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The Trial and Appellate Law Firm

Explaining How To Read

How the Textualism Wars Affect Advocacy and Jurisprudence

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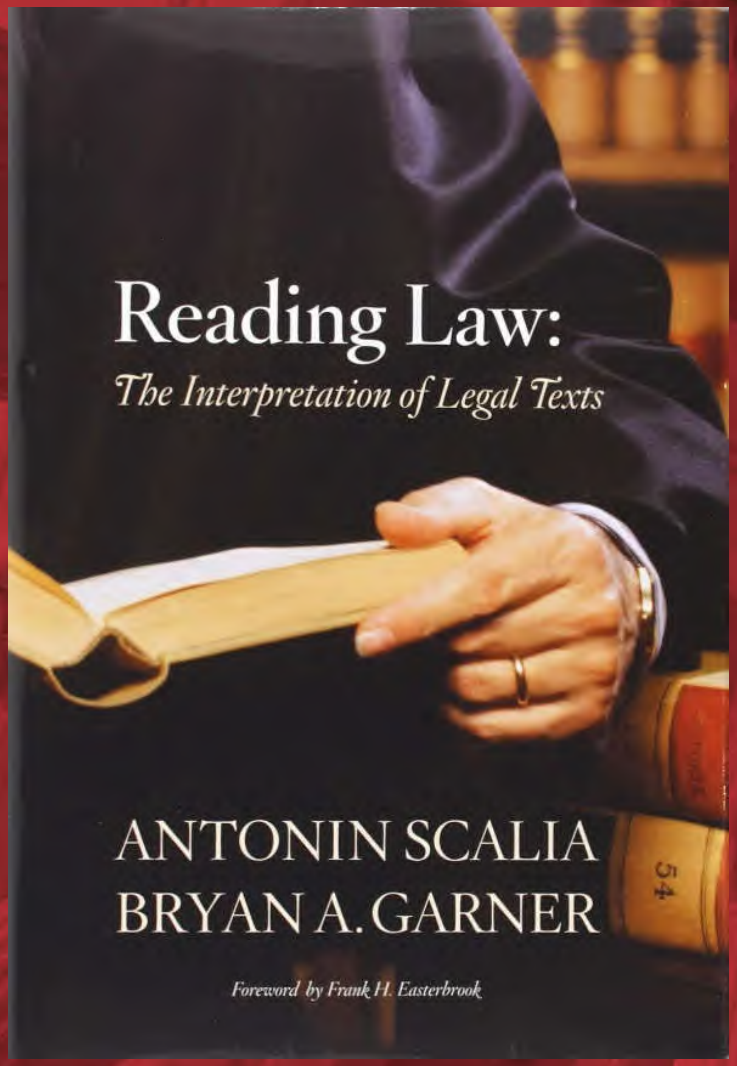
When did you know you were meant to be a lawyer?



The Book of Scalia

(and Garner)

Focusing this presentation.

To make this presentation manageable for all of us:

First, I focus only on cases from the **Texas and United States Supreme Courts**.

Second, I focus only on **very recent cases** (with a little context). I want to talk about the cutting edge of textualism.

Third, ***please read the paper***. It has *much* more detail and treats these important topics with the depth they deserve.

The Basic Rules

The more things change, the more they stay the same.

The uncertain role of “secondary rules.”

Coker v. Coker (1983) states the basic rules of construction and ambiguity. But there are many other so-called **“secondary” rules**, like “the earlier prevails over the later.”

Piranha Partners (2020) instructed us to reject canons that are **“arbitrary,” “default,” “rigid,” or “mechanical.”**

But “***whenever possible***, courts must assess adverse arguments and resolve a text’s meaning as a matter of law.” Secondary rules help courts decide cases without a jury, so they persist.

In Texas, parol evidence cannot create an ambiguity.

Coker v. Coker states the Texas rule that a party **may not use extrinsic evidence to "create" an ambiguity**—that is, to reveal the existence of a latent ambiguity.

Let me speak heresy. **This rule is not self-evident.** California reasons that judges are not all-knowing and should consult objective extrinsic evidence to reveal ambiguities.

It's not much different from consulting a **dictionary.**

The Texas Supreme Court **wrestles** with the effects of this rule.

“Surrounding circumstances…”

A generation of advocates used *National Union Fire Insurance Company* (1995) to argue that “**surrounding circumstances**” were admissible—and to create a huge loophole.

There has always been leeway for this in **trial testimony**. Lawyers don’t object, and courts don’t protest.

The Court tried to close the loophole in *First Bank v. Brumitt* (2017), which reiterated they can only **“inform”** the words in the text, and **not “add to, alter, or contradict”** them.

