

COMMENT

“EYES-OPEN” TEXTUALISM: WISCONSIN’S LATEST INTERPRETIVE PARADIGM

BENJAMIN S. WILLSTEIN*

The Wisconsin Supreme Court adopted textualism in *State ex rel. Kalal v. Circuit Court of Dane County* and, in doing so, promised an objective, text-focused approach to statutory interpretation. Yet, under this framework, the court has remained deeply divided, frequently splitting 4–3 along ideological lines—even as justices claim fidelity to textualist principles. This Comment examines how the court’s reliance on malleable canons of construction, such as *expressio unius* and the surplusage canon, has enabled policy-driven outcomes under the guise of textualist analysis through a decontextualization process.

However, since the court’s ideological shift to a liberal majority in 2023, the justices have adopted an “eyes-open” approach to textualism, restraining the decontextualizing canons and prioritizing textual coherence over selective canon application. Through an analysis of key cases, including *James v. Heinrich* and *Sojenhomer LLC v. Village of Egg Harbor*, this Comment argues that the liberal majority’s refined textualism mitigates the risk of judicial activism by requiring clearer triggers and stoppers for contested canons. The new majority has gone so far as to hint that *Kalal* may be on its last legs, though still adhering to a predominantly text-centered methodology.

Ultimately, the Comment proposes legislative and judicial reforms to codify guardrails around interpretive canons in order to ensure that textualism in Wisconsin fulfills its promise of objectivity, rather than serving as a vehicle for ideological outcomes. With *Kalal* under threat, this Comment suggests frameworks for refining Wisconsin’s textualist approach. The recent 2025 election, which cemented the liberal majority, presents a critical juncture: Wisconsin’s courts can embrace a more disciplined textualist methodology or revert to the fractured, policy-laden interpretations of the past.

Introduction	1688
I. (Decon)Textualism: The Somewhat Objective Method.....	1691
A. Textualism in a Nutshell	1692
B. The Decontextualization Problem	1697
1. The Ordinary-Meaning Canon.....	1698

* J.D. Candidate, University of Wisconsin Law School, 2026. I would like to thank *Wisconsin Law Review* Note and Comment Editors Emmerson A. Mirus, Alexis Cashman, and Pete Weber, as well as Professor John Strange, for their valuable comments on this work. Additionally, I would like to thank the *Wisconsin Law Review* cite checkers who worked diligently on this piece. Finally, I owe a special thank you to Senior Managing Editor Madison H. Polack for all her dedicated work in bringing the final piece to print.

	2. <i>Expressio Unius Est Exclusio Alterius</i>	1700
	3. The Surplusage Canon: Textualism’s Favorite Child	1703
II.	Wisconsin’s Shifting Textualist Paradigm	1706
	A. Textualism in Wisconsin	1706
	B. <i>James v. Heinrich</i> : The Opening Canon Fire	1710
	C. <i>Becker v. Dane County</i> : The <i>James</i> Rematch	1714
	D. “Eyes-Open” Textualism in Practice	1716
III.	Looking Ahead: Opportunity for a New Paradigm	1720
	A. Cementing Guardrails to Malleable Canons Through Legislative Action	1721
	B. Cementing Guardrails Through Judicial Action	1723
	C. “Eyes-Open” Pluralism?	1725
	Conclusion	1727

INTRODUCTION

“Our return to a method of statutory interpretation based not on policy concerns, but on the text of the law itself, has been a breath of fresh air in Wisconsin courts.”¹ Justice Brian Hagedorn wrote these words praising Wisconsin’s textualist approach to statutory construction in a concurring opinion in the 2021 case *James v. Heinrich*.² In doing so, Justice Hagedorn claimed that all was well at the state’s high court.³ But Justice Hagedorn failed to mention that the court issued a record number of plurality opinions in that same 2021 term—suggesting that the court was more divided than ever.⁴ While textualism’s supporters hail the method as objective,⁵ the court’s 4–3 splits in politically charged cases in recent years indicate otherwise,⁶ prompting a closer look at whether textualism delivers the consistency it promises.

1. *James v. Heinrich*, 2021 WI 58, ¶ 62, 960 N.W.2d 350, 375 (Hagedorn, J., concurring).

2. 2021 WI 58, 960 N.W.2d 350.

3. *See id.* ¶¶ 59–62 (Hagedorn, J., concurring).

4. Jeffery A. Mandell & Daniel J. Schneider, *Counting to Four: The History and Future of Wisconsin’s Fractured Supreme Court*, 107 MARQ. L. REV. 1, 35 (2023).

5. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 15–16 (2012); *see also State ex rel. Davis v. Cir. Ct. for Dane Cnty.*, 2024 WI 14, ¶ 51, 4 N.W.3d 273, 283 (R.G. Bradley, J., concurring) (“Textualism is the *only* method of statutory interpretation that properly respects the legislature’s authority to make policy choices.” (emphasis added)). Like others before, this Comment often falls into the trap of eschewing Garner’s contributions to *Reading Law* and mostly refers to Scalia as the main contributor.

6. *See* Alan Ball, *Wisconsin Supreme Court Statistics, 2021–22*, SCOWSTATS (July 21, 2022) [hereinafter Ball, *2021–22 Statistics*], <https://scowstats.com/2022/07/21/wisconsin-supreme-court-statistics-2021-22/>; Alan Ball, *Wisconsin Supreme Court Statistics, 2022–23*, SCOWSTATS (July 24, 2023) [hereinafter Ball, *2022–23 Statistics*], <https://scowstats.com/2023/07/24/wisconsin-supreme-court-statistics-2022-23/>; Alan Ball, *Wisconsin Supreme Court Statistics, 2023–24*, SCOWSTATS (July 18, 2024).

Textualism is a theory of statutory interpretation that commands judges to “begin *and end*” statutory construction with the black-letter text of the statute.⁷ The method eschews determinations of legislative intent derived from extrinsic sources, particularly legislative history.⁸ The Supreme Court of Wisconsin (the “SCOWIS”) adopted a modified textualist approach for statutory review in the 2004 case *State ex rel. Kalal v. Circuit Court for Dane County*.⁹ However, the *Kalal* framework stopped short of absolute textualism by directing courts to look at the text first, then allowing the court to resort to extrinsic sources to resolve ambiguous text.¹⁰ While *Kalal* references some textualist tools that courts may use during the initial textual inquiry, the opinion provides little guidance on how and when to use those tools.¹¹ As a result, *Kalal*’s loose structure has caused problems for a court full of radically different political ideologies because the justices can resort to whatever textualist tools—often canons of construction—support their preferred outcome.¹² The unchecked appeal to textualist tools prompted Justice Rebecca Dallet to declare in a dissenting opinion in *James*: “In any event, when we employ any tool or canon, we must do so with our eyes open to its shortcomings rather than naïvely championing it as a perfect method for interpreting all statutory language.”¹³

In 2023—following the court’s two most divided terms in history—the court’s majority flipped liberal for the first time in fifteen years.¹⁴

[hereinafter Ball, *2023–24 Statistics*], <https://scowstats.com/2024/07/18/wisconsin-supreme-court-statistics-2023-24/>.

7. SCALIA & GARNER, *supra* note 5, at 16 (emphasis added) (cleaned up); see also Kevin Tobia, *We’re Not All Textualists Now*, 78 N.Y.U. ANN. SURV. AM. L. 243, 250, 252 (2023) [hereinafter Tobia, *We’re Not All Textualists Now*] (“[J]udges today start *and end* with the text, eschewing all other interpretive criteria . . . unless the text is ambiguous or otherwise unclear.”); Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 216 (2022) (“Increasingly, the Supreme Court has emphasized that the interpretive process begins by giving statutory language its ordinary meaning. For some, interpretation begins and ends with ordinary meaning.” (footnote omitted)).

8. Tobia, *We’re Not All Textualists Now*, *supra* note 7, at 250, 252.

9. 2004 WI 58, ¶¶ 45–53, 681 N.W.2d 110, 124–26.

10. See *id.* ¶¶ 44–51. Ironically, *Kalal*’s second step requires a judge to find the text ambiguous before resorting to legislative history. *Id.* ¶ 51. Thus, a hardline textualist who inherently believes that the text is always dispositive could theoretically never find the text ambiguous.

