MODIFIED TEXTUALISM IN WISCONSIN: A CASE STUDY

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State ex rel. Kalal v. Circuit Court for Dane County sets forth a controlling two-step framework for interpreting Wisconsin statutes. Under *Kalal*, the first step is to start with a statute's text and apply linguistic tools of analysis (Step One). If the meaning of the statute is clear at this first step, that is the end of the inquiry. Only if the language of the statutory text is ambiguous is a court to go to step two and turn to "extrinsic sources of interpretation, such as legislative history" (Step Two).

Kalal has been one of the most influential cases in Wisconsin history. Its two-step process is so embedded in Wisconsin courts that it has been cited in published Wisconsin appellate decisions more than 1,200 times, on average once every six days, since it was decided eighteen years ago.

Kalal was one of several examples used by Professor Abbe Gluck over a decade ago to show that, despite ideological differences, state courts have settled into a "methodological consensus" about a form of "modified textualism" for statutory interpretation. As Professor Gluck recognized though, "a consensus on interpretive methodology cannot entirely eliminate normative disputes in statutory interpretation cases." That much is certainly true. Courts do not just apply linguistic algorithms. So, a methodology's test cannot be simply whether it eliminates the role of judgment in judging (although one factor might be how much discretion it allows). No methodology can do that. Instead, the test—or at least, one test—of an interpretive methodology ought to be whether it illuminates, rather than obscures, a court's actual levers of decision. I use a high-profile case involving ideological (and, arguably, methodological) differences among the Wisconsin Supreme Court Justices, *Wisconsin Carry v. City of Madison*, to explore the question of how well *Kalal* helps us understand the true nature of the dispute in statutory interpretation cases.

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INTRODUCTION

For the past eighteen years, Wisconsin courts have approached questions of statutory interpretation through the lens of what Professor Gluck has called a "modified textualism" methodology.[1] This approach stems from the Wisconsin Supreme Court's seminal decision in *State ex rel. Kalal v. Circuit Court for Dane County*.[2] *Kalal* created a structured two-step process for statutory interpretation.[3] While *Kalal* permits the consideration of legislative history, it tells courts to focus first on text.[4] Its first step limits courts to "intrinsic" evidence of a statute's meaning.[5] Only if the statute's text is ambiguous should a court then turn to the "extrinsic" evidence, such as legislative history.[6] This framework—a paradigmatic example of what Professor Samaha has called "lexical ordering"[7]—has profoundly shaped the way in which Wisconsin courts talk about statutory interpretation and the way in which lawyers have briefed and argued their cases.

Implicit in *Kalal* is a recognition that text alone cannot decide cases. The case thus recognizes the fact that, in difficult cases of statutory interpretation, appellate judges are inevitably what I have elsewhere called "multimodalists."[8] This notion is rooted in the empirical evidence: courts, including even self-avowed textualists, do in fact rely on multiple modalities of analysis when deciding statutory interpretation cases.[9] At the same time, *Kalal*'s approach clearly aims to prioritize text.

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1. Abbe Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1799–1803 (2010).

2. 681 N.W.2d 110 (Wis. 2004).

3. *Id.* at 124–25.

4. *Id.* at 124.

5. *Id.* at 123.

6. *Id.*

7. *See* Adam M. Samaha, *If the Text is Clear—Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155, 162–73, 166 n.49 (2018).

8. Anuj C. Desai, *Text is Not Enough*, 93 U. COLO. L. REV. 1, 1 (2022). Or what others, with perhaps greater verbal felicity than I, have called "pluralists." *See* Mitchell N. Berman & Guha Krishnamurthi, Bostock *was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 68 (2021). *See generally* William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321–22 (1990) (arguing that "[j]udges' approaches to statutory interpretation are generally eclectic" and that "the Court considers a broad range of textual, historical, and evolutive evidence when it interprets statutes").

9. *See* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 73 (2018); Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 224 (2010); Jane S. Schacter, *The Confounding Common Law Originalism in Recent*

In this Essay, I use the structure of the *Kalal* methodology to make a different, but related, point: in many difficult cases, the analysis *Kalal*'s modified textualism asks courts to perform misses an important aspect of statutory interpretation, the role of legal principles.[10] On its face, *Kalal* accepts the reality that courts must rely on multiple sources of evidence when they determine statutory meaning but then simply asks courts to rank-order their analysis. But even if we assume that a court can and should perform its analysis in a temporally rank-ordered fashion, statutory interpretation needs to incorporate, at some point in the analysis, an appeal to legal values or principles, principles that are found in neither the language of the statute (the "intrinsic" evidence, such as dictionaries or statutory context/structure) nor the "extrinsic" evidence such as legislative history. One doctrinal hook that federal courts often use to discuss these kinds of principles is a "substantive" canon.[11] The rule of lenity is probably the paradigmatic example, but the presumption of severability or the presumption against extraterritoriality might be others.[12] Sometimes these principles are implicitly embedded in a statute even if not in its text, but sometimes they are not even in the statute at all. However, substantive canons are not the only way in which these principles play a part in statutory interpretation. Other statutes and even the common law itself often embed legal principles into judicial thinking about statutes. Irrespective of the doctrinal tool used, these principles will at times necessarily shape statutory interpretation.[13] On its face, however, the *Kalal* methodology does not include a place for those principles to play a role.

To illustrate this point, I use *Wisconsin Carry v. City of Madison*,[14] an ideologically charged case about guns on public buses that divided the

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Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 STAN. L. REV. 1, 32 (1998); *see also* Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 134–35 (2008) (after reviewing a large random sample of Justice Scalia's dissents, concluding that "[Justice Scalia's] practice . . . resembles Legal Process methodology"; he "follows the 'ordinary' meaning only about a third of the time, even if 'common law statutes' are excluded. About a fourth of the time he . . . follows controlling precedent"; and "in nearly three quarters of the issues in my sample, Justice Scalia considers and weighs the purpose of the statute or the consequences and incentives created by different interpretations").

10. *See generally* William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) (exploring the "substantial role public values play in statutory interpretation, the potential role they might play, and the values that ought to be considered").

11. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 291–339 (2012).

12. *See, e.g.*, *id.* at 296.

