁶⁰ *Id.* at 480.

about a farmout agreement drafted by sophisticated oil and gas companies?

These are the questions that will continue to guide clever litigators. The lesson is to search for other signals in the text that can be used to justify the use of trade custom or usage.

The other critical lesson of *Barrow-Shaver* will be found in the majority's exasperated objection that there would be no end to litigation if the words "express written consent" could be said to mean "express written consent but not unreasonably withheld." Advocates should always include some sort of limiting rule in their arguments about ambiguity, to reassure courts that there will be an end to the litigation.

G. Can mathematics be ambiguous?

The Texas Supreme Court did not cleanly apply *any* of these rules in a trio of recent cases dealing with mathematics. The Court cheerfully acknowledged that its opinions seemed absurd, because they *were* absurd—the Court determined that "1/3 of 1/8" was 1/3 *unambiguously*, and not 1/24. In the end, it is useful to learn from how the Court subtly (and not-so-subtly) updated textualist dogma to do it.

1. *Hysaw v. Dawkins* describes the "double-fraction dilemma."

In the first of these three cases, 2016's *Hysaw v. Dawkins*,¹⁶¹ the Court laid the foundation for the remarkable conclusion that math might not be math. As the Court explains, double fractions in conveyances have long caused problems—when a grantor uses the fraction 1/8, does she truly mean 1/8 in the mathematical sense of .125, or is this a term of art that refers to the grantor's *entire* royalty (which would have been 1/8 of the original total as a matter of trade custom)?

In 1949, Ethel Hysaw's will conveyed "an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals..." to each of her three children.¹⁶² A second granting clause followed a similar formula, while a third states that the children would receive "one-third of the remainder of the unsold royalty" after any *inter vivos* royalty sale.¹⁶³

When the successors to those interests executed a mineral lease in 2008 that provided a 1/5 royalty—higher than the historically common 1/8—they fell into a disagreement over the meaning of Hysaw's original

grant.¹⁶⁴ The dispute turned on whether Hysaw had conveyed only a fixed fractional interest of 1/24 to each child (thus reserving the remaining 7/8 of Ms. Hysaw's royalty for her estate), or had conveyed 1/3 of her entire royalty interest at that time (reserving nothing).¹⁶⁵ The San Antonio Court of Appeals gave "1/3 of 1/8" its plain mathematical meaning, and held that the first and second clauses resulted in a grant of a fixed 1/24 royalty to each child.¹⁶⁶ The court likewise read the third clause plainly and literally—to award 1/3 interests in any remaining royalty after an *inter vivos* sale—but did not believe this conflicted with its mathematical interpretation of the first clause.¹⁶⁷ In other words, the court of appeals concluded the text plainly stated Hysaw's intent to convey the third interest differently than the first two interests. These interpretations were reasonable and did not conflict.

The Texas Supreme Court reversed and held that Ms. Hysaw unambiguously meant to convey her entire royalty interest in three equal parts to her three children.¹⁶⁸ That is, 1/3 of 1/8 was 1/3 *as a matter of law*, with no questions of fact to be resolved by a jury. The court of appeals, in its view, had erred by reading the three clauses "in isolation" instead of using the third clause to inform the interpretation of the first.

The Court began by declaring the textualist rules it would follow. Courts construe wills based on the words alone, and do not look outside the four corners of the text.¹⁶⁹ And courts may consider the surrounding circumstances when doing so, under the usual vague rules for such evidence.¹⁷⁰

More importantly, the Court repeatedly insisted it would not follow "bright-line rules of interpretation that are arbitrary and, thus, inimical to an intent-focused inquiry."¹⁷¹ To that end, it listed many forms of bright-line, "mechanical rules of construction" that the Court has discarded in the interpretation of conveyances of mineral interests.¹⁷² But—and this is the really interesting part—the "arbitrary" and "mechanical" rule that the Court rejected in this case was *mathematics itself*. It held, "[w]e therefore cannot embrace a mechanical approach requiring rote multiplication of double fractions whenever they exist."¹⁷³

The Court then moved on to what it called "the double-fraction dilemma," which "present[s] recurring interpretive challenges."¹⁷⁴ For much of Texas history, 1/8 was "a royalty rate so pervasive that, for decades,

¹⁶¹ 483 S.W.3d 1 (Tex. 2016).

¹⁶² *Id.* at 4.

¹⁶³ *Id.* at 5.

¹⁶⁴ *Id.* at 5-6.

¹⁶⁵ *See id.*

¹⁶⁶ *Id.* at 7.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 4.

¹⁶⁹ *Id.* at 7.

¹⁷⁰ *Id.* at 8.

¹⁷¹ *Id.* at 4, 8, 13.

¹⁷² *Id.* at 8.

¹⁷³ *Id.* at 4.

¹⁷⁴ *Id.* at 9.

courts took judicial notice of it as the standard and customary royalty.”¹⁷⁵ Accordingly, it was possible for drafters to assume that future royalties would *always* be 1/8, such that the term “1/8” might be used as shorthand for the landowner’s entire royalty interest.¹⁷⁶ This was compounded by the problem of “estate misconception,” which reflected “a once-common misunderstanding (perpetuated by antiquated judicial authority) that a landowner retained only 1/8 of the minerals in place after executing a mineral lease instead of a fee simple determinable with the possibility of reverter in the entirety.”¹⁷⁷ The result has been “mixed results, with no discernible unifying principle.”¹⁷⁸

The “double-fraction dilemma” is not the most plain and obvious reading of the text; it is revealed only when one learns of these historical facts external to the will or conveyance. So how should courts apply it? *URI* and *Barrow-Shaver* require the parties to provide *objective evidence* to reveal a latent ambiguity. Notably, the Court’s explanation of the “double-fraction dilemma” in *Hysaw* rests entirely on legal scholarship—indeed, almost exclusively on a single law review article.¹⁷⁹ The *Hysaw* Court does not draw from evidence that the parties might have adduced in the trial court, such as evidence of “surrounding circumstances” or other objective evidence of intent such as contemporaneous legal texts or drafting guides.¹⁸⁰ Admittedly, legal scholarship may be the best way to fill that role, because the disputed issue is a testator’s intent in Karnes County, Texas in 1949, and not likely to be proven by anything other than deep historical research. Nevertheless, *Barrow-Shaver* holds that industry custom and usage is a *question of fact* that must be proven by the parties and resolved by a jury.¹⁸¹

At any rate, the Court next acknowledges that “a mechanically applied, mathematical approach” is appealing because it provides a bright-line rule, and “purports to afford weight to each of the expressed fractions under a plain-meaning analysis.”¹⁸² But the problem, the Court explained, is that this approach does not explain why the drafter went to the trouble of

expressing the conveyance as *two* fractions instead of simply doing the math.¹⁸³ This observation is crucial, because it would later become the logical backbone of the rule of decision in double-fraction cases. “[A]s commentators have noted, there is ‘little explanation’ for the use of double fractions to express a fixed interest absent a misunderstanding about the grantor’s retained ownership interest or use of 1/8 as a proxy for the customary royalty.”¹⁸⁴ This rule establishes the double-fraction dilemma as a problem *inherent in the text itself*, instead of being external to it. As *URI* and *Barrow-Shaver* demonstrate, courts can only “inform” the meaning of the *existing* text, they cannot “add to” or “alter” it. (It’s instructive to compare this holding to *URI v. Kleberg County*, in which the Court held that the parties adopted a mathematical process but would *not* have performed the math to determine the result.¹⁸⁵)

But none of these rules are sufficient to make “1/3 of 1/8 = 1/24” *unambiguously* false. Ultimately, *Hysaw* turns on this rule:

But considering whether inconsistencies might exist and how they may be harmonized is part of the process for determining intent; it is not merely a cross-check method of validating an interpretation derived by segregating key terms and phrases. That is to say, **meaning derived without reference to context is not confirmed merely because such a construction would not produce an inconsistency with another provision.**¹⁸⁶

That is, an ordinary and grammatically correct reading of a contract provision can be *consistent* with the rest of the document without being *reasonable*.

I think this rule really blossoms in a 2025 Texas Supreme Court case, *Board of Regents of University of Texas System v. IDEXX Labs., Inc.*¹⁸⁷ *IDEXX* reiterated Justice Calvert’s prior explanation that a contract is only ambiguous if it is “*genuinely uncertain*” which of two meanings is intended, and it is not ambiguous if

¹⁷⁵ *Id.* at 9 (citing *Luckel v. White*, 819 S.W.2d 459, 462 (Tex. 1991); *Garrett v. Dils Co.*, 157 Tex. 92, 299 S.W.2d 904, 907 (Tex. 1957)).

¹⁷⁶ *Id.* at 10.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 11.

¹⁷⁹ Laura H. Burney, *Interpreting Mineral and Royalty Deeds: The Legacy of the One-Eighth Royalty and Other Stories*, 33 ST. MARY’S L.J. 1, 24 (2001). That is, the Court relies almost exclusively on this one article. Professor Burney’s work draws upon a variety of case law and the work of other writers.

¹⁸⁰ The Court notes that courts had taken judicial notice that 1/8 was the “customary royalty,” that falls short of proving that parties had come to use “1/8” as a proxy for “the entire

royalty.” The Court uses Professor Burney’s scholarship to fill that gap.

¹⁸¹ *Barrow-Shaver*, 590 S.W.3d at 485.

¹⁸² *Hysaw*, 483 S.W.3d at 12. The judgmental word “purports” is doing some heavy lifting here. In any other context there would be nothing unseemly about saying that the plain meaning of 3 x 8 is 24.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 10-11 (citing 2 Howard R. Williams & Charles J. Meyers, OIL AND GAS LAW § 327.2, at 90-91 (Patrick H. Martin & Bruce M. Kramer eds., 2015) and Burney, 33 ST. MARY’S L.J. at 24).

¹⁸⁵ *URI*, 543 S.W.3d at 770.

¹⁸⁶ *Hysaw*, 483 S.W.3d at 10-11 (emphasis added).

¹⁸⁷ 691 S.W.3d 438, 444-45 (Tex. 2025).

“only one reasonable meaning *clearly emerges*.”¹⁸⁸ Relying on a 2024 United States Supreme Court case, *Pulsifer v. United States*,¹⁸⁹ the Texas Supreme Court endorses the United States Supreme Court’s observation that some texts can have two grammatically correct meanings, but nevertheless, no ambiguity emerges because context provides ample confidence about which meaning was intended.¹⁹⁰

Certainly, the *Hysaw* Court seems to think that there can be no genuine question about Ethel Hysaw’s intent—it is the “only plausible construction.”¹⁹¹ And in announcing this conclusion, the Court holds it would be “paradoxical” to read the third granting clause as being intentionally different from the first.¹⁹² If that is truly what the Court meant, the entire opinion would have been much shorter. The Court could simply cite the long-established rule against interpretations that lead to absurd results.¹⁹³ But the interpretation is not absurd at all, *if it is reasonable to read the clauses separately*. If Ethel Hysaw could have intended to convey her royalty interest on death differently than she conveyed her royalty interest in life, then the result is not paradoxical at all. Thus the importance of *Hysaw*’s holding that an interpretation can be *consistent* without being *reasonable*.

It is easy to defend the result in *Hysaw*. Setting aside the dogma of textualism, it is really, really, *really* clear that Ethel Hysaw meant to give away her entire royalty interest to her three children in equal shares.¹⁹⁴ The problem is that she used ambiguous words to do so. And the Court really, really, *really* does not want to apply the settled rules for resolving ambiguous text.

This will lead directly to the principle, announced in two 2023 cases, that courts should do everything possible to avoid a finding of ambiguity.¹⁹⁵ (In fact, one of those cases was a direct result of the confusion caused by *Hysaw*.) Having decided to avoid jury trials, the Texas Supreme Court held—without spelling it out so plainly—that no reasonable person could conclude that Ethel Hysaw meant to convey different interests in

the three granting clauses. That left only one construction: no reasonable person could find it unreasonable to say that 1/3 of 1/8 is 1/3.

2. *Van Dyke v. Navigator Group*—converting *Hysaw* into a rebuttable presumption.

In 2023, the Texas Supreme Court issued *Van Dyke v. Navigator Group*¹⁹⁶ to “reaffirm *Hysaw* and clarify the import of our holding in that case.” *Mechanically*, *Van Dyke* turned *Hysaw* into a rebuttable presumption that the use of 1/8 in a mineral conveyance refers to the grantor’s entire royalty interest, and not the mathematical expression of .125. *Rhetorically*, *Van Dyke* attempts to rehabilitate *Hysaw*’s counter-intuitive logic.

