

Interpreting Wisconsin Statutes

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INTERPRETING WISCONSIN STATUTES

DANIEL R. SUHR*

*The seminal case on statutory interpretation in recent years is State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58. . . . In Kalal, the court emphasized the importance of statutory text when it embraced the principle that a court’s role is to determine what a statute means rather than determine what the legislature intended.*¹

Wisconsin Supreme Court Justice David Prosser, 2014

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I. INTRODUCTION

*State ex rel. Kalal v. Circuit Court of Dane County*² is a watershed decision in the modern history of the Wisconsin Supreme Court. First published in May 2004, the case has already been cited in over 800 subsequent published decisions of Wisconsin’s appellate courts, mak-

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1. *Force v. Am. Family Mut. Ins. Co.*, 2014 WI 82, ¶¶ 130–31, 356 Wis. 2d 582, 850 N.W.2d 866 (Prosser, J. concurring). See *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 84 (A.W. Bradley, J., dissenting) (referring to “seminal rules of statutory interpretation set forth in *Kalal*”).

2. 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.

ing it the most cited case of modern times.³ *Kalal* transformed statutory interpretation in Wisconsin, shifting state courts from a vaguely intentionalist interpretive method to what Professor Abbe Gluck of Yale Law School calls “the new modified textualism.”⁴ *Kalal* promulgated a uniform method for interpreting state statutes that all Wisconsin courts are now to follow. Moreover, its methodology has been extended to other types of public law in Wisconsin: federal statutes, municipal ordinances, state administrative rules, municipal administrative rules, and Supreme Court rules.⁵ It is, according to the Court, “the bedrock of the judiciary’s methodology.”⁶

Now, more than ten years after *Kalal*’s issuance, the time is right to evaluate the case’s interpretation and impact. This Article proceeds in four parts. First, I briefly sketch the history of statutory interpretation in Wisconsin prior to *Kalal*, and then covers the core principles of the case itself. In the second section, I ask whether *Kalal* has worked, so to speak—has it successfully replaced history and purpose with text and meaning? I do so by evaluating the use of extrinsic sources like legislative history in the ten years prior to *Kalal* with the ten years since its issuance. Third, as *Kalal* set forth a broad new standard, it left many methodological questions to be decided in subsequent cases, such as what tools are available to determine statutory meaning, when a statute is ambiguous, and what tools are appropriate to resolve that ambiguity. Finally, I address the future of statutory interpretation with a specific focus on an ongoing effort to undermine *Kalal*.

3. Data drawn from Westlaw’s Keycite feature.

Westlaw, [https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\)](https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)) (search in search bar for “2004 WI 58”; then follow “Citing References” hyperlink; then follow “Cases” hyperlink under “View”) (last visited Feb. 22, 2017).

4. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

5. *Nw. Airlines, Inc. v. Dep’t of Revenue*, 2006 WI 88, ¶¶ 35–36, 293 Wis. 2d 202, 717 N.W.2d 280 (federal statutes); *Magnolia v. Town of Magnolia*, 2005 WI App 119, ¶ 9, 284 Wis. 2d 361, 701 N.W.2d 60 (municipal ordinances); *Wis. Dep’t of Revenue v. Menasha Corp.*, 2008 WI 88, ¶ 63, 311 Wis. 2d 579, 754 N.W.2d 95 (state administrative rules); *Nelson & Sons Painting v. Cardenas*, No. 2007AP645, 2007 WL 2935808, at ¶ 9 (Wis. Ct. App. Oct. 10, 2007) (municipal administrative rules); *In re Judicial Disciplinary Proceedings Against Gableman*, 2010 WI 62, ¶ 30, 325 Wis. 2d 631, 784 N.W.2d 631 (Op. of Prosser, Roggensack, and Ziegler, Js.) (supreme court rules). The question has been discussed elsewhere whether it should also be applied to state constitutional interpretation. *Appling v. Walker*, 2014 WI 96, ¶ 20, 358 Wis. 2d 132, 853 N.W.2d 888; Daniel R. Suhr, *Interpreting the Wisconsin Constitution*, 97 MARQ. L. REV. 93 (2013).

6. *Wisconsin Carry, Inc.*, 2017 WI 19, ¶ 18.

My goals are both practical and academic. For the practitioner, I hope to synthesize the case law on public law interpretation in Wisconsin, setting forth the definitive summary of the court's method. I aim to explain for lawyers and judges what tools are available for statutory interpretation and what standards apply to discern statutory meaning. And I expect to identify and develop areas of interpretation where further clarification is needed.

From an academic perspective, I hope to illuminate *Kalal's* effect—was it successful in cabining the use of legislative history? Can courts achieve the “methodological consensus” proposed by Professor Gluck and others,⁷ or have subsequent decisions from the Wisconsin Supreme Court and lower courts undermined or avoided the clear rule of *Kalal*? Do judges cite it formulaically, or do they actually follow its holding and the larger principles that animated it? As Wisconsin is one of the few states in the country with a well-established textualist methodology for statutory interpretation, answers to these questions can serve both the development of Wisconsin law and the progress of legal theory in other states.

A Wisconsin attorney once titled his history of our state's high court *The Story of a Great Court*.⁸ A century since that book was published, the Wisconsin Supreme Court may have reached something the U.S. Supreme Court has not found in the modern era: consensus about how judges should read statutes. If this Article's review of “*Kalal* at Ten” vindicates that conclusion, such consensus will be an achievement worthy of a great court.

II. A LANDMARK DECISION

A principle courts recite with regularity today in fact stretches back decades: “when the meaning of a statute is plain or unambiguous it is not open to construction.”⁹ In a student note for the 1940 volume of the *Wisconsin Law Review*, Conrad Shearer goes on to say that though

7. See, e.g., Gluck, *supra* note 4; Chad M. Oldfather, *Methodological Stare Decisis and Constitutional Interpretation*, in PRECEDENT OF THE UNITED STATES SUPREME COURT (Christopher J. Peters, ed.) (2013); Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008).

8. JOHN BRADLEY WINSLOW, *THE STORY OF A GREAT COURT: BEING A SKETCH HISTORY OF THE SUPREME COURT OF WISCONSIN, ITS JUDGES AND THEIR TIMES FROM THE ADMISSION OF THE STATE TO THE DEATH OF CHIEF JUSTICE RYAN* (1912).

9. Conrad J. Shearer, *Statutory Construction – Use of Extrinsic Aids in Wisconsin*, 1940 WIS. L. REV. 453, 454 (citations omitted).

“the words of a statute are the most direct evidence of that ‘intention of the legislature,’” there are times when “the complexity of events and the frailties of draftsmen” prompt recourse to “interpretation materials extrinsic to the words of the statute,” i.e., legislative history.¹⁰

Twenty-five years later, another University of Wisconsin law student revisited the question and restated the conclusion: “The Wisconsin Supreme Court has often said that when a statute is plain and unambiguous, construction is not permitted.”¹¹ However, at the time he also recognized that “the Wisconsin cases decided since 1940 disclose an increasingly liberal trend in allowing the use of extrinsic evidence.”¹² This liberal trend continued such that Wisconsin Supreme Court Chief Justice Bruce Beilfuss would in 1976 equate plain meaning and extrinsic evidence as two equally accepted methods for interpretation.¹³

And so cases continued to set forth relatively formulaic litanies concerning statutory interpretation. In fact, just the term before *Kalal*, the Court said in *VanCleve v. City of Marinette*: “it is a well established rule that if the language of a statute is clear and unambiguous, the court must not look beyond the statutory language to ascertain the statute’s meaning. Only when statutory language is ambiguous may we examine other construction aids such as legislative history, context, and subject matter.”¹⁴

Yet for each decision like *VanCleve*, there was another the very same term like *State v. Byers*, in which the majority opinion relied on text, legislative history, and public policy without an initial finding of

10. *Id.* at 453–54.

11. Brad A. Liddle, Jr., *Statutory Construction – Legislative Intent – Use of Extrinsic Aids in Wisconsin*, 1964 WIS. L. REV. 660, 660 (first citing *Estate of Riebs*, 8 Wis. 2d 110, 98 N.W.2d 453 (1959); then *State ex rel. Badtke v. School Board*, 1 Wis. 2d 208, 83 N.W.2d 724 (1957)). Even after his extended discussion of extrinsic evidence, Mr. Liddle himself seems sympathetic to the text-first approach that would come in *Kalal*. He concludes his article:

It is unreasonable to expect a Wisconsin attorney to journey to the Legislative Reference Library in Madison to research the intimate history of each statute he encounters representing clients. The courts should give sufficient weight to statutory words so that lawyers may confidently rely on that which they read in the published statute.