13. *See generally* Eskridge, *supra* note 10.

14. 892 N.W.2d 233 (Wis. 2017).

Wisconsin Supreme Court.[15] As the majority and dissent in the case framed it, the debate was completely within the first step of the *Kalal* methodology (Step One) and so was apparently based on a disagreement about the "plain meaning" of a statute.[16] My argument is that the real disagreement can be found elsewhere, in the weighing of competing legal values that the difficult question in the case raised.

Kalal's framework cannot answer difficult questions of statutory interpretation that come before appellate courts, especially those of the type that reach a jurisdiction's supreme judicial body. Of course, it may be that the efficacy of a method is best measured lower down in the hierarchy, in the ice below the surface, rather than at the tip of the iceberg: in the trial courts and the countless acts of interpretation that occur among lawyers, government officials, and other actors.[17] Indeed, *Kalal* may even perform well in appellate cases with less ideological valence or cases when the ordering of values is shared by all of a court's judges.[18] For those circumstances, a "modified textualism" approach like *Kalal*'s may well best serve the legal system. On that question, I should be clear, this case study sheds little, if any, light at all. But for the limited purposes of assessing *Kalal*'s value in difficult or ideologically charged cases, *Wisconsin Carry* provides a nice example of the need to supplement *Kalal*'s two-step process—if only to help us better understand how statutory interpretation at the tip of the iceberg of a state's judiciary really works.

I. MODIFIED TEXTUALISM IN WISCONSIN: *KALAL V. CIRCUIT COURT OF DANE COUNTY*

In Wisconsin courts, statutory interpretation since 2004 has been structured around the two-step process set forth in *State ex rel. Kalal v. Circuit Court for Dane County*.[19] *Kalal*'s two-step interpretive framework tells Wisconsin courts to first determine whether the plain language of the statute is unambiguous.[20] If it is, that is the end of the inquiry: the unambiguous meaning of the statute applies.[21] If the statute is ambiguous, however, then—and only then—may a court turn to the

15. *Id.* at 235.

16. *Id.* at 240, 242, 260–64.

17. *See generally* Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012); Anuj C. Desai, *Heterogeneity, Legislative History, and the Costs of Litigation: A Brief Comment on Bruhl's "Hierarchy and Heterogeneity,"* 2013 WIS. L. REV. ONLINE 15.

18. I am indebted to my former colleague Jane Schacter for alerting me to this point.

19. 681 N.W.2d 118, 123–25 (Wis. 2004).

20. *Id.* at 124.

21. *Id.*

second step.[22] At the second step, a court then incorporates what the *Kalal* court refers to as "extrinsic evidence," which includes evidence from legislative history (Step Two).[23] Key to this two-step process is that it both has a clear emphasis on textualism and yet at the same time permits the use of legislative history.[24] It thus contrasts with the approach to textualism articulated by federal judges like Justices Scalia and Gorsuch, which precludes a resort to legislative history altogether.[25] Professor Gluck has referred to Wisconsin's approach as "modified textualism,"[26] and it exemplifies the notion of "lexical ordering" in statutory interpretation that Professor Samaha has explored.[27]

Kalal's analysis begins by laying out what it sees as two paradigms for statutory interpretation: "the 'statutory meaning' and 'legislative intent' approaches."[28] *Kalal* states that the "statutory meaning" approach is based on the view that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[29] The opinion then cites the Sutherland treatise on statutory construction to articulate the distinction between the two approaches: the key distinction is that "when legislative intent is employed as the criterion for interpretation, the primary emphasis is on what the statute meant to members of the legislature that enacted it"; in contrast, under the "statutory meaning" approach, "inquiry into the meaning of the statute generally manifests greater concern for what members of the public to whom it is addressed, understand."[30]

We might frame this distinction, as scholars often have, as a distinction between subjective and objective intent or between the drafter's and the reader's perspective.[31] What the *Kalal* court means when

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22. *Id.* at 124–25.

23. *Id.* at 125.

24. *Id.*

25. *See* SCALIA & GARNER, *supra* note 11, at 291.

26. *See* Gluck, *supra* note 1, at 1799.

27. *See* Samaha, *supra* note 7, at 162–63.

28. *Kalal*, 681 N.W.2d at 122–23 ("There are two accepted methods for interpretation of statutes. The first, determining legislative intent, looks to extrinsic factors for construction of the statute. The second, determining what the statute means, looks to intrinsic factors such as punctuation or common meaning of words for construction of the statute.") (quoting *Student Ass'n v. Baum*, 246 N.W.2d 622, 626–27 (Wis. 1976)).

29. *Id.* at 123 (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

30. *Id.* (quoting 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45:08 at 40 (6th ed. 2000)).

31. *See generally, e.g.*, Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 489–90 (2013) (citing PAUL GRICE, STUDIES IN THE WAY OF WORDS 3–143 (1989)) (framing the subjective-objective distinction as one between "speaker's meaning" and "sentence meaning"); Mark

it refers to the "legislative intent" approach is another way to describe subjective intent or the drafter's perspective on the statute; whereas the "statutory meaning" approach relies on a notion of "objective intent," or the reader's perspective on the statute. As Professor Nelson has argued, these two approaches actually blend into each other,[32] but the *Kalal* court describes them as distinct (and it is not alone in this view).[33]

The practical implication of the two different approaches, however, rests on differences in the types of evidence of statutory meaning that a court may rely on: in particular, the "legislative intent" approach may use what the court refers to as "extrinsic aids," while the "statutory meaning" approach aims to limit itself to "intrinsic aids."[34] What is commonly referred to as "legislative history" is viewed as an "extrinsic aid" and so, the court argues, it only becomes relevant with the "legislative intent" approach.[35]

After laying out this distinction, the court then states that "Wisconsin's statutory interpretation case law has evolved in something of a combination fashion, generating some analytical confusion."[36] Because of this confusion, the *Kalal* court then "conclude[s] that the general framework for statutory interpretation in Wisconsin requires some clarification."[37] The court then proceeds to, in effect, give preference to the "statutory meaning" approach.