11. *Id.* ¶¶ 45–47; see also Anuj C. Desai, *Modified Textualism in Wisconsin: A Case Study*, 2022 WIS. L. REV. 1087, 1092–93, 1104 (“*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*.”).

12. See Desai, *supra* note 11, at 1090.

13. *James v. Heinrich*, 2021 WI 58, ¶ 79, 960 N.W.2d 350, 381 (Dallet, J., dissenting).

14. Adam Edelman & Shaquille Brewster, *The New Liberal Majority on the Wisconsin Supreme Court Is Off to a Tense Start*, NBC NEWS (Aug. 7, 2023, at 06:00

After the ideological shift, the fractured opinions slowed¹⁵ because the liberal justices have mostly voted as a bloc since the shift.¹⁶ While the court is ruling unanimously slightly less than before, the court is also splitting 4–3 at a lower rate, and the liberal bloc has ended the plurality spell.¹⁷ However, the liberal justices have not departed from *Kalal*’s textualist approach (yet).¹⁸ Instead, they have operated according to Dallet’s “eyes-open” approach to *Kalal*’s textualist framework. Under this new approach, the justices treat more malleable canons of construction with greater care. Thus, the new approach limits judicial activism and promotes sound interpretation.

“Eyes-open” textualism is a much-needed change. Textualism has always been vulnerable to judicial cherry-picking,¹⁹ arising from a lack of consensus on when certain canons “trigger” or “cancel.”²⁰ Accordingly, Justice Dallet has questioned the canons’ usefulness to the

CT), <https://www.nbcnews.com/politics/politics-news/new-liberal-majority-wisconsin-supreme-court-tense-start-rcna98052> [<https://perma.cc/BPW8-SCFA>].

15. Compare Mandell & Schneider, *supra* note 4, at 35 (“[T]he court fractured a record nine times out of fifty-two cases.”), with Ball, *2023–24 Statistics*, *supra* note 6 (showing that the liberal justices voted together in all cases in the 2023–24 term). Plurality opinions only hold precedential value for significantly similar fact patterns; thus, when a court constantly fractures, it inhibits the court’s law-developing function. Mandell & Schneider, *supra* note 4, at 3–4 (noting how plurality opinions undermine *stare decisis* and “risk[] creating confusion among parties, lawyers, judges, legislators, regulators, law enforcement, and members of the public”).

16. See Ball, *2023–24 Statistics*, *supra* note 6 (illustrating how SCOWIS’s 2023–24 term saw the liberal justices voting in the majority 100 percent of the time); Alan Ball, *Wisconsin Supreme Court Statistics, 2024–25*, SCOWSTATS (July 21, 2025) [hereinafter Ball, *2024–25 Statistics*], <https://scowstats.com/2025/07/21/wisconsin-supreme-court-statistics-2024-25/> (indicating that Justices Karofsky and Protasiewicz have each broken rank once).

17. Ball, *2024–25 Statistics*, *supra* note 16.

18. Justice Dallet recently hinted that the court’s new majority may be inclined to reconsider *Kalal*. See generally *Serv. Emps. Int’l Union Healthcare Wis. v. Wis. Emp. Rels. Comm’n*, 2025 WI 19, ¶ 48–66, 22 N.W.3d 876, 888–93 (Dallet, J., concurring) (critiquing *Kalal*’s rigid framework). Justice Dallet expressly stated that her concurring opinion—joined by a majority of the court—did not overrule *Kalal* because the parties had not asked them to in their briefs. *Id.* ¶ 51 n.4.

19. See Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 681 (2019) [hereinafter Nourse, *Textualism 3.0*] (arguing that textualism holds an inevitable “picking and choosing” problem where judges will focus on the piece of text that best supports their personal policy goals); see also Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 23, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism> [<https://perma.cc/4LYA-J2PV>] (commenting on the “remarkable elasticity” of Scalia and Garner’s work).

20. Tobia, Slocum & Nourse, *supra* note 7, at 228–29 (“When an interpretive canon is implicated, the interpreter must understand the facts that trigger the canon as well as the circumstances relevant to applying the canon or cancelling its presumption.”).

court.²¹ But while Justice Dallet and the other liberal justices rebuked overreliance on textualist canons, they still frequently rely on those canons.²² Nevertheless, since gaining the majority, the liberal justices have approached highly flexible canons, such as the surplusage canon,²³ with restraint.²⁴ Accordingly, this Comment argues that SCOWIS’s liberal justices are refining textualist principles to reduce the arbitrary use of canons as a vehicle for policy-driven decontextualization of statutory text and to place a new gloss on *Kalal*—one that will serve to plug some of the holes of statutory interpretation²⁵ that the textualist opinion leaves open.

First, this Comment outlines the background of textualism and how it fits into the backdrop of Wisconsin’s fractured high court. Next, this Comment explores the court’s employment of malleable canons before and after the court’s 2023 ideological shift and how the “eyes-open” textualist approach differs from the 2021 majority’s approach. Finally, this Comment recommends that the court or the legislature explicitly adopt the trigger/stopper-aware “eyes-open” approach that the liberal majority illustrated during the 2023–24 term to limit policy decisions in statutory interpretation cases. Judge Susan Crawford’s election to the court has affirmed the liberal majority for the coming years.²⁶ Thus, SCOWIS is uniquely positioned to embrace its “eyes-open” textualist approach that limits the arbitrary use of canons.

I. (DECON)TEXTUALISM: THE SOMEWHAT OBJECTIVE METHOD

Textualism appears straightforward on its face. It instructs judges to read the text and apply that text, and only that text, to the facts before

21. *James v. Heinrich*, 2021 WI 58, ¶¶ 82–83, 960 N.W.2d 350, 382 (Dallet, J., dissenting).

22. *See, e.g., Becker v. Dane County*, 2022 WI 63, ¶¶ 10–18, 977 N.W.2d 390, 396–98; *Sojenhomer LLC v. Village of Egg Harbor*, 2024 WI 25, ¶¶ 16–26, 7 N.W.3d 455, 460–63.

23. *See* SCALIA & GARNER, *supra* note 5, at 174 (“If possible, every word and every provision is to be given effect. . . . None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”).

24. *See James*, 2021 WI 58, ¶¶ 82–83; *infra* Sections II.C–D.

25. This Comment analyzes only statutory interpretation and not constitutional interpretation. SCOWIS takes a broader approach to constitutional interpretation than statutory interpretation. *See generally* Chad M. Oldfather, *Some Observations on Separation of Powers and the Wisconsin Constitution*, 105 MARQ. L. REV. 845 (2022) (describing the holistic approach SCOWIS takes to interpreting the Wisconsin Constitution).

26. *See* Arlette Saenz & Fredreka Schouten, *Liberals Win Majority of the Wisconsin Supreme Court*, CNN (Apr. 2, 2025, at 11:00 ET), <https://www.cnn.com/2025/04/01/politics/wisconsin-supreme-court-election> [https://perma.cc/M883-4BPU].

the court.²⁷ Easy enough? Not quite. Textualism relies completely on context.²⁸ Therefore, textualism does not end with the text's most obvious meaning upon first glance; rather, it asks what contextual clues within the text give insight into the statute's meaning.²⁹ Thus, a basic understanding of textualism's relationship to statutory context is crucial to understanding this Comment's argument. First, this Part provides a background on the rise of modern textualism. Next, it examines interpolation within textualism and the problems surrounding a canon-based approach. Finally, this Part dissects three influential canons of construction—the ordinary-meaning canon, *expressio unius*, and the surplusage canon—often implicated in SCOWIS opinions to illustrate how the canons cause deep contextual debates over difficult statutory interpretation questions.

A. Textualism in a Nutshell

Textualism owes its reprise to Justice Antonin Scalia.³⁰ Justice Scalia argued that extrinsic interpretation tools, such as legislative drafting documents, allow judges to incorporate their own policy preferences when interpreting statutes.³¹ Accordingly, Justice Scalia rooted his theory in the text, the whole text, and nothing but the text.³² Textualism relies heavily on canons of construction, which are linguistic, contextual, and judicially created rules to discern a text's meaning.³³ Justice Scalia backed his method on the notion that legislative text is neither liberal nor conservative.³⁴ Thus, proponents argue that textualism inherently yields an objective analysis.³⁵

Furthermore, textualism takes a reader's view over a drafter's view. It asks what the text says, not what the writer meant.³⁶ Accordingly, Justice Scalia asserted that the textualist approach teaches drafters to

27. SCALIA & GARNER, *supra* note 5, at 16.

28. Nourse, *Textualism 3.0*, *supra* note 19, at 681–83.

29. *Id.*

30. John G. Roberts, Jr. et al., *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 1, 9 (2016) (“Does anyone now decline to focus first, in reading a statute, on its text in context? . . . If the answer is no (and the answer is no), Justice Scalia deserves much of the credit.”).