Justice Young’s opinion for the Court is positively *jovial*, beginning with a good-natured acknowledgement that “[o]nly in a legal text could the formula ‘one-half of one-eighth’ mean anything other than one-sixteenth.”¹⁹⁷ He continues, “[t]hose results may seem bizarre, unsatisfying, and literally fuzzy math. They can also be inefficient; resolutely adhering to the rules of arithmetic would more rapidly end litigation.”¹⁹⁸ Nevertheless, he warns, the strict rules of “textual construction” must prevail over “arithmetic.”¹⁹⁹

The text at issue in *Van Dyke* was this 1924 conveyance: “...one-half of one-eighth of all minerals and mineral rights in said land are reserved in grantors....”²⁰⁰ For ninety years, the parties consistently acted as though this reserved one half of the minerals, not 15/16 of them.²⁰¹ When litigation ensued in 2013, however, the Eastland Court of Appeals held this provision reserved 15/16 of the minerals.²⁰² It held there were no conflicting provisions in the deed that required harmonization, as in *Hysaw*, so it applied straightforward multiplication out of a dedication to textualist dogma.²⁰³

The Texas Supreme Court reversed and announced a new rule: “[a]ntiquated instruments that

¹⁸⁸ *Id.* at 443 (quoting *Universal C. I. T. Credit Corp. v. Daniel*, 150 Tex. 513, 243 S.W.2d 154, 157 (1951) (emphasis in *IDEXX*)).

¹⁸⁹ 601 U.S. 124 (2024).

¹⁹⁰ *IDEXX Labs.*, 691 S.W.3d at 444. As the *IDEXX* Court explains, *Pulsifer* held that “does not have A, B, and C” meant “does not have A and B and C” even though it would be grammatically correct to also interpret the words as meaning “does not have any of A, B, or C.” *Id.* In the context of the Sentencing Guidelines, the latter would be very counterintuitive because it would release criminals too quickly and thus “seriously rupture the sentencing system.” *Id.* One imagines the defendants would see it differently.

¹⁹¹ *Hysaw*, 483 S.W.3d at 15.

¹⁹² *Id.* at 15-16.

¹⁹³ See, e.g., *Rosetta Res. Operating, LP v. Martin*, 645 S.W.3d 212, 219 (Tex. 2022). And see also *infra*.

¹⁹⁴ See, e.g., *Hysaw*, 483 S.W.3d at 14-16.

¹⁹⁵ See *supra*.

¹⁹⁶ 668 S.W.3d 353 (Tex. 2023).

¹⁹⁷ *Id.* at 357.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* It is not clear why “textual construction” is any different from “arithmetic,” insofar as arithmetic is itself a grammar for expressing concepts in the clearest possible terms, but Justice Young was on a roll.

²⁰⁰ *Id.* at 357.

²⁰¹ *Id.* at 358.

²⁰² *Id.* at 359.

²⁰³ *Id.*

use 1/8 within a double fraction *raise a presumption* that 1/8 was used as a term of art to refer to the ‘mineral estate.’”²⁰⁴ “That presumption is readily rebuttable, however. If the text itself has provisions—whether express or structural—illustrating that a double fraction was in fact used as nothing more than a double fraction, the presumption will be rebutted. But the presumption is not rebutted here.”²⁰⁵

Van Dyke begins its discussion of the relevant rules of construction by insisting that courts must determine the meaning of the text when it was drafted, drawing support from a recent United States Supreme Court opinion.²⁰⁶ Moreover, the court will look only to the four corners of the document itself, not to extrinsic evidence, and will not “credit claims made in litigation of a secret or bespoke meaning that no one not privy to the code reasonably would have understood.”²⁰⁷ The need for objective evidence is all the greater because deeds are public documents that must be construed in a predictable way.²⁰⁸ But Justice Young conceded that *some* sources of extrinsic evidence could be consulted in such cases. “Contemporary dictionaries” are objective sources of what an “informed but disinterested speaker” would have thought the words meant, as are “specialized or technical dictionaries” where those contexts are relevant.²⁰⁹

Most interestingly, Justice Young concedes that the problem is not the plain meaning of the text, but the *uneasy tension* between plain text and textualist dogma:

Indeed, the challenge is not particularly legal in nature. Instead, it is to overcome the cognitive dissonance that arises because, at least at first glance, “one-half of one-eighth” seems unusually clear yet is alleged to mean something radically different from what we might expect. After all, it is certainly true that one-half times one-eighth did equal one-

sixteenth in 1924 and at every other time in history.²¹⁰

To explain this unease, Justice Young adopts *Hysaw*’s historical explanation of the double-fraction dilemma without adding any new sources of data, thereby doubly emphasizing that the *Hysaw* and *Van Dyke* opinions rest on the scholarship of a single historian and not on extrinsic evidence of “surrounding circumstances” introduced by the parties.²¹¹ Once again, there is no mention of the fact that industry custom and usage is a question of fact that must be proven by the parties.²¹²

Again, this may reflect the fact that the relevant “evidence” consists of the historical texts that informed Professor Burney’s work, and no one has yet disputed her work in a way that interested the Texas Supreme Court. But I pause to note that litigators should be keenly aware that it remains possible—theoretically—to develop the history in a more advantageous manner for your case. One might find strictly objective evidence of contemporaneous practices (like a form book, court opinion, or drafting guide) that demonstrate these particular parties knew that “1/8” was not the same thing as “the entire estate.”²¹³ Throughout the legal world, litigation increasingly requires deep dives into historical argument—and this is no different.²¹⁴

The Court implicitly acknowledges that *Hysaw* did not resolve the many disputes arising from the double-fraction dilemma.²¹⁵ And while the Court warns that it is “frankly, not aware of double fractions including 1/8 that were aimed at simple multiplication rather than referencing the mineral estate as a whole,” it reiterates that *Hysaw* does not require courts to “inexorably” treat them using a bright-line solution.²¹⁶

Having disclaimed a “bright-line” rule, *Van Dyke* creates a rebuttable presumption that it grounds in the “logic of our analysis in *Hysaw*.”²¹⁷ The presumption has three parts:

scholarship to undergird advocacy about whether certain forms of firearm restrictions were considered permissible under the Second Amendment at the time of the founding. *See, e.g.,* Chris Dove, *Judges as Historians: Bruen’s New Rules*, 33 APPELLATE ADVOCATE 1, 26 (Winter 2023). The principle that rights must be “deeply rooted in this Nation’s history and tradition” grows throughout federal jurisprudence and requires similar historical evidence. *See Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) The same could be true of the double-fraction dilemma. History is something that can and should be proven through *evidence*, after all. Advocates should not wholly yield the battlefield to judges, scholars, or anyone else.

²¹⁵ *Id.*

²¹⁶ *Id.* at 364.

²¹⁷ *Id.*

²⁰⁴ *Id.* (emphasis added).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 359-60 (citing *New Prime Inc. v. Oliveira*, 586 U.S. 105 (2019)).

²⁰⁷ *Id.* at 361.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 360.

²¹¹ *Id.* at 362-64 (citing *Hysaw* and Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 90 (1993)).

²¹² *Barrow-Shaver*, 590 S.W.3d at 485.

²¹³ *Id.* at 361 (holding that objective, contemporaneous sources are admissible to inform the meaning of the text).

²¹⁴ A few years ago I delivered a talk at this conference about how the bench and bar urgently required new historical

- “[W]e *begin* with a presumption that the mere use of such a double fraction was purposeful and that 1/8 reflects the *entire* mineral estate, not just 1/8 of it.”²¹⁸ And just as in *Hysaw*, the Court grounds this new presumption in the words of the text themselves—“it would be odd to say ‘one-half of one-eighth’ rather than simply ‘one-sixteenth’ if all that was intended by ‘one-half of one-eighth’ was 1/16.”²¹⁹
- But this presumption “is readily and genuinely rebuttable.”²²⁰ At the same time, “[w]e emphasize that the rebuttal must *come from the document itself*, given the public’s right to rely on the meaning of deeds and our general insistence on predictability and stability in matters of interpretation.”²²¹
- And the Court insists that it is still possible for a double fraction to be ambiguous. “[A]n instrument may have enough textual evidence to drain confidence in the presumption yet insufficient evidence for a court to conclude that a reasonable reader at the time would have understood the instrument to require mere multiplication.”²²² “When that happens, a factfinder may be needed to finally resolve the text’s meaning. Courts should endeavor to give meaning to the text without too hastily finding ambiguity, but there may be times in which no other choice remains.”²²³

The *Van Dyke* Court then gently rebukes the court of appeals for distinguishing *Hysaw* merely because because the conveyance in *Van Dyke* was far more straightforward than Ethel Hysaw’s will.²²⁴ *Van Dyke* recharacterizes the issue as one of “default rules,” and chastises the court of appeals for inventing a “default rule that requires multiplication unless it can be proven that doing so would contravene some other provision of the text.”²²⁵ Instead, “the use of a double fraction in this deed, combined with the *lack* of anything that could rebut the presumption, is precisely why we can conclude as a matter of law that this deed did not use 1/8 in its arithmetical sense but instead reserved to the Mulkey grantors a 1/2 interest in the mineral estate.”²²⁶

Hysaw did not use a “default rule” of any sort.²²⁷ *Hysaw* held the overwhelming effect of the entire will was to demonstrate that the mathematical interpretation was not reasonable, even if it was consistent with the rest of the document. Accordingly, it was not unreasonable for the Eastland Court of Appeals to take note that the conveyance in *Van Dyke* lacked these same indicia.²²⁸ Nor was it unreasonable to note that the logic of *Hysaw* could not apply because the “estate misconception theory” could not have confused these particular grantors.²²⁹ Nevertheless, the Texas Supreme Court had every right to change the law to create a new “default rule,” and that is what it did in *Van Dyke*.

It’s interesting to contrast the rule explored in *Hysaw* and crystallized in *Van Dyke* with the Texas Supreme Court’s handling of a similar issue only one year later. In *Rodriguez v. Safeco Insurance Company of Indiana*,²³⁰ the Court rejected an argument that the formula for calculating attorneys’ fees found in Section 542A.007 of the Texas Insurance Code would lead to absurd results:

Whether we think the Legislature envisioned or anticipated the practical consequences of its attorney’s-fees formula is beside the point. Much could be said of the oft-debated concept of “legislative intent,” but this point is certain: The Legislature intends courts to follow its instructions. **Few legislative instructions are as inescapable as a math formula.** If the Legislature does not like the consequences of the instructions it has given the courts, it obviously has every right to change them.²³¹

Does it matter that *Rodriguez* interpreted a statute instead of a deed? Does it matter that the deeds in *Hysaw* and *Van Dyke* were older than the statute in *Rodriguez*? Discuss.

At any rate, *Van Dyke* goes on to hold that the presumed-grant doctrine would lead to the same result.²³² That doctrine is “a common law form of

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* (emphasis added).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.* at 365-66.

²²⁶ *Id.* at 366 (emphasis in original).

²²⁷ *Hysaw* did observe that the very fact of spelling out the double fraction suggests that something more than mere

mathematics was intended. *Hysaw*, 483 S.W.3d at 10-11. And *Van Dyke* grounds its “default rule” in this observation. But *Hysaw* did not treat this observation as a default rule. If it had, the Court could have avoided all that discussion about the need to look at the three granting clauses together and not in isolation.

²²⁸ 647 S.W.3d 901, 908 (Tex. App.—Eastland 2020, pet. granted).

²²⁹ *Id.*

²³⁰ 684 S.W.3d 789 (Tex. 2024).

²³¹ *Id.* at 795 (emphasis added).

²³² *Van Dyke*, 668 S.W.3d at 366.

adverse possession.”²³³ The parties’ ninety-year history of treating the conveyance as retaining a 1/2 interest instead of a 15/16 interest was more than adequate to establish adverse possession of the disputed minerals.²³⁴

I mention the presumed-grant aspect of the case to nitpick at a comment the Court makes in passing, because it is both (1) completely sensible; and (2) completely at odds with textualist dogma. The Court observes that the ninety years of evidence “simultaneously supplies evidence for the presumed-grant doctrine if it is actually needed *and adds to our confidence that our reading of the deed is correct.*”²³⁵ Obviously. But *Sun Oil Co. (Delaware) v. Madeley* strictly forbids Texas courts from considering extrinsic evidence of the parties’ subsequent performance if the text of the contract is unambiguous.²³⁶ Such evidence has always been tantalizing, and is likely to persuade even if *Sun Oil* says it should not. *Van Dyke* now gives clever litigators something to cite as an excuse for introducing it. It will “add to [the court’s] confidence.”

3. Clifton v. Johnson—the presumption can actually be rebutted.

In 2026, the Texas Supreme Court revisited *Van Dyke* in *Clifton v. Johnson*,²³⁷ which held the *Van Dyke* presumption was rebutted on the facts of that case.²³⁸ The difference was that the parties showed their work in the disputed conveyance. That is, the text provides a complete statement of the mathematical formula and thus confirms that it is meant to be understood as math.

