4

Practical Reason in Peril

From Cicero to Texas Health Presbyterian

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4.1 INTRODUCTION

Judging requires practical reason, in each case a decision about what to do rather than one about scientific truth (Bix, 2022, p. 14; see also Aristotle, 1934; Burton, 1989; Larson, 2019). Writing sixty years apart, legal theorists Lon L. Fuller (1946) described an "antinomy" between reason and fiat, what Francis J. Mootz III (2018) called an "in-betweenness" in judging: The conclusion that judges necessarily exercise some discretion, because their decision cannot be the results of geometric proofs and deduction. In the face of this necessity, Mootz called for judges to exercise "rhetorical knowledge," "a practical accomplishment that achieves neither apodictic certitude nor collapses into a relativistic irrationalism" (Mootz III, 2018, p. 16).

In short, Fuller's whole theory of law and Mootz's in-betweenness acknowledge *underdeterminacy*, a state where more than one outcome is reasonably and rationally possible in many (or even all) cases. It lies between the extremes of *determinacy*, where there is only one possible answer and one possible way to reach it, and radical *indeterminacy*, where any outcome is acceptable simply as an exercise of the court's power. Judges should thus not pretend to engage in a deductive enterprise or pure fiat, but they should instead *show their work* in their practical judgments by writing opinions that exhibit a reasonable route to their conclusions. The admonition is important because the argumentation in judicial opinions is often the only evidence we have of the reasoning of the judges behind them, and it is of central concern to

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democracy and judicial legitimacy that the arguments judges present are cogent enough to secure (at least grudging) assent of those bound by them (Bencze & Ng, 2018; Larson, 2019). This use of rhetorical invention in the law has ancient roots in the West and a family tree that leads to the founding of the United States.

Nevertheless, express appeals to rhetorical invention in law have become unfashionable since the mid-twentieth century, while the focus of much rhetoric *about* the functioning of law and the reasoning of judges has shifted to what I call the contemporary *determinist imaginary*. An imaginary is what philosopher Charles Taylor labels "the ways people imagine their social existence, … how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations" (Taylor, 2004, p. 23). The imaginary is "carried in images, stories, and legends," and it "makes possible … a widely shared sense of legitimacy."

Like most of the present, the determinist imaginary is an outgrowth of the past. During the centuries before the framing of the US Constitution, most English (and thus American colonial) law was *common law*, or judge-made law. On the one hand, those judges told the story that they were merely uncovering law that was already there, often on natural-law bases. On the other, it was clear that their decisions could have "discovered" quite different laws that were equally rational (if they were rational at all). Around the time of the framing of the US Constitution, Supreme Court Justice Joseph Story – whose legal treatises were widely read in the nineteenth century – seized on the view that judicial opinions could be demonstrations, much like geometrical proofs, and that legal principles could be *deduced* – either from natural law or from other principles (Eisgruber, 1988). A similar view reached its apex in the teaching methods of Harvard Law School dean C. C. Langdell, who purported late in the nineteenth century to derive the principles of law scientifically by induction from reading court opinions. Already at the time of Langdell, however, there were theorists pushing in a different direction. For example, Oliver Wendell Holmes Jr. argued that law was a prediction about what courts would do.[1] So the imaginary swung away from determinism during the first two-thirds of the twentieth century, with more talk of Holmes' probabilities than of mathematical or scientific deduction and Langdell's induction.

But the advent of modern textualism and originalism (see Hannah & Mootz, Chapter 2 in this volume) in the latter decades of the twentieth century corresponded with the new determinist imaginary. The contemporary determinist imaginary is like older claims of determinism, in that it portrays a world where there is one right answer to each legal question and, indeed, one right way to arrive at that answer.

[1] Note, however, that some contemporary theorists of law have accused Holmes himself of being a determinist, but based on social or scientific perspectives external to the law (Burton, 1989).

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The determinist imaginary's stories and legends blossomed as "a series of reactions and countermobilizations from different segments of society" to the New Deal, the civil rights movement, and the Warren Court's arguably liberal decisions (Balkin, 2009, p. 69). In that sense, the contemporary determinist imaginary is an outgrowth of conservative backlash to arguably activist, arguably liberal judging during that earlier era. But the result has been an arguably activist conservative judiciary cloaking sweeping decisions in questionable claims of certainty. In this way, determinism destabilizes the public's understanding of judging and brings into question the legitimacy of the judiciary.

This chapter cannot describe all the antecedents, all the pernicious consequences, or even all the current manifestations of the determinist imaginary (though there are many). Rather, it presents a case study comprising two treatises and the conversation into which they can be set, along with two recent opinions in the Texas Court of Appeals and Texas Supreme Court. The case study shows how the determinist imaginary obscures underdeterminacy in the interpretation of authoritative legal texts.

The first treatise is *De Inventione* (Cicero, 1949), an early work of Marcus Tullius Cicero, probably the most famous orator of the ancient West. *De Inventione* provides a checklist for practical reasoning for the invention of arguments in legal reasoning about texts, is candid about the tensions between competing interpretations, and does not dress them in the rhetoric of determinacy. I illustrate this approach in the first part of a case study, an opinion of the Court of Appeals of Texas in *D.A. v. Texas Health Presbyterian* (2017; "*THP I*"). I then discuss *Reading Law: The Interpretation of Legal Texts*, the work of Supreme Court Justice Antonin Scalia and lexicographer Bryan Garner (2012). Scalia was a self-proclaimed textualist and is one of the revered figures of the new determinist imaginary. Their book employs sweeping rhetoric to portray legal reasoning as determinist. But for their work to be practically useful to advocates and judges – as it has unquestionably been – it must subtly acknowledge the underdeterminism of all its precepts. Thus, Scalia and Garner's rhetoric *about* legal reasoning is part of the new determinist imaginary, but their description of rhetorical invention *as* legal reasoning lays bare law's underdeterminacy.

I illustrate the consequences of Scalia's determinist rhetoric with the second half of the case study: The Texas Supreme Court in *Texas Health Presbyterian v. D.A.* (2018; "*THP II*") purports to resolve the same case based on an entirely questionable assessment of grammar and punctuation. Its rhetoric about legal reasoning flees from the underdeterminacy that even *Reading Law* must acknowledge (if only in the fine print) and imagines instead judges calling "balls and strikes" (Roberts, 2005), exhibiting the perfect reason of law, and limiting judicial discretion. I wrap up with a summary of the broader strokes of Scalia and Garner's portrayal of the determinist imaginary and oppose it by urging a return to the tradition of practical reason that we can inherit from Cicero.