31. SCALIA & GARNER, *supra* note 5, at 13–16.

32. *Id.* at 16. *But see* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 72 (2012) (noting that textualists still resort to legislative history).

33. SCALIA & GARNER, *supra* note 5, at 13–16.

34. *Id.* at 16.

35. *Id.*

36. *Id.* at 29–31.

write statutes according to textualist principles.³⁷ Justice Scalia theorized that drafters and judges would bridge their understanding over time.³⁸ To aid this process, Justice Scalia, along with linguist Bryan Garner, published *Reading Law: The Interpretation of Legal Texts*.³⁹

Before Justice Scalia’s rise, the legal community had largely embraced Karl Llewellyn’s provocative “thrust and parry” theory, which largely discounted a canon-centered approach to interpretation.⁴⁰ Llewellyn’s revered article posited that every canon has an equal counter-canon that neutralizes any canon’s usefulness to interpretive puzzles.⁴¹ But Justice Scalia claimed that Llewellyn fundamentally misunderstood textualist canons; *Reading Law* discounts Llewellyn’s counter-canons as infrequent exceptions or not interpretive canons at all.⁴² Additionally, the book lays out fifty-seven “approved” canons of construction and

37. *Id.* at 51. Contrary to Justice Scalia’s assertions, Abbe Gluck and Lisa Schultz Bressman conducted a survey of federal drafters that revealed that under half of federal drafters always draft in accord with at least five major canons due to various barriers within Congress. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 932–39 (2013). The drafters argued that political pressure from legislators overpowers the court’s interpretive principles. *See id.* at 934.

38. *See* SCALIA & GARNER, *supra* note 5, at 51. Textualists still conduct textual analyses of statutes written in the purposivist era when Congress often relied on courts to fill in gaps in statutes. *See generally Alexander v. Sandoval*, 532 U.S. 275 (2001) (conducting a textual analysis to determine whether Title VI, section 602 implied a private right of action). The problem with a pure text-based approach in these circumstances is that courts will eschew conclusive evidence found in legislative history pointing to broader coverage of a statute. *See generally Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023) (using textualist principles to rule that private citizens may not enforce the Voting Rights Act despite decades of precedent and conclusive legislative history implying a private right of action). *See also* Ellen D. Katz, *Curbing Private Enforcement of the Voting Rights Act: Thoughts on Recent Developments*, 123 MICH. L. REV. ONLINE 23, 23 (2024), https://repository.law.umich.edu/mlr_online/vol123/iss1/2/ [https://perma.cc/3QA2-QAQQ] (arguing that the textualist approach in *Arkansas State Conference NAACP* is deeply flawed). In turn, textualist judges often overturn well-settled law. *See, e.g., Ark. State Conf. NAACP*, 86 F.4th at 1218–19 (Smith, C.J., dissenting) (listing eleven Supreme Court cases that previously assumed a prior right of action under the Voting Rights Act).

39. *See generally* SCALIA & GARNER, *supra* note 5 (listing Justice Scalia’s new and improved list of canons).

40. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

41. *Id.*

42. SCALIA & GARNER, *supra* note 5, at 59–60 (addressing Llewellyn’s canons).

principles to refine Llewellyn's list and to give judges all the tools needed for a good-faith textual analysis.⁴³

Scalia's list includes contextual canons, such as the surplusage canon;⁴⁴ syntactic canons, such as the grammar canon;⁴⁵ and semantic canons, such as the negative-implication canon—*expressio unius est exclusio alterius*.⁴⁶ Many canons are straightforward because they are patterns rooted in everyday language.⁴⁷ Accordingly, these canons harmlessly assume that legislatures write with proper attention to grammar and natural language. However, other canons are based on linguistic principles that do not necessarily ring true for the general public, which causes confusing inconsistencies between common understanding and textualist interpretation.⁴⁸ Finally, some canons are presumptions based on legal principles and are thus judicially constructed.⁴⁹

Common to many new theories, Justice Scalia's approach invited heavy criticism. Perhaps the most bitter came from Judge Richard Posner—the most-cited jurist to date.⁵⁰ In a *The New Republic* piece not-so-subtly titled *The Incoherence of Antonin Scalia*, Judge Posner lambasts *Reading Law* as a medium for judicial policymaking cloaked in a smoke-and-mirrors “objective” approach.⁵¹ Judge Posner claimed that Justice Scalia's approved canons were vague enough to “provide [Justice Scalia and Garner] with all the room needed to generate the outcome that favors Justice Scalia's strongly felt views on such matters as abortion, homosexuality, illegal immigration, states' rights, the death penalty, and

43. See generally *id.* (offering descriptions of fifty-seven principles and canons, categorized as semantic, syntactic, contextual, expected-meaning, government-structuring, private-right, and stabilizing canons).

44. *Id.* at 174.

45. *Id.* at 140 (“Words are to be given the meaning that proper grammar and usage would assign them.”).

46. *Id.* at 107 (“The expression of one thing implies the exclusion of others”)

47. See Frank H. Easterbrook, *The Absence of Method in Statutory Interpretation*, 84 U. CHI. L. REV. 81, 84 (2017) [hereinafter Easterbrook, *The Absence of Method*]. Judge Easterbrook goes so far as to claim language “depend[s] on canons.” *Id.*

48. See Tobia, Slocum & Nourse, *supra* note 7, at 224 & n.57, 225, 261 (finding that the general public does not support the textualist canons of ordinary-meaning and *expressio unius*).

49. See generally SCALIA & GARNER, *supra* note 5, at 241–336 (containing Justice Scalia's list of judicially constructed canons).

50. *The Judicial Philosophy of Richard Posner*, ECONOMIST (Sep. 9, 2017), <https://www.economist.com/united-states/2017/09/09/the-judicial-philosophy-of-richard-posner>.

51. Posner, *supra* note 19.

guns.”⁵² Judge Posner proffered that textualism ignores the limitations of foresight where “a judge refuses to apply [a legislature’s] handiwork to an unforeseen situation that is encompassed by the statute’s aim but is not a good fit with its text.”⁵³ Furthermore, Judge Posner attacked Justice Scalia’s idea that textualism will teach legislatures to write better laws by claiming that Justice Scalia demands that the drafters “think through myriad hypothetical scenarios . . . rather than rely on courts to be sensible.”⁵⁴ According to Judge Posner, “textualism hobbles legislation”—tilting the theory toward “small government.”⁵⁵ Thus, the theory naturally leans conservative.⁵⁶

However, textualism has endured decades of critiques such as Judge Posner’s.⁵⁷ Justice Scalia pushed textualism into U.S. Supreme Court opinions for twenty-nine years,⁵⁸ and, as the de facto leader of conservative jurisprudence, his disciples willingly followed.⁵⁹ Conservative jurists were not the only subscribers, though. Textualism is mainstream in the lower federal courts, academia, and state courts.⁶⁰ The academic landscape greeted textualism with open arms.⁶¹ Even first-year law students tend to grasp textualist basics quickly.⁶² Moreover, most statutory interpretation scholars agree that statutory analysis should start with the text.⁶³ In a recent survey of 600 law professors conducted by Eric Martínez and Kevin Tobia, over 60 percent stated that they accept

52. *Id.*; see also Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 912 (2016) (“[D]emonstration that the canons readily can be used to cancel each other out has been taken to demonstrate the canons’ illegitimacy and has served as a catalyst for discussions about the ability of interpretive tools to constrain judges.”).

53. Posner, *supra* note 19.

54. *Id.*

55. *Id.*

56. *Id.*

57. See, e.g., *id.*; Krishnakumar, *supra* note 52, at 912; Nourse, *Textualism 3.0*, *supra* note 19, at 681–82.

58. See *How Antonin Scalia Changed America*, POLITICO MAG. (Feb. 14, 2016), <https://www.politico.com/magazine/story/2016/02/antonin-scalia-how-he-changed-america-213631/>.