In *Clifton*, a 1951 deed conveyed “an undivided one-one hundred and twenty-eighth (1/128) interest in and to all of the oil, gas and other minerals in and under” the land in Reeves County.²³⁹ It also stated, “[i]t is understood and herein stipulated that said land is under oil and gas leases providing for a royalty of 1/8 of the oil and certain royalties or rentals for gas and other minerals and that Grantees herein shall received [sic] one-sixteenth (1/16) of the royalties provided for in said lease....”²⁴⁰ For future leases,

“Grantees shall only receive under such subsequent lease or leases a 1/128 (1/16 of the usual 1/8 royalty) part of all of the oil, gas and other minerals taken and saved under such lease.”²⁴¹

Van Dyke was issued while the case was pending in the El Paso Court of Appeals, which (unsurprisingly) applied the *Van Dyke* presumption to the “1/16 of the usual 1/8 royalty” grant.²⁴² It concluded that the resulting grant was a 1/16 floating royalty instead of the fixed 1/128 royalty “that had been received for nearly 70 years.”²⁴³

The Texas Supreme Court reversed, explaining that *Clifton* was a case where the rebuttable presumption had been rebutted, just as *Van Dyke* promised was possible.²⁴⁴ “The use of 1/8 in this case’s deed implicates the *Van Dyke* presumption, but the deed’s language amply contains the kind of textual indicia we described as sufficient to rebut that presumption.”²⁴⁵ That is, the parties “showed their work” by treating the double fractions as a mathematical expression:

[I]n the future-lease clause, 1/128 is followed by a parenthetical containing two fractions (1/16 and 1/8) that, multiplied together, produce 1/128. The deed thus uses the double fraction to show its work. By expressly multiplying the fractions to arrive at a *single* fraction, in other words, the parenthetical containing the double fraction explains how the parties reached their 1/128 future-royalty figure.²⁴⁶

The Court also noted another feature of the grant that supported its conclusion. “The future-lease clause grants a 1/128 portion of future royalties ‘given on said land or any part thereof,’ not on the fraction of the land given to the grantees in the granting clause. Because the future-royalty conveyance comes from the entire original tract, it must be read separately from the granting clause, as an independent conveyance.”²⁴⁷

Clifton then doubled down on its insistence that the parties’ subsequent performance can be cited to

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 367 (emphasis added).

²³⁶ 626 S.W.2d 726, 732 (Tex. 1981). In that case, Sun Oil paid royalties for forty-five years before changing its mind about what the lease required it to pay. *Id.* at 727. But the contract unambiguously supported Sun’s later position, so that was entirely irrelevant. *Id.* And the Court held that the forty-five years of payments did not estop Sun Oil either. *Id.* at 734.

²³⁷ 733 S.W.3d 16 (Tex. 2026).

²³⁸ *Id.* at 19-20.

²³⁹ *Id.* at 20.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 21.

²⁴⁴ *Id.* at 22.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 22 (emphasis in original). Of course, one could just as easily argue that it is unnecessary for the drafter to “show his work,” so the mathematical expression “1/16 of 1/8” must be given some additional meaning or it will become mere surplusage.

²⁴⁷ *Id.* at 23 (citing *Richardson v. Hart*, 143 Tex. 392, 185 S.W.2d 563, 565 (1945)). Note that this makes all of the hullabaloo about math irrelevant.

“confirm” a desired interpretation of an unambiguous contract.²⁴⁸ Once again discussing the “presumed grant” doctrine, the Court emphasized that the “70 years” of historical payments confirmed the Court’s interpretation of the conveyance.²⁴⁹ In doing so, the opinion provides even more text that litigators can use to support the use of such evidence, despite *Sun Oil*’s holding that such evidence is *verboten*:

The confluence in textual interpretation and the parties’ shared understanding should seem normal and reassuring, not odd or coincidental. One would expect parties’ views of their respective rights, and their corresponding conduct over time, to be consistent with the text of the governing legal instrument. It would be surprising for parties to misinterpret (or disregard) their own legal instrument from the very beginning.²⁵⁰

For this reason, the *Clifton* opinion is useful far beyond the quirk of double-fraction cases, or even the oil and gas context. It injects common sense into a textualist analysis.

H. Lessons in Anchoring History to the Text

Throughout these cases, the Texas Supreme Court reiterated that extrinsic evidence and history must be used to inform the meaning of the text, not to “add to, alter, or contradict” it.²⁵¹ And the Court was careful to base its default rule in the text of the double-fractions themselves.²⁵² In its most recent Term, the United States Supreme Court applied a similar rule in two very public cases. Both deserve a quick review.

The highly publicized opinion in *Trump v. Barbara*²⁵³ rejected the Trump administration’s executive order declaring that persons unlawfully or temporarily present in the United States are not “subject to the jurisdiction” of the United States, and

thus their children cannot enjoy the privilege of birthright citizenship conferred by the Fourteenth Amendment to the United States Constitution.²⁵⁴ Justice Thomas drew on a variety of historical sources to write a very lengthy dissent arguing about the concept of “domicile” at the time the Fourteenth Amendment was adopted, in service of his argument that infants should not enjoy citizenship unless their parents were “domiciled” in the United States.²⁵⁵ Other Justices disagreed with his historical analysis,²⁵⁶ but for now, that is beside the point.²⁵⁷

For present purposes, advocates should note the way in which the *Trump v. Barbara* majority set aside his analysis on textualist grounds.²⁵⁸ Chief Justice Roberts wrote that “In any case, postenactment history cannot override the text. If Congress intended to limit American citizenship to the children of those domiciled in the United States, nothing in the succinct language of the Citizenship Clause conveyed that design.”²⁵⁹ Chief Justice Roberts chides Justice Thomas for adding to the operative words of the text, changing the Fourteenth Amendment’s “subject to the jurisdiction” into “subject to the jurisdiction of the government of his domicile.”²⁶⁰ And he points out that Justice Thomas tries to overcome this deficiency by talking about the text of the Civil Rights Act, which was overridden by the different text of the Fourteenth Amendment.²⁶¹

The Court used similar reasoning in *Watson v. Republican National Committee*,²⁶² a similarly high-profile case about voting by mail. Justice Alito’s dissent insists upon the force of the “impressive historical record” he has gathered to prove the requirements of federal law at the time of the Civil War.²⁶³ But Justice Barrett’s majority opinion rebuffs him with a textualist argument: “Notably, plaintiffs admit that they cannot ‘precisely’ tie this historical practice to the text of the election-day statutes. That is a delicately put understatement.”²⁶⁴ She then goes on to add that the plaintiffs and the United States could not

²⁴⁸ *Id.* at 24-25.

²⁴⁹ *Id.* (emphasis in original).

²⁵⁰ *Id.* at 25.

²⁵¹ See, e.g., *First Bank*, 519 S.W.3d at 110.

²⁵² *Hysaw*, 483 S.W.3d at 10-12.

²⁵³ 609 U.S. ___, ___ S.Ct. ___, 2026 WL 1870543 (2026).

²⁵⁴ *Id.* at *15.

²⁵⁵ *Id.* at *29-69.

²⁵⁶ See *id.* at *11-14 (majority opinion); *15-25 (Jackson, J., concurring).

²⁵⁷ Ironically, the most interesting thing about “domicile” in *Trump v. Barbara* is not relevant here. If you take the deep dive into the merits of this highly politicized opinion, read all the way to the very last page, which is Justice Gorsuch’s brief dissent. Though he would hold the President’s executive order was *facially* valid, Justice Gorsuch incisively identifies some very serious problems that might have

doomed it under an *as-applied* challenge. *Id.* at *90 (Gorsuch, J., dissenting). “Still, I wonder: Is a child born here to parents who have long chosen to make this Nation their permanent home not a citizen under the Fourteenth Amendment solely because his parents’ presence violates statutory law? If those parents are not domiciled here, then where *are* they domiciled? And if the answer is nowhere, how can we reconcile that conclusion with this Court’s longstanding recognition that every person is domiciled somewhere?” *Id.* (emphasis in original).

²⁵⁸ *Id.* at *13-14.

²⁵⁹ *Id.* at *13.

²⁶⁰ *Id.* at *14.

²⁶¹ *Id.* at *14.

²⁶² 609 U.S. ___, ___ S.Ct. ___, 2026 WL 1855462 (2026).

²⁶³ *Id.* at *16 (Alito, J., dissenting).

²⁶⁴ *Id.* at *8.

even agree on a single interpretation of the Uniformed and Overseas Citizens Absentee Voting Act.²⁶⁵ The majority and dissent also engaged in a debate similar to the Texas Supreme Court's in *Barrow-Shaver*, in that they argued over just how much meaning could be smuggled into the word "election."²⁶⁶

The lesson was clear: in a textualist system, all arguments must be grounded in the disputed text. Textualists will not allow extrinsic evidence (or even "history") to change the meaning of plain text, if it does not directly relate to the definition of the disputed words.

II. ADVOCATE FOR "CLEAR," NOT MERELY "UNAMBIGUOUS."

In recent years, case law has struggled with arguments that disputed text should have to be more than merely "unambiguous," but "clear." This rhetorical approach presents real opportunities for clever advocates and real headaches for courts.

Normally, textualism seeks to arrive at the one and only reasonable interpretation of a text. If there is more than one reasonable interpretation, after a strenuous effort to apply the canons of construction, then it is ambiguous and must go to the jury.²⁶⁷ Nevertheless, courts sometimes apply rules requiring a drafter to make an intent *clearly* known—a standard that seems to be higher than "reasonable" but otherwise undefined.

In 2026, the United States Supreme Court and Texas Supreme Court fractured over clear statement rules, and these cases provide fascinating insights for advocates.

A. The "major questions doctrine" requires "clear" text, not merely "colorable."

The most famous "clear statement rule" of our time is the major questions doctrine. And while few Texas litigators will litigate the sorts of cases that present a "major question" of American governance, the Supreme Court has decided these cases in ways that provide useful insights and strategies for advocates.

The United States Supreme Court first embraced the label "major questions doctrine" in a 2022 case, *West Virginia v. EPA*.²⁶⁸ The Court cannot agree on the

history of that doctrine, or even what compels it. The *West Virginia* majority's discussion emphasizes a 2000 case, *FDA v. Brown & Williamson Tobacco Corp.*,²⁶⁹ in which the Court held that it very much doubted that Congress had meant to delegate to the FDA the power to regulate tobacco as a "drug" or "device."²⁷⁰ Justice Gorsuch's concurrence in *West Virginia* (which Justice Alito joined) expansively described the doctrine as a constitutional principle dating back to 1897.²⁷¹ And Justice Kagan's dissent argued that previous cases had simply applied ordinary textualist principles without doing anything remarkable enough to justify the new label "major questions doctrine."²⁷²

In 2023's *Biden v. Nebraska*, Justice Barrett added her own view that the doctrine merely applies textualism with a focus on context (which she defines similarly to "surrounding circumstances" in allowing certain extratextual cues).²⁷³ She rejects the idea that the doctrine is one of the "strong-form substantive canons," her term for certain default rules and presumptions that candidly conflict with honest textualism for historical and policy reasons.²⁷⁴ For what it's worth, Justice Barrett's concurrence in *Biden v. Nebraska* may be the best writing on textualism since, well, her law review article on the subject.²⁷⁵

At any rate, *West Virginia* explains that the Court will sometimes, in "certain extraordinary cases," be very reluctant to conclude that Congress delegated sweeping powers to the executive branch:

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims.²⁷⁶

Importantly, the Court admits that Congress spoke with a "colorable textual basis" in these previous cases.²⁷⁷ Congress's authorization must instead be

²⁶⁵ *Id.* at *9-10.

²⁶⁶ Compare *id.* at *5-6 (majority opinion) with *id.* at *14 (Alito, J., dissenting).

²⁶⁷ See *supra*; *Coker*, 650 S.W.2d at 393; *U.S. Polyco*, 681 S.W.3d at 389.

²⁶⁸ 597 U.S. 697, 724 (2022).

²⁶⁹ 529 U.S. 120 (2000).

²⁷⁰ *West Virginia*, 597 U.S. at 721.

²⁷¹ *Id.* at 740 (Gorsuch, J., concurring).

²⁷² *Id.* at 764-70.

²⁷³ 600 U.S. 477, 507-08 (2023).

²⁷⁴ *Id.* As examples of "strong-form substantive canons," she lists "constitutional avoidance, the clear-statement federalism rules, and the presumption against retroactivity." *Id.*

²⁷⁵ A. Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. REV. 109, 117 (2010).

²⁷⁶ *Id.* at 723.

²⁷⁷ *Id.* at 722-23 ("All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, common sense as to the manner in which Congress would have been likely to delegate such

“clear.”²⁷⁸ Applying this elevated standard, the Court held that Congress had not “clearly” authorized EPA to issue the 2015 Clean Power Plan controlling power plant emissions,²⁷⁹ which had never gone into effect due to an unprecedented stay by the Court.²⁸⁰

B. In 2026, the Court shattered when trying to apply the doctrine to President Trump’s tariffs.

With that brief background,²⁸¹ this paper will focus on the useful and fascinating textualist debate in the recent decision *Learning Resources, Inc. v. Trump*.²⁸² That highly publicized case held that the International Emergency Economic Powers Act (IEEPA) did not authorize tariffs imposed by President Trump in 2025.²⁸³

Strangely, I think the best way to understand the opinion is by starting with Justice Gorsuch’s concurrence. Because it comes immediately after Chief Justice Roberts’s “opinion of the Court” and before all other opinions, Justice Gorsuch’s concurrence provides an unflattering preview of what follows. It begins this way:

Past critics of the major questions doctrine do not object to its application in this case, and they even join much of today’s principal opinion. But, they insist, they can reach the same result by employing only routine tools of statutory interpretation. Post, at — (KAGAN, J., joined by SOTOMAYOR and JACKSON, JJ., concurring in part and concurring in judgment). Meanwhile, one colleague who joins the principal opinion in full suggests the major questions doctrine is nothing more than routine statutory interpretation. Post, at — (BARRETT, J., concurring). Still others who have joined major questions decisions in the past dissent from today’s application of the doctrine. Post, at — (KAVANAUGH, J., joined by

THOMAS and ALITO, JJ., dissenting). Finally, seeking to sidestep the major questions doctrine altogether, one colleague submits that Congress may hand over to the President most of its powers, including the tariff power, without limit. Post, at — — — (THOMAS, J., dissenting). It is an interesting turn of events. Each camp warrants a visit.²⁸⁴

To be sure, you should take Justice Gorsuch’s view of the case with a grain of salt, because he analyzes each of the other opinions in light of his view that the “major question doctrine” *must* find support in the Constitution instead of more pedestrian canons of construction.²⁸⁵ But he gets right to the heart of what makes *Learning Resources* such an interesting test of the current state of textualism. These nine justices could not agree on nearly *any* aspect of how to apply textualism to a straightforward *but politically charged* task.