Id. at 670.

12. *Id.* at 660.

13. *Student Ass’n of Univ. of Wisconsin-Milwaukee v. Baum*, 74 Wis. 2d 283, 294–95, 246 N.W.2d 622 (1976).

14. *VanCleve v. City of Marinette*, 2003 WI 2, ¶ 17, 258 Wis. 2d 80, 655 N.W.2d 113.

ambiguity, in clear contravention of the principles set forth in *VanCleve* just months before.¹⁵ Thus, concurring in *Byers*, Chief Justice Shirley Abrahamson could write: “Even a casual observer of the Wisconsin cases would, without fear of being contradicted, summarize the case law as adopting inconsistent approaches to statutory interpretation.”¹⁶

Lower courts also operated under unclear and contradictory principles for statutory interpretation. In a decision published three years before *Kalal*, the Wisconsin Court of Appeals said: “The spirit and intention of a statute should govern over its literal meaning.”¹⁷ Yet a term earlier, the same court of appeals labeled it “judicial legislation at its worst” to use a statute’s supposed purpose to override its plain language.¹⁸ In other words, the supreme court itself, lower courts, and the bar all felt the confusion evident in the court’s statutory interpretation jurisprudence.

In fact, Justice Diane Sykes begins the statutory interpretation section of *Kalal* by acknowledging: “Wisconsin’s statutory interpretation case law has evolved in something of a combination fashion, generating some analytical confusion.”¹⁹ This confusion prompts her to “conclude that the general framework for statutory interpretation in Wisconsin requires some clarification,”²⁰ leading into the heart of *Kalal*.

The task before the Court in the relevant section of *Kalal* is an innocuous one: interpret Wisconsin Statutes section 968.02(3) governing private filings of criminal complaints.²¹ Justice Sykes, however, sets out to provide “some clarification” to the “analytical confusion” then

15. *In re Commitment of Byers*, 2003 WI 86, ¶¶ 63–65, 263 Wis. 2d 113, 665 N.W.2d 729 (Crooks, J., dissenting).

16. *Id.* ¶ 46 (Abrahamson, C.J., concurring). See *In re Commitment of Burris*, 2004 WI 91, ¶ 32, 273 Wis. 2d 294, 682 N.W.2d 812 (noting “[t]his court has been wrestling with statutory interpretation in recent years”).

17. *Gasper v. Parbs*, 2001 WI App 259, ¶ 11, 249 Wis. 2d 106, 637 N.W.2d 399 (citing *Sprague v. Sprague*, 132 Wis. 2d 68, 72, 389 N.W.2d 823, 824 (Ct. App. 1986)).

18. *Zink v. Khwaja*, 2000 WI App 58, ¶ 16 n.6, 233 Wis. 2d 691, 608 N.W.2d 394 (quoting *Madison Teachers, Inc. v. Madison Metro. Sch. Dist.*, 197 Wis. 2d 731, 754, 541 N.W.2d 786 (Ct. App. 1995)).

19. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 43, 271 Wis. 2d 633, 681 N.W.2d 110 (majority opinion). Elsewhere she prefaces a comment by saying, “[T]o the extent that there was some confusion in this area, we have clarified the principles that govern statutory interpretation in *Kalal*.” *State v. Hayes*, 2004 WI 80, ¶ 108 n.39, 273 Wis. 2d 1, 681 N.W.2d 203.

20. *Kalal*, 2004 WI 58, ¶ 44 (majority opinion).

21. *Id.* ¶ 4.

regnant in Wisconsin's statutory construction jurisprudence.²² She begins:

It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do so requires a determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.²³

In order to honor this solemn obligation, statutory construction begins with the language of the statute, giving its words their "common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning."²⁴ Beyond the words themselves, context, the structure of the statute, explicit statements of legislative purpose, and canons like the avoidance of surplusage are important tools to read a statute's plain meaning.²⁵ And there the inquiry ends if these tools lead to a plain meaning; no resort to extrinsic sources is permitted or required.²⁶

The majority is clear that this is "more than a mistrust of legislative history or cynicism about the capacity of the legislative or judicial processes to be manipulated."²⁷ This method finds its footing on deeper foundations:

The principles of statutory interpretation that we have restated here are rooted in and fundamental to the rule of law. Ours is "a government of laws not men," and

22. *Id.* ¶¶ 43–44.

23. *Id.* ¶ 44. For a further discussion of the folly of consulting legislative history during statutory interpretation, see *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 40 n.23.

24. *Id.* ¶ 45.

25. *Id.* ¶¶ 46, 49.

26. *Id.* ¶ 46.

27. *Id.* ¶¶ 49 n.8, 52.

“it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.” Antonin Scalia, *A Matter of Interpretation*, at 17 (Princeton University Press, 1997). “It is the law that governs, not the intent of the lawgiver. . . . Men may intend what they will; but it is only the laws that they enact which bind us.”²⁸

In her concurrence, Chief Justice Abrahamson “part[s] company with the majority” and instead defends the use of extrinsic sources of all types in all cases, stating that a court may “examine history without declaring an ambiguity,” regardless of whether the text’s meaning is plain.²⁹ After defending legislative history produced in Wisconsin against the “bad reputation” sometimes associated with federal legislative history, she lays out thirteen potential extrinsic sources that courts could consider.³⁰ She ends by urging the Court to adopt the Canadian method of interpretation, which looks at “total context” and “all relevant and admissible indicators of legislative meaning” which might “promote the legislative purpose . . . and produce a reasonable and just meaning.”³¹ Justice Ann Walsh Bradley “commend[s] both the majority and the concurrence for their endeavors” to explicate statutory interpretation, but she “ultimately join[s] neither.”³²

28. *Id.* ¶ 52 (emphasis omitted) (citing ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 17 (1997)).

29. *Id.* ¶¶ 63–64 (Abrahamson, C.J., concurring).

30. *Id.* ¶ 69.

31. *Id.* ¶ 70. For instances where Abrahamson adopted reasoning that reflects the same principles as *Kalal*, see also *State v. Schwarz*, 2005 WI 34, ¶ 47, 279 Wis. 2d 223, 693 N.W.2d 703 (Abrahamson, C.J., dissenting) (“I agree with the court of appeals that the statutory phrase ‘term of supervision’ means exactly what it says. The text of the statute matters. When the legislature wanted to refer to ‘expiration of the sentence’ and ‘discharged by the department,’ it used those words.”); *Mortier v. Town of Casey*, 154 Wis. 2d 18, 39–40, 452 N.W.2d 555, 564 (1990) (Abrahamson, J., dissenting) (questioning the reliability of federal legislative history); *State v. Williams*, 2012 WI 59, ¶ 85, 341 Wis. 2d 191, 814 N.W.2d 460 (Abrahamson, C.J., concurring) (identifying the danger of bias in the reading of history during interpretation)

32. *Kalal*, 2004 WI 58, ¶ 74 (Abrahamson, C.J., concurring). For an instance where Bradley adopted reasoning that reflects the same principle as *Kalal*, see *Haferman v. St. Clare Healthcare Found., Inc.*, 2005 WI 171, ¶ 42 n.9, 286 Wis. 2d 621, 707 N.W.2d 853 (majority opinion) (“In focusing on the ‘actual intent’ of one member of the senate, the dissent answers the wrong question. The question is not: what was the intent of a single legislator? Rather, the question is: what was intended by the legislature as a whole, given the language

Kalal was issued on May 25, 2004.³³ Not a month later, the Court issued *State v. Hayes*.³⁴ The lead opinion was written by Chief Justice Abrahamson and does not reference *Kalal*, but instead considers “(A) the context of the statute; (B) the history of the statute; and (C) the purposes and consequences of the parties’ competing interpretations.”³⁵ After finding the statutory context and legislative history inconclusive, she turns to the “consequences of alternative interpretations.”³⁶ The State argued “strong policy reasons” for its position, yet the defendant argued it would be “manifestly unjust” to adopt the State’s view.³⁷ Abrahamson sides with the defendant: “Although the State makes a number of good policy, purpose, and consequence arguments, ultimately we are not persuaded by them.”³⁸

In her concurrence, Justice Sykes sets about with a vengeance on Abrahamson’s lead opinion, labeling it “47 paragraphs [of] an unusual, freewheeling method of statutory interpretation. . . .”³⁹ In Sykes’s view, Abrahamson’s opinion vindicates her critique of legislative history made in *Kalal*, as Abrahamson’s review of the history here “discover[s] contradictory and misleading information” that is “inconclusive;” “[u]ltimately, this interpretive journey leads nowhere (at each stage we are told there are good arguments all around),” and so the court “eventually makes its own policy choice” to resolve the case.⁴⁰

Sykes also sets forth her view that *Kalal* “recently clarified” the “legal principles governing statutory interpretation” that courts must follow, saying they cannot “be dismissed as mere ‘spirited discussions’ or ‘vigorous discussions’ by ‘part of the court,’” but rather are part of a majority decision that is “binding precedent” that “cannot simply be ignored.”⁴¹ To use terminology from the literature, the Court in *Kalal* did not merely achieve methodological consensus; it mandated methodological consistency.⁴²

of the statutes?”).