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4.2 PRACTICAL REASON'S PEDIGREE

> [N]othing at all could be done either with laws or with any instrument in writing ... if everyone wished to consider only the literal meaning of the words and not to follow the intentions of the speaker.
>
> Cicero, *De Inventione* ([1st century BCE]1949, 2:140)

The sort of practical reasoning available to contemporary US courts traces its origins to the ancient Mediterranean. Aristotle (2007) offered one model, perhaps in hopes of settling a debate between those who valued rhetoric and those who considered it unethical. Building on Hellenistic thinkers who were the heirs of Aristotle's thought, Cicero's *De Inventione* (1949) provided a method for interpreting texts whose meaning is uncertain, a method well familiar to many jurists of eighteenth-century England, to the framers of the US Constitution, and to American lawyers through the nineteenth century.

4.2.1 *Starting a Debate in Greece*

On the one side were the Greek sophists of the late fifth century BCE, teachers of rhetoric or philosophy or both, depending on who you asked. The fragments of Gorgias and the *Dissoi Logoi* (see Britt, Chapter 13 in this volume) illustrate the argumentative techniques of these teachers, producing arguments on both sides of any issue and arguments in the alternative (*The Greek Sophists*, 2003). The practical value of this type of training, and the practical reasoning of which it was evidence, could not be denied in litigious Athens during its brief experiment in democracy. On the other side was the idealism of Plato (2004, 463b) and others who decried rhetoric's focus on winning and its failure to focus on truth. For Plato, rhetoric was a pale imitation of reason – it was "cookery" or merely a "knack."

Mediating between the sophists and his own teacher Plato in the *Ethics*, Aristotle (1934, p. 337) distinguished the kind of reasoning used in geometry and the sciences, "about things that cannot vary," from the deliberation necessary for action. Because action in the public sphere requires persuasion, Aristotle's *On Rhetoric* (2007, p. 27) embraced the need for the "ability, in each [particular] case, to see the available means of persuasion"[2] and provided the first extant theoretical account of rhetoric in the West.

4.2.2 *Cicero and* De Inventione

Marcus Tullius Cicero was certainly the most famous ancient Roman orator and wrote several texts on rhetoric, including *Topica*, *De Oratore* and *Brutus*. This

[2] The emendation appears in the 2007 translation by Kennedy.

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chapter deals with his early work *De Inventione* (Cicero, 1949). It addresses the first of the five canons of rhetoric, invention – the discovery of arguments available to the orator appearing before a tribunal – and introduces us to arguments about text, "when some doubt arises from the nature of writing" (Cicero, 1949, II.116). Though such doubts arise from several sources, I will restrict my treatment here to ambiguity and letter and intent, as they are the most salient for the discussion that follows.

For Cicero (1949, II.116), ambiguity appeared when "the written statement has two or more meanings." He gave the example of a will where the testator required that "my heir give to my wife a hundred pounds of silver plate as desired."[3] Both heir and wife desired to select which silver plate the widow would receive. The author could have cleared matters up by saying "as desired *by my heir/my wife*." Cicero offered a variety of bases for arguing on each side of the case: trying to show there is no ambiguity; the immediate linguistic context; looking at the author's "other writings, acts, words, disposition and in fact his whole life" (Cicero, 1949, II.117); the "convenience" for the state of implementing one interpretation over the other (II.118); whether one interpretation gives a result that is "more expedient, more honourable or more necessary" (II.119); whether another law determines the outcome (II.119–120); and how the author would have worded the text were the other side's interpretation correct (II.120).

Cicero (1949, II.121) discussed a second type of dispute about text that involves whether "the letter" – "the exact words that were written" – conflicts with the author's intent. We can extend the previous example, assuming that the testator required that "my heir select a hundred pounds of silver plate to give to my wife." Perhaps numerous witnesses, friends both of the testator and his wife, witnessed the testator saying – after writing his will – that he intended his wife to receive particularly a set of very valuable silver goblets, weighing some twenty pounds, that she cherished. Would this expression constrain the complete freedom that the will's text appeared to grant the heir?

On the one hand, the advocate for the author's intent would look outside the text of the writing itself to consider whether the author had some specific end in mind or to equitable considerations, where enforcing the language as written would have unexpected and undesirable consequences (Cicero, 1949, II.122–124). The advocate would urge against the letter on grounds that injustice would result from enforcing the letter in this instance and "that there is no law which requires the performance of any inexpedient or unjust act" (II.138); that the law requires that judges should exercise discretion; or that following the law as the other side urges would require it to be ignoble or "base" (II.140). The advocate for the author's intent may argue "that

[3] Though the example in Cicero and here is of a will, a document unlike a law in that it does not bind other citizens to its pronouncements, Cicero proposed the same interpretive techniques for laws as for private documents. Scalia and Garner (2012) also asserts that *Reading Law* is generally applicable to interpreting contracts, statutes, and constitutions.

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we value the laws not because of the words, which are but faint and feeble indications of intention, but because of the advantage of the principles which they embody, and the wisdom and care of the law-makers" (II.141). Such an advocate could conclude that "the true nature of law . . . consist[s] of meanings, not of words, and that the judge who follows the meaning may seem to comply with law more than one who follows the letter" (II.141).

On the other hand, the advocate for enforcing the letter of the text could first argue that it is *always* best to follow the letter, considering the following lines of argument: Where the text is clear, it is the best evidence for the intention of the author (Cicero, 1949, II.127–128); authors know well how to draft exceptions, so they should not be inferred (II.130–131); if exceptions are allowed it is "nothing more than repealing the law" (II.131); departing from the letter of the law makes the law unpredictable (II.134). Finally, if the judge alters the law by exception, they deny the legislators or the people an opportunity to approve this version of the law.

The advocate may also seek to show that, *regarding this text*, it is better to follow the letter, including the following lines of argument: that this law is "of the highest importance" or "sanctity" (Cicero, 1949, II.135); or that this law "was so carefully framed, that such provision was made for every situation and proper exception" (II.135). Finally, the letter's advocate can argue that *in this case* it is better to follow the letter by arguing, for example, that allowing for an exception here would create an inequitable result.

From this brief treatment, we can see that Cicero by no means saw reference to intent to be applicable only when a text was ambiguous. He acknowledged both the strength of the letter and that the strongest attack on the letter occurs when the equities favor intent. His willingness to look to extrinsic evidence in any case demonstrated his open embrace of the antinomy and underdeterminacy that letter and intent represent in this type of argument.