Chief Justice Roberts’s “opinion for the Court” in *Learning Resources* employs the “major questions doctrine” with restraint—and in so doing, he essentially speaks only for himself.²⁸⁶ He would hold that a clear Congressional statement is required because “the purported delegation involves the core congressional power of the purse.”²⁸⁷ After examining the statutory text, he concluded that IEEPA does not clearly confer the tariff power on the President.²⁸⁸ He spends most of his opinion responding to Justice Kavanaugh’s dissenting position, and argues that Justice Kavanaugh gets the major-questions doctrine backward.²⁸⁹ Whereas Justice Kavanaugh and the Trump Administration would hold “that ambiguous delegations in statutes addressing the most major of major questions should necessarily be construed broadly,” that is exactly when “we should be alert to claims that sweeping delegations—particularly

power to the agency at issue made it very unlikely that Congress had actually done so.” (cleaned up)).

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 732-35.

²⁸⁰ *Id.* at 715. This feature of *West Virginia* made news earlier this year, when the New York Times obtained and published the internal memoranda addressing that stay order. See Taraleigh Davis, *What the New York Times got wrong—and right—about the emergency docket*, SCOTUSBlog (Apr. 21, 2026), available at <https://www.scotusblog.com/2026/04/what-the-new-york-times-got-wrong-and-right-about-the-emergency-docket/>.

²⁸¹ A mountain of legal scholarship can provide additional information, if desired.

²⁸² 607 U.S. ___, 146 S. Ct. 628 (2026).

²⁸³ *Id.* at 646.

²⁸⁴ *Id.* at 647 (Gorsuch, J., concurring).

²⁸⁵ See *id.* Moreover, Justice Gorsuch’s tone may not be your cup of tea. Can text be both scholarly and catty? Yes—yes, it can.

²⁸⁶ *Id.* at 639. Justices Sotomayor, Kagan, and Jackson declined to join the portions of the opinion that applied the major-questions doctrine. *Id.* at 634 at *. Justice Gorsuch joined the opinion, but wrote a separate concurrence that takes the major-questions doctrine much farther than Chief Justice Roberts would have. See *id.* at 650-54. And Justice Barrett joined the opinion but wrote a concurrence arguing that the major-questions doctrine was unnecessary to the outcome. *Id.* at 672-73.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 637-38, 642-46.

²⁸⁹ *Id.* at 642.

delegations of core congressional powers—lurk in ambiguous statutory text.”²⁹⁰

Justice Kavanaugh wrote the principal dissent for himself and Justices Alito and Thomas.²⁹¹ He would hold that IEEPA’s delegation of power to “regulate ... importation” is broad enough to encompass tariffs.²⁹² The dissenting justices think the major-question doctrine exists, but would hold it does not “control” this case because (1) “the statutory text, history, and precedent constitute ‘clear congressional authorization’”²⁹³ and (2) the major-questions doctrine should apply differently in the foreign-affairs context.²⁹⁴ When the powers alleged to be conferred by Congress implicate foreign affairs, Justice Kavanaugh would hold that no “clear” statement is required and ordinary textualist principles apply instead.²⁹⁵ Justice Kavanaugh also helpfully cataloged a number of other statutes that the Trump administration might use to justify re-issuing the tariffs in the future.²⁹⁶

Justice Kagan, writing for herself and Justices Sotomayor and Jackson, explained that she agreed that IEEPA “does not authorize the President to impose tariffs” but would not base that conclusion on the major-questions doctrine.²⁹⁷ While that doctrine demands “a clear statement—something more explicit or specific than the statutory basis that would ordinarily suffice to support executive action,” she would hold that “the proper way to interpret a delegation provision is through the standard rules of statutory construction.”²⁹⁸ And in this case, using the ordinary canons of construction, she would hold that IEEPA clearly does not authorize the President to impose tariffs. “It is not just that the Government’s arguments fail to satisfy an especially strict test; it is that they fail to satisfy the normal one.”²⁹⁹

Justice Jackson briefly concurred to argue the Court should not shy away from relying on legislative history.³⁰⁰ Her opinion will be discussed in more detail below in the section on legislative history.

Justice Barrett wrote a short concurrence solely to respond to Justice Gorsuch’s criticism of the idea that the Court could reach the same result without relying on the major-questions doctrine.³⁰¹ She protested that she thinks her view is not really so different from Justice Gorsuch’s, but because he insists on criticizing her viewpoint, she gives as good as she gets in defense of her own refusal to impose a higher standard than textualism alone.³⁰²

Justice Thomas wrote a separate dissent to argue that Chief Justice Roberts was wrong to base the Court’s opinion in part on separation-of-powers concerns.³⁰³ He offers a thorough historical argument for why “the power to impose duties on imports is not within the core legislative power.”³⁰⁴ And in concluding his dissent, he agrees that power was “clearly” conferred on the President without taking a position on Justice Gorsuch’s assertion that the major-questions doctrine *must* rest in the Constitution.³⁰⁵

Which brings us back to Justice Gorsuch’s concurrence. Justice Gorsuch surveys the many other opinions in the case and finds them all lacking in candor, either intentionally or through self-delusion.³⁰⁶ (It is worth noting that each of these other justices protests that Justice Gorsuch has unfairly characterized their position.)

- Justice Kagan’s dissent is simply hypocritical, in his view, because the dissenters’ prior opposition to the doctrine had been purely political.³⁰⁷ Now that they want to invalidate President Trump’s tariffs instead of defend a Biden administration position, they are unwilling to admit they must use the major question doctrine to do so.
- Justice Barrett’s appeal to “common sense” textualism likewise fails, Gorsuch argues, because a common-sense reading of the statutory text would have allowed the challenged executive action in prior major-question doctrine cases.³⁰⁸ That is, mere textualism would not have been

²⁹⁰ *Id.* at 642 (cleaned up).

²⁹¹ *Id.* at 689.

²⁹² *Id.* at 690.

²⁹³ No, Justice Kavanaugh does not explain why *satisfying* the doctrine means that it does not “control.” But reading between the lines, what’s really going on is that Justice Kavanaugh finds support for his position in the “history and precedent” but not so much in the “text.” Thus, he briefly argues that he has satisfied the major-questions doctrine before arguing at much greater length that the doctrine does not apply in the first place.

²⁹⁴ *Id.* at 691, 706-20.

²⁹⁵ *Id.* at 713-17. *See, e.g., id.* at 717 (“In the foreign affairs context, including tariffs, the longstanding rule is simple: Interpret the statute as written, not with a thumb on the scale against the President”).

²⁹⁶ *Id.* at 691, 723.

²⁹⁷ *Id.* at 674.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 675.

³⁰⁰ *Id.* at 677-79.

³⁰¹ *Id.* at 672 (Barrett, J., concurring).

³⁰² *Id.* at 673 (throwing Justice Scalia back in Justice Gorsuch’s face).

³⁰³ *Id.* at 679 (Thomas, J., dissenting).

³⁰⁴ *Id.* at 684.

³⁰⁵ *Id.* at 689.

³⁰⁶ *Id.* at 647 (Gorsuch, J., concurring).

³⁰⁷ *Id.* at 647-50.

³⁰⁸ *Id.* at 657-58.

sufficient to defeat Biden administration policies in the past.

- The principal dissent (Kavanaugh) cheats by misapplying the factors to create a false conclusion that the major-question doctrine supports the grant of tariff power through IEEPA.³⁰⁹ (That is, no one really thinks that “regulate ... importation” *clearly* confers the tariff power.) And because the Government conceded that the President has no independent tariff power in peacetime, the dissent’s proposed foreign-affairs exception “would have (enormous) consequences hard to reconcile with the Constitution.”³¹⁰
- Justice Thomas’s dissent fails because he “suggests that Congress may hand over most of its constitutionally vested powers to the President completely and forever.”³¹¹ Given this combative description of Justice Thomas’s position, it is unsurprising that Justice Gorsuch writes to defend the separation of powers from what he views as an outrageous overreach.³¹²

One may agree or disagree with Justice Gorsuch’s opinions, but regardless, it provides a point-by-point description of how textualist arguments can and will be critiqued by an opponent.

Learning Resources v. Trump rewards careful study for many reasons, but I bring it to your attention because of its lessons for textualist advocacy. *Every one* of these justices proclaims their faithful adherence to textualist dogma, and nearly *every one* of these justices came to a different result in one way or another. This is rich evidence that textualism lends itself to many styles of advocacy and many different outcomes. You can find clever strategies in each of these combative opinions.

C. The major-question doctrine in everyday litigation: “elephants in mouseholes.”

So how can advocates make use of the major-question doctrine in less politically sensitive cases? How can litigators urge a court to demand a higher

standard of “clarity” than a mere lack of ambiguity? The answer is the “elephant in a mousehole” doctrine.

Justice Scalia originated the phrase as a way to summarize the holdings that later became the major-questions doctrine (at least in Chief Justice Roberts’s telling). He wrote, “Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”³¹³

The Texas Supreme Court adopted the phrase in a 2016 opinion, *Wasson Interests, Ltd. v. City of Jacksonville*,³¹⁴ in which it held that Chapter 271 of the Local Government Code did not supplant certain common-law principles because the Legislature had spoken too vaguely. And the phrase has become *very* popular at the Texas Supreme Court since 2020.³¹⁵

There’s a good reason for the rise of this folksy saying. By expressing the idea of heightened clarity as an aphorism, the Texas Supreme Court can avoid the bitter fighting over whether the major-questions doctrine derives from the United States Constitution (as Justice Gorsuch argues) or from ordinary textualism (as Justices Kagan and Barrett argue).

Moreover, in this recent surge, courts have come to apply the “elephant in a mousehole” aphorism to *contractual* interpretation and not merely *statutory* interpretation.³¹⁶ Such cases seem to apply the doctrine in ways that resemble Justice Barrett’s description of how courts must draw from “context” to achieve “common sense” results. But the rhetorical use of “elephant in a mousehole” subtly suggests that your opponent’s position is ridiculous—and thus leaves room to advocate that the court should require greater “clarity” than merely “not ambiguous.”

III. “THAT CAN’T BE RIGHT” IS A LOSING ARGUMENT.

One of the common challenges in construing any text—whether a contract or a statute—is that a strictly textualist reading of the statute might seem to lead to unexpected or unreasonable results. In such cases, the canons of construction advise courts to prefer readings that would avoid such outcomes. In some recent textualist cases, however, courts have given little

³⁰⁹ *Id.* at 660-63.

³¹⁰ *Id.* at 664.

³¹¹ *Id.* at 668.

³¹² *Id.* at 668-71.

³¹³ *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468 (2000) (citing *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994) and *FDA v. Brown & Williamson Tobacco*, 529 U.S. at 159-60).

³¹⁴ 489 S.W.3d 427, 438 (Tex. 2016).

³¹⁵ See *Ex parte E.H.*, 602 S.W.3d 486 (Tex. 2020); *Ex parte R.P.G.P.*, 623 S.W.3d 313 (Tex. 2021); *Hogan v. Zoanni*,

627 S.W.3d 163 (Tex. 2021); *Horton v. Kansas City Ry. Co.*, 692 S.W.3d 112 (Tex. 2024); *Texas Dept. of State Health Services v. Sky Marketing Corp.*, 733 S.W.3d 689 (Tex. 2026).

³¹⁶ See, e.g., *Commave Therapeutics SA v. Zevra Therapeutics, Inc.*, 2025 WL 3778938, at *8 & n.93 (Del. Ch. Dec. 31, 2025); *Hoffheins v. Turnkey Logistics, LLC*, No. 4:25-CV-01286, 2025 WL 3657322, at *2 (M.D. Pa. Dec. 17, 2025); *Cockerill v. Corteva, Inc.*, No. 21-3966, 2024 WL 5159892, at *56 (E.D. Pa. Dec. 18, 2024); *Breeder’s Cup Limited v. Nuvei Techs, Inc.*, No. 5:19-cv-00113-GFVT, 2023 WL 4111373, at *7 (E.D. Ky. June 21, 2023).

weight to these objections. Courts would prefer to follow strict textualist dogma, *even when it leads to unexpected results*, rather than to adopt the argument “the most obvious reading of the text cannot possibly be correct.”