Continuing to tighten the rules.

URI (2018) is a beautifully written opinion that tries to explain the rules of ambiguity and the role of extrinsic evidence.

It **acknowledges the tension** between "revealing" and "creating" an ambiguity, but instead of resolving that tension, it insists the old rules are "**absolutely clear**" and gives simple examples.

The take-away is that "surrounding circumstances" evidence must be **"objective in nature."**

URI ought to refocus us on the important role of **mistake**. You can use extrinsic evidence to prove mistake…

Barrow-Shaver: Confusion over trade usage.

In 2019, the Texas Supreme Court issued its most confusing opinion ever, ***Barrow-Shaver***. The Court fractured 5-3-1 on how to implement **"trade usage"** into "surrounding circumstances."

Here's my take-away summary:

> 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.

This is backward—and why **the UCC is the opposite**.

Math. *Math?* Yes, math.

An “arbitrary” and “mechanical” standard.

Math is wrong, as a matter of law.

"Few legislative instructions are as inescapable as a math formula." *Rodriguez* (2024).

Yet the Texas Supreme Court has held that **1/3 of 1/8 is 1/3 *unambiguously and as a matter of law*.** Fortunately, the Court has a **good sense of humor** about it.

What happened? Some oil conveyances from the 1940s through the 1960s used "1/8" to mean "all of my royalty interest" instead of .125, due to an accident of history and a "once-common misunderstanding" about the estate retained by the grantor.

How did the Court get there?

Hysaw v. Dawkins (2016) held 1/3 of 1/8 is 1/3, *unambiguously*.

The Court explained it would **avoid "arbitrary," "bright-line," and "mechanical rules of construction."** That is, *mathematics*.

How was the unintuitive result proven? The court relied on ~~extrinsic evidence~~ a **law review article**.

It found the use of double fractions to be **suspicious**—why say "1/3 of 1/8" instead of "1/24"?—because the Court will only deviate from plain meaning if there is some basis in the raw text.

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Even clear text can be unreasonable.

Hysaw ultimately turns on the holding that **a reading can be *consistent* without being *reasonable*.**

This theme was amplified in two recent cases, *IDEXX Labs* (2025) in Texas and *Pulsifer* (2024) in the U.S. Supreme Court. It is possible for texts to have two grammatically correct meanings, but only one of those meanings is *reasonable.*

As advocates, therefore, **we must show our position is more than "grammatically correct."**

Revising the rule against math.

***Van Dyke* (2023) jovially clarified and revised *Hysaw*.**

Justice Young acknowledges the **uneasy tension** that math is "**unusually clear**" but alleged to mean "**something radically different from what we might expect**."

If extrinsic evidence can reveal a latent ambiguity, no problem.

Instead, the Court creates a ***rebuttable presumption*** that double fractions express the old legal error.

Any "rebuttal" must come from the document alone.

Using the rule against math.

Clifton (2026) **rebutted the presumption** because the grantors showed their math—"1/128 (1/16 of the usual 1/8 royalty)."

Advocates should also think about **historical research**. Can you prove the drafter didn't make a mistake? Does that matter?

Van Dyke and *Clifton* usefully state that the parties' **subsequent performance** "adds to our confidence that our reading of the deed is correct." You can use that to counter the long-standing no-subsequent-performance rule of *Sun Oil v. Madeley*.

More than unambiguous

How do we argue text is “clear”?

The “clear statement” standard.

Courts sometimes require that a legislature must speak “**clearly**”—not just unambiguously—to achieve a certain result.

How does textualism address this allegedly higher standard, when it already and always seeks the “only reasonable” result? Recall that *Van Dyke* conceded that math is “unusually clear.”

The “**major questions doctrine**” teaches excellent lessons, because the Supreme Court fractured over this very problem.

Is a “clear” requirement a higher standard?

In the recent tariff case, *Learning Resources* (2026), the Court fractured over whether the “**major questions doctrine**” imposed a higher standard than textualism, and if it did, whether that standard was grounded in the United States Constitution.

Several justices claimed to use **ordinary textualism** yet came to very different results. Justice Gorsuch lampooned all of them.

We’ll come back to a recent Texas Supreme Court case that blended a “clear” standard with a surplusage problem.

How can we advocate for a "clear" standard?

So how can we *use* this in our advocacy? How can we subtly (or not-so-subtly) argue that our opponent should have to argue the text is "clear" and not just "unambiguous"?

The answer is "**the elephant in a mousehole doctrine**." It's a rhetorical flourish from Justice Scalia that lets you cast doubt on unambiguous language. That is, a facially reasonable reading of the words may be suspicious if it is *surprising* (but not absurd).