33. *Kalal*, 2004 WI 58.

34. *State v. Hayes*, 2004 WI 80, 273 Wis. 2d 1, 681 N.W.2d 203.

35. *Id.* ¶ 17.

36. *Id.* ¶ 39.

37. *Id.* ¶¶ 40, 43.

38. *Id.* ¶ 44.

39. *Id.* ¶ 102 (Sykes, J., concurring).

40. *Id.* ¶¶ 102-03.

41. *Id.* ¶¶ 91, 104 & n.38.

42. *Id.*

Justice Ann Walsh Bradley, concurring in *Hayes*, predicts, “the new ‘bright line’ rules of statutory interpretation recently set forth by the majority in *Kalal* will be often mouthed but not always applied.”⁴³ She forecasts “a continuing discussion” of the topic, including the “well intentioned, but nevertheless early and often misapplication by the *Kalal* majority of the ‘new’ bright line rules of statutory interpretation.”⁴⁴ Elsewhere Abrahamson suggests that “the court (some members more than others) [would] silently take a holistic approach anyway, despite lip service to the ambiguous/unambiguous/plain meaning shibboleths.”⁴⁵ In the next section of this article, I investigate whether their prophecies have been realized—do courts cite *Kalal* only to ignore its intended effect, or has the opinion made a measurable difference in the way courts handle cases?

III. *KALAL*’S EFFECT OVER TIME

In this part, I consider whether *Kalal* has achieved its goal: has it cabined the use of extrinsic sources, especially legislative history, to only those cases where it is necessary and appropriate to do so?⁴⁶

In order to answer this question, I compared the ten years preceding *Kalal* (1993–2003) with the ten years following *Kalal* (2005–2015). I put together a series of eleven search terms that would evidence extrinsic sources, such as “assembly committee,” “drafting record,” or “Legislative Fiscal Bureau.”⁴⁷ Searching on this basis is necessarily both over- and under-inclusive. It is over-inclusive in that it will capture cases where a court used extrinsic sources in a constitutional interpretation case (where they are currently permitted), or used search

43. *Id.* ¶ 67 (Bradley, J., concurring).

44. *Id.* ¶ 68.

45. *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶ 70, 293 Wis. 2d 123, 717 N.W.2d 258 (Abrahamson, C.J., concurring).

46. *Teschendorf*, 2006 WI 89, ¶¶ 12–15. Justice Prosser listed three circumstances when it would be appropriate for a court to consider extrinsic evidence given the Court’s ongoing commitment to *Kalal*. First, “if the meaning of the statute is ambiguous after considering all intrinsic sources.” Second, “if the meaning of the statute is plain, we sometimes look to legislative history to confirm the plain meaning.” Third, if the meaning “appears to be plain but that meaning produces absurd results,” then extrinsic sources may be used “to verify that the legislature did not intend these unreasonable or unthinkable results.”

47. Full list: “judicial council” or “legislative council” or “assembly committee” or “senate committee” or “drafting record” or “bulletin of proceedings” or “veto message” or “legislative reference bureau” or “legislative fiscal bureau” or “caucus” or “legislative committee.”

terms in the facts section, or found ambiguity and then looked to extrinsic sources to resolve that ambiguity, or used extrinsic sources to confirm a statute's plain meaning, or where extrinsic sources were only used in dissent. It is under-inclusive in that it may exclude extrinsic sources not covered by the search terms. It also only counts published opinions, excluding all circuit court cases and unpublished Court of Appeals cases. Nevertheless, I believe that this search method gives us a sufficient snapshot of judicial activity to capture a valid conclusion. These are the data:

	WICA Pub- lished Deci- sions	WICA Deci- sions using Search Terms	WISC Pub- lished Deci- sions	WISC Deci- sions using Search Terms	WICA % of Pub- lished Deci- sions us- ing Search Terms	WISC % of Pub- lished Deci- sions us- ing Search Terms
1993 – 2003	14583	307	11337	178	2.105	1.570
2005 – 2015	10274	137	10175	184	1.333	1.808

These results indicate that *Kalal's* primary impact was at the court of appeals—the absolute number of cases using extrinsic sources dropped by more than half between the two decades. By contrast, the Wisconsin Supreme Court remained consistent in absolute terms in its use of the search terms. When looked at as a percentage, the Court of Appeals saw nearly a halving of its citations, while the Supreme Court increased its citations slightly.

There are several possible conclusions from this observation. One may be that the Supreme Court did not use much legislative history before *Kalal*, and Justice Sykes' primary target was the excessive usage happening within the Court of Appeals. Another possibility is that the Court of Appeals feels bound by *Kalal*, while some or all justices of the Supreme Court do not feel as bound by *Kalal*, and therefore continue to use extrinsic sources. Yet another explanation might be that the Supreme Court is more likely to hear the complicated cases where a stat-

ute is likely to be ambiguous, and therefore extrinsic sources are necessary, whereas the Court of Appeals stopped using legislative history in cases where the meaning was already plain. In all events, even given the over- and under-inclusive nature of the searches, it seems clear that *Kalal* significantly reduced the use of legislative history by the court of appeals.

IV. QUESTIONS AND ISSUES

Justice Sykes, the author of *Kalal*, has been honest to acknowledge the limits of the opinion, “recogniz[ing] that these principles are of general application and therefore may require supplementation by special or additional rules applicable to specific problems of interpretation in particular cases.”⁴⁸ In this section, we will flesh out some of the “special or additional rules” that the court has pronounced in the wake of *Kalal*.

A. *What Tools are Available to Determine the Plain Meaning of a Statute?*

A court always begins its analysis by evaluating the plain meaning of the statute. “Cases that turn on statutory interpretation generally begin the analysis by setting forth the text of the statute.”⁴⁹ Sometimes reading the text in front of the court is sufficient. Other times, the court must do some work to discern the plain meaning, which is more than simply the words on the page of the statute book. There are tools available to determine the plain meaning of a statute. One is a dictionary; “consulting a dictionary to ascertain the meaning of undefined words in a statute does not mean that those words are ambiguous.”⁵⁰ Another source for statutory definitions may be the Legislative Reference Bureau’s Wisconsin Bill Drafting Manual, which guides drafters’ use of certain words to maintain consistency across the statutes.⁵¹

Other tools are the scope, context, and purpose of the statute, so long as they are “ascertainable from the text and structure of the stat-

48. *Hayes*, 2004 WI 80, ¶ 104 (Sykes, J., concurring).

49. *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 79 (A.W. Bradley, J., dissenting).

50. *Cty. of Dane v. Labor & Indus. Review Comm’n*, 2009 WI 9, ¶ 23, 315 Wis. 2d 293, 759 N.W.2d 571. See *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶¶ 53–54, 271 Wis. 2d 633, 681 N.W.2d 110 (majority opinion) (looking to the American Heritage Dictionary definition to elucidate the plain meaning of a statutory term).