A. The Rule Against Surplusage was never strong, and grows weaker.

A well-known and long-established rule of construction is the “rule against surplusage,” but courts have weakened its effect in recent years. As a result, advocates should be aware that the “rule” is really more like a rough guideline³¹⁷ that can be “more honored in the breach than the observance.”³¹⁸ It has little real-world force, and it will be very easy for the other side to cite recent case law to overcome the argument.

READING LAW endorses the surplusage canon—that “if possible, every word and every provision is to be given effect.”³¹⁹ In ordinary usage, that canon requires that “[i]f a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred.”³²⁰

However, READING LAW also acknowledges that the rule is often undermined by the common-sense reality that surplusage is commonplace. “Sometimes drafters *do* repeat themselves and *do* include words that mean nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach.”³²¹ The very modest examples offered by READING LAW are words presented in doublet or triplet out of longstanding habit like “rest, residue, and remainder.”³²²

Nevertheless, courts have gone much farther than READING LAW in recognizing that legislatures sometimes incorporate entire provisions that are effectively meaningless. This conclusion will surprise no one who has watched a legislature make its sausage, but it still presents a serious problem for strict textualism. Deleting an entire provision from the text

requires more work from the advocate, as opposed to more modest duplication like the doublets and triplets cited in READING LAW. And yet, recent cases have rejected the argument even in this strongest form.

Additionally—and there is no delicate way to put this—the most *detailed* explanations of why surplusage is acceptable have come in recent cases where conservative judges seek to defend a result sought by conservative politicians. Be careful not to let the politics of these cases overwhelm your argument. For this paper, the point is the consistency of the rhetoric and not its outcome.

1. Texas acknowledged the Legislature uses surplusage.

Consider the 2022 Texas Supreme Court case *Whole Woman’s Health v. Jackson*.³²³ The question in that case, which had been certified by the Fifth Circuit, was whether certain state officers could enforce the Texas Heartbeat Act.³²⁴ (One of the key features of the Act is to thwart judicial review of the statute’s constitutionality by making it enforceable only by private citizens.³²⁵) The Court held they could not, and in so doing, issued an opinion that will be useful to any lawyer advocating a position that would result in surplusage.

Among other arguments about the statutory text, the plaintiffs asserted that prosecutors must be able to enforce the Act or else a provision referring to the Penal Code would be mere surplusage.³²⁶ The Court rejected this argument, explaining that the provision served a narrow purpose.³²⁷ But the Court did not stop there—it went on to defend the provision *even as pure surplusage*. The surplusage canon is “useful,” it explained, but also “has its exceptions.”³²⁸ The Court candidly admitted that it had “often expressed this surplusage canon in mandatory and inflexible terms,” but had also used more moderate terms like “endeavor” or “if possible.”³²⁹ As a result, the canon was not rigid but “must be applied with judgment and discretion, and with careful regard to context.”³³⁰

review despite the statute’s design to prevent it). To speak plainly, the Texas Heartbeat Act had the effect of chilling abortions in Texas in the period before *Dobbs* overruled *Roe v. Wade*. The plaintiffs in *Whole Woman’s Health* were trying to find someone who could serve as a defendant, so that they could get a pre-enforcement ruling on the constitutionality of the Act without waiting for a private citizen to sue them.

³²⁶ *Whole Woman’s Health*, 642 S.W.3d at 579-83.

³²⁷ *Id.* at 580-81.

³²⁸ *Id.* at 581.

³²⁹ *Id.* (gathering many cases).

³³⁰ *Id.* at 582 (quoting READING LAW at 176-77).

³¹⁷ “The code is more what you’d call ‘guidelines’ than actual rules.” Captain Barbosa, *PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL* (2003).

³¹⁸ William Shakespeare, *HAMLET* Act I, Scene 4.

³¹⁹ READING LAW at 174.

³²⁰ *Id.* at 176.

³²¹ *Id.* at 176-77 (emphasis in original).

³²² *Id.* at 177.

³²³ 642 S.W.3d 569 (Tex. 2022).

³²⁴ *Id.* at 573-74.

³²⁵ TEXAS HEALTH & SAFETY CODE § 171.208; see *Whole Woman’s Health v. Jackson*, 595 U.S. 30, 35-36 (2021) (explaining the plaintiffs’ desire to obtain pre-enforcement

The Texas Supreme Court then gathered cases in which it had gone even further and “repeatedly recognized, when faced with legal language that appears repetitive or otherwise unnecessary, that drafters often include redundant language to illustrate or emphasize their intent.”³³¹ The Court embraces the idea that the Legislature sometimes includes entire provisions (and not just word doublets and triplets) that have no purpose whatsoever. “In short, as we have observed, ‘there are times when redundancies are precisely what the Legislature intended.’”³³²

These passages will be exceptionally useful to any Texas litigator wanting to argue in favor of an interpretation that makes other parts of a statute or contract meaningless. Additionally, the Court has reiterated the same point in cases since *Whole Woman’s Health*.³³³ In contrast, Texas litigators who want to rely on the rule against surplusage will find that rule greatly diminished, because *Whole Woman’s Health* overrules the more forceful statements of that rule in prior case law.

2. The United States Supreme Court embraced surplusage as well.

In a highly publicized recent case, *Mullin v. Al Otro Lado*,³³⁴ the United States Supreme Court also embraced the idea that Congress intentionally creates surplusage. That case concerned whether an alien “arrives in” the United States when he presents himself at the Mexican border to apply for asylum.³³⁵ Advocates should study the *entire* opinion because both the majority and dissent apply several canons of construction. This paper, however, will focus on the opinions’ vigorous disagreement about the role played by the rule against surplusage.

The plaintiffs argued (and the Ninth Circuit agreed) that if “arrives in” required the asylum applicant to physically cross the border, that would make surplusage of a separate provision allowing applications where the alien is “physically present in the United States.”³³⁶ The majority, in an opinion drafted by Justice Alito, conceded that the argument “has some force” but “does not overcome the arguments that point the opposite way.”³³⁷ His opinion is chock-full of quotes that will fit easily into a brief opposing a surplusage argument:

- “The anti-surplusage canon is not an iron rule.”³³⁸
- “[E]ven excellent writers do not always trim every unnecessary word, and the same is true of Congress.”³³⁹
- “The anti-surplusage canon is useful, but it is subordinate to the cardinal canon that a legislature says in a statute what it means and means in a statute what it says there.”³⁴⁰

Justice Alito also writes that the language is not “pure” surplusage, as the dissent argues, but even so, he tries to explain the reason why Congress would have created surplusage due to a belt-and-suspenders approach.³⁴¹

Justice Sotomayor’s dissent responds on textualist grounds and would apply the rule against surplusage.³⁴² While the Court has long recognized that the rule against surplusage “is less salient” in some circumstances, it is strongest where “interpretation would render superfluous another part of the same statutory scheme.”³⁴³ For that reason, the dissent would not adopt an interpretation of “arrives in” that renders an entire statutory provision moot. “It is particularly strange to assume Congress intended the ‘arrives in’ clause to do no work apart from the ‘present in the

³³¹ *Id.* at 582-83.

³³² *Id.* at 583 (quoting *In re Est. of Nash*, 220 S.W.3d 914, 918 (Tex. 2007)).

³³³ See, e.g., *City of San Antonio v. Realme*, 731 S.W.3d 342, 354 (Tex. 2026); *Ohio Cas. Ins. Co. v. Patterson-UTI Energy, Inc.*, 703 S.W.3d 790, 796 (Tex. 2024).

³³⁴ 609 U.S. ___, 146 S. Ct. 2079 (2026).

³³⁵ *Id.* at 2086 (majority opinion), 2100-02 (Sotomayor, J., dissenting). The statutory term “arriving in” matters because, before 2017, aliens who arrived at the Mexican border seeking asylum might step a few feet into the United States to reach the counter where they could make their application. The first Trump administration adopted a policy of physically blocking the alien from crossing the international boundary line, to set up the argument that the applicant had never been “in” the United States in any sense of the word. *Id.* at 2088-89, 2101-02. And just to balance the political scales, please note that the idea of physically thwarting applicants’ ability to apply for asylum at the border (which is euphemistically called “metering”) *started under the Obama administration*. The Biden Administration ended it

in 2021, but the case continued through the courts. See *id.* at 2118 (Jackson, J., dissenting). The case was not moot, the Supreme Court held, because the second Trump administration declared that it “would likely resume the use” of the practice if conditions warranted and the district court’s injunction were lifted. *Id.* at 2090 n.7.

³³⁶ *Id.* at 2092.

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *Id.* at 2093 (quoting *United States Postal Service v. Konan*, 607 U.S. 391, 406 (2026)) (nested quotations removed).

³⁴¹ *Id.* Remarkably, Justice Alito relies on *legislative history* to explain the reason why the two statutory clauses are not coterminous. *Id.* at 2093 n.8.

³⁴² *Id.* at 2108-09 (Sotomayor, J., dissenting).

³⁴³ *Id.* (quoting *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013)).

United States’ clause given that both are not only in the same law but in the very same sentence.”³⁴⁴

Al Otro Lado, therefore, provides useful material for any litigator wanting to advocate for a result that blatantly turns a contractual or statutory provision into surplusage. Indeed, between *Whole Women’s Health* and *Al Otro Lado*, litigators should be aware that relying on the rule against surplusage will open you to an easy rebuttal.

3. When “clear statement rules” collide with surplusage.

A recent Texas Supreme Court case provides an excellent example of the intersection of the two principles most recently discussed in this paper—“clear statement” rules and the rule against surplusage.

On the last day of the 2025-26 Term, the Texas Supreme Court issued its fractured opinion in *Family Dollar Stores of Texas, LLC v. JLMH Investments, LLC*.³⁴⁵ The merits of that case concern the applicable statute of limitations for a nuisance claim seeking an injunction.³⁴⁶ The Court had little difficulty resolving that issue.³⁴⁷ The much more interesting question was whether the Texas Supreme Court had appellate jurisdiction.

Appellate jurisdiction would have been indisputable after the district court entered an order on April 17 that had the magic incantation that creates finality—“[t]his Order is final, disposes of all parties and claims, and is appealable.”³⁴⁸ After a motion asking to “clarify” this order, the district court confused matters by signing a new order on May 8 (within its plenary power) that contained some very peculiar language. This order claimed to “recognize” that the Plaintiff could appeal “any Final Judgment.”³⁴⁹ But it also granted the movant’s request for a *permissive* appeal and stayed the proceedings pending that appeal.³⁵⁰

The Texas Supreme Court split three ways in how it interpreted this unconventional order.

Justice Busby wrote an opinion, joined by Justices Lehrmann and Devine, holding that the May 8 order

fell short of the clear statement that would be required to erase the finality of the prior judgment. Justice Busby held the May 8 order presented “mixed signals regarding finality.”³⁵¹ And a 1980 Texas Supreme Court opinion (*McCormack v. Guillot*) held that “during the time in which a court has plenary power to vacate, set aside, modify or amend its previous final order, such action must, to be effective, be by written order that is *express and specific*.”³⁵² Justice Busby explained that this clear-statement rule made particular sense when the prior order contained the *Lehmann* magic language. “Put another way, a trial court cannot eliminate express finality language by implication—it must do so directly.”³⁵³ The trial court was “trying to say something” in its May 8 order, he conceded, but “the language chosen is unclear when applied to these facts.”³⁵⁴

Justice Young wrote a concurring opinion, joined by Justices Bland and Huddle, in which he took a much narrower view of the issue.³⁵⁵ He explained that he agreed with much of what Justice Sullivan wrote in his dissent, but “under the specific circumstances of this case,” he concluded that the Court had jurisdiction.³⁵⁶ In a footnote, he elaborated that the May 8 order was “completely facially ineffective” and did not lack clarity—“the final order remained final.”³⁵⁷ He described the clear-but-ineffective order as “bizarre (and hopefully unique).”³⁵⁸ Note that because Justice Young found the May 8 order to be clear, he did not have to express an opinion on the clear-statement rule that Justice Busby had emphasized.

Justice Sullivan dissented in an opinion joined by Chief Justice Blacklock and Justice Hawkins.³⁵⁹ He criticized Justice Busby’s position as giving no meaning whatsoever to the May 8 order, whereas he would give that order at least *some* legal effect by holding it “transformed the final order into an interlocutory one” through unclear language.³⁶⁰ He would hold the order satisfied the standard for vacating a final judgment because it had no other conceivable

³⁴⁴ *Id.*

³⁴⁵ No. 24-0543, 2026 WL 1871092 (Tex. June 26, 2026).

³⁴⁶ *Id.* at *6-7.

³⁴⁷ *Id.* Well, Justice Busby wrote a concurrence to his *own majority opinion* to further explain the limits of what he would have said (but apparently the rest of the Court would not). But Justice Young’s concurrence describes the Court’s resolution of the merits as “brisk.” *Id.* at *15.

³⁴⁸ *Id.* at *3; see *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001); see also *id.* at 209-13 (Baker, J., concurring) (protesting that the language promoted by the *Lehmann* majority merely replaced one set of “magic language” for another).

³⁴⁹ *Id.*

³⁵⁰ *Id.* at *3-4.

³⁵¹ *Id.* at *5.

³⁵² *Id.* (quoting *McCormack v. Guillot*, 597 S.W.2d 345, 346 (Tex. 1980), emphasis in original, quote presented as in *Family Dollar*).