4.2.3 *The Through-Line from Cicero to the Framers of the US Constitution*

Cicero's *De Inventione* was available almost continuously in the Western Middle Ages and Renaissance. The guidance in this work heavily influenced the medieval *ars dictaminis* and the *ars notaria*, the proto-legal-writing practices of Western Europe (Larson & Tiscione, 2024, p. 18). Martin Camper (2018) has noted the pervasive effect of *De Inventione* in arguments about texts – including functioning as the seed for hermeneutics of the Bible – in the West from that time through the sixteenth century. Nevertheless, Cicero's ideas began to play a less prominent role after the beginning of the seventeenth century, as "influential thinkers of the day insisted that empirical evidence, mathematics, and strictly logical premises and proofs were the only suitable means by which to discover new knowledge" (Camper, 2018, p. 5). So, for example, Hobbes and Locke derided the abuses of rhetoric (Andrus, Chapter 6 in this volume; Larson & Tiscione, 2024, p. 20). The

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apotheosis of the movement to make even practical reasoning "logical" is possibly Emmanuel Kant's *Critique of Practical Reason* (1909), appearing in 1788, around the time that the United States was adopting its Constitution.

Nevertheless, leaders in the legal profession in the early United States were familiar with Cicero. President and lawyer John Quincy Adams was an ardent Ciceronian and first Boylston Professor of Rhetoric at Harvard. As late as the 1890s, a professor at Yale Law School, William C. Robinson, published *Forensic Oratory: A Manual for Advocates* (1893), a legal textbook that relied heavily on Cicero.

Cicero lived in a culture with its own imaginaries – imperfectly accessible to us, of course, as two millennia separate us – and those imaginaries evolved with the times through church and monarchy to parliamentary and congressional forms of government. But the focus of this chapter is on what I have called the contemporary *determinist imaginary*. To illustrate some of its practices, this chapter presents a case study in two parts, the first engaging practical reason of the sort that Cicero would have recognized, and the second embracing the rhetoric about legal reasoning that Scalia and Garner espouse.

4.3 CASE STUDY: PART 1

> The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.
>
> Antonin Scalia and Bryan A. Garner (2012, p. 56)

This section introduces "statutory construction" and the litigation in the *Texas Health Presbyterian* opinions that provide the case study for this chapter. It then measures the opinion of the Texas Court of Appeals in *THP I* against the approach that Cicero proposed.

In the United States, statutes are the enactments of the federal Congress and state legislatures, and courts must frequently interpret or construe[4] these statutes to apply them to particular circumstances. It is helpful to think of the tools of statutory interpretation as consisting of different levels of text and context. Just as we saw in Cicero, in the contemporary United States there is wide consensus that one must begin with the text of the enacted provision that is subject to interpretation. The "text" could be something as short as a word, a prepositional phrase, a sentence, or a section of a statute. Within that text are words and punctuation, and there are generally recognized guidelines in the law – known as *canons* – for interpreting certain combinations of them. It is also generally accepted, even by staunch

[4] Note that many distinguish "interpreting" and "construing" (e.g., Scalia & Garner, 2012, pp. 13–15; Solum, 2010), but I'm not taking up that issue.

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advocates of textualism, that none of these canons is, by itself, dispositive of what the meaning of a text is, that the different canons can cut in different directions and with different weights (e.g., Scalia & Garner, 2012, p. 59; see also Llewellyn, 1950).

Outside the statutory text under consideration, there is a statutory context: other provisions of the same statute and other statutes adopted in the same jurisdiction. Though we could call this *textual context*, I'll refer to it as *intrinsic context*. This terminology will help to distinguish it from context outside the body of statutes enacted in the jurisdiction, what various commentators refer to as extrinsic aids to statutory construction. The latter might include legislative history – reports of the debates and committees in the legislature that led to adoption of the statute – events in the jurisdiction at the time of enactment or interpretation, evidence of the likely consequences of a particular interpretation, and so on.[5] Self-described textualists usually eschew any use of extrinsic context in interpretation of statutes (e.g., Scalia & Garner, 2012). For them, the meaning of a statutory provision, for purposes of applying it as law, can be found *only* in the provision and in its intrinsic context. Unlike Cicero, these jurists permit recourse to extrinsic aids only when the text of the statute is ambiguous, and some of them would prohibit it even then.

As we shall now see, however, while looking at the opinion in *THP I*, even textualist judges are wise to engage in the type of weighing and balancing that Cicero advised.

4.3.1 *The* Texas Health Presbyterian *Litigation and Its Statutory Context*

In the course of the *Texas Health Presbyterian* case, the Texas Court of Appeals in *THP I* (*D.A. v. Texas Health Presbyterian*, 2017) reversed a trial court determination, and the Texas Supreme Court in *THP II* (*Texas Health Presbyterian v. D.A.*, 2018) reversed the appellate court. The factual context of the *THP* case study is a procedure that Dr. Marc Wilson performed in an obstetrics unit during the birth of baby "A.A." An emergency condition during the birth prompted Dr. Wilson's procedure, but he allegedly performed it negligently, injuring A.A. and resulting in long-term effects. The plaintiffs "D.A." and "M.A." were the child's parents, suing on his behalf. For the sake of simplicity, this discussion refers to D.A., M.A., and A.A. as "the plaintiff" and to "Dr. Wilson" and "the defendant" interchangeably, though Texas Health Presbyterian Hospital of Denton and a limited liability company that provided nursing services were also named defendants. At issue was whether the defendant had acted not just negligently, but with "willful and wanton

[5] *Black's Law Dictionary* (Garner, 2019) defines "extrinsic material" as "[i]nformation that is not included in a statute . . . subject to interpretation but that may be helpful to understanding its meaning." For a balanced, thorough, and digestible summary of these materials and the other canons commonly in use in contemporary US federal courts, see Brannon (2023).

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negligence" (*D.A. v. Texas Health Presbyterian*, 2017, p. 129), causing the injuries to A.A.

"Willful and wanton negligence" is a higher burden of proof for the plaintiff and would protect Dr. Wilson. The Texas Medical Liability Act (Section 74.153) spelled out that the higher standard applied:[6] "[i]n a suit … arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department." Wilson asserted that because he was rendering "emergency care" during the procedure, and he did so in an obstetrical unit and not a surgical suite, the plaintiff had to meet the willful-and-wanton standard. The plaintiff argued instead that the clause "immediately following the evaluation … of a patient in a hospital emergency department" applied to the whole phrase beginning "arising out of …"[7] If the plaintiff was correct, the willful-and-wanton standard would not apply to their case. In other words, because A.A. and his mother had never been in the emergency department, they would need to prove only ordinary negligence.

Like many states, Texas has statutes that direct courts how to interpret its statutes, and Texas courts commonly refer to them when interpreting or construing statutory language.[8] The Texas Government Code also permits Texas courts to consider several other "construction aids" – regardless of "whether … the statute is considered ambiguous on its face" – including, among others, the "object sought to be attained," "circumstances under which the statute was enacted," "legislative history," and "consequences of a particular construction" (Tex. Gov't Code § 311.023).