51. Legislative Reference Bureau, *Wisconsin Bill Drafting Manual* (2005–06). See *State v. James P. (In re Chezron M.)*, 2005 WI 80, ¶ 25, 281 Wis. 2d 685, 698 N.W.2d 95.

ute itself, rather than extrinsic sources, such as legislative history.”⁵² “Context usually refers to the relationship with other statutes. Context also can mean factual setting.”⁵³ Context can also mean reading the entirety of a provision rather than an isolated sentence or snippet stripped from a larger block of language.⁵⁴ Context and statutory purpose may also be guides to which of multiple dictionary definitions is the appropriate one.⁵⁵ Canons of statutory construction are also appropriate tools to illuminate plain meaning; they are not extrinsic sources like legislative history.⁵⁶

The Court has debated whether statutory history—previously enacted versions of a particular statute—constitutes an internal source that may be used to illuminate plain meaning or an extrinsic source that may only be used to resolve ambiguity.⁵⁷ In *County of Dane v. LIRC*, the Court’s majority reviewed past versions of a statute as part of the plain-meaning analysis, drawing the ire of Chief Justice Abrahamson, who considered this beyond the analysis’s proper scope.⁵⁸ Commenting on the case, Andrew Hitt has argued that statutory history should be seen as an intrinsic aid within the *Kalal* framework.⁵⁹ In a

52. *Kalal*, 2004 WI 58, ¶ 48.

53. *Seider v. O’Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659 (citation omitted). *See, e.g.*, *City of Madison v. Dept. of Health Services*, 2016AP727 (Wis. Ct. App. March 9, 2017), <https://www.wicourts.gov/ca/opinion/DisplayDocument.pdf?content=pdf&seqNo=185883> [<https://perma.cc/89XJ-4XM8>] (discussing legislative purpose and relationship to other statutes).

54. *Alberte v. Anew Health Care Services, Inc.*, 2000 WI 7, ¶ 10, 232 Wis. 2d 587, 605 N.W.2d 515 (“While it is true that statutory interpretation begins with the language of the statute, it is also well established that courts must not look at a single, isolated sentence or portion of a sentence, but at the role of the relevant language in the entire statute.”).

55. *Kalal*, 2004 WI 58, ¶ 49 (context); *State v. Swiams*, 2004 WI App 217, ¶ 16, 277 Wis. 2d 400, 690 N.W.2d 452 (purpose).

56. *See In re Chevron M.*, 2005 WI 80, ¶ 26. *See generally* ANTONIN SCALIA & BRYAN A. GARDNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

57. *Compare* *Cty. of Dane v. Labor & Indus. Review Comm’n*, 2009 WI 9, ¶ 27, 315 Wis. 2d 293, 759 N.W.2d 571 (majority opinion), with *id.* ¶¶ 47–51 (Abrahamson, C.J., concurring).

58. *Id.*

59. Andrew Hitt, *The Debate over Statutory History*, MARQ. UNIV. L. SCH.: FAC. BLOG (Aug. 5, 2009), <http://law.marquette.edu/facultyblog/2009/08/05/the-debate-over-statutory-history/> [<https://perma.cc/4YM8-B3EK>] (“As provided in *Sutherland’s Statutes and Statutory Construction*, intrinsic aids are canons of construction (e.g., grammar, punctuation, or textual canons), dictionary definitions, titles, context, scope, and surrounding statutes. Previously enacted versions of a statute fall nicely within the realm of these other intrinsic tools because the focus remains on the statutory text. One would be confined to the

subsequent case, the Court again used statutory history as part of the plain-meaning analysis, confirming *County of Dane's* ongoing vitality.⁶⁰

All of these tools underline a fundamental reality: plain meaning is not the same as obvious meaning. *Kalal* does not require that the meaning of a particular sentence leap off the page in isolation, and anything less than obviousness is ambiguity. Rather, courts must do the intellectual work often necessary to determine the only reasonable reading of a text.⁶¹

B. *What if the Plain Meaning Leads to an Absurd Result?*

On July 22, 2014, the Wisconsin Supreme Court issued its decision in *Force v. American Family Insurance Co.*⁶² The same day, a panel of the U.S. Court of Appeals for the D.C. Circuit decided *Halbig v. Burwell*.⁶³ The first case concerned a wrongful-death action;⁶⁴ the second was a

statute's text—either the current or the previous version. Unlike typical types of extrinsic evidence, such as common law and legislative history, the legislature has voted on previous versions of a statute. To the extent that words or phrases have been added or subtracted over the years, this provides great insight as to what the legislature meant when it worded the current version of the statute. Concerns about legislative history and other materials not voted on by the legislature do not apply to previous versions of a statute.”) Justice Scalia is generally the north-star reference point on all questions of textualism, legislative history, and statutory interpretation. Though I was unable to find any direct commentary on previously enacted versions from him, two cases indicate that he would likely consider them in the category of legislative history. See *Conroy v. Aniskoff*, 507 U.S. 511, 519–25 (1993) (Scalia, J., concurring); see also *BFP v. Resolution Tr. Corp.*, 511 U.S. 531 (1994). It is a separate problem how to handle statutory changes made *after* the version of a statute at issue in a case. Justice A.W. Bradley looked at, but did not necessarily rely upon, a subsequent statutory change to suggest that the Legislature broadened a statute's scope to fix the restriction identified by the case at hand, which was filed when a previous version of the statute was in effect. *State v. Kozel*, 2017 WI 3, ¶¶ 73–74 (A.W. Bradley, J., dissenting). Reliance on accepted or rejected amendments to a statute is generally frowned upon by scholars and courts. See, e.g., Charles H. Willard & John W. MacDonald, *Effect of an Unsuccessful Attempt to Amend a Statute*, 44 CORNELL L. REV. 336 (1959); William N. Eskridge, Jr., *Post-Enactment Legislative Signals*, 57 L. & CONTEMP. PROBLEMS 75 (1994); Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends*, Cong. Research Service (Dec. 19, 2011), available at <https://fas.org/sgp/crs/misc/97-589.pdf> [<https://perma.cc/7JKH-MUTT>].

60. *State v. Obriecht*, 2015 WI 66, ¶ 46, 363 Wis. 2d 816, 867 N.W.2d 387.

61. See, e.g., *In re Chezron M.*, 2005 WI 80, ¶¶ 22–38.

62. *Force v. Am. Family Mut. Ins. Co.*, 2014 WI 82, 356 Wis. 2d 582, 850 N.W.2d 866. For another discussion of the absurd-results doctrine, see *Haferman v. St. Clare Healthcare Found., Inc.*, 2005 WI 171, ¶¶ 23, 25, 56–59, 286 Wis. 2d 621, 707 N.W.2d 853 (wherein Justice A.W. Bradley insists that the Court cannot “rewrite” a statute to fix a perceived error).

63. *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014).

64. *Force*, 2014 WI 82, ¶ 4.

challenge to the Affordable Care Act.⁶⁵ Though the courts and cases were very different, both included a discussion of the absurd-results doctrine, and each took its own attitude as to the breadth and capaciousness of the precedents.⁶⁶

Force centered on a wrongful-death action brought by family members of the deceased.⁶⁷ Billy Joe Force was killed in a car accident in 2008.⁶⁸ His wife, whom he had separated from but not divorced in 1997, brought a wrongful-death action as was her statutory right as the “surviving spouse.”⁶⁹ The circuit court granted summary judgment for zero damages, deciding that the wife suffered no compensable damages given their eleven-year separation, the last five of which they had zero contact.⁷⁰ The minor children, who stand next in the statutory hierarchy if there is no surviving spouse, then appealed.⁷¹

A majority of the court concluded that the estranged wife is not a “surviving spouse” under the statute, and therefore the right to bring the claim flowed to the children.⁷² The majority opinion by Chief Justice Abrahamson delves deeply into the “fundamental purposes” of the wrongful-death statute⁷³ and says to rule otherwise would be an “absurd, unreasonable result.”⁷⁴ Abrahamson, however, gives no attention to *Kalal*, a case she assiduously avoids citing.⁷⁵

Justice David Prosser, who joined the majority, wrote an extended concurrence on the absurd-results doctrine within the framework of *Kalal*.⁷⁶ He quotes the operative language from *Kalal*:

Context is important to meaning. So, too, is the structure of the statute in which the operative language appears. Therefore, statutory language is to be interpreted in the context in which it is used; not in isolation but as

65. *Halbig*, 758 F.3d at 393.

66. For a general discussion of the doctrine, see John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003), and *Cameron v. Auto Club Ins. Ass’n*, 718 N.W.2d 784 (Mich. 2006).

67. *Force*, 2014 WI 82, ¶¶ 21–26 (covering all facts).

68. *Id.* ¶¶ 21, 24.

69. *Id.* ¶¶ 7, 23.

70. *Id.* ¶¶ 24–25.

71. *Id.* ¶ 17.

72. *Id.* ¶ 17.

73. *Id.* ¶¶ 10, 57.

74. *Id.* ¶¶ 8, 11, 68.