Next, *Kalal* sets forth what subsequent courts have seen as a two-step, lexical-ordering approach to statutory interpretation.[38] Step One evokes traditional "textualist" principles.[39] The court starts by giving statutory language "its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning."[40] The court goes on to note that statutory language must be interpreted "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid

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Greenberg, *Natural Law Colloquium: Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109 (2020) (examining textualism through semantic and pragmatic linguistics and comparing it to intentionalism).

32. *See* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 348–49 (2005).

33. *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–23 (2005).

34. *Kalal*, 681 N.W.2d at 122–23 (quoting SINGER, *supra* note 30, § 45:14).

35. *Id.* at 123–25.

36. *Id.* at 123.

37. *Id.*

38. *Id.* at 124–25.

39. *Id.* at 124.

40. *Id.*

absurd or unreasonable results."[41] But Step One's key aspect is that the analysis ends there if it "yields a plain, clear statutory meaning" or, as the court puts it, if "there is no ambiguity."[42] This means that, at Step One, a court may not consult legislative history.[43] The exception to this prohibition on consulting legislative history is that the court may consult legislative history "to reinforce a plain meaning interpretation of a statute."[44]

Only when the statute is ambiguous should a court then turn to Step Two.[45] How, though, should a court determine whether the statute is ambiguous? Importantly, the court attempts to put a strict limit on what constitutes ambiguity: "[A] statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more senses."[46] Disagreement about meaning alone is insufficient. Rather "the test for ambiguity examines the language of the statute 'to determine whether "well-informed persons *should have* become confused," that is whether the statutory . . . language *reasonably* gives rise to different meanings.'"[47]

What may be obvious from all this, but the court emphasizes throughout, is that "[t]he test for ambiguity generally keeps the focus on the statutory language."[48] While a statute's "scope, context, and purpose" can be relevant, they are relevant only if they "are ascertainable from the text and structure of the statute itself, rather than extrinsic sources, such as legislative history."[49]

As a practical matter, then, the key methodological point of the court dividing the analysis into two steps is to ensure that courts exclude "extrinsic aids" when determining, at Step One, whether the statute is ambiguous. The court makes explicit that "resort to legislative history is not appropriate in the absence of a finding of ambiguity."[50]

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41. *Id.*

42. *Id.* (quoting *Bruno v. Milwaukee County*, 660 N.W.2d 656, 662 (Wis. 2003)).

43. *Id.* ("Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history.") (citing *Bruno*, 660 N.W.2d at 659).

44. *Id.* at 127 n.11 (citing *Seider v. O'Connell*, 612 N.W.2d 659, 671 (Wis. 2000)).

45. *Id.* at 124–25.

46. *Id.* at 124 (citing *Bruno*, 660 N.W.2d at 661).

47. *Id.* (quoting *Bruno*, 660 N.W.2d at 662).

48. *Id.*

49. *Id.* at 125.

50. *Id.* at 125–26 (cleaned up) (quoting *Seider v. O'Connell*, 612 N.W.2d 659, 671 (Wis. 2000)) (noting that "as a general matter, legislative history need not be and is not consulted except to resolve an ambiguity in the statutory language . . ."). There is one circumstance in which legislative history may be used at Step One: "to confirm or verify a plain-meaning interpretation." *Id.* at 126.

The court's rationale for prioritizing text over legislative history seems to be rooted in the "fair notice"/"rule-of-law" rationale. After laying out its two-step approach to statutory interpretation, the *Kalal* majority defends its approach against a concurring opinion by Chief Justice Abrahamson, and in so doing, articulates its rationale: "[t]he principles of statutory interpretation that we have restated here are rooted in and fundamental to the rule of law."[51] The court then goes on to quote Justice Scalia's *A Matter of Interpretation*:

> Ours is "a government of laws not men," and "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." "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."[52]

Of course, as numerous scholars and jurists have pointed out, those who are willing to turn to legislative history are not disputing the fair notice rationale. They do so fully understanding that legislative history is not "the law."[53] The issue is always what evidence a judge may use to determine the meaning of "the law." The "rule-of-law" rationale for refusing to look to legislative history depends on a "reader-focused" approach to law and on a view that readers of the law can understand the law without resorting to any "extrinsic aids".[54] The proponents of using legislative history argue that, in some circumstances, the fair notice rationale can conflict with the goal of judicial deference to the legislature's policy choices and that, in other circumstances, neither rule-of-law nor judicial deference is at issue.[55]

One reason I suspect the *Kalal* approach to "modified textualism" has had such staying power is that it is capacious enough to incorporate both "reader-focused" concerns, such as "rule-of-law" values, and "drafter-focused" ideals of judicial deference to the legislature's policy choices. It has been cited by Wisconsin judges from across the political spectrum.[56]

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51. *Id.*

52. *Id.* (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997)).

53. *See*, *e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 855, 863 (1992).

54. Opponents of using legislative history have other reasons too. *See* SCALIA & GARNER, *supra* note 11, at 369–90.

55. Breyer, *supra* note 53, at 853–54.

56. Recently, though, Justice Dallet has criticized the approach. *See Clean Wis., Inc. v. Wis. Dep't of Nat. Res.*, 961 N.W.2d 346, 358–59 (Wis. 2021) (Dallet, J., concurring).

Moreover, the approach is particularly capacious in one other important way: its articulation of what is commonly called the "absurdity doctrine." In the federal context, this has ordinarily been seen as an extremely limited doctrine.[57] Some judges have gone so far as to limit the doctrine to grammatical absurdities.[58] None have articulated the absurdity doctrine in the way that *Kalal* does, which is as follows: "statutory language is interpreted . . . *reasonably*, to avoid absurd *or unreasonable* results."[59] Permitting judges to determine what constitutes an "unreasonable result[]" allows for plenty of discretion beyond the linguistic and well into the policy realm. I return to this point below.