4.3.2 *Opinion of Texas Court of Appeals*

In *THP I*, the Appeals Court of Texas reversed the trial court, which had accepted Dr. Wilson's interpretation. The appellate court nodded to the requirement that "the source for legislative intent is found, whenever possible, in the plain language of the statute itself" (*D.A. v. Texas Health Presbyterian*, 2017, p. 433). To assess the plain language of the statute, the court began with the grammar and punctuation of the sentence. It illustrated the potential ambiguity with a diagram, a relatively rare sight in a court opinion (p. 437):

[6] The provision appears here as it was when the courts decided *THP I* and *THP II*. The Texas legislature amended the statute in 2019, changing the applicable language. 2019 Tex. Sess. Law Serv. Ch. 1364 (H.B. 2362) (Vernon's).

[7] Section 74.001 of the act defined "emergency medical care" as "bona fide emergency services provided after the sudden onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity … such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part."

[8] See, e.g., *Wal-Mart Stores, Inc. v. Forte* (Tex. 2016); *Atmos Energy Corp. v. Cities of Allen* (Tex. 2011).

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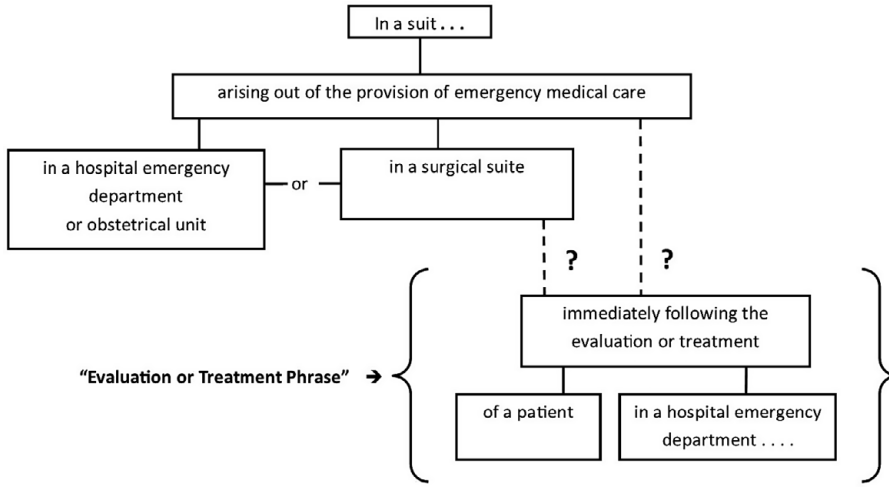

The question marks show the possible points of attachment for the limiting clause, which the court called the "Evaluation or Treatment Phrase": (1) to the participle phrase beginning with "arising" and thus governing all the locations, a reading that would favor the plaintiffs or (2) to the prepositional phrase "in a surgical suite" and governing only it, a reading that would favor Dr. Wilson. The Court of Appeals grappled with the question whether the sentence would have surplus words or absurd consequences if the Evaluation or Treatment Phrase applied to all three locations, with one reading being "arising out of the provision of emergency medical care in a hospital emergency department . . . immediately following . . . treatment of a patient in a hospital emergency department." Wasn't the second "emergency department" redundant or absurd and therefore surplusage under this reading?[9] The Court of Appeals rightly concluded that the two instances were not redundant, as one might receive "emergency medical *care* in a hospital emergency department" only after receiving "*evaluation* . . . in a hospital emergency department." The disjunctive "or" in the Evaluation *or* Treatment Phrase saved the clause from being redundant or absurd under either party's reading of the statute. The court thus concluded that grammar permitted either reading.

To select the correct attachment point, the appeals court then considered four canons of construction: the last-antecedent, series-qualifier, nearest-reasonable-referent, and related-statutes canons, finding the first two did not apply, the third favored Dr. Wilson, and the fourth favored the plaintiff.[10] The last-antecedent canon provides that a "pronoun, relative pronoun, or demonstrative adjective

[9] On the reluctance of courts to regard statutory words as surplus, see the discussion of the surplusage canon below.

[10] The court of appeals erroneously referred to these as "extrinsic aids," but as I noted previously, and also within Scalia and Garner's textualist model discussed below, they are part of the statutory, and therefore *intrinsic*, context.

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generally refers to the nearest reasonable antecedent" (Scalia & Garner, 2012, p. 144 [emphasis added]). Because the Evaluation or Treatment Phrase in *THP* was not a pronoun, relative pronoun, or demonstrative adjective, the Texas Court of Appeals concluded that this canon did not apply.

The series-qualifier canon provides that when "there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier *normally* applies to the entire series" (Scalia & Garner, 2012, p. 147 [emphasis added]); the nearest-reasonable-referent rule holds that when "the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier *normally* applies only to the nearest reasonable referent" (Scalia & Garner, 2012, p. 152 [emphasis added]). The Court of Appeals noted that the construction here did not involve "all nouns and verbs in a series" and it thus did not apply the series qualifier. Nevertheless, it concluded that the nearest reasonable referent applied, working in favor of Dr. Wilson by limiting the Evaluation or Treatment Phrase only to surgical suites, its nearest reasonable referent.

Finally, the related-statutes canon provides that "affiliated statutes" – the body of law enacted "for the same purpose" – "are to be interpreted together, as though they were one law" (Scalia & Garner, 2012, pp. 252–253). The Texas Court of Appeals carefully examined adjacent portions of the Texas Medical Liability Act, identifying other circumstances that referred to the higher standard of "wanton and willful negligence." In each, the court found that the higher standard of proof against a healthcare provider applied where "the situation presented an emergency requiring medical care by a provider who had no prior knowledge, or realistic opportunity to acquire knowledge, about the patient's history" – that is, the typical emergency room visit (*D.A. v. Texas Health Presbyterian*, 2017, p. 442). Because Dr. Wilson had a prior relationship with the plaintiff, this canon favored the plaintiff.

Taking these facts about the text into account, the court concluded that both potential attachment points for the limiting clause were reasonable (*D.A. v. Texas Health Presbyterian*, 2017, p. 439). In the presence of this ambiguity, the court looked to extrinsic aids in its construction of the statute, as the Texas Government Code had invited it to do (even absent any ambiguity). It relied on an exchange between two state senators while they debated the bill, which "the Senate voted unanimously to publish in the Senate Journal … 'to establish legislative intent regarding'" the statute (*D.A. v. Texas Health Presbyterian*, 2017, p. 442):

> Sen. Hinojosa: [This version of] the bill adds in the words "obstetrical unit" and "surgical suite" to the new section on the standard of proof now required for emergency care. Does this mean that now the higher standard applies to emergency care in these areas of the hospital, not just the emergency room?