75. *Id.* ¶¶ 1–129.

76. *See id.* ¶¶ 130–47.

part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.⁷⁷

Prosser proceeds to provide seven examples from 1955 to 2006 when Wisconsin appellate courts recited the absurd-results doctrine as part of the overall statutory interpretation scheme.⁷⁸ He then said,

Absurd results are much more than undesirable results. Absurd results are aberrations that clash with the manifest purpose of a statute or related statutes (evidenced by statutory language) and cannot be explained as a rational exception to the statutory scheme. Absurd results are usually unexpected. They are different from harsh consequences because they are seldom the fault of an adversely affected party. Instead, they almost always result from circumstances beyond the party's control. Absurd results produce hardship or unfairness that is quickly recognized and cannot be ignored.⁷⁹

Justice Annette Ziegler, writing in dissent, replies to Prosser's argument that her interpretation would create an absurd result: "An unpalatable result is not the same as an absurd result. . . . The court should not avoid the plain language of a statute in order to prevent unpleasant results."⁸⁰

In the *Halbig* decision from the U.S. Court of Appeals for the D.C. Circuit, written by Judge Thomas Griffith and issued the same day as *Force*, that court declines the government's invitation to rely on the absurd-results doctrine.⁸¹ Under the D.C. Circuit's version of the doctrine, the court "will not give effect to a state's literal meaning when

77. *Id.* ¶ 132 (quoting *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110) (emphasis added by Prosser).

78. *Id.* ¶¶ 136–42 (Prosser, J., concurring) (citing *Worachek v. Stephenson Town Sch. Dist.*, 270 Wis. 116, 124, 70 N.W.2d 657, 661 (1955); *Isaksen v. Chesapeake Instrument Corp.*, 19 Wis. 2d 282, 289–90, 120 N.W.2d 151, 155–56 (1963); *Kayden Indus., Inc. v. Murphy*, 34 Wis. 2d 718, 732, 150 N.W.2d 447, 454 (1967); *Alberte v. Anew Health Care Servs., Inc.*, 2000 WI 7, ¶ 10, 232 Wis. 2d 587, 605 N.W.2d 515; *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶ 15, 293 Wis. 2d 123, 717 N.W.2d 258; *Gasper v. Parbs*, 2001 WI App 259, ¶ 8, 249 Wis. 2d 106, 637 N.W.2d 399; *Steinbarth v. Johannes*, 144 Wis. 2d 159, 165, 423 N.W.2d 540, 542 (1988)).

79. *Force*, 2014 WI 82, ¶ 145. In another case, the doctrine applies to an interpretation which "produces absurd results and defies both common sense and the fundamental purpose" of the act. *Teschendorf*, 2006 WI 89, ¶ 43.

80. *Force*, 2014 WI 82, ¶¶ 165–66 (Ziegler, J., dissenting).

81. *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014).

doing so would render the statute nonsensical or superfluous or create an outcome so contrary to perceived social values that Congress could not have intended it.”⁸² Under this test, the doctrine has “a narrow domain, insisting that a given construction cross a high threshold of unreasonableness before we conclude that a statute does not mean what it says.”⁸³ Importantly for the contrast with *Force*, Griffith quotes this passage from a previous D.C. Circuit case: “Because our role is not to ‘correct’ the text so that it better serves the statute’s purposes, we will not ratify an interpretation that abrogates the enacted statutory text absent an extraordinarily convincing justification.”⁸⁴ After reviewing the government’s arguments concerning its reading of the Affordable Care Act, the court in *Halbig* concludes: “The government has failed to make the extraordinary showing required for such judicial rewriting of an act of Congress.”⁸⁵

Kalal did not address the absurd-results doctrine beyond preserving its legitimacy for future cases.⁸⁶ However, the *Force* case highlights the importance of clarifying these few words from *Kalal*.⁸⁷ In the next case, which presents such an opportunity, the Wisconsin Supreme Court should clarify the standards necessary to find an absurd result. *Halbig* provides a good start: the absurdity doctrine has a “narrow domain” which requires a “high threshold” and an “extraordinary showing” of an “extraordinarily convincing justification” before the Court overrides the plain meaning of a statute.

C. *When is a Statute Ambiguous?*

Deciding that a statutory provision is ambiguous is as much art as science. Some may say the exercise is meaningless, nothing more than a “conclusory label[] a court pins on a statute.”⁸⁸ Nonetheless, the

82. *Id.* at 402 (internal quotation omitted).

83. *Id.* (internal quotation omitted).

84. *Id.* at 403 (quoting *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002)).

85. *Id.* at 406.

86. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110

87. *See Force v. Am. Family Mut. Ins. Co.*, 2014 WI 82, ¶¶ 158, 165, 356 Wis. 2d 582, 850 N.W.2d 866 (Roggensack, J., dissenting; Ziegler, J., dissenting).

88. *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶ 67, 293 Wis. 2d 123, 717 N.W.2d 258 (Abrahamson, C.J., concurring) (“The ambiguous/unambiguous, literal, plain meaning debate is a word game. The characterization of ‘ambiguous,’ ‘unambiguous,’ ‘literal,’ and ‘plain meaning’ are in the eyes of the beholder and appear to be conclusory labels a court pins on a statute.”). *See also Juneau Cty. v. Courthouse Emps., Local 1312*, 221 Wis. 2d 630,

Court has laid down a number of rules and tools to help judges determine when a statute is ambiguous.

The fundamental rule is stated in *Kalal*: a statute is ambiguous when “it is capable of being understood by reasonably well-informed persons in two or more senses.”⁸⁹ Phrased slightly differently, a statute is ambiguous when “statutory . . . language reasonably gives rise to different meanings.”⁹⁰ People may arrive at differing reasonable readings because the legislature used imprecise terms⁹¹ or through this provision’s interaction with or relation to other statutes.⁹² “A statute that is unambiguous in one context may be ambiguous in another, because words cannot anticipate every possible fact situation.”⁹³

The test for multiple reasonable readings of a statute is not met “simply because the parties, the circuit court, and the court of appeals disagree as to its meaning.”⁹⁴ However, it may be indicative of ambiguity when courts or state officials disagree as to a statute’s meaning.⁹⁵ Another sign of ambiguity is when a court can create clarity simply by adding a word here or there to reach a definitive meaning.⁹⁶

Courts should not be eager to declare a statute ambiguous. “A statute is not ambiguous simply because it is general enough to apply in more than one circumstance. Nor is a statute ambiguous if the facts of a case make the statute difficult to apply.”⁹⁷ At bottom, the court must do its own independent work to determine whether a statute is ambiguous. It cannot take the easy road, throwing up its hands and declaring, “the parties disagree,” or “the lower courts disagree,” or even “the dissenters disagree.” Instead, the court must do the job laid out by *Kalal*—it must use the tools of plain meaning to analyze a statute. Only after the court has satisfied itself that multiple reasonable

642 n.8, 585 N.W.2d 587 (1998).

89. *Kalal*, 2004 WI 58, ¶ 47.

90. *Id.* (internal emphasis omitted) (quoting *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶ 21, 260 Wis. 2d 633, 660 N.W.2d 656).

91. *Landis v. Physicians Ins. Co. of Wis.*, 2001 WI 86, ¶ 26, 245 Wis. 2d 1, 628 N.W.2d 893.

92. *State v. White*, 97 Wis. 2d 193, 198, 295 N.W. 2d 346 (1980).

93. *Teschendorf*, 2006 WI 89, ¶ 20 (citations omitted).

94. *Id.* ¶ 19. See *Seider v. O’Connell*, 2000 WI 76, ¶ 30, 236 Wis. 2d 211, 612 N.W.2d 659.

95. *Teschendorf*, 2006 WI 89, ¶ 19 (courts); *State v. Schwarz*, 2004 WI App 136, ¶ 19, 275 Wis. 2d 225, 685 N.W.2d 585 (Schudson, J., dissenting) (state officials).

96. *State v. Schwarz*, 2005 WI 34, ¶ 20, 279 Wis. 2d 223, 693 N.W.2d 703.

97. *Seider*, 2000 WI 76, ¶ 46 (citations omitted).

readings exist in this case may it turn to extrinsic sources to resolve the ambiguity it has found.