59. See Roberts, Jr. et al., *supra* note 30, at 9.

60. See Tobia, *We’re Not All Textualists Now*, *supra* note 7, at 246 n.8, for a non-exhaustive list of lower federal court opinions relying on textualism. However, while lower federal courts commonly follow the notion that one should begin and end with *unambiguous* text, judges still rely on a pluralistic rather than strict textualist approach for ambiguous provisions. See Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1310, 1324 (2018).

61. See Tobia, *We’re Not All Textualists Now*, *supra* note 7, at 247 (“Textualism has also grown within the academy. The theory increasingly holds a prominent place in legal education.”).

62. See *id.*

63. Roberts, Jr. et al., *supra* note 30, at 9.

textualism as a legitimate interpretive method.⁶⁴ Many state courts—including Wisconsin’s—also embraced textualism.⁶⁵ After Justice Scalia died in 2015, textualism had gained so much traction that liberal Supreme Court Justice Elena Kagan famously stated, “[w]e’re all textualists now,” in remembrance of Justice Scalia.⁶⁶ But she later recanted the statement in a dissenting opinion.⁶⁷

Statutory interpretation is far from solved, however. Justice Scalia changed the game with his “new textualism,”⁶⁸ but he failed to monopolize it. Rather than falling in lockstep with Justice Scalia, most judges, even those who claim to be hardline textualists,⁶⁹ employ some form of pluralist approach that draws from various extrinsic sources, but most judges still “give great weight to statutory text.”⁷⁰ Some courts have gone so far as to embrace textualism but reject some of Justice Scalia’s principles.⁷¹ Moreover, Justice Scalia’s belief that “common sense” would keep judges from using malleable textualist canons to reach policy-driven dispositions⁷²—a belief that was naïve at best—has left the question of which canons predominate over others wide open. Thus, with little instruction on the canons’ restraints, there is little stopping textualist judges from picking a particular canon that supports their policy preference in one case but ignoring the same canon in a similar situation. Today, textualists do not follow a uniform standard.

64. Eric Martínez & Kevin Tobia, *What Do Law Professors Believe About Law and the Legal Academy?*, 112 GEO. L.J. 111, 138, 157 (2023).

65. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758, 1799 (2010) [Gluck, *The States as Laboratories of Statutory Interpretation*].

66. HARVARD LAW SCHOOL, *The 2015 Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, at 08:29 (YouTube, Nov. 25, 2015), <https://youtu.be/dpEtszFT0Tg> (on file with the Wisconsin Law Review).

67. *West Virginia v. EPA*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting) (claiming that some of her fellow justices only invoke textualism when it suits them).

68. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623–24 (1990).

69. See Posner, *supra* note 19 (commenting that Judge Easterbrook employs textualism differently than Justice Scalia). Judge Easterbrook acknowledged this, stating that he was “skeptical of canons.” Easterbrook, *The Absence of Method*, *supra* note 47, at 83, 91.

70. Gluck, *The States as Laboratories of Statutory Interpretation*, *supra* note 65, at 1765 (quoting Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 (2006)).

71. *Id.* at 1805.

72. See SCALIA & GARNER, *supra* note 5, at 17, 107 (“[I]n a textualist culture, the distortion of the willful judge is much more transparent, and the dutiful judge is never *invited* to pursue the purposes and consequences that he prefers.”). Judge Posner scoffed at this. See Posner, *supra* note 19 (“Justice Scalia has called himself in print a ‘faint-hearted originalist.’ It seems he means the adjective at least as sincerely as he means the noun.”).

Rather than ending the statutory interpretation debate, Justice Scalia opened a new Pandora’s box.

B. The Decontextualization Problem

Textualism is far from uniform. Different judges often arrive at conflicting results using textualist methods—especially in cases involving high-stakes political issues.⁷³ Even the hardline conservative textualists on the U.S. Supreme Court split on decisions.⁷⁴ Such inconsistent dispositions cast major doubt on claims that textualism is objective. While scholars differ on what causes these discrepancies,⁷⁵ a glaring answer is in the canons’ vulnerability to decontextualization. The canons are not as rigid as they appear.⁷⁶ Victoria Nourse expands on Judge Posner’s initial critique by examining Justice Scalia’s disciples—the current conservative Supreme Court Justices whom she fashionably dubs “new, new, new” textualists.⁷⁷ Nourse argues that these “new, new, new” textualists manipulate text to reach policy results through a three-part process: (1) “intense decontextualization”; (2) “open reference to ‘original meaning’”; and (3) intense emphasis on verbs, infinitives, and grammatical construction.⁷⁸ Decontextualization—removing a word or phrase from the text, applying a new meaning, and reinserting it into the statute⁷⁹—often lies at the heart of policy-driven textualist decisions.⁸⁰

But how are the canons facilitating decontextualization? This Comment proceeds to explore three canons that most serve the decontextualization process in Wisconsin in order to understand how they interact with the text. While certain canons are less susceptible to decontextualization, others—particularly the ordinary-meaning canon,

73. See generally *James v. Heinrich*, 2021 WI 58, 960 N.W. 2d 350 (analyzing statutory text to determine whether local health officers had the power to close schools during the COVID-19 pandemic); *Becker v. Dane County*, 2022 WI 63, 977 N.W.2d 390 (analyzing statutory text to determine whether local health officers had the power to issue public health orders during the COVID-19 pandemic).

74. See Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266–67 (2020).

75. For instance, Tara Leigh Grove differentiates “formalistic” textualists from “flexible” textualists. *Id.* at 267. While interpolation of textualists exists to some extent, Grove largely fails to address how different textualist forms foster different results when applying the same canons. See generally *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (addressing whether discrimination based on sexual orientation is discrimination based on sex). In *Bostock*, both Justice Gorsuch, writing for the majority, and Justice Alito, writing for the dissent, relied on canons of construction in their opinions, yet came to the opposite disposition. See *id.* at 1754–56.

76. See Posner, *supra* note 19.

77. See Nourse, *Textualism 3.0*, *supra* note 19, at 669.

78. *Id.* at 669–70, 685.

79. *Id.* at 669, 682.

80. See *id.* at 684–85.

negative-implication canon (*expressio unius*), and the surplusage canon—are flexible enough to allow judges near free rein with their interpretation. While Justice Scalia illustrated loose guardrails around these canons, he fell far short of providing comprehensive restraints,⁸¹ and the flexible nature of these canons allows two judges to come to different results by applying the same canons to different parts of the statutory text.⁸²

Decontextualization poses a significant threat to democracy by enabling courts to strip statutes of their intended meaning. In Wisconsin, decontextualization has interfered with the legislature’s ability to address emergencies⁸³ and with the executive’s ability to remove an officer who overstates their term.⁸⁴ While judges must often make difficult interpretive decisions, decontextualization grants the judiciary unchecked authority over legislation, which can embolden politically motivated litigants to exploit ideologically aligned judges,⁸⁵ promoting outcomes that favor narrow interests over the bipartisan compromises essential to legislation.⁸⁶ Ultimately, decontextualization risks violating the separation of powers, as it allows courts to encroach on the lawmaking role and to hamper executive power at will. The following subsections illustrate how certain canons can be manipulated to achieve policy outcomes.

1. The Ordinary-Meaning Canon

Textualism aims to decipher a statute’s plain or ordinary meaning.⁸⁷ However, plain meaning seldom means a layman’s interpretation of the statute. Instead, plain meaning refers to the statute’s meaning within its legal context—or the meaning intrinsic sources give to the text.⁸⁸ Thus, a court cannot declare a meaning “plain” without a full textual analysis. The term “plain meaning” invites confusion: Judges, litigants, and scholars alike often interpret plain meaning to only encapsulate a

81. See SCALIA & GARNER, *supra* note 5, at 107, 176 (instructing judges to use *expressio unius* and the surplusage canon only when context suggests their use). But see Easterbrook, *The Absence of Method*, *supra* note 47, at 83 (“Indeed, a reference to ‘the context’ does not even pin down *what* context.”).