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SEN. RATLIFF: Only if the same emergency that brought the patient into the ER still exists when the patient gets to the OR or Labor and Delivery area.[11]

The Texas House also published excerpts, including Representative Nixon's unopposed claim that "it is the intent of this legislation that emergency situations [sic] where you do not have a prior relationship with the patient is [sic] the one given the protection" (*D.A. v. Texas Health Presbyterian*, 2017, p. 443).[12] In light of these discussions "about the application of this statute to a fact scenario nearly identical to the one" the appeals court considered, it could not "ignore what plain grammar also [shows] is a reasonable reading of this ambiguous statute." The court concluded that the limiting phrase applied to all three treatment locations, in favor of the plaintiff, and reversed the trial court.

* * *

The appeals court here engaged in practical reason of a kind that Cicero would have recognized. It carefully examined the text and its intrinsic context. The court could have weighed the canon favoring one party more than the one favoring the other and gone either way. But given the uncertainty that remained under those analyses, the court widened the circle of context – as recommended by the Texas Government Code – and found important evidence in the legislative history to support the plaintiff's conclusion. The court showed its work. Throughout this process, the court cited Scalia and Garner's *Reading Law* for their methodology and interpretive method – the self-same methods that textualists urge for legal reasoning – but as we shall see, the Texas Supreme Court later fell prey to Scalia and Garner's *rhetoric about* their methods.

4.4 SCALIA AND GARNER ON INTERPRETING STATUTES

Scalia and Garner published *Reading Law: The Interpretation of Legal Texts* in 2012. The text is influential: As of November 2023, nearly 3,200 court opinions had cited it, often as authority for a court's selection and application of a general principle or canon for statutory interpretation.[13] In *Reading Law*, Scalia and Garner grudgingly acknowledged in descriptions of their methods that often canons must be balanced against each other and weighed with the discretion of the judge. The results are

[11] *Quoting* S.J. of Tex., 78th Leg., R.S. 5003 (2003), www.journals.senate.state.tx.us/sjrnl/78r/pdf/sj06-01-f.pdf.

[12] *Quoting* H.J. of Tex., 78th Leg., R.S. 6041 (2003), www.lrl.state.tx.us/scanned/HouseJournals/78/day84final.pdf.

[13] By comparison, the fifty-year-old landmark reproductive rights case *Roe v. Wade* (U.S. 1973) had been cited in barely 4,500 opinions as of the same date.

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necessarily underdeterminate. But when describing those methods, their rhetoric soared in support of deterministic goals. Note here that I'm not attacking textualists for not following their own methods; others have done so, arguing that self-described textualists sneak consequentialist and other non-textualist arguments into their interpretation quite regularly.[14] Instead, I propose to show that textualists using methods on their own terms illustrate Fuller's antinomy: The rhetorical weighing and balancing of the intrinsic tools of textualist statutory interpretation requires some fiat, but textualists' rhetoric about the tools emphasizes claims that their methods result in determinism (Fuller, 1946).

In the introduction of *Reading Law* and its section on fundamental principles, the rhetoric about its methods emphasizes the determinist perspective – that legal questions have right answers and right ways of reaching them. This approach also dominates in the balance of the text, which explores eighteen "semantic" canons, seven "syntactic," and fourteen "contextual" (but always relating to intrinsic context); and twenty-one canons "applicable specifically to" statutes and other enacted law. It continues the trend in its treatment of ambiguity and legislative intent, particularly in the latter part of the book, which "exposes" thirteen "falsities."

As this section shows, *Reading Law*'s rhetoric about its methods is determinist, root and branch. It denies the complexity of the interpretive task using rhetorically effective but rationally questionable arguments. Nevertheless, in statements of principle and in the explanatory notes for almost every one of the canons, *Reading Law* acknowledges that the judge must balance them against each other, addressing those that are applicable and ignoring those that are not. We can account for these acknowledgements, and to an extent the popularity of the book with judges, by noting that Scalia and Garner meant the text to be a handbook for those actually engaged in statutory construction.[15] Tellingly, *Reading Law* describes the canons only in isolation and provides no advice to the reader about how to balance them. As the case study in this chapter shows, the result is that judges must often choose between results that would be equally plausible but for the judge's decision to weigh one canon more than another – or not – much as the Texas Court of Appeals did in *THP I*. The denial of this reality results in opinions like that of the Texas Supreme Court in *THP II*, which I take up in Part 2 of the case study.

4.4.1 *Fundamental Principles*

From the very beginning, *Reading Law* emphasizes the determinist perspective. It provides a long block quotation from a law professor writing nearly 100 years earlier and asserting that "the demand for *certainty* and predictability requires an *objective basis* for interpretation" (Scalia & Garner, 2012, p. 34 [emphasis added]).

[14] For a recent example, see Krishnakumar (2024).

[15] Note that book also covers contractual language, but that is not the focus here.

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Immediately after that quote, Scalia and Garner (2012, p. 34 [emphasis added]) emphasized those words: Professor "De Sloovere . . . was right to insist on *certainty*, *predictability*, *objectivity*, reasonableness, rationality, and regularity." They claimed that "most interpretive questions have a right answer" and that "[v]ariability in interpretation is a distemper" (p. 6). And they used the language of determinism when, for example, they claimed that "we will *demonstrate* . . . [that] the textualist routinely takes purpose into account, but in its concrete manifestations as *deduced* from close reading of the text" (p. 20 [emphasis added]).

Nevertheless, the book struggles to maintain the determinist imaginary in the face of practical constraints: It asserts that its methods provide determinist answers, but it must in many cases acknowledge the underdeterminacy of those self-same answers and that its methods might justify more than one outcome. Scalia and Garner's solution was, on the one hand, to use a strongly deterministic rhetoric when describing their approach, and even particular canons. On the other hand, their blackletter[16] characterizations of the canons and occasional acknowledgments quietly (and fairly) allow for the contingency that is inherent in natural language – in other words, for underdeterminacy.

For example, they began their exposition of their method with a series of "fundamental principles" that represent the foundation of their approach. *Reading Law* (Scalia & Garner, 2012) sets each off in its own short section. Two of the first three begin with blackletter maxims or headings that seem quite underdeterministic:

1. Interpretation Principle: Every application of a text to particular circumstances entails interpretation. (p. 53)
2. Supremacy-of-Text Principle: The words of a governing text are of paramount concern, and what they convey, *in their context*, is what the text means. (p. 56 [emphasis added])
3. Principle of Interrelating Canons: *No canon of interpretation is absolute* [emphasis added]. Each may be overcome by the strength of differing principles. (p. 59)

We expect the content of each section to develop the subject in the heading, but the book does so in a complicated way.