D. What Extrinsic Tools are Available to Resolve Ambiguity?

Once a court has determined that a statute is ambiguous, it is generally believed that any manner of illuminative extrinsic source is acceptable.⁹⁸ However, courts must bear in mind that not all extrinsic aids are created equal—some are more reliable and objective than others.⁹⁹ Extrinsic sources can “potentially include a broad array of material, reliable and unreliable, objective and subjective.”¹⁰⁰

We generally think of legislative history as the most common form of extrinsic source, which could include materials from the Legislative Reference Bureau, Legislative Fiscal Bureau, Legislative Council, floor remarks recorded in the journals, or gubernatorial veto messages, among others.¹⁰¹ On the more reliable end, a committee staff report may reflect the consensus understanding of an entire drafting committee. On the more unreliable end, a letter from a lobbyist is the opinion of one person from outside the formal process given with a particular motive.¹⁰² The court may also use its own powers of reasoning to discern a legislative purpose or goal which motivated the statute.¹⁰³ There is an entire statutory construction literature on the varieties of evidence of legislative intention, and it is not my purpose to explicate

98. See *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 50, 271 Wis. 2d 633, 681 N.W.2d 110.

99. *State v. Hayes*, 2004 WI 80, ¶ 108 n.39, 273 Wis. 2d 1, 681 N.W.2d 203 (Sykes, J., concurring). See also *Seider*, 2000 WI 76, ¶ 62 (“Extrinsic aids include postenactment events. Although these materials are probative, we approach nonlegislative sources cautiously, and we do not afford them the same relevance or weight as evidence of legislative intent.”). But see *Fox v. Catholic Knights Ins. Soc’y*, 2003 WI 87, ¶ 44, 263 Wis. 2d 207, 665 N.W.2d 181 (Abrahamson, C.J., concurring) (“Courts must look to all relevant available evidence of legislative intent, with no single factor controlling, and interpret a statute consistently with the preponderance of that evidence.”).

100. *Hayes*, 2004 WI 80, ¶ 108 n.39 (Sykes, J., concurring).

101. See *Kalal*, 2004 WI 58, ¶ 69 (Abrahamson, C.J., concurring).

102. See, e.g., *Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶¶ 49–55, 293 Wis. 2d 123, 717 N.W.2d 258 (looking to a Legislative Reference Bureau staff analysis, a lobbyist’s comments, and a leading treatise).

103. See *Lagerstrom v. Myrtle Werth Hosp.—Mayo Health Sys.*, 2005 WI 124, ¶ 104, 285 Wis. 2d 1, 700 N.W.2d 201 (Roggensack, J., concurring) (citing *Sonnenburg v. Grohskopf*, 144 Wis. 2d 62, 65, 422 N.W.2d 925, 927 (Ct. App. 1988) (“When a statute is ambiguous, the legislature is presumed to intend the interpretation that advances the purpose of the statute.”)).

in depth these questions here.¹⁰⁴ Rather, my point is simple. In the next relevant case, the Wisconsin Supreme Court should say explicitly what it has implied previously: not all extrinsic sources are equally authoritative, and when using extrinsic sources to resolve ambiguity, courts should not adopt an “everything and the kitchen sink” approach to analyzing their insights. Rather, courts should weigh objective, widely representative sources over subjective, single-speaker sources.

V. THE FUTURE OF STATUTORY INTERPRETATION IN WISCONSIN

In *State v. Beyers* in 2003, Chief Justice Abrahamson lamented that “the case law” of the Court “adopt[s] inconsistent approaches to statutory interpretation.”¹⁰⁵ She called for the court to “clearly adopt a more encompassing analytic model for statutory interpretation.”¹⁰⁶ The next term the Court emphatically adopted an analytic model for statutory interpretation in *Kalal*.¹⁰⁷ Since then, Justice Abrahamson has been on a sustained campaign against *Kalal*’s holding, sowing the very confusion she previously decried.¹⁰⁸ In the term of *Kalal* and the term following, some judges or justices acted as though the case did not exist.¹⁰⁹ After an initial push-back period, however, *Kalal* seemed to survive and thrive, putting down deep roots and making clear that it was here to stay. Fewer cases seemed to attack its holding or ignore it

104. See, e.g., Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427 (2005).

105. *In re Commitment of Byers*, 2003 WI 86, ¶ 46, 263 Wis. 2d 113, 665 N.W.2d 729 (Abrahamson, C.J., concurring).

106. *Id.* ¶ 47.

107. See *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110.

108. See, e.g., *Klemm v. Am. Transmission Co.*, 2011 WI 37, ¶ 5, 333 Wis. 2d 580, 798 N.W.2d 223.

109. See, e.g., compare *Lagerstrom v. Myrtle Werth Hosp. – Mayo Health Sys.*, 2005 WI 124, ¶ 26, 285 Wis. 2d 1, 700 N.W.2d 201 (determining statutory meaning “in light of (A) the text of the statute; (B) the legislative history of the statute; (C) the legislative goal in adopting the statute; and three concepts of law embodied in the statute.”), with *id.* ¶ 121 (Wilcox, J., dissenting). Compare *Strenke v. Hogner*, 2005 WI 25, ¶ 19, 279 Wis. 2d 52, 694 N.W.2d 296 (engaging in statutory construction by looking to “the language of the statute, the legislative history, and the common law meaning of the phrase in question” without reference to *Kalal*), with *id.* ¶¶ 100–02 & n.12 (Prosser, J., dissenting). Compare *State v. Hayes*, 2004 WI 80, 273 Wis. 2d 1, 681 N.W.2d 203 (see discussion *supra* pp. 107–08), with *In re Madison Cmty. Found.*, 2005 WI App 239, ¶ 23, 288 Wis. 2d 128, 707 N.W.2d 285 (Dykman, J., dissenting) (criticizing the majority for engaging in statutory construction without reference to *Kalal*).

completely.

But the effort to supplant or undermine *Kalal* has taken on renewed vigor in the last few years.¹¹⁰ In Abrahamson's majority opinion in *Klemm v. American Transmission Co.* she asserted her own style of statutory interpretation without providing any citation or justification: "We examine the texts of Wis. Stat. § 32.06 and § 32.28(3)(d) . . . the statutes in the context of the condemnation statutes, the legislative purpose of awarding litigation expenses, and the legislative history of §§ 32.06 and 32.28(3)(d)."¹¹¹ Her opinion first reviews the plain text, then conducts a review of "legislative purpose" that she concludes "supports" her plain-text analysis.¹¹²

She then decides that the legislative history gives "some support" to that interpretation by looking first to "the work of the Legislative Council Special Committee on Eminent Domain," namely a staff brief and the committee report.¹¹³ She concludes that the Committee material "does not enlighten us about the legislature's intended meaning of the language" at issue.¹¹⁴ From there she proceeds to the legislative drafting file, such as a single member asking the Legislative Reference Bureau to draft a particular amendment and two members seeking another amendment, but "[n]othing in the legislative history clarifies the impetus for these amendments."¹¹⁵ Nevertheless, though "[t]here is nothing explicit in the drafting records" suggesting a link between the two provisions at issue in the case, the legislature adopted the amendments contemporaneously, and from that "we may surmise" a

110. Interestingly, though much has been written about Justice Louis Butler's tenure on the court (2004–2008), virtually all analysis focused on constitutional and common-law cases—none of the four substantive critiques of the Court's cases during that period discussed statutory interpretation. Perhaps it is a sign of *Kalal*'s persuasiveness and staying power that it did not come under significant attack during the Butler era. See Michael Brennan, *Are Courts Becoming Too Activist: Wisconsin's Supreme Court Has Shown a Worrisome Turn In That Direction*, MILWAUKEE J. SENTINEL, Oct. 2, 2005, at 1J; Diane S. Sykes, *Reflections On The Wisconsin Supreme Court*, 89 MARQ. L. REV. 723 (2006); Rick Esenberg, *A Court Unbound? The Recent Jurisprudence of the Wisconsin Supreme Court* (2007) (Federalist Society White Paper), available at <http://www.fed-soc.org/publications/detail/a-court-unbound-the-recent-jurisprudence-of-the-wisconsin-supreme-court> [<https://perma.cc/8P8Q-VX2X>]; Charles J. Sykes, *Wisconsin's Activist Court*, WISCONSIN INTEREST, Vol. 14 No. 3, available at <http://www.wpri.org/WIInterest/Syk14.3.pdf> [<https://perma.cc/QN9D-A8V3>] (2005).

111. *Klemm*, 2011 WI 37, ¶ 5.

112. *Id.* ¶ 41.

113. *Id.* ¶¶ 51–54.

114. *Id.* ¶ 56.