82. See Nourse, *Textualism 3.0*, *supra* note 19, at 672; Easterbrook, *The Absence of Method*, *supra* note 47, at 85–88.

83. See, e.g., *James v. Heinrich*, 2021 WI 58, ¶¶ 31–32, 960 N.W.2d 350, 365–67 (limiting a local health official’s ability to close schools amid a pandemic).

84. See *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶¶ 34–35, 976 N.W.2d 821, 831.

85. See *infra* note 221 and accompanying text.

86. See generally *James*, 2021 WI 58 (limiting the powers of local health officials to a narrow set of discretionary acts).

87. SCALIA & GARNER, *supra* note 5, at 53, 69.

88. *Id.* at 53, 69–73.

straightforward reading of the provision at issue.⁸⁹ But Justice Scalia never distinguished plain and ordinary meaning.⁹⁰ To him, context was the name of the game, and therefore, plain meaning must always take intrinsic context into account.⁹¹ Thus, to textualists, a statute’s plain meaning *is* its ordinary meaning.⁹²

Distinguishing plain meaning from ordinary meaning can foster different interpretations,⁹³ allowing judges to select whichever meaning supports their policy preferences. SCOWIS recently confirmed its commitment to the context-based approach in *Service Employees International Union Healthcare Wisconsin v. Wisconsin Employment Relations Committee (SEIU)*.⁹⁴ Writing for a unanimous court, Justice Hagedorn stated that “all intrinsic sources—text, context, and structure—are essential components of a plain meaning analysis.”⁹⁵ While Wisconsin’s context-based approach closes holes in theory, there is prior evidence of justices ignoring context in favor of literal readings,⁹⁶ and there are still plenty of ways to decontextualize text using canons of construction to facilitate policy outcomes. Because context is usually deciphered through the canons, manipulating malleable canons becomes an attractive method of achieving desired results.

The most basic canon aimed at finding a statute’s plain meaning is the ordinary-meaning canon.⁹⁷ The ordinary-meaning canon states that “[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.”⁹⁸ Accordingly, textualist judges often resort to dictionaries.⁹⁹ However, a word’s definition will vary depending on the dictionary—inviting

89. See, e.g., Marco Basile, *Ordinary Meaning and Plain Meaning*, 110 VA. L. REV. 135, 136–37 (2024) (categorizing plain meaning as a straightforward reading and ordinary meaning as a contextual reading).

90. See SCALIA & GARNER, *supra* note 5, at 53, 69–73.

91. See *id.*

92. See *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 49, 681 N.W.2d 110, 125 (“[A] plain-meaning interpretation cannot contravene a textually or contextually manifest statutory purpose.”). More recently, SCOWIS reaffirmed a context-based approach to plain meaning. See *Serv. Emps. Int’l Union Healthcare Wis. v. Wis. Emp. Rels. Comm’n*, 2025 WI 29, ¶¶ 10–12, 22 N.W.3d 876, 879–80 (noting that statutory history is relevant to the statute’s plain meaning and is rightfully considered during *Kalal*’s first step).

93. See *infra* notes 260–270 and accompanying text.

94. 2025 WI 29, ¶¶ 11–12, 22 N.W.3d 876, 880.

95. *Id.* ¶ 12.

96. See *infra* notes 238–240 and accompanying text.

97. See SCALIA & GARNER, *supra* note 5, at 69.

98. *Id.*

99. See *id.*

litigators¹⁰⁰ and judges to pick and choose the dictionary that best supports their side.¹⁰¹ Moreover, the fixed-meaning canon—which states that words take on their ordinary meaning at the time the statute was enacted—allows judges to choose between ordinary societal or legal meanings without a clear indication of which meaning the term should bear.¹⁰²

These battles over which dictionary the court should apply often lead courts to toss out dictionary definitions altogether and decide cases on other grounds.¹⁰³ Furthermore, because plain meaning depends on the surrounding context of the statutes, meaningless inquiries into specific definitions of straightforward terms can overvalue or undervalue the term’s purpose in the statute in large legal disputes,¹⁰⁴ such as questions concerning the powers of executive officials.¹⁰⁵ Thus, technical definitions and canons aimed at discovering context become inherent to textual interpretation—but some of these contextual canons are just as easily manipulated.

2. *Expressio Unius Est Exclusio Alterius*

Expressio unius est exclusio alterius, or the negative-implication canon, is a broad contextual canon that is poorly defined.¹⁰⁶ Its reach is significant, so unsurprisingly, it comes up in politically charged cases.¹⁰⁷ The Latin phrase translates to “[t]he expression of one thing implies the

100. See *State Farm Fire & Cas. Co. v. Amazon.com, Inc.*, 390 F. Supp. 3d 964, 969–70 (W.D. Wis. 2019) (“Both sides submit competing dictionary definitions of ‘seller’ and ‘distributor.’ But the definitions are inconsistent, and it’s not clear which, if any, would apply in the context of strict product liability.” (footnote omitted)).

101. See *Sojenhomer LLC v. Village of Egg Harbor*, 2024 WI 25, ¶¶ 44–46, 7 N.W.3d 455, 468–69 (Ziegler, C.J., dissenting); Posner, *supra* note 19 (“A dictionary-centered textualism is hopeless.”).

102. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1769 (2020) (Alito, J., dissenting) (applying a society’s perception of homosexuality in 1964 to Justice Alito’s definition of the word “sex”). The fixed-meaning canon adds an originalist element to Justice Scalia’s textualism. See SCALIA & GARNER, *supra* note 5, at 78. Originalism and textualism are often conflated, but the two lie on different axes. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998) (citing Eskridge, Jr., *supra* note 68). But originalism is not as popular as textualism; according to Tobia and Martínez, while over 60 percent of professors endorse textualism, only 17 percent endorsed originalism. Martínez & Tobia, *supra* note 64, at 157.

103. *State Farm*, 390 F. Supp. 3d at 969–70 (“So neither the statutes nor dictionaries provide decisive, or even helpful, definitions.”).

104. See *infra* notes 259–265 and accompanying text.

105. See, e.g., *State ex rel. Kaul v. Prehn*, 2022 WI 50, ¶¶ 24–25, 976 N.W.2d 821, 827–28 (overvaluing the term “vacancy”).

106. Tobia, Slocum & Nourse, *supra* note 7, at 241–42.

107. See, e.g., *James v. Heinrich*, 2021 WI 58, ¶ 18, 960 N.W.2d 350, 359–61; *Prehn*, 2022 WI 50, ¶ 25.

exclusion of others.”¹⁰⁸ To illustrate the canon’s function, Justice Scalia used a “[n]o shoes, no shirt, no service” sign at a beachside restaurant.¹⁰⁹ According to Justice Scalia, a patron without socks should not fret over entry because socks are not listed on the sign.¹¹⁰ But Justice Scalia equivocated by stating that the patron should be wary of showing up without pants because, within the context of a restaurant, whether at the beach or not, the patron should assume pants are required in public.¹¹¹ This illustration is hardly comprehensive, and Justice Scalia fails to address how the canon functions in complicated statutory schemes. Thus, the breadth of *expressio unius* makes it a powerful tool for decontextualizing statutory language.

Justice Scalia laid out a few guardrails for *expressio unius*. He stated that “[t]he more specific the enumeration, the greater the force of the canon.”¹¹² Accordingly, the canon is best applied to lists or other finite enumerations. Otherwise, Justice Scalia argued that this canon should be used “with great caution,” but again expressed faith that “[c]ommon sense” would guide judges’ use of the canon.¹¹³ In response, several courts and scholars have attempted to restrict the canon. For example, the Sutherland treatise on statutory interpretation proffers three elements that must be met before applying the canon.¹¹⁴ The U.S. Supreme Court has established other restraints, such as relying on the canon only when listed items are associated in a group or series,¹¹⁵ but the Court has softened these restraints in recent years.¹¹⁶ California views the canon with particular suspicion and considers a number of factors that may indicate the legislature’s intent prevails over the letter of the statute, including:

108. SCALIA & GARNER, *supra* note 5, at 107.

109. *Id.* at 108.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 107. The validity of *expressio unius* is disputed. The survey of federal legislative drafters found that fewer than 40 percent of drafters always follow the principle. Gluck & Bressman, *supra* note 37, at 932. Tobia, Slocum, and Nourse found that the public tends to reject the canon, while a small majority of the legal community accepts it. Tobia, Slocum & Nourse, *supra* note 7, at 261.