The application of *Kalal*'s approach to statutory interpretation in *Kalal* itself was relatively straightforward and uncontroversial. The case involved a Wisconsin statute that permits those who are not district attorneys to file a criminal complaint if the district attorney "*refuses* or is unavailable to issue a complaint" and a judge finds probable cause.[60] In *Kalal*, an alleged crime victim sought to file a criminal complaint against an alleged perpetrator several months after the victim first complained about the situation to the police and district attorney.[61] Although the district attorney had not explicitly said that he would not prosecute the crime, he had indicated that the victim "was free to proceed legally in whatever manner she believed necessary."[62] The question was whether that sufficed to constitute "refus[ing]" to issue a complaint.[63] During the course of the proceedings, the deputy district attorney assigned to the case told the court that, even though the office had not affirmatively stated it would not prosecute, he too shared the victim's view that the office's conduct constituted a "refusal" within the meaning of the statute.[64]

The court concluded that this was enough to satisfy the statute.[65] Relying primarily on the dictionary definition of "refuse," the court held that the statute was unambiguous and decided the case under Step One.[66]

In short, *Kalal* established a two-step process for statutory interpretation in Wisconsin courts: turn first to intrinsic evidence of

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57. Breyer, *supra* note 53, 848–49.

58. *See, e.g.*, *Amalgamated Transit Union Loc. 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1097–98 (9th Cir. 2006) (Bybee, J., dissenting from the denial of rehearing en banc).

59. *Kalal*, 681 N.W.2d at 124 (emphases added).

60. *See id.* at 114 (emphasis partially removed) (quoting WIS. STAT. § 968.02(3) (2019–20)).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 127.

66. *Id.*

statutory meaning; if and only if the statute is "ambiguous" based on that evidence should a court then turn to the second step, which is to look to extrinsic evidence.[67] In the next Part, I look at how the Wisconsin Supreme Court, both a majority and a dissent, applied *Kalal*'s interpretive methodology to address an ideologically charged legal question in a case called *Wisconsin Carry, Inc. v. City of Madison*. I argue that, although *Kalal*'s structured approach is helpful, statutory interpretation necessarily involves tools of legal reasoning that transcend the two-step paradigm. Courts will thus inevitably do something other than just those two steps. Assuming courts want a hierarchy of methodological tools in a structured approach to statutory interpretation,[68] courts will either need to supplement the *Kalal* approach with more steps or explicitly incorporate more tools into the existing two steps.

II. MODIFIED TEXTUALISM APPLIED: *WISCONSIN CARRY V. CITY OF MADISON*

Wisconsin Carry, Inc. v. City of Madison is a perfect illustration of how *Kalal* is insufficient to give judges the necessary tools to decide difficult statutory interpretation cases. *Wisconsin Carry* involved a state statute that preempts municipal gun-control laws.[69] The law forbids political subdivisions from "enact[ing] or enforc[ing] an ordinance or adopt[ing] a resolution" regulating firearms "unless the ordinance or resolution is the same as or similar to, and no more stringent than, a state statute."[70] The majority referred to the statute as the "Local Regulation Statute,"[71] and the dissent referred to it as the "Preemption Statute."[72] The City of Madison's Transit and Parking Commission (Transit Commission), which operates Madison's public bus service, adopted a "rule" that prohibited the bringing of weapons on board its buses (Bus Rule).[73]

Wisconsin Carry, a nonprofit gun-rights advocacy group, argued that, under the Local Regulation Statute, the Bus Rule was inconsistent with a state statute that, among other things, authorizes licensed

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67. *Id.* at 124–26.

68. This hierarchy could take a lexical-ordering approach, as in *Kalal*, where the court omits the subsequent steps if certain conditions are met, or simply a "sequencing" approach, in which the methodological tools are just considered in a temporal order. *See* Samaha, *supra* note 7, at 162.

69. *Wis. Carry, Inc. v. City of Madison*, 892 N.W.2d 233, 245 (Wis. 2017).

70. *Id.* at 236 (quoting WIS. STAT. § 66.0409(2) (2019–2020)).

71. *Id.*

72. *Id.* at 259 (Bradley, J., dissenting).

73. *Id.* at 235–36 (majority opinion). The rule was broader, but for purposes of the case, this is where the core of the challenge was.

Wisconsin residents to carry concealed weapons (Concealed-Carry Statute) and permits the carrying of loaded handguns on vehicles (Vehicle Statute).[74]

The crux of the City's response was a straightforward application of *Kalal* Step One's approach to "plain meaning": the text of the statute only applies to "ordinances and resolutions," and the Bus Rule is neither.[75] Although this argument is clearly linguistic, it is also a functional claim, at least implicitly. It was premised not only on the idea that a "rule" is neither an "ordinance" nor a "resolution" as a semantic matter but also that the Bus Rule did not operate like an ordinance or a resolution either.

A. Wisconsin Carry *Majority*

The Wisconsin Supreme Court disagreed. It held, in a five-to-two vote, that the Local Regulation Statute, together with the Concealed-Carry Statute and the Vehicle Statute, preempted the Bus Rule.[76] Importantly, the court agreed with the City that *Kalal*'s Step One was sufficient to decide the case—in other words, the "plain meaning" of the statute dictated the result—and the court explicitly rejected any reliance on legislative history.[77] But it disagreed with the City about that "plain meaning." The core of the majority's logic went like this: (1) the judicial function is not a mechanical one, and so the fact that the word "rule" is different from the words "ordinance" and "resolution" does not decide the case; (2) the Transit Commission is a "sub-unit" of the City and derives all of its regulatory authority from a City ordinance; and (3) allowing the City to delegate authority to a body other than itself to regulate in such a way that is not "the same as or similar to, and no more stringent than," the Concealed-Carry Statute or Vehicle Statute would effectively render the Local Regulation Statute a nullity.[78] As the court put it,

> [a]ccepting the City's argument . . . would require that the legislature amend the statute every time a municipality conceived of a new label for its legislative acts. But this is law-making as comedy, with a hapless legislature chasing about a wily municipality as it first enacts an ordinance on a forbidden subject, and then a policy, then a rule, then a standard and on

74. *Id.* at 236, 238–39.

75. *Id.* at 239 ("The City says a 'rule' is different from ordinances and resolutions, and therefore les beyond the statute's reach.").

76. *Id.* at 254.

77. *See id.* at 244 n.23.

78. *See id.* at 242.