115. *Id.* ¶ 61.

conclusion.¹¹⁶ At bottom, “[t]he legislative history of the two revisions to ch. 32 provides no evidence contrary to our interpretation,” and the “limited legislative history [as a whole] gives some support to our interpretation.”¹¹⁷ No one dissented from the opinion; no one pointed out its utter incompatibility with *Kalal* or expressed concern about conclusions reached by surmising a lack of contradiction.¹¹⁸

Having injected *Klemm* into the bloodstream without any citation to precedent, that case is now available to serve as precedent itself, making its propositions somehow acceptable because there is a recent unanimous decision setting them forth. Thus Abrahamson could cite *Klemm* to say in the majority opinion in *Force v. American Family*:

In examining the statutory text, however, we do more than focus on a dictionary definition of each word. Words are given meaning to avoid absurd, unreasonable, or implausible results and results that are clearly at odds with the legislature’s purpose. We scrutinize the words in view of the purpose of the statute. We consider the meaning of words in the context in which they appear. The definition of a word or phrase can vary in different circumstances. Different fact scenarios may require different interpretations of the text, because words cannot anticipate every possible fact situation. “[R]easonable minds can differ about a statute’s application when the text is constant but the circumstances to which the text may apply are kaleidoscopic.” We also examine our case law interpreting the statute and the statutory history of the statute to determine the meaning of words.¹¹⁹

In *Force*, Abrahamson sets out to “fill the gap in the statute” because of the “unique fact scenario of the instant case.”¹²⁰ Her “study of the text demonstrates that we are unable to discern the answer to our inquiry in the present case by a mere examination of the words of Wis. Stat. § 895.04(2) isolated from interpretive aids. We next look for assistance from the legislative pronouncement of the purposes” of the stat-

116. *Id.* ¶¶ 57–62.

117. *Id.* ¶¶ 63–64.

118. *See id.*

119. *Force v. Am. Family Mut. Ins. Co.*, 2014 WI 82, ¶¶ 30–31, 356 Wis. 2d 582, 850 N.W.2d 866 (quoting *Seider v. O’Connell*, 2000 WI 76, ¶ 43, 236 Wis. 2d 211, 612 N.W.2d 659).

120. *Id.* ¶ 48.

utes.¹²¹ From the purposes to the case law, and from the case law to the statutory history, though Abrahamson pines that the drafting file from two amendments made fifty years ago “does not reveal the back-story” for the changes.¹²²

Thankfully, in *Force* three justices dissented to call out Abrahamson’s departure from the Court’s usual method for statutory interpretation. Justice Patience Roggensack wrote, “While the majority opinion’s result is appealing, I cannot join the majority opinion’s interpretation of the Wis. Stat. § 895.04(2) term ‘surviving spouse.’ The methods employed to interpret § 895.04(2) comport with none of the legal principles that guide statutory interpretation. See, e.g., *State ex rel. Kalal*. . . . Saying that § 895.04(2) means whatever the majority wants it to mean will cause confusion and repetitive litigation.”¹²³

Most recently in *Anderson v. Aul*, Abrahamson propounds a whole hierarchy as though it is the usual way of doing things: “The court has set forth the tools of statutory interpretation many times.”¹²⁴ Having made that assertion, she proceeds to cite two pre-2004 cases and *Klemm* for the following tools: text, context, statutory history, case law, legislative purpose, and “the consequences of alternative interpretations.”¹²⁵ In the *Anderson* decision, she looks to the minutes of the Insurance Laws Revision Committee of the Legislative Council, but finds them unhelpful for the question at hand.¹²⁶ She then marches through various versions of the statute over the years, and again finds them of no bearing on the instant issue.¹²⁷ Hope first arises from the Legislative Council notes to the laws of 1975, which “seem to signify” and “suggest” something potentially useful.¹²⁸

The baldest assertion of judicial power comes from her discussion of “the consequences of alternative interpretations.”¹²⁹ Indeed,

121. *Id.* ¶ 55.

122. *Id.* ¶ 115–16.

123. *Id.* ¶ 158 (Roggensack, J., dissenting).

124. *Anderson v. Aul*, 2015 WI 19, ¶ 49, 361 Wis. 2d 63, 862 N.W.2d 304.

125. *Id.* ¶¶ 49–51. See *Legue v. City of Racine*, 2014 WI 92, ¶ 61, 357 Wis. 2d 250, 849 N.W.2d 837 (including “consequences of alternative interpretations”); *In re Commitment of Alger*, 2015 WI 3, ¶ 84, 360 Wis. 2d 193, 858 N.W.2d 346 (Abrahamson, J., dissenting) (same).

126. *Anderson*, 2015 WI 19, ¶ 62.

127. *Id.* ¶¶ 64–78.

128. *Id.* ¶¶ 74–76.

129. *Id.* ¶ 79.

“[s]trictly limiting the time in which an insured must report a claim can lead to harsh results for the insured and third-party victims.”¹³⁰ Later, “we are concerned that a decision favorable to [the insurer] in the present case may open the door for insurance companies to incorporate similar reporting requirements into a wide range of insurance policies and thereby circumvent the consumer protection aspects of these notice-prejudice statutes.”¹³¹ At the same time, “if we interpret the notice-prejudice statutes to apply to the reporting requirement . . . , we will in effect rewrite the terms of such policies.”¹³² What is a court to do in such a dilemma? Well, having scoured all available materials, having searched high and low and failing to “locate anything in the statutory text, the history of claims-made-and-reported policies, the statutory history, or the Committee materials,” the Court is left to simply make the judgment call that “to rewrite the fundamental terms of the WILMIC insurance policy would be unreasonable.”¹³³ There you have it.

A four-justice majority concurred in the case, led by Justice Ziegler, who focuses on the statutory interpretation question. She states that a majority of the Court concluded that the statute was not ambiguous, that its plain meaning dictated the outcome, and that “[t]he opinion of the court was to be written to clearly state these conclusions,” citing *Kalal*.¹³⁴ However, Abrahamson chose to ignore the wishes of her colleagues expressed at conference and reiterated during the opinion drafting process, “reject[ing] suggested changes to the opinion which would make these conclusions clear. . . .”¹³⁵

Thus, Ziegler wrote to “clarify that although a court may consider whether a particular interpretation of a statute would produce an absurd or unreasonable result, a court may not balance the policy concerns associated with the ‘consequences of alternative interpretations,’” a “more subjective” analysis which she finds “seemingly inconsistent with our jurisprudence.”¹³⁶ She notes that Abrahamson

130. *Id.* ¶ 80.

131. *Id.* ¶ 81.

132. *Id.* ¶ 82.

133. *Id.* ¶¶ 83–84.

134. *Id.* ¶ 106 (Ziegler, J., concurring).

135. *Id.*

136. *Id.* ¶ 107 (Ziegler, J., concurring).

first created this language in *State v. Hayes* in 2004.¹³⁷ At the time, Justice Sykes labeled this factor “new to our statutory interpretation jurisprudence, and the majority cites no authority for it.”¹³⁸ Sykes criticized the consideration as a “judicial policy judgment” that “leaves rooms for the substitution of the judiciary’s subjective policy choices for those of the legislature, a phenomenon that a text-based, plain-meaning approach to statutory interpretation seeks to guard against.”¹³⁹ A decade later, Ziegler finds this subjective “consequences” analysis equally “problematic.”¹⁴⁰

The *Anderson* case as a whole is especially angst-inducing because Abrahamson’s “lead opinion” lacked four votes.¹⁴¹ Indeed, a majority of the Court joined Ziegler’s plain-meaning opinion. Yet due to the Court’s unique system of case assignment, whereby authors are randomly chosen from among the majority at conference,¹⁴² Abrahamson was able to write an opinion that many would assume to be the governing, majority opinion if they did not look closer. Dean Joseph D. Kearney of Marquette University Law School has called the bar’s attention to this phenomenon and rightly urged the Court to reform its practice to align with “general American tradition (and logic)” so the opinion joined by the majority of justices is issued first.¹⁴³

Justice A.W. Bradley, who initially declined to join either opinion in *Kalal* and who reiterated her ambivalence in *Hayes*,¹⁴⁴ has generally avoided Abrahamson’s crusade, and pays more traditional obeisance to *Kalal*, once citing *Kalal* a sentence before citing *Klemm* as though the two were entirely simpatico.¹⁴⁵ Yet her recent opinion in *Bank of New York Mellon v. Carson* raises concerns about her approach.¹⁴⁶ A.W.