114. NORMAN J. SINGER & SHAMBIE SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2014) (“[W]here a statute designates a form of conduct, the manner of its performance and operation, and the persons and things to which it refers, courts should infer that all omissions were intentional exclusions.” (footnotes omitted)). Further, the Sutherland treatise sets out a comprehensive list of possible contextual limitations of the canon. *Id.* § 47:25.

115. *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

116. *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, 117 (2018).

where no manifest reason exists why other . . . things than those enumerated should not be included and thus exclusion would result in injustice; to a statute the language of which may fairly comprehend many different objects, some of which are mentioned merely by way of example, without excluding others of a similar nature; to a matter which is only incidentally dealt with in a statute; [and] where its application would run counter to a well-established principal of law.¹¹⁷

SCOWIS used to eschew the canon unless there was factual evidence that the legislature intended to use the rule.¹¹⁸ In post-*Kala* Wisconsin, however, *expressio unius* is often used with anything but great caution. Between 2020 and 2023, Justices Annette Ziegler and Rebecca Grassl (R.G.) Bradley¹¹⁹ refused to cancel the canon despite conflicts with text-based canons.¹²⁰ And, the canon is so flexible that opposing judges can apply it and arrive at opposite results.¹²¹

Kevin Tobia, Brian Slocum, and Victoria Nourse proffer that a poorly defined trigger makes *expressio unius* malleable.¹²² Unlike other canons that possess an explicit “trigger” and “stopper,”¹²³ or the requisite contextual signs indicating when to apply an individual canon, the trigger for *expressio unius* is “the explicit expression of one thing [plus] an argument that some implicit term is also included.”¹²⁴ Additionally—despite the many suggested limitations—the canon has no uniform stopper other than Justice Scalia’s “great caution” warning.¹²⁵ Because the canon has no clear stopper, judges can subjectively decide when statutory context overrides *expressio unius*—creating further room for unchecked judicial discretion. Thus, with minimal restraint, *expressio unius* perpetuates the decontextualization problem by allowing judges to determine the breadth of a legislature’s statutory silence regardless of overriding context. In Part II, this Comment compares SCOWIS’s use of *expressio unius* before and after the 2023 ideological shift and what an “eyes-open” approach to the canon entails.

117. *Est. of Banerjee v. Bank of Am.*, 580 P.2d 657, 664 & n.10 (Cal. 1978) (citations omitted) (cleaned up).

118. *State v. Engler*, 259 N.W.2d 97, 100 (Wis. 1977).

119. To avoid confusion, this Comment refers to Justice Rebecca Grassl Bradley as R.G. Bradley and Justice Ann Walsh Bradley as A.W. Bradley.

120. See *infra* Sections II.A–B.

121. SINGER & SINGER, *supra* note 114, § 47:25.

122. See Tobia, Slocum & Nourse, *supra* note 7, at 260.

123. This Comment coins the term “stopper” to describe contextual evidence that indicates a canon is inapplicable to the relevant text or overridden by another canon.

124. *Id.*

125. See SCALIA & GARNER, *supra* note 5, at 107.

3. The Surplusage Canon: Textualism’s Favorite Child

“It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”¹²⁶ By delivering these famous words in *Marbury v. Madison*,¹²⁷ Chief Justice John Marshall animated one of the oldest, most recognized, and most criticized canons. The surplusage canon follows the idea that, “[i]f possible, every word and every provision is to be given effect None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”¹²⁸ To Justice Scalia, the surplusage canon is “the cardinal rule of statutory interpretation,” mostly because the canon underpins at least nine other canons, including *expressio unius*.¹²⁹ However, Justice Scalia’s love of the canon may have blinded him to its dangers.

The surplusage canon is most often applied to individual words or phrases,¹³⁰ but it can also apply broadly to statutory or constitutional schemes, such as when Justice Marshall famously invoked the canon to determine that the judiciary holds the power to review congressional acts.¹³¹ However, when applied broadly, the canon becomes fluid and dangerous enough to completely neutralize statutes.¹³² Similar to *expressio unius*, there is no clear stopper for the surplusage canon, which makes it vulnerable to judicial abuse.¹³³ Justice Scalia recognized the canon’s malleability to an extent, stating that the canon “cannot always be dispositive because . . . the underlying proposition is not *invariably* true,” and that judges must approach the canon with “judgment and discretion, and with careful regard to context.”¹³⁴ Naturally, the surplusage canon’s reliance on judicial discretion has drawn mountains of criticism.¹³⁵

126. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

127. 5 U.S. (1 Cranch) 137 (1803).

128. SCALIA & GARNER, *supra* note 5, at 174.

129. Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 GEO. MASON L. REV. 453, 456, 481 (2018) (quoting *Kungys v. United States*, 485 U.S. 759, 778 (1988)).

130. See SCALIA & GARNER, *supra* note 5, at 174–75 (citing *Abright v. Shapiro*, 458 N.Y.S.2d 913 (App. Div. 1983)); *Cath. Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm’n*, 2024 WI 13, ¶¶ 41–44, 3 N.W.3d 666, 678 (applying the surplusage canon to give the terms “operate” and “purposes” independent meanings), *rev’d on other grounds*, 145 S. Ct. 1583 (2025).

131. See *Marbury*, 5 U.S. (1 Cranch) at 175–76.

132. See *infra* Section III.B.

133. Cf. SCALIA & GARNER, *supra* note 5, at 176 (advising judges to apply the canon “with careful regard”).

134. *Id.* at 176.

135. See generally Gluck & Bressman, *supra* note 37 (highlighting how the Supreme Court’s majority utilizes the rule against superfluities when deciding a case,

The surplusage canon's critics raise two main arguments. First, they argue that empirical research shows that drafters often pad statutes with redundancies for political and gap-filling purposes.¹³⁶ Second, they argue that the canon is too subjective and malleable.¹³⁷ The first criticism stems from empirical research on legislative drafters' and legislators' consideration of the canons. According to Abbe Gluck and Lisa Schultz Bressman's study, congressional drafters are often pressured by their congressmen to add redundancies to the statute to please certain stakeholders or constituents.¹³⁸ Even though the drafters are aware of the canon, they choose to satisfy the legislators' requests.¹³⁹ Moreover, in a survey of Minnesota's legislature, three-quarters of legislators stated they intentionally add redundancies to fill gaps and make the statutory purpose unequivocally clear.¹⁴⁰ This double-coverage approach is often called the "belt-and-suspenders consideration."¹⁴¹ Ironically, because the belt-and-suspenders approach is the antithesis of the surplusage canon, a legislature's attempt to fill statutory gaps ends up being the statute's downfall at the hands of a textualist judge.¹⁴² Thus, scholars have previously argued for a belt-and-suspenders canon to be weighed against the surplusage canon.¹⁴³

The surplusage canon is also criticized for its malleability.¹⁴⁴ Like *expressio unius*, the canon possesses no clear trigger or stopper.¹⁴⁵ Additionally, from the moment the canon is considered to the moment it is applied, there are at least two stages where a judge can insert their subjective preferences into the analysis. As applied, the canon triggers when a judge identifies a redundancy in the statute, whether it be a

while the dissent argues that redundant language is intentional); Cross, *supra* note 129 (criticizing courts for failing to recognize congressional intent behind redundant statutory language and thus preventing courts from carrying out their role as agents of Congress); Ethan J. Leib & James J. Brudney, *The Belt-and-Suspenders Canon*, 105 IOWA L. REV. 735 (2020) (discussing drafters' dislike of the rule against surplusage and how repetition is favored as a drafting technique for practical and political reasons); Paul Thissen, *When Rules Get in the Way of Reason: One Judge's View of Legislative Interpretation*, BENCH & BAR MINN., Nov. 2019, at 24 (highlighting how courts utilize the surplusage canon to create multiple meanings, despite legislators intentionally drafting statutes with redundant terms to increase clarity).

136. Gluck & Bressman, *supra* note 37, at 934.

137. See Leib & Brudney, *supra* note 135, at 766.

138. Gluck & Bressman, *supra* note 37, at 934–35.

139. *Id.*

140. Thissen, *supra* note 135, at 28–29.

141. Leib & Brudney, *supra* note 135, at 736.

142. See Cross, *supra* note 129, at 457.

143. See generally Leib & Brudney, *supra* note 135 (arguing that the belt-and-suspenders canon helps clarify why a statute contains redundant language).