> and on until one of them wearies of the pursuit or the other exhausts the thesaurus.[79]

The majority relied on a key hypothetical that framed a *reductio ad absurdum* argument. What if, the court said, a city

> create[d] a "public-safety commission" with a mandate to secure the public's well-being in all publicly accessible spaces. The enabling ordinance would make no specific reference to firearms, so (under the City's theory) it would escape the Local Regulation Statute's attention. The public-safety commission would then adopt the same city-wide firearms regulation the city's governing body could not itself adopt.[80]

Or, the court went on to say, let us say the municipality got even cleverer. Imagine it "create[d] a number of limited-portfolio sub-units whose cumulative scope of authority would equal that of the municipality. The sub-units could then adopt firearms regulations that would differ in no meaningful way from a single regulation adopted by the municipality's governing body."[81] In other words, the cumulative effect would be the equivalent of an "ordinance" or a "resolution." Surely, the court said, this would violate the Local Regulation Statute, no? As the court explained, "[f]unctionally, this imputed purpose would leave the statute with neither meaning nor effect."[82]

In short, then, the *Wisconsin Carry* majority concluded that the logic of the City's approach to interpreting "ordinance" and "resolution" in the Local Regulation Statute would amount to a nullification of the statute. I will return to this shortly when discussing the dissent's approach to this question; but for now, just note how capacious this approach to interpretation is: the argument requires thinking about a potentially "hapless legislature" and "wily municipality"; it also requires the logic of *reductio ad absurdum*. We can certainly think of both arguments through the lens of textualism. One could see them through the lens of the "absurdity" doctrine,[83] but both arguments necessarily incorporate purposivist thinking, and neither derives from the text of the statute, whether in linguistic "context" or otherwise. Both depend, in other words, on drafter-focused, rather than reader-focused, ways of thinking about interpretation.

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79. *Id.* at 246–47.
80. *Id.* at 245.
81. *Id.*
82. *Id.*
83. *Id.* at 240, 247 n.31 (citing *Kalal*, 681 N.W.2d at 124).

Having concluded that the "Bus Rule" was subject to the Local Regulation Statute, the court then went on to analyze the question of whether the Bus Rule was "the same as or similar to, and no more stringent than," the Concealed-Carry Statute or the Vehicle Statute, what it referred to as the "stringency analysis."[84] Here, the court does something quite interesting, again using forms of argumentation that are staples of legal analysis but that do not match the *Kalal* Step One-Step Two divide.

For present purposes, I want to focus on the court's analysis of whether the Bus Rule is "no more stringent than" the Vehicle Statute. Recall that the "Vehicle Statute" permits the carrying of loaded handguns in vehicles.[85] But let's look at the language of the statute. The statutory provision is entitled "[s]afe use and transportation of firearms and bows," and the language of the relevant provision is actually framed as a prohibition, rather than in permissive terms. Putting aside for the moment some other exceptions, the provision states, "no person may place, possess, or transport a firearm . . . in or on a vehicle, *unless* . . . [*t*]*he firearm is unloaded or is a handgun*."[86] In other words, by not prohibiting a person from "plac[ing], possess[ing], or transport[ing] a firearm" that is either unloaded or a handgun, the law implicitly permits unloaded firearms and handguns.

The City made a couple of arguments about the Vehicle Statute. First, the City argued that "an exception from a prohibition is not the same thing as a mandate."[87] In other words, nothing in the Vehicle Statute *requires* a person to carry such a weapon in a vehicle. The court rejected that argument by noting that the City's "burden is not to find a statute that neither bans nor requires carrying firearms."[88] Rather, "its burden is to identify a statute that *does* ban, and does so at least as restrictively as the [Bus] Rule."[89] Here, because "the Vehicle Statute prohibits only the carrying of loaded non-handguns in a vehicle," it "justifies the Rule only in that regard."[90] The Bus Rule is thus "dramatically more restrictive than the Vehicle Statute."[91]

It is the City's second argument, though, that I would like to focus on. This argument drew on the idea that the City owns the buses and thus should have a form of "property rights"-like control over them.[92] The

84. *Id.* at 247.
85. *See supra* note 74 and accompanying text.
86. WIS. STAT. § 167.31(2)(b) (2019–20) (emphasis added).
87. *Wis. Carry*, 892 N.W.2d at 248.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *See id.*

City argued that just as surely as private vehicle owners could ban firearms in their own vehicles, so too could the City with the buses it owns.[93] The majority had two responses. First, the individual's right to ban weapons from his vehicle "is incident to his property right in the vehicle," and is thus "not statutory, and so cannot serve as the point of comparison" for purposes of the "stringency" analysis.[94] I will return to this point below, but notice the conception of an individual's property rights as being independent of statutes. Literally, of course, that is not true—and certainly not for motor vehicles. The Uniform Commercial Code—a statute[95]—regulates the buying and selling of goods in Wisconsin,[96] and other statutes impose even stricter regulations on the sale of vehicles.[97] Vehicle ownership itself is regulated by a statutory licensing regime.[98] And, of course, there are no end of statutes regulating the use of private vehicles.[99] Still, private property ownership and "the right to exclude others from [one's] property"[100] is a core concept; we understand this as a legal value that transcends the fact that, in the twenty-first century, property rights (particularly, in motor vehicles) are based on statutes.

Second, the court said, "the City's ownership rights in its buses are not the same as an individual's ownership rights in his private vehicle."[101] But, why not? The City drew on the U.S. Supreme Court's opinion in *Adderley v. Florida*[102] and other cases giving governments the right to control their property in ways comparable to a private property owner.[103] I would like to quote the court's response at some length, because it speaks volumes about the core of its thinking here:

> An individual may ban weapons because he has unlimited discretion to bar anyone and everyone from his vehicle for any

93. *Id.* ("The City also says the Rule is no more restrictive than Wisconsin's Statutes because, as owner of its buses, it has the same authority to ban the carrying of weapons as individuals have in banning weapons from their private vehicles.").

94. *Id.*

95. *See* WIS. STAT. ch. 402 (2019–20).

96. *See id.* § 402.102 (noting that "this chapter applies to transactions in goods").

97. *See, e.g.*, WIS. STAT. ch. 342 (2019–20) ("Vehicle Title and Anti-Theft Law").

98. *See* Wis. STAT. ch. 341 (2019–20) ("Registration of Vehicles").