The whole description of the principle in section 1 and at least the clauses in sections 2 and 3 that I have italicized here seem to acknowledge that there will be underdeterministic practical reasoning going on. The text that follows these headings in sections 1 and 3, however, works hard to undermine the underdeterminacy implied by the headings. Section 1 quotes nineteenth-century legal theorist

[16] Blackletter statements are common in legal treatises such as Scalia and Garner's, where the principle of law appears at a section's beginning in bold type. The rest of the plain-type text explains or justifies the main principle. This approach also appeals to the reader's sense that blackletter principles are settled and not subject to dispute.

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Frederick Pollock (1896): "Given a rule of law that [those] conditions generically described as A produce a certain legal liability or other consequence X, does the specific fact or group of facts *n* fall within the genus A?" (Scalia & Garner, 2012, p. 54). Scalia and Garner gave that passage this gloss: "You read an authoritative legal text to discover A (a major premise). You find facts to discover *n* (the minor premise). Then you draw your conclusion" (p. 54). In other words, Scalia and Garner reconfigured the *interpretation* referred to in the section heading as a *deduction*.

Section 2, which has the blackletter maxim that seems most determinist, asserts that extrinsic context (such as legislative history) is an unacceptable aid. The text of this section is among Scalia and Garner's most determinist, asserting that "the purpose must be defined *precisely*" and as "*concretely* as possible, *not abstractly*," and that "purpose . . . *cannot be used to contradict text or to supplement it*" (Scalia & Garner, 2012, pp. 56–57 [emphases added]).

Though the blackletter statement that begins section 3 seems highly underdeterministic, most of its text argues against the view that the canons have no value and for the view that they restrain prejudice and provide near-certainty. Scalia and Garner's conclusion, quoting Bishop (1882), is that "[t]he sound view is that 'statutory interpretation is *covered as absolutely by rules* as anything else in the law'" (Scalia & Garner, 2012, p. 61 [emphasis added]). *Reading Law* argues that the canons are stable, and it claims – without any argument or support – that "[t]hey *should* be stable . . . despite the efforts of many moderns to destabilize them" (p. 62).

Importantly, these fundamental-principle sections offer brief nods to reality: "Yes, [the canons] can be abused, but every useful tool can be abused," and "This is not to say that it is always clear what results the principles *produce*" (Scalia & Garner, 2012, p. 61). But *Reading Law* provides absolutely no guidance how the judge should mediate or weigh the interaction of the canons pointing in different directions, probably because acknowledging the necessity of that process would emphasize the underdeterminacy of the result.

4.4.2 *Complexity and Its Denial*

Reading Law continues these practices of emphasizing determinism while scantly acknowledging markers of underdeterminism, including in its presentation of the canons and its treatment of ambiguity and legislative history. Throughout its discussion of the canons of interpretation, the book exhibits the tension between determinist rhetoric and underdeterminist reality. But because *THP* implicates particular canons, I will discuss several of them briefly: the grammar, last-antecedent, series-qualifier, nearest-reasonable-referent, punctuation, surplusage, interpretive-direction, and related-statutes canons. I add some notes about Scalia and Garner's stance on the use of legislative history.

The blackletter of *Reading Law*'s grammar canon provides: "Words are to be given the meaning that proper grammar and usage would assign them" (Scalia &

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Garner, 2012, p. 140). As to punctuation, it "is a permissible indicator of meaning" (p. 161). The text of the grammar section begins: "Judges rightly presume … that legislators understand [grammar]. No matter how often the accuracy, indeed the plausibility, of this presumption is cast in doubt by legislators' oral pronouncements, when it comes to what legislators enact, the presumption is *unshakable*" (p. 140 [emphasis added]). But a paragraph later, it acknowledges that "[t]he presumption of legislative literacy is a *rebuttable* one; like all the other canons, this one can be overcome by other textual indications of meaning" (p. 140 [emphasis added]). The presumption is both unshakable and rebuttable? *Reading Law* also notes that "some grammatical principles are weaker than others" (p. 142). Meanwhile, the section on the punctuation canon makes an extended argument for the permissibility of the use of punctuation in interpretation, again apparently relying on the literacy of legislators. Nowhere does it suggest the punctuation is a *conclusive* aid to interpretation. Nowhere in these sections is there guidance about which grammatical principles and punctuation rules are stronger and how one should weigh them against each other or against other canons.

The last-antecedent canon has been criticized by linguists and legal theorists (e.g., Kimble, 2017). *Reading Law* states the blackletter principle simply: "A pronoun, relative pronoun, or demonstrative adjective *generally* refers to the nearest reasonable antecedent" (Scalia & Garner, 2012, p. 144 [emphasis added]). As the "generally" in the blackletter statement would suggest, the last paragraph of the section contains a "caveat," that this "canon may be superseded by another grammatical convention" (p. 146). We receive an example but may be left wondering, are there others? I presented the series-qualifier and the nearest-reasonable-referent canons in part 1 of the case study (Section 4.3). Again, after many easy cases given as examples discussing those canons, *Reading Law* admits: "Perhaps more than most of the other canons, [these two are] highly sensitive to context" and "subject to defeasance by other canons" (p. 150). By which canons, and under which circumstances, it does not say.

Under the surplusage canon, "*[i]f possible*, every word and every provision is to be given effect … None should *needlessly* be given an interpretation that causes it to duplicate another provision or to have no consequence" (Scalia & Garner, 2012, p. 174 [emphasis added]). Again, I highlight the words "if possible" and "needlessly" here to emphasize the contingency of this canon, and one would expect a court disregarding a word as surplus should explain the need. In fact, *Reading Law* provides an example: In *Moskal v. United States* (1990), a majority of the Supreme Court concluded that "falsely made" meant something other than "forged, altered, or counterfeited" on grounds that if "falsely made" meant the same as "forged" in this list, it would be surplus. In dissent, Scalia maintained "falsely made" *did* mean "forged" and blistered that the "entire phrase is *self-evidently* not a listing of differing and precisely calibrated terms, but a collection of near synonyms" (Scalia & Garner, 2012, p. 178 [emphasis added]). By "self-evidently," Scalia meant

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that he didn't think his view needed explanation. But departing from this canon seems to demand it.

The related-statutes canon provides that "affiliated statutes" – the body of law enacted "for the same purpose" – "are to be interpreted together, as though they were one law" (Scalia & Garner, 2012, pp. 252–253). It is important to note that for Scalia and Garner, related statutes are not an extrinsic aid to interpretation. They are part of the same body of statutes in the same jurisdiction. Again, the authors acknowledged that "[t]he critical questions are these: Just how affiliated must 'affiliated' [statutes] be, and what purposes are the same? The cases provide – properly in our view – a good deal of leeway" (Scalia & Garner, 2012, p. 253). And again, there are no guidelines here.