The phrase has become popular at the Texas Supreme Court in recent years. And courts are adopting it for **contracts** as well.

“That can’t be right” loses.

Courts openly embrace surplusage and absurd results.

The Rule Against Surplusage is more of a rough guideline.

The **Rule Against Surplusage** sensibly supposes that the drafter meant all words to have meaning. Reality tells a different story.

Reading Law endorses the rule, while also noting that "**sometimes drafters *do* repeat themselves and *do* include words that mean nothing of substance**." But it gives very modest examples of surplusage.

Recent courts diminished the role of "surplusage," and drew attention because the outcome was politically conservative.

Supreme Courts openly embrace surplusage.

Texas: *Whole Women's Health* (2022) rejects the rule against surplusage—it is "**useful**" but "**has its exceptions**." The Court rejected prior formulations that used mandatory language.

US: In *Al Otro Lado* (2026), Justice Alito openly embraces surplusage—it is "**not an iron rule**." Justice Sotomayor pounced.

These cases provide pull-quotes for anyone acknowledging surplusage—but the rule still has rhetorical force.

Family Dollar: finding meaning in the meaningless.

In Texas, *Family Dollar* (2026) was a 3-3-3 split over whether a **garbled order** was sufficiently "clear" or had any meaning at all. There's useful material for every position here.

Busby: We're not sure what this means, but an order setting aside a judgment must be "express and specific," and this isn't.

Young: We are confident this "bizarre" order is meaningless. (No opinion on a "clear" statement requirement.)

Sullivan: The order must mean *something*, which can only be an intent to set aside the judgment. No "clear" statement needed.

The Rule Against Absurdity is a loser, too.

The rule against absurd results also finds approval in *Reading Law*—which is actually *more liberal* than current dogma. **But plain text will always be enforced**, even if crazy.

If you have to defend an absurd result, Justice Barrett's opinion in *Montgomery* (2026) has a mic-drop for you:

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

Recall that if there are *two* correct interpretations, the reasonable one must prevail.

Using Legislative History

"Legislative history is not always a villain."

I renounce “legislative history” and all its works.

The greatest heresy listed in *Reading Law* is the use of “**legislative history**,” though has been in retreat since the 80s.

For context, in 1971 the U.S. Supreme Court lamented that the legislative history was ambiguous so it must “look primarily to the statutes themselves to find the legislative intent.” Today, “**we are all textualists now**” (Kagan 2015).

Changes in enacted legislation (“**statutory history**”) are OK.

Using legislative history in the U.S. Supreme Court

Legislative history never went away—Justice Kagan gleefully points out when the conservative majority uses legislative history, as in *West Virginia* (2022). You can use it if you don't call too much attention to it—perhaps to **"confirm" an argument**.

Justice Jackson openly advocates for its use in her *Learning Resources* (2026) concurrence. She cites **objective evidence** that legislators do *not* actually read the text of the legislation, as Scalia assumes, but instead rely on the committee reports.

For his part, Scalia also denies that "intent" is even relevant.

Legislative history in Texas: Permissible, right?

Texas's Code Construction Act (1985) **expressly permits a court to consider "legislative history," "whether or not the statute is considered ambiguous on its face."** So shouldn't the courts follow this statute with the same textualist rigor?

Absolutely not, says the Texas Supreme Court, citing the Apostle Paul as authority. *Texas Presbyterian Hospital* (2018).

The Court previously cited legislative history with gusto, **as recently as 2009 and 2011**. Concurrences identified limited uses for legislative history, while Justice Willett cried heresy.

Use legislative history strategically.

Those concurrences and real-world outcomes provide some **strategies** for using legislative history when it helps your case:

- **Official bill analyses or failed legislation** may seem more "reliable"—they sneak into textualists' opinions.
- Frame the argument as "**history**," "**storytelling**," or "**confirming**" a preferred outcome.
- **Just do it**, because the other side can't unring the bell.

“The singular includes the plural…”

Another Code provision states that “**the singular includes the plural.**” Not “may”—the Legislature commands it.

Reading Law approves this rule if applied with common sense.

This rule became a focus in ***In re Greystar*** (2026), a 5-4 split that uses every tool in the textualist toolbox to decide that the $25M cap on supersedeas bonds applies to each judgment debtor individually. **Is “judgment debtor” truly singular?**

That glorious case **reinforces my faith in textualism**.

A Revival Service!

All these cases confirm that **textualism is a rich doctrine that can support all kinds of results**.

Diligent judges earnestly employ textualist principles, and yet still disagree over the result. **That's a good thing!** These judges aren't *phonies*—they're *faithful*.

My final advice, then, is to **proclaim your faith in textualism!**

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