99. *See*, *e.g.*, WIS. STAT. ch. 346 (2019–20) ("Rules of the Road"); WIS. STAT. ch. 344 (2019–20) ("Vehicles–Financial Responsibility").

100. *Wis. Carry*, 892 N.W.2d at 248.

101. *Id.* at 249.

102. 385 U.S. 39 (1966).

103. *Id.* at 250 ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.") (quoting *Adderley*, 385 U.S. at 47).

> reason, or even no reason at all. The City enjoys no such latitude with respect to bus passengers. Indeed, the City's ability to exclude passengers is subject to significant circumscription. *The most significant is that, whatever property rights it might have, it may not use them in derogation of the law*: "[A] municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden."[104]

A few points here, two about the substance of the argument, and one that brings us back to the *Kalal* methodology. First, notice again the implicit conception of *private* property rights. The court seems not to recognize that the sentence I have italicized in the quoted paragraph applies just as readily to private property as to public property: Surely it is as accurate to say, "[w]hatever property rights [a private property owner] might have, it may not use them in derogation of the law" as it is to say, "whatever property rights [the City] might have, it may not use them in derogation of the law." Yet, the court starts with a far more capacious sense of private property rights than the City's property rights. This, despite the fact that a Wisconsin statute explicitly gives cities presumptive plenary power over their "property."[105]

Second, notice the self-referential nature of the argument. The court's argument is itself dependent on its prior interpretation of the Local Regulation Statute. If the terms "ordinance" and "regulation" do not cover "rules" of this sort, rules that by their own terms are limited to government property, then the logic of the whole paragraph fails: the court's reasoning depends on a premise that "the legislature has expressly forbidden" the Bus Rule. But that is the very question at issue in the case! I do not mean to be overly critical, because the correctness of the majority's analysis here is not my point. What is crucial, though, is the next point.

The third, and most important, observation to note is that this argument has nothing, absolutely nothing, to do with anything mentioned in *Kalal* Step One. There is no reference to the plain meaning of any

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104. *Id.* (emphasis added) (quoting *Fox v. City of Racine*, 275 N.W. 513, 514 (Wis. 1937)).

105. WIS. STAT. § 62.11(5) (2019–20) ("Powers. Except as elsewhere in the statutes *specifically provided*, *the council shall have the management and control of the city property*, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. *The powers hereby conferred* shall be in addition to all other grants, and *shall be limited only by express language*.") (emphases added). Although the City's brief makes a reference to this provision, neither the majority nor the dissent mentions it at all.

words in the statute, no linguistic canons, no reference to the statute's "context," or "to the language of surrounding or closely-related statutes,"[106] and not even a reference to the capacious "absurdity" doctrine used earlier in its analysis—indeed, no reference to any of the stated tools of statutory interpretation. Instead, the court draws on cases, analogies, and a conception of the City's property rights as more regulable by the legislature than a private individual's property rights.[107] To be fair, this argument is a direct response to one of the City's arguments, and the court cannot necessarily control the arguments it needs to respond to. But the court's need to respond to this argument at this point of the analysis, as it purports to be doing *Kalal*'s Step One, just shows us that statutory interpretation requires all of these tools—including common law reasoning and legal values—and that, as framed, the *Kalal* "modified textualism" methodology seems ill-equipped to tell us when to use such tools.

In short, the court concluded that the Bus Rule was in fact "more stringent" than the Vehicle Statute and so was preempted by the Local Regulation Statute. But importantly, much of the analysis to reach that conclusion depended on reasoning that the *Kalal* "modified textualism" methodology fails to include in either of its two steps.

B. Wisconsin Carry *Dissent*

The dissent responded, in effect, that this is an easy case under *Kalal*'s Step One. The logic of the dissent is pretty straightforward, and it tracks the City's argument, fitting neatly into *Kalal*'s Step One: apply the "plain meaning" of the statute, and "[i]f the meaning of the statute is plain, . . . stop the inquiry."[108] Under *Kalal*, the dissent argues, the court's job should be to apply "the common and ordinary meaning of both 'ordinance' and 'resolution.'"[109] And so the dissent turns to the definitions of "ordinance" and "resolution" and concludes that "[t]he bus rule is not an 'ordinance' or 'resolution.'"[110] Citing previous judicial opinions, the dissent states that an "ordinance" is "a regulation of a *general*, permanent nature, enacted by the governing council of a municipal corporation"; and a "resolution" is an "informal enactment of a temporary nature, providing for the disposition of a particular piece of the administrative business of a municipal corporation."[111]

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106. *State ex rel. Kalal v. Cir. Ct.*, 681 N.W.2d 110, 124 (Wis. 2004).

107. *See Wis. Carry*, 892 N.W.2d. at 250–51.

108. *Id.* at 262 (Bradley, J., dissenting) (quoting *Kalal*, 681 N.W.2d at 124).

109. *Id.* at 261.

110. *Id.* at 263.

111. *Id.* (emphasis added) (quoting *Cross v. Soderbeck*, 288 N.W.2d 779, 784 (Wis. 1980)).

Applying these definitions to the Bus Rule, the dissent concludes that "the bus rule is not a [*generally applicable*] legislative enactment like an ordinance" because "[b]us policies are limited in scope and apply . . . only to persons who choose to ride a Madison Metro bus, rather than to the general public."[112] Let me re-emphasize that point: according to the dissent, what makes the Bus Rule *not* "generally applicable" is that it only applies to those who ride the bus, not to everyone. The logic of the dissent seemed so straightforward under *Kalal*'s Step One that the dissent was able to accuse the majority of "superimpos[ing] on *Kalal* a new approach" by "creat[ing] alternative interpretive principles, including examining the ordinance's 'taxonomy functionally.'"[113]

I will have more to say on this in a moment, but it is not obvious why a prohibition of guns on all public buses should be viewed as *not* "generally applicable." It does, after all, apply to *all* buses and to everyone who wants to use the city's public transportation system. True, it does not apply to all public property. But, based on the dissent's logic, one could equally argue that a "rule" that applied only to, say, public sidewalks was not "generally applicable" either, because it, well, only applied to sidewalks and not to other public property. Surely that argument cannot be right. So, for the dissent, the work is being done by the term "generally applicable," and without something more than linguistic, *Kalal* Step One-type reasoning, nothing tells us whether the Bus Rule is or is not "generally applicable."