The interpretive-direction canon acknowledges that legislatures sometimes provide some interpretive machinery of their own, defining terms they use in statutes and even providing interpretive guidance. These provisions are enacted law just as much as the statutes they are to help interpret. "Definition sections and interpretation clauses are to be carefully followed" (Scalia & Garner, 2012, p. 225) according to the blackletter, but the section that follows includes Scalia and Garner's lengthy ruminations on the limits of the ability of legislatures to adopt statutes that dictate how they want their own statutes to be interpreted. *Reading Law* asserts there are many such limits, but often without supporting arguments and often with the only authority supporting them being a few citations to law-review articles. Again, the reader receives mixed signals, as if the authors are saying: "Carefully follow interpretation clauses, but we'll let you know when they go too far."

In addition to canons that *Reading Law* endorses, it abjures some interpretive tools, including legislative history. It is a common perception among attorneys that one either should not consider legislative history – an extrinsic aid to interpretation – at all or that one should consider it only if the statutory text is ambiguous. *Reading Law* does not adopt the view that "[w]hen the words of a statute are unambiguous, [the] first canon is also the last: 'judicial inquiry is complete'" (*Connecticut National Bank v. Germain*, 1992, p. 254). In fact, the treatise suggests that the question of ambiguity is not a central one and can usually be resolved by selecting the proper word sense.[17] It argues instead that problems consistently arise from "vagueness."[18] It urges that "[m]ost interpretive canons apply to both ambiguity . . . and vagueness" (Scalia & Garner, 2012, p. 33), though it does not say which ones do not apply or when.

[17] E.g., "*[T]able* could refer either to a piece of furniture or to a numerical chart" (Scalia & Garner, 2012, p. 31).

[18] "A word or phrase is ambiguous when the question is which of two or more meanings applies; it is vague when its unquestionable meaning has uncertain application to various factual situations" (Scalia & Garner, 2012, p. 32).

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One controversial view that *Reading Law* firmly espouses is that legislative history, an extrinsic aid to interpretation, should never be used.[19] Well, almost never: The treatise acknowledges the utility of history as evidence "establishing linguistic usage" at the time of the enactment or for showing that an interpretation by the court is not absurd if even one legislator maintained that view in the legislative history (Scalia & Garner, 2012, p. 388). But a section making up nearly 5 percent of the book's pages appeals to judges to avoid it in all other cases.

* * *

Scalia and Garner peppered their exposition of the canons with assertions of determinism and self-evidence, especially in the excerpts of Scalia's own opinions. But as I have shown, their treatise acknowledges – indeed, must acknowledge – several things: First, canons compete, and their weighting when they do is uncertain. Second, canons' presumptions are rebuttable, though it is unclear when. Third, canons require conduct only generally or abjure it only when it is needless. Fourth, canons are sensitive to context, though how sensitive and to how great a context is uncertain. And finally, the statutes' own internal rules for interpretation work only to an extent, but to what extent, it is hard so say.

If we take at face value the canons as *Reading Law* explains them, they are at best a checklist of lenses through which courts should view an interpretation problem, rules of thumb to solve a problem that will require the give and take of practical reason, the result of which is often – if not always – underdeterminate. They are a complex toolset for judges, requiring subtle judgments so difficult to balance that *Reading Law* does not even try. But its rhetoric *about* the canons is consistently determinist.

Cicero, the Texas Court of Appeals, and the explanations of *Reading Law* seem to be in complete agreement (with the exception of legislative history): Interpreting statues is a complicated act of practical reasoning, rarely resolved by any zinger of a rule. Though the Texas Court of Appeals seemed to understand the underdeterminate reality in *THP I* and showed its work, the Texas Supreme Court instead embraced the determinist rhetoric of *Reading Law* when it decided *THP II*.

4.5 CASE STUDY: PART 2

The Texas Supreme Court reversed the appeals court's decision in *THP II* (*Texas Health Presbyterian v. D.A.*, 2018, p. 137). The Supreme Court stepped through the facts of the case and the procedural history at the trial court and Court of Appeals. The Supreme Court disposed of Dr. Wilson's arguments based on the punctuation

[19] For the contrary view, see the concurrence of Justice Stevens in *Connecticut Nat. Bank* (1990, p. 255), arguing that "[w]henever there is some uncertainty about the meaning of a statute, it is prudent to examine its legislative history."

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and nearest-reasonable-referent canons, concluding that it was "left with an unpunctuated phrase containing a modifier that – in light of its location within the phrase – could modify the entire series or only the last item in the series" (p. 132). It nevertheless concluded there are "two features that make the family's construction unreasonable" (p. 133). The first is the location of the clause "in a" in the text, which the court illustrated by parsing the text in the way that Dr. Wilson would:

[1] ***in a*** hospital
  [a] emergency department or
  [b] obstetrical unit or
[2] ***in a*** surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department.

And in the way that the plaintiff would:

[1] ***in a***
  [a] hospital emergency department or
  [b] obstetrical unit or
  [c] ***in a*** surgical suite
[2] immediately following the evaluation or treatment of a patient in a hospital emergency department.[20]

The court concluded that the plaintiff's reading required it to ignore the second "in a," violating the surplusage canon and, with reference to Scalia and Garner, the nearest-reasonable-referent canon. The court accepted Dr. Wilson's reading of the clause, claiming "[i]t simply permits no other reasonable reading."

The court nevertheless considered a second reason, grounded solely in the clause they interpreted. The reason was that the plaintiff's reading required the court to accept a gloss of the statute it deemed nonsensical: "treatment in a hospital emergency department . . . immediately following . . . treatment of a patient in a hospital emergency department" (*Texas Health Presbyterian v. D.A.*, 2018, p. 134). It failed to note the Court of Appeals' conclusion that the "or" between "evaluation" and "treatment" permitted this gloss: "treatment in a hospital emergency department . . . immediately following the evaluation . . . of a patient in a hospital emergency department." Given that treatment, even in the ER, always follows some kind of evaluation or assessment of the patient's condition, this gloss seems quite reasonable. Nevertheless, the Supreme Court concluded that the plaintiff's reading "would create a redundancy that deprives the phrase of any linguistic sense" (p. 135).

The Supreme Court entirely ignored the appeals court's use of the related-statutes canon, failing to account for evidence in other sections of the same statute that it is meant to protect doctors providing emergency care who have no familiarity with their patients. It did, however, expressly discount the appeals court's and the family's

[20] The emphasis in these two excerpts reproduces the Texas Supreme Court's in the original.

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use of legislative history: "[T]he family relies heavily on statements individual legislators made during floor debates" (*Texas Health Presbyterian v. D.A.*, 2018, p. 136). The court responded that "statements explaining *an individual legislator's* intent cannot reliably describe the *legislature's intent.*" Here, though, the court relegated to a footnote the fact – pointed out in the appeals court decision – that the exchange between Senators Hinojosa and Ratliff appeared in the Senate report only after *unanimous consent* of the Senate, a threshold higher than the majority required to pass the statute in the first place.