³⁵³ *Id.*

³⁵⁴ *Id.* at *6.

³⁵⁵ *Id.* at *15 (Young, J., concurring).

³⁵⁶ *Id.*

³⁵⁷ *Id.* at *15 n.*.

³⁵⁸ *Id.*

³⁵⁹ *Id.* at *20 (Sullivan, J., dissenting).

³⁶⁰ *Id.*

purpose, no matter how badly it was drafted.³⁶¹ And he would also reject *McCormack* to the extent that older case required anything more than that.³⁶² Amusingly, Justice Sullivan compared Justice Busby's position to the Italian pop song "Prisencolinensinainciusol," whose lyrics are surely one of the few examples of *intentional* gibberish.³⁶³

Accordingly, *Family Dollar* represents a loss for both a clear-statement rule and the rule against surplusage. Three justices held the May 8 order was too unclear to meet a heightened standard, three held it was perfectly clear (and nonsensical), and three justices held it was sufficient because there was no other possible reason the order would be issued. Each approach provides fuel for future advocacy. None of these holdings provides much confidence that the Court would give much weight to the argument "the text can't possibly mean that."

B. The Rule Against Absurdity often fails to persuade, when the text is otherwise clear.

Sometimes, advocates will argue that a particular textualist interpretation creates more than mere surplusage—it creates impossible or absurd results. This argument has always been recognized as one of the canons of construction. And in recent years, it has been too weak to overcome a court's dedication to strict textualism.

READING LAW contains a chapter on the absurdity doctrine,³⁶⁴ and it is surely one of the more curious chapters in that text. The authors accept that courts should avoid absurd results and spend more time discussing the circumstances under which a court has the power to *correct the text* to avoid the absurd result, than on the rule that courts should adopt readings that avoid the absurd result in the first place.³⁶⁵ Typographical errors can be easily corrected, the authors assert.³⁶⁶ The phrase "the winning party must pay the other side's reasonable attorney's fees" can also be rewritten, in their opinion, because it makes no sense to the authors that the contract or statute would require

the winner to pay the loser's fees.³⁶⁷ Yet they acknowledge this is a "slippery slope" and requires both a high hurdle and the correction of a merely "technical or ministerial error."³⁶⁸ Thus, they assert, the United States Supreme Court was correct to hold that a provision that conferred greater rights on naturalized citizens than on native citizens, because even though the result was absurd, it would have made no sense to grant rights to native citizens in the Immigration Act.³⁶⁹

Clever advocates can find much to work with in this chapter. I do not find it *nearly* so self-evident that a court could read the word "winning" to mean "losing," especially under current textualist dogma. In Texas, *URI v. Kleberg County* would seem to directly forbid that result.³⁷⁰ But anyone seeking to work around the strict rules of *URI* could do a lot worse than citing Justice Scalia in support.

The most recent Term provided a stellar example of the United States Supreme Court refusing to deviate from a strict textualist approach even though it leads to absurd results. In *Montgomery v. Caribe Transport II, LLC*,³⁷¹ the question was whether the Federal Aviation Administration Authorization Act (FAAAA) preempts state-law tort claims based on negligent hiring against transportation brokers.³⁷² The FAAAA's safety exception states that the preemption provision "shall not restrict the safety regulatory authority of a State with respect to motor vehicles."³⁷³ In her opinion for a unanimous Court, Justice Barrett had no difficulty holding that these negligent hiring claims were claims "with respect to motor vehicles," because the claims against the transportation broker allege a failure of reasonable care in the hiring of trucks.³⁷⁴

More usefully, Justice Barrett also dealt with the argument that this argument created "an anomaly" with subsection (b) of the same statute. "Why, respondents ask, would Congress completely preempt state regulation of brokers for *intrastate* rates, routes, and services while only partially preempting state regulation of brokers for *interstate* rates, routes, and services?"³⁷⁵ She admitted the problem existed: "We'll

³⁶¹ *Id.*

³⁶² *Id.* at *22-23. That is, Justice Sullivan asserted the "express and specific" requirement was dictum, was itself unclear, and should be overruled in any event. *Id.*

³⁶³ *Id.* In 1972, Adriano Celentano wrote a song that mimicked how American pop songs sounded to Italians who didn't speak English. It's gibberish, and it's a banger. The 2026 Milano-Cortina Winter Olympics used it for a dance number.

³⁶⁴ READING LAW ch. 37, at 234-39.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 234-35.

³⁶⁷ *Id.* at 235-36.

³⁶⁸ *Id.* at 237-38.

³⁶⁹ *Id.* at 238-39 (discussing *Chung Fook v. White*, 264 U.S. 443, 446 (1924)). The authors add a footnote to remind the reader that they are only discussing the application of the rule against absurd results, and that a constitutional equal-protection analysis might compel a different result. *Id.* at 239 n.18.

³⁷⁰ 543 S.W.3d at 765 (refusing to allow extrinsic evidence to change the meaning of "green" to "blue"). As discussed above, in a contract case, I think Justice Scalia's argument fits more easily into the rhetoric of "mistake."

³⁷¹ 608 U.S. ___, 146 S. Ct. 1199 (2026).

³⁷² *Id.* at 1203-04.

³⁷³ *Id.* at 1204 (quoting 49 U.S.C. § 14501(c)(2)(A)).

³⁷⁴ *Id.* at 1204-05.

³⁷⁵ *Id.* at 1205-06 (emphasis in original).

grant respondents this: It is not obvious why Congress included a safety exception in (c) but not in (b).³⁷⁶ But Justice Barrett was unwilling to avoid the plain-text reading of subsection (c). “The text of subsection (c)(2)(A) controls.”³⁷⁷ And then she delivered the *coup de grace* that should be quoted by every advocate who opposes an argument that her interpretation leads to absurd results:

Better to live with the mystery than rewrite the statute.³⁷⁸

It is far from clear what READING LAW would say about this holding. But surely this quote from *Montgomery* is the best riposte to anyone trying to use the more-subtle explanation of the doctrine from READING LAW.

Texas law likewise recognizes that it is better to enforce a crazy statute than to be accused of “rewriting” it. While there are surely several examples of this principle, the most entertaining is Justice Hecht’s opinion for the Texas Supreme Court in *Ruiz v. Conoco, Inc.*³⁷⁹ In addressing the venue statute’s express statement that “the appellate court shall consider the entire record, including the trial on the merits” when reviewing the venue determination, he explained that “the procedure mandated by this statute is fundamentally flawed because it allows appellate review of venue on a basis different from that on which it was decided.”³⁸⁰ Nevertheless, that is what the statute said, so Justice Hecht would enforce it. “[W]hile the wisdom of the statute may be challenged, there is no misunderstanding its plain language.”³⁸¹

IV. USING AND AVOIDING LEGISLATIVE HISTORY, THE ENEMY OF TEXTUALISM.

The *bete noire* of textualism is the use of “legislative history” to discern the “intent of the Legislature.” READING LAW takes particular aim at both concepts, and forcefully advocates for the interpretation of the statutory text *alone*.³⁸² And while it appears that no court today would dare to use the

statement of a single person as legislative history (as occurred well into the 1990s), the careful use of detailed committee reports has never gone out of style.

A. In federal courts, legislative history has receded from its heyday, but everything old is new again.

As READING LAW tells the story, American law has consistently rejected the use of legislative history to construe a statute, except for a lamentable period that peaked in the 1970s and 1980s.³⁸³ In one study, 100% of the statutory cases decided by the United States Supreme Court in 1981-1982 relied on legislative history.³⁸⁴ However, the Supreme Court’s reliance on legislative history dropped significantly in the 1990s and into the 2000s.³⁸⁵

Justice Scalia claims the “lowest point” of the Supreme Court’s use of legislative history came in a 1971 decision where Justice Marshall got it exactly backwards:

The legislative history ... is ambiguous.... Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.³⁸⁶

One can scarcely imagine a modern opinion of *any* American court containing such language.

Nevertheless, Justice Scalia grudgingly admits that legislative history has *some* proper uses.³⁸⁷ It is just as worthwhile as any other source of information about linguistic usage at a particular point in time.³⁸⁸ And for the purpose of proving that a particular construction of a statute should not be rejected as absurd, it would suffice to show that *even one legislator* “viewed the allegedly absurd result with equanimity”—though he quickly added that this usage “would be very rare.”³⁸⁹

Moreover, even the most fervent opponents of “legislative history” admit that courts may consider what they sometimes call “the history of the legislation”³⁹⁰ or “statutory history.”³⁹¹ As the Texas Supreme Court has explained it, courts may always consider changes in the *enacted text* of a statute over

³⁷⁶ *Id.* at 1206.

³⁷⁷ *Id.* at 1207.

³⁷⁸ *Id.*

³⁷⁹ 868 S.W.2d 752 (Tex. 1993).

³⁸⁰ *Id.* at 757.

³⁸¹ *Id.* at 757-58.

³⁸² READING LAW chs. 66-68.

³⁸³ *Id.* ch. 66, p. 373-74.

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 384 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 n.29 (1971) (quote presented as in READING LAW)).

³⁸⁷ *Id.* at 388.

³⁸⁸ *Id.*

³⁸⁹ *Id.* He hastens to add this exception because he wrote an opinion that employed the same maneuver. *Id.*

³⁹⁰ See *Ojo v. Farmer’s Group*, 356 S.W.3d 421, 445 n.31 (Tex. 2011) (Willett, J., concurring in part) (“...nobody should quarrel with examining how an enacted statute changes over time. Such variations lend helpful interpretive context as they boast the imprimatur of the Legislature as a whole”).

³⁹¹ READING LAW ch. 40, p. 256; *Interest of J.S.*, 670 S.W.3d 591, 597-98 (Tex. 2023). It is not clear why “statutory history” is any clearer than “legislative history,” except that textualists need a different label they can use to distinguish the proper use of the history of the legislative process.

time, because such changes “boast the imprimatur of the Legislature as a whole.”³⁹² “Statutory history ‘concerns *how the law changed*, which can help clarify *what the law means*’; unlike legislative history, it ‘does not concern collateral or speculative questions such as the policy goals that motivated individual legislators, the reasons that a given version of a legislative proposal was not adopted, or the like.’”³⁹³

It has become customary to proclaim the death of legislative history by reciting Justice Kagan’s 2015 statement that “we are all textualists now.”³⁹⁴ Even as Justice Kagan bitterly recanted her statement in a 2022 dissent,³⁹⁵ she did not advocate for a return to the widespread use of legislative history. She was criticizing the conservative majority *for insufficient fealty to textualist dogma*.³⁹⁶

Nevertheless, legislative history is primed to return to the judicial toolbox—at least in its most modest form. In *West Virginia*, Justice Kagan gleefully called out the conservative majority for using legislative history to support its conclusion,³⁹⁷ thus providing an example that advocates can cite when they want to talk about failed legislation and thus face opposition from textualist opinions declaring such evidence impermissible.

The continued role of legislative history became obvious through the dissenting opinions in *Learning Resources, Inc. v. Trump*,³⁹⁸ the highly publicized case addressing President Trump’s use of tariffs. That case provided a particularly fruitful ground for revisiting the value of legislative history, because the congressional reports in that case left no doubt whatsoever that Congress never meant to confer the power that President Trump purported to exercise.³⁹⁹

Chief Justice Roberts’s majority opinion never refers to those reports, which amounts to a conspicuous

omission of strong evidence for his position. Justice Kavanaugh’s principal dissent finds no reason to engage with those reports either.⁴⁰⁰ He references one of them, but drops a footnote to carefully disavow any illicit intent.⁴⁰¹

Justice Kagan’s concurrence *ferociously* applies textualist dogma to ward off Justice Gorsuch’s criticism that she must secretly be relying on the major-questions doctrine instead.⁴⁰² Nevertheless, she drops a short footnote to observe that the Senate and House Reports “offer[] yet more proof that Congress did not authorize taxation.”⁴⁰³

Justice Jackson goes much further.⁴⁰⁴ She wrote separately for the purpose of defending the use of legislative history: “In my view, the Court can, and should, consult a statute’s legislative history to determine what Congress actually intended the statute to do.”⁴⁰⁵ She expressly rejects the notion that the Legislature pays little attention to the text of committee reports, as expressed in *READING LAW*, and relies instead on more-recent scholarship about the reality of the legislative drafting process.⁴⁰⁶ “Indeed, there is evidence that lawmakers themselves pay more attention to these reports than a statute’s text to understand the statute’s purpose and meaning.”⁴⁰⁷ Thus, contrary to the dissent’s rejection of the committee reports, “I think these Senate and House Reports are among the best evidence of what Congress sought to accomplish with its enactments.”⁴⁰⁸ One should also note, however, that she cites legislative history to understand Congress’s intent. In Justice Scalia’s view, Justice Jackson’s practice would remain improper because the court’s purpose is to interpret the text only, and not to discern the intent of the drafter.⁴⁰⁹

Nevertheless, advocates who want to rely on especially valuable legislative committee reports now

³⁹² *Ojo*, 356 S.W.3d at 445 n.31 (Willett, J., concurring in part).

³⁹³ *J.S.*, 670 S.W.3d at 597-98 (quoting *Brown v. City of Houston*, 660 S.W.3d 749, 755 (Tex. 2023) (emphasis in *J.S.*)).