Now, as my earlier characterization of *Kalal* as emphasizing "rule-of-law" principles suggests, one could view the dissent's argument through a "reader-focused" lens. This approach would be premised on the claim that the ordinary reader would understand "ordinance" and "resolution" not to encompass the Bus Rule. Notice, though, that the argument depends on a negative implication, based on the familiar principle of *expressio unius est exclusio alterius*: the express inclusion of one thing implies the exclusion of all else. Here, the argument is in essence that the express inclusion of "ordinance" and "resolution" in the statute necessarily excludes from the statute's purview a "rule" that is not "generally applicable." To support this argument, the dissent drew on the firearms preemption statutes of other states, many of which included more far-reaching language.[114]

Of course, courts ordinarily view *expressio unius* as a "textualist" tool and so comfortably within *Kalal*'s Step One. But nothing in *Kalal*'s Step One *necessitates* using *expressio unius*. *Expressio unius* is not a command, but is instead a tool. What most scholars and judges, whatever their methodological approach, recognize is that the decision about

112. *Id.* at 263–64.
113. *Id.* at 261 (quoting Majority Opinion at 242).
114. *Id.* at 262.

whether to use a tool like *expressio unius* requires a subtle understanding of both language and statutory drafting: it requires, in other words, a shift in focus from the reader to the drafter, from the objective to the subjective. Perhaps one can still think of the decision through the lens of the reader, but only by asking the reader to inquire into what the drafter likely intended.[115]

Why does this matter? It matters because *Wisconsin Carry* shows us that, as articulated, *Kalal*'s Step One cannot even resolve a fundamental question that textualists face in myriad cases: whether and when to use a textualist tool like *expressio unius*. Just to be clear, I am not criticizing *Kalal* on those grounds: it is important to have an analytical framework, and *Kalal* nicely does that. Its framework amounts to, in effect, first be a textualist and only if that cannot resolve the case, turn to evidence of legislative intent. My point, instead, is that *Kalal*'s Step One framework will almost inevitably be under-determinate in difficult cases like *Wisconsin Carry* because it purports to eschew subjective intent as a relevant criterion. Even as straightforward an interpretive step as determining whether a doctrine like *expressio unius* is appropriate demands the interpreter have some sense of the scope of legislative—*i.e.*, subjective—intent.

C. Analysis

As I hope my description made clear, *Wisconsin Carry* raised a difficult question, one with ideological implications connected to gun rights. One lens through which to view the case is the typical political divide for which politically charged cases in the Wisconsin Supreme Court have been known. The case did divide along the lines one would expect based on our real-world knowledge of the political leanings of the judges. Those known for greater sympathy to gun rights sided with the majority and those known for greater sympathy for gun control dissented.

But my claim here is not to rehash worries about the politicization of judicial decision making. In fact, despite the "liberal-conservative" breakdown of the votes in the case, I will argue that views about gun rights, the politically charged issue on the surface of the case, cannot resolve the real issue—although I am not saying that those views did not shape the justices' thinking. Rather, my claim is that *Kalal*'s approach to modified textualism did not—indeed as the test is formulated, could not—resolve the real issue in the case. The reason? The real issue in the case was a subtle question about the scope of property rights and its relation to the concept of a "generally applicable" legislative enactment, one the

115. *See* Nelson, *supra* note 32.

legislature had not contemplated and the resolution of which thus required a weighing of legal principles or values.

Statutory interpretation will at times require such weighing, and no test that purports to ignore such weighing can resolve such cases. The *Kalal* framework helps structure some aspects of the necessarily multi-modal needs of any comprehensive approach to statutory interpretation. But even assuming a desire to rank-order text above legislative history, *Kalal* cannot help with the many cases where the text and legislative materials by themselves yield no answer.

One way to see the case, then, is as two different ways to approach *Kalal*'s Step One. On the surface, that is what seems to be going on. The majority, in this case the "conservative" majority, took a more holistic approach to *Kalal*'s Step One, and the "liberal" dissenters took a stricter approach. When describing *Kalal* earlier, I noted that a lot seems to turn on whether a statute is deemed "ambiguous" at Step One. But what *Wisconsin Carry* shows us is that a lot also depends on how capacious Step One in fact is and whether Step One can incorporate more than just the question of whether a statute is "ambiguous." Is Step One only for "textualist" tools of interpretation—*e.g.*, ordinary meaning, linguistic canons, etc.—or can other kinds of considerations play a role? Both the majority and the dissent in *Wisconsin Carry* claimed to be confining their Step One analysis to "intrinsic" evidence of "plain meaning," and to be excluding "extrinsic" evidence of meaning. On the surface, then, there was no debate that *Wisconsin Carry* was a "Step One" case. Yet, the two opinions run to 122 paragraphs! So, if *Kalal* is meant to simplify the analytical process—if Step One is really meant to start the inquiry with "plain meaning"—then the notion of "intrinsic" evidence is a pretty capacious concept.

But my claim is that a focus on the question about how capacious Step One should be misses the crux of the dispute in *Wisconsin Carry*. I hinted at this point above. The key issue in the case is how the Local Regulation Statute treats buses owned by the City and used by the public. That question is one we want to answer not only when analyzing whether the Bus Rule is "more stringent than" the Vehicle Statute,[116] but just as importantly, when determining whether the Bus Rule is even an "ordinance" or "resolution." The key question that actually decides the case is thus whether the City is acting as a proprietor or as a regulator. In this sense, the relevant question revolves around the definition of "ordinance" as a "*regulation* of a *general*, permanent nature."[117]

The problem, though, is that the question of whether the Bus Rule is a "regulation" and is of a "general" nature requires a judgment about

116. *See supra* text accompanying notes 85–105.