4.6 RESTRAINT AND TRADITION

Reading Law argues throughout its length for an approach to judicial decision-making on grounds that it promotes judicial restraint and supports democratic values and that it enacts traditional jurisprudence. Judicial restraint is part of a story in the determinist imaginary that in the mid-twentieth century judges moved away from the principles Scalia and Garner espoused, and the result "has weakened our democratic processes, and has distorted our system of government checks and balances" (Scalia & Garner, 2012, p. xxvii). They claimed that "nontextual means of interpretation . . . erode society's confidence in a rule of law that evidently has no agreed-upon meaning" (p. xxviii). Of course, by telling that story, they simultaneously responded to and helped to perpetuate populist beliefs that judges should not exercise discretion in applying the law, that they should do only what the text of the law demands.

But Scalia and Garner (2012) also had to acknowledge that textualist judges can abuse their discretion as can non-textualist judges. They claimed that "in a textualist culture, the distortion of the willful judge is much more transparent, and the dutiful judge is never *invited* to pursue the purposes and consequences he [sic] prefers" (Scalia & Garner, 2012, p. 17). The transparency they asserted seems to require that if a court draws a practical conclusion, it should provide considerable explanation for the public, other judges, and lawyers to understand how it reached that conclusion (Larson, 2022). The Texas Court of Appeals and Texas Supreme Court in *THP* were both textualist-minded courts, given that both liberally cited Scalia and Garner. But the Texas Court of Appeals showed its practical reasoning, balancing the arguments of the parties and its own inventive efforts, while the Texas Supreme Court ignored or misconstrued arguments in its effort to give a conclusive answer based on questionable grammatical analysis.

The Texas Supreme Court embraced the determinist imaginary, just as Scalia had in his own opinion-writing, where he often claimed his answers were self-evident. Unfortunately, his example and the impulse to make conclusions sound determinist have worked to obscure courts' reasons, as *THP II* showed. Rather than showing their work as they evaluated and balanced the canons, they often claimed abruptly that one is determinative. The Supreme Court's opinion in *THP II*

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represents what even Scalia and Garner might call a "crabbed" reading that hangs on deterministic conclusions about the meaning of the text based on contestable grammatical claims. Citing *Reading Law*, the court did not employ the balancing that the treatise's explanations counseled, and it failed to consider the intrinsic context of the related-statutes canon or the wider extrinsic context of the legislative history, which the legislature had invited it to do. It is difficult to describe *THP II* as more restrained than *THP I*.

Scalia and Garner further propped up the determinist imaginary with frequent appeals to a tradition before the twentieth century, where they said judges behaved according to their standards. But some of their appeals to tradition seem to cut both ways, and in other cases they proposed *abandoning* the old ways. *Reading Law* relies on frequent claims about the historicity of its approach, claiming that today "judicial invention replaces what used to be an all-but-universal means of understanding enacted texts [resulting in] the distortion of our system of democratic government" (Scalia & Garner, 2012, p. xxviii). It asserts that its "approach is consistent with what the best legal thinkers have said for centuries" (p. xxix) and – without argument or citation to support this claim – that textualism's "principal tenets have guided the interpretation of legal texts for centuries" (p. 16).

Reading Law frequently quotes and cites authorities from around the time of the framing of the US Constitution as supporting its views, but these examples cut both ways. For example, Scalia and Garner began their arguments against using legislative history with a block quotation from William Blackstone, the eighteenth-century British jurist whose *Commentaries* had a profound influence on judges for more than 100 years and which appeared in its first American edition shortly before the Revolution. The beginning of the Blackstone quotation says that the interpreter should look for legislators' intentions in "*signs* the most natural and probable" (Scalia & Garner, 2012, p. 369).[21] What seems surprising, however, is that Scalia and Garner continued the quotation: "these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law." The consequences and spirit of the law, however, have no place in Scalia and Garner's interpretive scheme.

Scalia and Garner (2012) also needed to abjure certain judicial traditions that were current at the time of the framing, which *Reading Law* usually does without supporting argument. It admits, for example, that judges had both legislative and judicial powers in England and before the US Constitution. Scalia and Garner (2012, p. 4) complained that "[s]ome judges, however, refuse to yield the ancient judicial prerogative of making the law, improvising on the text to produce what they deem socially desirable results." To support their assertion that judges should only interpret and not make law, they pointed to Article III of the Constitution. But the Constitution says only that "[t]he judicial Power of the United States, shall be vested

[21] *Quoting* William Blackstone (1770, p. 59).

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in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" and says nothing in derogation of the common-law equity or law-making powers of courts.

Reading Law supports the determinist imaginary by picking and choosing from among the forms of restraint and legal traditions only those that support its story.

* * *

Cicero (1949) on the one hand and Scalia and Garner (2012) on the other both counsel judges to explore thoroughly the intrinsic context of a text. Cicero and the Texas legislature also counseled interpreters to use rhetorical knowledge from broader, extrinsic contexts, such as legislative history and considerations of equity. The Texas Court of Appeals in the *Texas Health Presbyterian* case exhibited these characteristics of judging well, taking "perfect reason" as far as it could go with grammar and punctuation and then balancing considerations derived from broader contexts, intrinsic *and* extrinsic. Even if we set aside the extrinsic aid of legislative history, the appeals court could have concluded for either party based on its analysis. The Supreme Court, on the other hand – licensed by the determinist imaginary and by Scalia and Garner's rhetoric *about* legal reasoning – concluded based only on a questionable application of one canon and an erroneous application of grammatical rules that there was only one possible conclusion.

To be clear, I don't argue that either court could not reasonably have concluded as it did in *THP*.[22] The problem is rather that the Supreme Court, trying "to promise unequivocal, correct results" (Hohmann, 2006, p. 194), deprived the parties and the broader audience of citizens of Texas of a more thoughtful analysis, one that accounted for all the context that judging well requires. For fear of admitting the antinomy of "fiat" and "reason," the court dressed its opinion in the rhetoric of certainty. Judging well requires more.

The remedy to this concern is not in particular courts' opinions, but rather in the professional and public rhetoric surrounding judicial decision-making. Those who embrace Scalia and Garner's rhetoric *about* legal reasoning, without admitting the contingencies that even Scalia and Garner must acknowledge *within* legal reasoning – and its need for rhetorical invention – fail to embrace the legacy of judging well that the West can inherit from Cicero.

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[22] In 2019, the Texas legislature amended Section 74.153, and the relevant clause now reads "arising out of the provision of emergency medical care in a hospital emergency department, in an obstetrical unit, or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department," apparently siding with the plaintiff here against the Supreme Court.

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