144. See sources cited *supra* note 135.

145. Cf. SCALIA & GARNER, *supra* note 5, at 176 (explaining that judges should apply the canon with "with judgment and discretion, and with careful regard to context").

synonymous word, phrase, or provision. Operating under the assumption that the drafters wrote the statute with the surplusage canon in mind—an assumption proven false—a judge must first decide whether giving the synonymous language independent effect is possible.¹⁴⁶ In cases where the context suggests that the canon should be rejected due to an impossibility that each provision or term holds an independent meaning, a judge can ignore the canon’s “when possible” proviso, apply the canon over the contextual evidence, and thus foster a desired policy outcome.¹⁴⁷ Moreover, the lack of a clear stopper adds a second discretionary question: What surrounding context suggests that the canon should cancel? As explored next, misconstruing the surplusage canon as an objective tool, rather than a subjective tool, allows judges to reach policy-driven dispositions under the guise of objective legal analysis.

Justice Scalia proffered four counterarguments to his critics. He argued that (1) “the surplusage canon is well known”; (2) the accepted method for covering statutory gaps is general meaning and not belt-and-suspender redundancies; (3) if legislators are not willing to put effort into drafting effective statutes, “they ought to hire ‘eagle-eyed’ editors who are”; and (4) when legislators do mistakenly create redundancies, they are “so easily detectable” that the surplusage canon can be ignored.¹⁴⁸ However, Justice Scalia failed to back these counterarguments with any research, and they largely fail in practice.¹⁴⁹ For instance, Gluck and Bressman’s study illustrated that federal drafters are aware that they create statutory redundancies despite clear awareness of the surplusage canon.¹⁵⁰ Thus, when textualist judges apply the surplusage canon, they can decontextualize the text by presuming the legislature writes statutes using principles the drafters clearly reject. Predictably, the misapplication of broad canons like this one can lead to frustrating results. Neither Justice Scalia nor *Kalal* adequately solved the decontextualization problem in Wisconsin, but recent case law shows that the current court is eagerly seeking a more robust approach to limit the canon’s weight when narrower textual canons are also indicative of meaning.

146. *Id.*

147. *See infra* Section III.B.

148. SCALIA & GARNER, *supra* note 5, at 178.

149. *See* Charlie D. Stewart, *The Rhetorical Canons of Construction: New Textualism’s Rhetoric Problem*, 116 MICH. L. REV. 1485, 1496–97 (2018).

150. Gluck & Bressman, *supra* note 37, at 934.

II. WISCONSIN'S SHIFTING TEXTUALIST PARADIGM

This Part analyzes SCOWIS's approach to the canons and efforts to limit the decontextualization problems the canons invite. It examines the justices' commitments to Justice Scalia's nuanced textualist theory and the court's responses to textualism's shortcomings. Using conflicting textualist interpretations from the 2021–2022 term and the 2023–2024 term, this Part identifies a shift in the court's eagerness to restrain canons of construction after the 2023 ideological flip. Next, this Part suggests different approaches that state actors can take to reduce canon decontextualization, such as codifying restraints on the canons or incorporating restraints into case law. Finally, this Part concludes by briefly examining the future of the canons in Wisconsin.

A. Textualism in Wisconsin

In the 2004 landmark opinion *State ex rel. Kalal v. Circuit Court of Dane County*,¹⁵¹ the Wisconsin Supreme Court adopted what Gluck deemed a “modified textualist”¹⁵² approach to statutory interpretation.¹⁵³ Citing Justice Scalia, the opinion outlined a two-step process for courts to follow when interpreting statutes. First, the court looks to the plain meaning of the statute using textualist tools such as dictionaries, canons of construction, and the context of surrounding statutes.¹⁵⁴ If this first step yields an ambiguous result—one in which two reasonable people “*should* have become confused”—the court moves to step two, where it can look to extrinsic sources to advance its analysis.¹⁵⁵ Notably, the *Kalal* majority does not use the term *textualism* once in its opinion, but the first step that the case outlines is unmistakably textualist.¹⁵⁶ However, *Kalal* still allows a court to derive statutory meaning from extrinsic sources when the analysis at the first step is inconclusive,¹⁵⁷ which deviates from Justice Scalia's textualism.¹⁵⁸

151. 2004 WI 58, 681 N.W.2d 110.

152. Gluck, *The States as Laboratories of Statutory Interpretation*, *supra* note 65, at 1758, 1799–1803.

153. *Kalal*, 2004 WI 58, ¶¶ 45–53.

154. *Id.*

155. *Id.* (quoting *Bruno v. Milwaukee County*, 2003 WI 28, ¶ 21, 660 N.W.2d 656, 662).

156. See *id.* ¶¶ 59–61 (Abrahamson, C.J., concurring).

157. *Id.* ¶¶ 48, 50–51.

158. SCALIA & GARNER, *supra* note 5, at 28. To a textualist, statutory history and legislative history are different. Legislative history refers to drafting documents, which is a nonstarter for textualists, whereas statutory history refers to a legislature's prior enacted statutes, which can indicate current statutory meaning. *Id.* at 256.

Yet, *Kalal*’s interpretive principles come directly from Justice Scalia. The opinion expressly endorsed the ordinary-meaning canon,¹⁵⁹ the whole-text canon,¹⁶⁰ the surplusage canon,¹⁶¹ the absurdity canon,¹⁶² and the *in pari materia* canon.¹⁶³ Subsequent opinions endorsed other canons, such as the presumption of consistent usage.¹⁶⁴ Unlike at the federal level, Wisconsin treats canons as precedential rules that function as interpretive guides for lower courts.¹⁶⁵ To supplement the case law, the Wisconsin State Legislature has codified a few of Justice Scalia’s canons¹⁶⁶ and expressly rejected others.¹⁶⁷ The legislature’s active role in codifying canons—some from Justice Scalia, some from elsewhere—is telling. First, it supports Justice Scalia’s theory that textualism can teach legislatures to write for textualist judges. Second, it shows that *Reading Law* employs a non-exhaustive and unfinished list of relevant canons in Wisconsin.

Even though *Kalal* does not follow Justice Scalia in lockstep, *Reading Law* maintains a strong grip on Justices Ziegler, Hagedorn, and R.G. Bradley, who often reference the book and show their allegiance to conservative jurisprudence.¹⁶⁸ By contrast, Justices Ann Walsh (A.W.) Bradley, Rebecca Dallet, Jill Karofsky, and Janet Protasiewicz rarely—if ever—cite *Reading Law*.¹⁶⁹ This has led to arguments on the court over *Reading Law*’s persuasive value.¹⁷⁰ Justice R.G. Bradley swears by *Reading Law*, seldom resorts to legislative history, will not tolerate any

159. *Kalal*, 2004 WI 58, ¶ 45 (“Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.”).

160. *Id.* ¶ 46 (“[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole . . .”).

161. *Id.* (“Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.”).

162. *Id.* (“[S]tatutory language is interpreted . . . reasonably, to avoid absurd or unreasonable results.”).

163. *Id.* (“[S]tatutory language is interpreted . . . in relation to the language of surrounding or closely-related statutes . . .”).

164. *See, e.g., State ex rel. Dep’t of Nat. Res. v. Wis. Ct. App., Dist. IV*, 2018 WI 25, ¶ 28, 909 N.W.2d 114, 125 (“When the legislature uses different terms in the same act, we generally do not afford them the same meaning.”).

165. *See* Gluck, *The States as Laboratories of Statutory Interpretation*, *supra* note 65, at 1754, 1756.

166. *See* WIS. STAT. § 990.01(1) (2023–24) (codifying the ordinary-meaning canon).

167. *See* § 990.001(6) (rejecting the title-and-headings canon).

168. *See, e.g., A.M.B. v. Cir. Ct. for Ashland Cnty. (In re Adoption of M.M.C.)*, 2024 WI 18, ¶ 3, 5 N.W.3d 238, 241; *Fabick v. Evers*, 2021 WI 28, ¶ 30 n.12, 956 N.W.2d 856, 865 n.12.