137. *Id.* ¶ 115 (Ziegler, J., concurring) (citing *State v. Hayes*, 2004 WI 80, ¶ 16, 273 Wis. 2d 1, 681 N.W.2d 203).

138. *Hayes*, 2004 WI 80, ¶ 112 (Sykes, J., concurring).

139. *Id.*

140. *Anderson*, 2015 WI 19, ¶ 115 (Ziegler, J., concurring).

141. *Id.* ¶ 106 (Ziegler, J., concurring).

142. Wis. Sup. Ct. Internal Operating Procedures, Section III.F, <https://wicourts.gov/sc/IOPSC.pdf> [<https://perma.cc/8QBJ-BMTY>] (last amended Feb. 13, 2017).

143. Joseph D. Kearney, *The Wisconsin Supreme Court, Can We Help?*, MARQ. LAW., at 48 (Fall 2015).

144. *Hayes*, 2004 WI 80, ¶ 66 (Bradley, J., concurring).

145. *Waranka v. Wadena Ins. Co.*, 2014 WI 28, ¶ 17, 353 Wis. 2d 619, 847 N.W.2d 324.

146. *See Bank of N.Y. Mellon v. Carson*, 2015 WI 15, ¶¶ 20–41, 361 Wis. 2d 23, 859 N.W.2d 422.

Bradley begins by reciting the usual litany about statutory interpretation and *Kalal*, and then turns to the plain meaning of the word “shall” in a provision that “judgment *shall* be entered as provided in s. 846.10 except that the sale of such mortgaged premises *shall* be made upon the expiration of 5 weeks from the date when such judgment is entered.”¹⁴⁷ She notes that the word shall is “presumed mandatory” by the case law, but there is no “per se” rule that it is so.¹⁴⁸ She then cites two pre-*Kalal* cases for the propositions that the “court considers legislative intent in determining whether a statutory provision is mandatory or directory” and “factors to consider in determining whether a statute is mandatory include ‘the statute’s nature, the legislative objective for the statute, and the potential consequences to the parties, such as injuries and wrongs.’”¹⁴⁹ In this particular instance, after evaluating the language in its statutory context, she concludes that shall is in fact mandatory.¹⁵⁰

In the next section, she analyzes the phrase “upon expiration of 5 weeks” from the same statute.¹⁵¹ She decides without explanation that the word “upon” is ambiguous and looks to context, legislative history, and legislative purpose to find its intended meaning.¹⁵² In the legislative history section, she considers remarks by the four speakers at the public hearing on the most recent amendment: the bill sponsor and three lobbyists.¹⁵³ Based on this testimony, she discerns the purpose of the bill, and then decides that one party’s interpretation would “exacerbate the problem the statute was meant to ameliorate.”¹⁵⁴ In fact, “[m]ultiple studies have remarked upon the negative impact of such a scenario.”¹⁵⁵ Based then on context and history, she construes the stat-

147. *Id.* ¶ 20 (quoting Wis. Stat. § 846.102(1) (2013–2014)).

148. *Id.* ¶¶ 21–22.

149. *Id.* ¶ 22 (citing State *ex rel.* Marberry v. Macht, 2003 WI 79, ¶ 15, 262 Wis. 2d 720, 665 N.W.2d 155; and then citing State v. Thomas, 2000 WI App 162, ¶ 9, 238 Wis. 2d 216, 617 N.W.2d 230).

150. *Id.* ¶ 23.

151. *Id.* ¶¶ 29–41.

152. *Id.* ¶ 31.

153. *Id.* ¶ 35 (referencing the bill hearing video on Wisconsin Eye’s website).

154. *Id.* ¶ 37.

155. *Id.* ¶¶ 38–39 (first quoting U.S. Gov’t Accountability Office, GAO–11–93, *Mortg. Foreclosures: Additional Mortg. Servicer Actions Could Help Reduce the Frequency and Impact of Abandoned Foreclosures* 29, 30 (Nov. 2010), <http://www.gao.gov/new.items/d1193.pdf> [<https://perma.cc/9T8A-ZP89>]; then quoting Judith Fox, *The Foreclosure Echo: How Abandoned Foreclosures are Re-entering the Market through Debt Buyers*, 26 LOY. CONSUMER L. REV.

ute to further the supposed statutory purpose.¹⁵⁶

Cases like these—*Klemm*, *Force*, *Anderson*, *Bank of New York Mellon*—all serve the same end: they create an alternative body of doctrine that intentionally ignores *Kalal* and presumes an accepted approach to statutory interpretation utterly at odds with its holding. Having lost the vote in *Kalal*, Abrahamson simply ignores it and uses her occasional majority opinions to write as though it does not exist. Sometimes, as in *Force* and *Anderson*, her colleagues rightly call out this furtive undermining of *Kalal*. Other times, as in *Klemm* and *Bank of New York Mellon*, they allow odious propositions to proceed without comment or dissent, thus further embedding them into mainstream doctrine. If justices (and judges on the court of appeals) believe in *Kalal* and its vision for text-first interpretation, or if they simply respect precedent and doctrine, then they should not cite *Klemm* and its progeny in their opinions, and they should be vigilant to call out and criticize when their colleagues write opinions at odds with *Kalal*'s method. Subjectivist statutory interpretation must be named and rebuked at every turn if *Kalal* is to remain the law of the land; otherwise lower court judges will begin using *Klemm* and company as legitimizing precedent to return to the days of leveraging legislative history to legislate from the bench.

VI. CONCLUSION

I began this article making perhaps a bold claim: that *Kalal* is a landmark or watershed case in the recent history of the Wisconsin Supreme Court. I end my inquiry convinced that Wisconsin courts have accepted *Kalal* as the “controlling interpretive approach” for statutory interpretation.¹⁵⁷ It is the standard reference point by which five of the seven sitting justices decide cases of statutory interpretation, and the

25, 29–30 (2013); and then quoting Kristin M. Pinkston, *In the Weeds: Homeowners Falling Behind On Their Mortgages, Lenders Playing the Foreclosure Game, and Cities Left Paying the Price*, 34 S. ILL. U. L.J. 621, 633 (2010)).

156. *Id.* ¶¶ 40–41.

157. Gluck, *supra* note 4, 1800. *See id.* (“Wisconsin’s textualist approach also is treated as precedential.”); *Haferman v. St. Clare Healthcare Found., Inc.*, 2005 WI 171, ¶ 42 n.9, 286 Wis. 2d 621, 707 N.W.2d 853 (describing *Kalal* as “our case law on statutory interpretation”); *State v. Mason*, 2004 WI App 176, ¶ 12, 276 Wis. 2d 434, 687 N.W.2d 526 (*Kalal* “set forth governing principles of statutory construction”). Gluck, *supra* note 4, at pp. 1800–01 n.182, provides a detailed explanation for the author’s finding that *Kalal* controls with numerous citations.

other two must write within the context it creates even if they disagree.¹⁵⁸ In this regard alone it is an improvement on the state of the doctrine in the years prior to its issuance, when lower courts and the bar lacked clarity as to the Supreme Court's framework for deciding these important issues.

In addition to bringing needed stability and predictability to the statutory interpretation, it has brought those same virtues to the law as a whole through its textualist emphasis. Now lower courts and the bar know not only that they should use a textualist method, but they know as well that it is the text of the law that governs in all circumstances when questions arise, not unenacted intent or the social consequences of competing alternative interpretations.

Moreover, the evidence from the cases indicates that *Kalal* succeeded in its mission to cabin the use of extrinsic sources in statutory interpretation. The court of appeals shows a significant decrease in citations to extrinsic sources in the ten years after *Kalal* compared to the ten years prior to its issuance.

It is, then, a landmark opinion—it marks a break from the past, and it set the course for the future. Its method has been expanded beyond statutory interpretation to numerous other areas of public law. And although one or two justices prefer an alternative methodology that is far more inclusive of extrinsic sources and policy considerations, they are forced to operate always in its shadow. Such consistent, persistent methodological consensus within a state's entire judiciary is indeed an achievement worth of a great court.

158. Gluck, *supra* note 4, 1802-03 (“[A]lthough Chief Justice Abrahamson, along with her colleague Justice Ann Walsh Bradley, occasionally write separately to urge a more comprehensive approach (that includes nontextual sources), they have essentially conceded that *Kalal* is the controlling approach and generally dispute only its case-specific application.”).

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