³⁹⁴ Harvard Law School, The Antonin Scalia Lecture Series: *A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015).

³⁹⁵ *West Virginia v. EPA*, 597 U.S. 697, 778-79 (2022) (Kagan, J., dissenting).

³⁹⁶ *See id.*

³⁹⁷ *Id.* (“As we have explained time and again, failed legislation ‘offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress’ adopted” (quoting *Bostock v. Clayton County*, 590 U.S. 644, 670 (2020)).

³⁹⁸ 607 U.S. 229 (2026).

³⁹⁹ *Id.* at 311-12 (Jackson, J., concurring in part and concurring in the judgment) (discussing the relevant reports in detail).

⁴⁰⁰ *Id.* at 330 (Kavanaugh, J., dissenting).

⁴⁰¹ *Id.* at 344 n.11.

⁴⁰² *Id.* at 304-08 & n.1 (Kagan, J., concurring in part and concurring in the judgment).

⁴⁰³ *Id.* at 308 n.2.

⁴⁰⁴ *See id.* at 310 (Jackson, J., concurring in part and concurring in the judgment).

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 310-11 (citing A. Gluck & L. Bressman, *Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 965-966, 968-969 (2013) and R. Katzmann, *JUDGING STATUTES* 19-20 (2014)).

⁴⁰⁷ *Id.* at 310.

⁴⁰⁸ *Id.* at 311.

⁴⁰⁹ *READING LAW* ch. 67 & 68. While I concede the wisdom of Justice Scalia’s point that the law is the law and not mere “evidence” of the law, *see id.*, this is often a straw man. The more interesting question in everyday legal practice is whether a court can properly look to extrinsic evidence (like

have a recent opinion they can cite in support. It is unclear what value Justice Jackson's opinion has as persuasive authority. Justice Jackson's dissent provides the best (and perhaps only) way to oppose the current textualist dogma—through a reasoned attack on its factual basis, rather than through policy arguments. But it is indisputably a direct attack on settled dogma. It remains to be seen whether the courts will adapt to the challenge or merely reject it outright.

B. Texas's Code Construction Act allows the use of legislative history.

Texas ought to have a more generous jurisprudence regarding the role of legislative history in statutory interpretation. Statutory interpretation is, after all, the task of understanding the Legislature's intent through the words the Legislature enacted.⁴¹⁰ And the Legislature furnished courts with an enacted, explicit guide to understanding statutory texts—the Code Construction Act, Chapter 311 of the Texas Government Code. Among the various rules in the Act, the Legislature inserted an important authorization:

Sec. 311.023. STATUTE CONSTRUCTION AIDS. In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) **legislative history**;
- (4) common law or former statutory provisions, including laws on the same or similar subjects;
- (5) consequences of a particular construction;
- (6) administrative construction of the statute; and
- (7) title (caption), preamble, and emergency provision.⁴¹¹

These “statute construction aids” merely restate well-established principles of Anglo-American law.⁴¹² Nevertheless, they conspicuously go further than the usual common-law rules because courts may consider

extrinsic evidence “whether or not the statute is considered ambiguous on its face.”⁴¹³ It also may be worth noting that the Legislature enacted this text in 1985, which READING LAW reports was the apex (or nadir) of the courts' use of legislative history.

These principles take on additional importance *because they are enacted by the Legislature*. Surely the Legislature's imprimatur gives these canons of construction additional weight. After all:

- The drafters of the statutory text have expressly provided a guide to understanding the words that they have chosen.
- Judges who apply these rules cannot overstep the boundaries between the judicial and legislative branches, because they were created by the Legislature, not courts.
- Moreover, the Legislature chooses the words of its statutes in reliance on these rules, reasonably presuming that the courts will apply them when interpreting the statutory text.

So Texas courts can and should rely on “legislative history” in construing a statute, right? In 1991, the answer was “absolutely.” In 2026, the answer is “absolutely not.” Legislative history has been proclaimed heretical, even though the Legislature enacted legislation that invites courts to rely on it.

The latest word on the subject is *Texas Health Presbyterian Hospital of Denton v. D.A.*,⁴¹⁴ a unanimous opinion written by Justice Boyd in 2018. That case required the Court to construe a provision of the Texas Medical Liability Act requiring medical malpractice claimants to prove “willful and wanton negligence” in the provision of emergency medical care.⁴¹⁵ The issue was whether the statutory term “immediately following” referred only to the immediately preceding words (“in a surgical suite”) or to the entire phrase that preceded them (“in a hospital emergency department or obstetrical unit or in a surgical suite”).⁴¹⁶ The Court held that the former reading was the only reasonable one, rejecting arguments based on punctuation and other grammar rules, but accepting an argument based on the rule against surplusage.⁴¹⁷

legislative history) to reveal or resolve ambiguities in the words-that-are-the-law.

⁴¹⁰ See, e.g., *Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.*, 642 S.W.3d 551, 557 (Tex. 2022) (quoting classics of the genre, such as *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006)).

⁴¹¹ TEXAS GOV'T CODE § 311.023 (emphasis added).

⁴¹² See, e.g., *Chisholm v. Bewley Mills*, 155 Tex. 400, 287 S.W.2d 943, 945 (1956).

⁴¹³ TEXAS GOV'T CODE § 311.023.

⁴¹⁴ 569 S.W.3d 126 (Tex. 2018).

⁴¹⁵ *Id.* at 128-29; see TEXAS CIV. PRAC. & REM. CODE § 74.153.

⁴¹⁶ *Id.* at 129-30.

⁴¹⁷ *Id.* at 133-34. The Court emphasized that the statute repeated the words “in a” before “surgical suite,” which would be meaningless if “surgical suite” were merely the third item in a list that was already preceded by the words “in a.” *Id.* So the argument does work sometimes.

The plaintiff/respondent family nevertheless argued that the Court could rely on legislative history including the statute's "drafting history" and "statements individual legislators made during the legislative process."⁴¹⁸ The family emphasized that the Code Construction Act expressly states that legislative history can be considered "whether or not the statute is considered ambiguous on its face."⁴¹⁹ The Court refused to take the Legislature up on this offer, quoting the Apostle Paul and citing Justice Scalia: "Although this section may grant us legal permission, not all that is lawful is beneficial."⁴²⁰ The Court reiterated that it will never consider legislative history or any other "extrinsic aide" to interpret an unambiguous statute "because the statute's plain language most reliably reveals the legislature's intent."⁴²¹

Unfortunately, the Court's bright-line rule in favor of "plain language" begs the question "*what* plain language should the court consider"? The Code Construction Act is *also* "plain language" enacted by the Legislature. Why isn't it also statutory text that must be construed? It is in a different location, but does that matter, when the Legislature plainly stated its intent that the Code be consulted *throughout* the various other codes? Does that make it any different than a court looking to definitions adopted by the Legislature in other parts of a statute? On what basis does a court profess dedication to the statutory text and then disregard the text of a literal statute?

I don't want to overstate a point that the Legislature has not insisted upon. The Code Construction Act says courts "may" consider legislative history, not that they "must" do so. As a result, the Court's refusal to consider legislative history feels more like declining an invitation than refusing a command. But still, *Texas Health Presbyterian Hospital* is not one court declining to accept the

Legislature's invitation for one case; rather, the Texas Supreme Court declares that *no* court should *ever* accept that invitation. It implicitly criticizes the Legislature for even daring to issue the invitation, potentially conflicting with the textualist doctrine that courts must enforce the enacted words of the Legislature without imposing their own policy preferences.

Moreover, previous Courts eagerly accepted the Legislature's invitation. In 1991, the Texas Supreme Court enthusiastically relied on the Code Construction Act as justification for using the testimony of individual witnesses before House Committees and "the floor debate in the House of Representatives" to discern the Legislature's intent.⁴²² And in 2001, the Texas Supreme Court invoked the power granted by the Code Construction Act to rely on a bill analysis produced for the House Committee on Agriculture and Livestock.⁴²³

The Court's retreat from the Code Construction Act began more *de facto* than *de jure*. In 2004, the Texas Supreme Court noted it had the power to consider legislative history but found the statements of legislators to be inconclusive, and further, the Court refused to consider an affidavit from one of the authors of the statute because "after-the-fact statements by individual legislators are not legislative history."⁴²⁴ A 2008 opinion favorably noted the permission granted by the Code Construction Act, but found the legislative history to be opaque or unhelpful.⁴²⁵

The Court changed direction in 2009-2011. The Court resolutely decided that legislative history was improper, then retreated from that rigid rule. Justices Hecht and Jefferson wrote concurrences that identified narrow roles for legislative history (while also proclaiming fealty to the new dogma), but drew fervent criticism from other justices.⁴²⁶

⁴¹⁸ *Id.* at 136.

⁴¹⁹ *Id.*

⁴²⁰ *Id.* Justice Boyd quotes Paul's first letter to the Corinthians, Chapter 10, verse 23: "All things are lawful; but not all things are expedient. All things are lawful; but not all things edify." While "all things are lawful" is an astonishing statement for a court to make—one can just imagine a pro se litigant taking it seriously—it was not a marvel of clarity in its original theological context either. Justice Boyd does not comment on the mountain of theological works that synthesize Paul's views deemphasizing the Law (in some sense) with Jesus's insistence that the Law has lost none of its force. Compare, e.g., Romans 7 and Galatians 3 with Matthew 5:17-18. That's a shame because the ongoing role of the Code Construction Act seems similarly unclear, and just as theologically fraught for the ardent textualist. If Justice Scalia appears to me on the Road to Damascus, therefore, I shall be sure to supplement this paper.

⁴²¹ *Id.*, citing *Sullivan v. Abraham*, 488 S.W.3d 294, 297 (Tex. 2016).

⁴²² *Beck v. Beck*, 814 S.W.2d 745 (Tex. 1991). One should not overstate *Beck*'s use of this slender legislative history; it was apparently quite evident that the statute had been enacted to express the Legislature's distaste for the Court's opinion in *Williams v. Williams*, 569 S.W.2d 867 (Tex. 1978). The Court had many options for reaching that conclusion, not just the testimony of lone witnesses at a legislative committee.

⁴²³ *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486 (Tex. 2001).

⁴²⁴ *Brown v. De La Cruz*, 156 S.W.3d 560, 568 & n.43 & n.45 (Tex. 2004).

⁴²⁵ *City of Rockwall v. Hughes*, 246 S.W.3d 621, 626 n.6 (Tex. 2008).

⁴²⁶ I am reminded of my favorite cartoon about Texas politics, a *Doonesbury* strip about the 1994 Texas gubernatorial election. The strip imagines a political ad where a grieving Texan widow says of her husband's murderer, "Sure, Ann Richards signed his death warrant, but George W. Bush would have *killed him with his bare hands*."

In 2009, the Court rejected legislative history in *Entergy Gulf States v. Summers*, which interpreted the Texas Workers Compensation Act.⁴²⁷ On rehearing, the Court added a new section to its opinion so that it could address the legislative-history arguments made by the respondent and several amici while seeking rehearing.⁴²⁸ The Court held that it would not consider legislative history if a statute was unambiguous, without noting that the Code Construction Act expressly permitted it to do so.⁴²⁹ The Court also rejected the proffered extrinsic evidence, which was the text of bills that failed to pass and the post-hoc statements of individual legislators.⁴³⁰ Such evidence was unreliable and thus impermissible, according to the *Entergy* Court.⁴³¹

Justice Hecht wrote a concurrence in *Entergy* to state his view that a judge must rely on a statute's *historical context*—and in so doing, cited the Code Construction Act's authorization of the use of legislative history for that purpose.⁴³² He extensively cited the history of failed attempts to change the Act.⁴³³ He then explained, “I do not mean to suggest for a moment that the drafting history of the 1983 statute is relevant in determining the Legislature’s intent by enacting it.”⁴³⁴ Nevertheless, he explained the legislative history was useful to prove the *historical fact* that the existing law was unclear.⁴³⁵ Justice Willett wrote a concurrence in which he extensively argued against the use of legislative history for any purpose, *including* Justice Hecht’s willingness to use “legislative history” to prove the adjudicative facts of what happened in the Legislature at an earlier date.⁴³⁶

The Court then seemingly retreated from its bright-line anti-legislative-history position in the 2011 opinion *Ojo v. Farmer’s Group*.⁴³⁷ That case required the Court to interpret a provision of the Texas Insurance Code concerning racial discrimination that was necessarily intertwined with federal law on that same subject.⁴³⁸ In holding that the Texas Insurance Code did not create a cause of action based on disparate impact, the Court cited the Code Construction Act and

extensively relied on legislative history, including a bill analysis from the House Research Organization and a report that the Texas Department of Insurance prepared at the Legislature’s request.⁴³⁹ The majority’s decision to rely on legislative history also may have been impacted by the fact that authoritative decisions of the United States Supreme Court relied on legislative history in interpreting similar federal statutes.⁴⁴⁰

Nevertheless, one suspects the use of legislative history hit a sore spot because Chief Justice Jefferson felt compelled to issue a concurring opinion that began, “Legislative history is not always a villain.”⁴⁴¹ He reiterated that the opinion rested on purely textual analysis, but defended the importance of legislative history because it “gives context to our decision, making it more approachable to our readers and more easily integrated into our social fabric. In this sense, we as judges act as storytellers and historians.”⁴⁴²

In contrast, Justice Willett issued an opinion concurring in part, expressing his view that while “cautious use of secondary construction aids” may be justified where a statute is ambiguous, it was anathema where the statute is unambiguous.⁴⁴³ He professed to be “vexed”⁴⁴⁴ by Chief Justice Jefferson’s concurring opinion, which he described uncharitably and at greater length than the concurring opinion itself.⁴⁴⁵ And Justice Willett openly acknowledged that his rule required Texas courts to “steadfastly decline the Act’s open-ended invitation to utilize extrinsic aids when construing unambiguous statutes.”⁴⁴⁶ He expressed alarm that the bright line drawn in *Entergy* had so quickly been cast aside.⁴⁴⁷

At any rate, Justice Willett had nothing to worry about. The Code Construction Act’s authorization of legislative history has become a dead letter at the Texas Supreme Court. In 2016, the Court considered the point settled at some point in the undefined past—it would not look to extrinsic aids to interpret an unambiguous contract, notwithstanding the Act’s permission to do so

⁴²⁷ 282 S.W.3d 422 (Tex. 2009).