117. *Wis. Carry*, 892 N.W.2d at 263 (emphasis added) (Bradley, J., dissenting) (quoting *Cross v. Soderbeck*, 288 N.W.2d 779, 784 (Wis. 1980)).

the nature of the City's property rights in its buses, and so, as formulated, nothing in *Kalal*'s Step One can help us answer it. The dissent simply asserts that "[b]us policies are limited in scope and apply . . . only to persons who choose to ride a Madison Metro bus, rather than to the general public."[118] That might be right, but it implicitly depends on a conception of the type of property rights the City has in its buses. Surely if some subunit of the City had created a "rule" prohibiting firearms in, say, all publicly owned parks or sidewalks, the dissent would not have said the policy applies "only to persons who choose to [frequent the parks/use a sidewalk], rather than to the general public."[119] The point is not that those are the same as the Bus Rule. The point is that it underscores that the key issue is the *nature of the governmental property*, not the fact that the Bus Rule only applies to "persons who choose" to use the buses.

So, even if one rejects the majority's *reductio ad absurdum* argument about the "hapless legislature" and "wily municipality," the argument's core insight has to be correct: it cannot be enough to call the Bus Rule a "rule" that only applies to "persons who choose" to use buses and thereby sidestep the Local Regulation Statute. The Bus Rule applies to *all* public buses and so, on that score, is "regulating" everywhere—*i.e.*, "generally"—on public buses. If that is correct, then surely the fact that the City calls it a "rule" ought to be irrelevant, as is the fact that it was the Transit Commission, not the City Council, that adopted it. On the other hand, the Bus Rule *only* applies to public buses and permits firearms throughout all other public spaces in the city. In that sense, the majority's *reductio* argument faces the counter that all "slippery slope" arguments face: The City *did not* create a "Public Safety Commission" and prohibit firearms in all public places; it *did not* create multiple commissions whose jurisdiction aggregated to do that either. And there is no reason to think the Bus Rule will lead to the "*absurdum*."[120]

One way to see this is to note that the majority's rejection of the City's proprietary rights in its buses might itself be subject to slippery slope reasoning. Consider a few variations on the Bus Rule.

Let us imagine for a moment that Madison's Police and Fire Commission adopts a "rule" that prohibits anyone other than duly employed police officers from carrying firearms in police cars. Does the Local Regulation Statute preempt what I will call the "Police Car Rule"? Or, what if the Police and Fire Commission adopts a "rule" prohibiting firearms on city-owned fire trucks and ambulances? Does the Local

118. *Id.* at 263–64.

119. *Id.* at 264.

120. *See generally* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1030 (2003) (analyzing how lawyers can "sensibly evaluate the risk of slippery slopes").

Regulation Statute preempt the "Firetruck and Ambulance Rule"? On the one hand, every argument the majority makes can apply to these rules. But would the result be the same? I do not know. But I do know that nothing in *Kalal*'s Step One will be able to tell us. Like the actual "Bus Rule," deciding these hypotheticals requires a balancing of values: The municipality's property rights with a sense of how important it is for a person to be able to transport handguns or unloaded firearms. The latter might be informed by a sense of the *subjective* views of the legislature that adopted the Local Regulation Statute, which is what appears to drive the dispute between the majority and dissent in *Wisconsin Carry*. But nothing in the ordinary conception of "plain meaning" or *Kalal*'s Step One can answer the question.

Similarly, imagine the Madison Transit and Parking Commission adopts a rule that permits individual Uber/Lyft drivers to decide whether to permit their passengers to carry firearms. Does the Local Regulation Statute preempt the "Uber/Lyft Rule"? Again, as with the Bus Rule, *Kalal* cannot answer the relevant question: Should we view the Uber/Lyft Rule as not "generally applicable," as the dissent puts it, because it only applies to "persons who choose to ride [an Uber or Lyft], rather than to the general public."[121] Or is it instead, in essence, an ordinance because, as the majority puts it, "whatever property rights [the Uber/Lyft drivers] might have, [they] may not use them in derogation of the law"?

My key point is that *none of that is found anywhere in the plain meaning of the text of any of the statutes the court would have to analyze*. This type of reasoning is completely orthogonal to *Kalal*. Why? Because the considerations the court needs to take into account are legal values that are embedded into statutes independent of their text. The idea that, as the majority put it, "[g]overnments, whether great or small, exercise only that amount of authority they rightfully receive from those they represent"[122] is not in the text of any of the statutes the court analyzed. The idea that an individual "may keep weapons from his vehicle because he has the right to exclude others from his property"[123] is, again, not in the text of any of the statutes the court analyzed.

In short, a difficult case like *Wisconsin Carry* shows us that *Kalal* is incomplete. There are certainly arguments in favor of a structured approach to statutory interpretation, and there are likewise arguments to prioritize textualist tools. But no approach that purports to establish a comprehensive methodology for statutory interpretation can ignore the role that legal values and a wide variety of legal-reasoning tools, tools that do not fit neatly into the "statutory meaning"/"legislative intent" dichotomy, play in the interpretive process.

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121. *Wis. Carry*, 892 N.W.2d at 263–64 (Bradley, J., dissenting).
122. *Id.* at 249.
123. *Id.* at 248.

CONCLUSION

Some cases will require consideration of legal principles or values, and many cases will necessitate that judges use legal-reasoning tools that do not fit neatly into the *Kalal* framework. This in turn raises the question that this conference asked us all to interrogate: in what ways should statutory interpretation in state courts differ from statutory interpretation in federal courts? My instinct is that the fact that state judges are elected ought to give them more leeway than federal judges to incorporate into the interpretive process the values that helped get them the job. After all, values are (at least implicitly) crucial to the debates that rage during judicial elections.

That said, interpretive methodology should allow for transparency as to when legal values are playing a role. If values are going to play a role—and, as I said, that is inevitable in some cases—the doctrine should give judges a place to put them. This is as important for helping voters know what judges are doing in such cases as for helping judges be more conscious of the role that legal values play in their decisions.

Kalal's methodology has focused judges' attention on the distinction between reader-focused tools of interpretation and drafter-focused tools, directing courts to prioritize the former. For those who view methodological stare decisis and this rank ordering as a preferable approach to statutory interpretation, this is clearly a step forward. But in cases where courts need to transcend that dichotomy, courts might want to supplement *Kalal* to give judges all of the tools they need so as to help them think more concretely about when to use those tools.