⁴²⁸ *Id.* at 442-44.

⁴²⁹ *Id.* at 442.

⁴³⁰ *Id.* at 442-44.

⁴³¹ *Id.*

⁴³² *Id.* at 447 & n.12.

⁴³³ *Id.* at 456-60.

⁴³⁴ *Id.* at 460.

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 469-76.

⁴³⁷ 356 S.W.3d 421 (Tex. 2011).

⁴³⁸ *Id.* at 424-26.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 430, citing *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005); *Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 389 (1982); and *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971). One wonders whether those 1971 and 1982 United States Supreme Court decisions would be written the same way today.

⁴⁴¹ *Id.* at 435 (Jefferson, C.J., concurring).

⁴⁴² *Id.* at 437.

⁴⁴³ *Id.* at 439 (Willett, J., concurring in part).

⁴⁴⁴ Cf. [GLADIATOR \(2000\)](#) (“It vexes me. I’m terribly vexed.”). I suspect Judge Willett would enjoy the pop-culture comparison.

⁴⁴⁵ See *id.* at 450-54.

⁴⁴⁶ *Id.* at 451.

⁴⁴⁷ *Id.* at 449-50.

or the use of legislative history in *Ojo*.⁴⁴⁸ Two years later, *Texas Health Presbyterian Hospital* announced the Court's refusal to apply the Code in Biblical terms.

I suspect the case law also depends on an implicit assessment of the reliability of the purported "legislative history" on offer. As discussed above, courts consider changes in the *enacted* texts over time wholly reliable. To defend this practice, courts have searched for a different name than "legislative history," even though it is the "history" of "legislation."⁴⁴⁹

Even when considering material extrinsic to the statute, however, there seems to be a spectrum. It was not so long ago⁴⁵⁰ that the Texas Supreme Court gave significant weight to a report from the Texas Department of Insurance that it prepared at the Legislature's request.⁴⁵¹ It is easy to imagine the Court finding such evidence to be especially reliable, and thus worthy to be included in its reasoning.⁴⁵² (Similarly, some of the force of Justice Jackson's defense of legislative history in *Learning Resources v. Trump* came from the unusual clarity and authority of the Senate and House Reports she cited.⁴⁵³) At the other end of the spectrum, it has been quite a while since the Court gave any weight to the statements of an individual legislator or witness at a legislative hearing.⁴⁵⁴

One might argue (and some have) that statements by the legislator who actually drafted the legislation should be given some weight,⁴⁵⁵ if those statements were made contemporaneously and not for the purpose of the instant litigation.⁴⁵⁶ Texas courts commonly cited such evidence in the 1990s and 2000s. Nevertheless, the current Texas Supreme Court categorically forbids the use of the statements of an individual legislator. "An individual legislator's statements—even those of the bill's author or sponsor—do not and cannot describe the understandings, intentions, or motives of

the many other legislators who vote in favor of a bill."⁴⁵⁷

All that is to say, any advocate wanting to rely on legislative history faces an uphill battle. Possible strategies include:

- Using only the most reliable forms of legislative history, like official bill analyses or failed legislation. One can find reasonably recent case law relying on such sources.
- Framing the extrinsic evidence as "history," "storytelling," or "confirming" that the court has not acted unreasonably—as recent concurring and dissenting opinions have argued.
- Boldly using legislative history anyway, because the "bell can't be unrung" (or similar analogy), and your opponent will look weak arguing that the author of the bill didn't know what it meant.

Any advocate wanting to *oppose* the use of legislative history doesn't need my advice. It's shooting fish in a barrel.⁴⁵⁸

C. "The singular includes the plural"—an uncontroversial (but sometimes impossible) provision of the Code Construction Act

Another provision of the Code Construction Act deserves discussion, both because it presents similar questions about how the Legislature communicates its intent, and because it recently gave the Texas Supreme Court fits.

The Code Construction Act states that "the singular includes the plural and the plural includes the singular,"⁴⁵⁹ and the United States Code says something similar.⁴⁶⁰ Some contracts also advise the reader to disregard any distinction between singular

⁴⁴⁸ *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).

⁴⁴⁹ *J.S.*, 670 S.W.3d at 597-98.

⁴⁵⁰ 2011! It wasn't that long ago! People had iPhones, for Pete's sake!

⁴⁵¹ *Ojo*, 356 S.W.3d at 424-26.

⁴⁵² *See id.*; but *see also id.* at 439 (Willett, J., concurring in part) (lamenting the Court's use of even this evidence).

⁴⁵³ *Learning Resources*, 607 U.S. at 312 (Jackson, J., concurring in part). But *see* READING LAW ch. 66 (rejecting the use of committee reports because "they are drafted by committee staff and are not voted on (and rarely even read) by the committee members, much less by the full house").

⁴⁵⁴ That would have ended somewhere between 1991 and 2004, as described above.

⁴⁵⁵ *See, e.g., Wheeler v. J.M. Martin Custom Homes, Inc.*, 728 S.W.3d 326, 333-34 (Tex. App.—Amarillo 2025, no pet.) (Yarbrough, J., dissenting) (noting a colloquy in the Legislature and sensibly concluding, after duly reciting the

dogma against legislative history, "[w]hat more evidence of legislative intent do we need than the author of the bill itself?").

⁴⁵⁶ *See In re Doe*, 19 S.W.3d 346, 352 (Tex. 2000) ("Explanations produced, after the fact, by individual legislators are not statutory history, and can provide little guidance as to what the legislature collectively intended" (quoting *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 328-29 (Tex. 1994) (Hecht, J., concurring and dissenting))).

⁴⁵⁷ *Texas Health Presbyterian Hospital*, 569 S.W.3d at 136-37.

⁴⁵⁸ One could start with READING LAW Chapter 66, titled "The false notion that committee reports and floor speeches are worthwhile aids in statutory construction."

⁴⁵⁹ TEXAS GOV'T CODE § 311.012(b).

⁴⁶⁰ 1 U.S.C. § 1 ("words importing the plural include the singular").

and plural nouns.⁴⁶¹ READING LAW accepts this rule as “simply a matter of common sense and everyday linguistic expedience,”⁴⁶² while also noting that the use of the plural in a criminal statute might create an ambiguity that justifies the use of the Rule of Lenity.⁴⁶³

READING LAW does not recognize that the rule cannot be taken too literally, or too seriously, because nonsense would result. Nor does it confront the meta-jurisprudential problem that the Legislature sometimes seems to *forget* that “the single includes the plural,” and yet, “the single includes the plural” is *also statutory text*. (The same problem arises in contract law—should one disregard the drafters’ express statement when they seem to have deliberately chosen a singular or a plural word in a particular context?)

The Texas Supreme Court dealt with this problem very recently in *In re Greystar Development & Construction, L.P.*,⁴⁶⁴ when determining that the \$25 million cap on supersedeas bonds⁴⁶⁵ applies to each judgment debtor individually, and not to all judgment debtors collectively. *Greystar* fascinates the reader⁴⁶⁶ because it draws on nearly every canon of textual interpretation, yet still resulted in a 5-4 split on the Court. It reminds the bench and bar that even when the justices agree on the principles to be applied, they can still disagree in good faith about the result.

For present purposes, however, we can note that Justice Busby’s opinion for a five-justice majority emphasized that Section 52.001 defined “security” as *a bond ... posted ... by a judgment debtor*.⁴⁶⁷ Among other rationales, the majority emphasized that “judgment debtor” was stated in the singular instead of the plural, thus indicating the Legislature’s intent that each “debtor” must post its own “bond.”⁴⁶⁸ The majority expressly rejected the argument that the Code Construction Act required the Court to treat “judgment debtor” as a plural term.⁴⁶⁹ After all, Justice Busby explained, “if we construe ‘a judgment debtor’ to include the plural, we must do the same for ‘amount’

and ‘bond.’”⁴⁷⁰ His point is well-taken—if the singular includes the plural and vice-versa, is there any logical end to it?

In contrast, Justice Huddle’s opinion for a four-justice concurrence and dissent cited both the Code Construction Act and READING LAW in rejecting this argument.⁴⁷¹ She would read “judgment debtor” as including the plural, and rejected Justice Busby’s slippery-slope rationale because a single bond jointly posted by several judgment debtors (as in *Greystar*) would not create any interpretive difficulty.⁴⁷² Her point is well-taken—if the singular includes the plural in everyday practice and in context, shouldn’t that be sufficient?⁴⁷³

These two well-taken opinions illustrate the recurring difficulty in deciding what constitutes “the statutory text.” Did the Legislature choose the singular word “judgment debtor” purposefully? Or did it choose the singular word with the Code Construction Act in mind, knowing that courts would look to the Act and interpret “judgment debtor” as including “judgment debtors”? How can anyone *ever* claim that statutory text is singular or plural so long as this enacted text erases this otherwise plain distinction?

There is nothing new to the idea that courts sometimes cannot apply “the singular includes the plural,” even if instructed to do so in a statute or contract. Courts confront the problem occasionally,⁴⁷⁴ even if the terse discussion in READING LAW does not address the problem. This gap between theory and practice reminds us yet again that even though the Legislature *commands* courts to read statutes in a certain way, courts sometimes conclude that the Legislature must not have meant what it said in plain English, because plain English can still be nonsense.

Let’s cut to the chase. It sure seems as though the Legislature sometimes forgets the Code Construction Act exists. That’s a good reason for courts to be reluctant to rely upon it. Nevertheless, this part of the

⁴⁶¹ Westlaw searches reveal many such cases, but a recent example is *Dream Land Investment, Inc. v. Sanna Enters., Inc.*, No. 09-24-00137-CV, 2026 WL 468003, at *3 (Tex. App.—Beaumont Feb. 19, 2026, no pet.).

⁴⁶² READING LAW Semantic Canon 14.

⁴⁶³ *Id.* (quoting Jeremy Bentham’s discussion of a decision interpreting a 1278 statute forbidding the theft of “horses,” which Bentham agreed would not apply to the theft of a single “horse” under the principles of lenity).

⁴⁶⁴ 69 Tex. Sup. Ct. J. 791, 2026 WL 1445481 (Tex. May 22, 2026).

⁴⁶⁵ TEXAS CIV. PRAC. & REM. CODE § 52.006(b)(2).

⁴⁶⁶ That is to say, it will fascinate the sort of person who comes to the Advanced Civil Appellate course.

⁴⁶⁷ 2026 WL 1445481, at *1 (quote presented as in *Greystar*).

⁴⁶⁸ *Id.* at *7.

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ 2026 WL 1445481, at *16 (Huddle, J., concurring in part and dissenting in part).

⁴⁷² *Id.*

⁴⁷³ All these well-taken points are exactly why *Greystar* resulted in a 5-4 split. Really, go read it. Both the majority and dissenting opinions are terrific.

⁴⁷⁴ See, e.g., *State v. T.S.N.*, 547 S.W.3d 617, 621 (Tex. 2018) (“However, if ‘the offense’ is to include the plural, as the State argues, then logically and consistently ‘the arrest’ must also include the plural”); *Gonzalez v. Gonzalez*, 672 S.W.2d 887, 890 (Tex. App.—Corpus Christi-Edinburg 1984, no writ) (observing that this rule would allow a family court to appoint more than one managing conservator, though that would upset other provisions of the Family Code).

Act (and others like it⁴⁷⁵) remind us that the “statutory text” is not as immutable as one might think. This creates opportunities for clever advocates.

CONCLUSION

Courts in Texas and throughout the United States demonstrate fierce loyalty to the principles of textualism. Even in United States Supreme Court opinions that split 6-3 along predictable political lines, the dissenting justices proclaim their adherence to strict textualism. Accordingly, there would be no value in legal arguments that fail to proclaim devotion to textualist dogma.

Nevertheless, I hope this paper has demonstrated that textualism still provides ample opportunities for clever advocates. We can remain doctrinally “pure” while nevertheless making common-sense arguments on behalf of our clients.

⁴⁷⁵ “Words in the present tense include the future tense.” TEXAS GOV’T CODE § 311.012(a). “Words and phrases that

have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.” *Id.* § 311.011(b).