169. *James v. Heinrich*, 2021 WI 58, ¶ 76, 960 N.W.2d 350, 380 (Dallet, J., dissenting) (critiquing Justice Scalia).

170. *See id.* (Dallet, J., dissenting).

deviation from textualism,¹⁷¹ and can be observed trying to incorporate the strict textualist principles not covered by *Kalal* into her opinions.¹⁷² Justices Ziegler and Hagedorn are not as strict.¹⁷³ They are more likely to resort to legislative history to confirm their interpretation and to resolve ambiguities.¹⁷⁴

Justice Hagedorn is more difficult to pin down, partially because his understanding of textualism tends to be less canon-centric than his peers'. This often separates him from his fellow conservatives.¹⁷⁵ When the conservatives held the majority, Justice Hagedorn usually played the middleman between the liberal and conservative blocs—providing a swing vote and concurring in the judgment but not joining the substance of the opinion—thus perpetuating the 2021 plurality problem.¹⁷⁶ Justice R.G. Bradley was not fond of this behavior and never hesitated to call out her fellow conservative by name when he deprived her opinions of precedential value.¹⁷⁷

The liberal justices are less polarized than their conservative counterparts and prefer to distance *Kalal* from its textualist roots. Justice Dallet has highlighted conflicts between *Reading Law* and Wisconsin

171. See, e.g., *Cath. Charities Bureau, Inc. v. Lab. & Indus. Rev. Comm'n*, 2024 WI 13, ¶¶ 158–59, 3 N.W.3d 666, 710 (R.G. Bradley, J., dissenting), *rev'd on other grounds*, 145 S. Ct. 1583 (2025).

172. A close look into Justice R.G. Bradley's writing suggests that she is subtly trying to bridge the gap between Justice Scalia's strict textualism and *Kalal*'s more flexible approach. Justice Scalia was adamant that a justice's analysis "begins and ends with" the statutory text. SCALIA & GARNER, *supra* note 5, at 16 (emphasis added). However, *Kalal* only states that judges should *start* with the text—clearing the way for *Kalal*'s second step regarding legislative history. *State ex rel. Kalal v. Dane County*, 2004 WI 58, ¶¶ 45, 48, 681 N.W.2d 110, 124–25. In *Sanders v. State of Wisconsin Claims Board*, instead of following *Kalal*'s language verbatim, Justice R.G. Bradley directly cites herself in *James* and instructs courts to *begin and end* with the text in line with Justice Scalia's method. 2023 WI 60, ¶ 22, 992 N.W.2d 126, 132.

173. See, e.g., *Fleming v. Amateur Athletic Union of U.S., Inc.*, 2023 WI 40, ¶ 33, 990 N.W.2d 244, 255; *Serv. Emps. Int'l Union Healthcare Wis. v. Wis. Emp. Rels. Comm'n*, 2025 WI 29, ¶ 32, 22 N.W.3d 876, 884.

174. See, e.g., *Fleming*, 2023 WI 40, ¶ 14; *Serv. Emps. Int'l Union Healthcare Wis.*, 2025 WI 29, ¶ 32.

175. See, e.g., Ball, *2021–22 Statistics*, *supra* note 6 (showing Justice Hagedorn's deviation from his fellow conservatives).

176. See, e.g., *Sanders*, 2023 WI 60, ¶ 52 (Hagedorn, J., concurring).

177. See, e.g., *Johnson v. Wis. Elections Comm'n*, 2022 WI 14, ¶ 244, 971 N.W.2d 402, 473 (R.G. Bradley, J., dissenting) ("Justice Hagedorn may have cast the deciding vote in this case, but he does not have the power to act as a supreme court of one."); *Becker v. Dane County*, 2022 WI 63, ¶ 89, 977 N.W.2d 390, 417–18 (R.G. Bradley, J., dissenting) (calling Justice Hagedorn out for not supporting the nondelegation doctrine in Wisconsin); *Sanders*, 2023 WI 60, ¶¶ 33–41 (devoting nine paragraphs to ridiculing Justice Hagedorn's unwillingness to join portions of the lead opinion).

case law while broadly critiquing the canons altogether,¹⁷⁸ and she has gone so far as to suggest that the court replace *Kalal* and instill a more “holistic” approach to statutory interpretation.¹⁷⁹ But Justice Dallet and the other liberal justices rely heavily on many of Justice Scalia’s canons, as explored throughout this Part. Justices Dallet and Karofsky especially tend to draw upon canons with clear triggers and stoppers rather than broad canons such as *expressio unius*.¹⁸⁰ When the liberal justices do rely on the malleable canons, they are careful to test them against other canons to ensure no conflicts arise.¹⁸¹

Contrary to the liberals’ approach, Justices Ziegler and R.G. Bradley are more likely to draw on decontextualizing canons like *expressio unius* and the surplusage canon, and do so with anything but restraint despite Justice Scalia’s warnings.¹⁸² They have also ignored text-based canons that conflict with a conservative disposition.¹⁸³ With a scattered set of conflicting methodologies, the court’s textualist approach to statutory interpretation is no more uniform than pre-*Kalal*.¹⁸⁴

The scattered opinions are unsurprising because *Kalal* is far from perfect. Shortly after *Kalal*, Justice A.W. Bradley warned that its rules would “be often mouthed but not always applied.”¹⁸⁵ Professor Anuj

178. *James v. Heinrich*, 2021 WI 58, ¶¶ 63–65, 76, 960 N.W.2d 350, 376, 380 (Dallet, J., dissenting).

179. *Serv. Emps. Int’l Union Healthcare Wis.*, 2025 WI 29, ¶¶ 50, 65 (Dallet, J., concurring).

180. See *infra* notes 231–253 and accompanying text.

181. See discussion *infra* Section II.D.

182. See, e.g., *State v. Dorsey*, 2018 WI 10, ¶¶ 29, 34, 906 N.W.2d 158, 170–71; *State v. Lira*, 2021 WI 81, ¶¶ 37–38, 966 N.W.2d 605, 614; *Wis. Elections Comm’n v. LeMahieu*, 2025 WI 4, ¶ 22, 16 N.W.3d 469, 477; see also discussion *infra* Sections II.B–C (discussing Justice R.G. Bradley applying the surplusage canon to entire statutory provisions and Justice Ziegler leaning on *expressio unius* despite context suggesting an alternate disposition).

183. See, e.g., *Sojenhomer LLC v. Village of Egg Harbor*, 2024 WI 25, ¶¶ 39–40, 7 N.W.3d 455, 467 (Ziegler, C.J., dissenting) (decontextualizing technical terms by substituting dictionary definitions despite the ordinary-meaning canon’s deference to technically defined terms).

184. Justice A.W. Bradley employed a pluralistic statutory interpretation approach that balances textualism with purposivism. See generally *Cath. Charities Bureau, Inc. v. Lab & Indus. Rev. Comm’n*, 2024 WI 13, ¶¶ 34–36, 3 N.W.3d 666, 677, *rev’d on other grounds*, 145 S. Ct. 1583 (2025) (reversing the case on constitutional grounds). Justice Hagedorn, on the other hand, is a staunch originalist who often relies on common law historical analysis. See generally *Friends of Frame Park U.A. v. City of Waukesha*, 2022 WI 57, 976 N.W.2d 263 (working through the history of federal and state law regarding fee-shifting provisions prompting a thirty-six-page “textually supported” concurrence from Justice R.G. Bradley to “correct” Justice Hagedorn’s error). While not at odds with textualist principles, Justice Hagedorn places less weight on canons to find meaning than his fellow justices.

185. *State v. Hayes*, 2004 WI 80, ¶ 67, 681 N.W.2d 203, 218 (A.W. Bradley, J., concurring).

Desai argues that *Kalal*'s first step is "capacious" and gives judges too much discretion in using substantive canons¹⁸⁶—although a textualist would argue those canons are inherent to *Kalal*'s first step.¹⁸⁷ While he concedes that the framework is helpful and flexible enough to incorporate multiple judges' philosophies, Desai argues that "courts will either need to supplement the *Kalal* approach with more steps or explicitly incorporate more tools into the existing two steps."¹⁸⁸ Moreover, the *Kalal* opinion lacks clarity over when the courts should move to step two.¹⁸⁹ *Kalal*'s definition of a statutory ambiguity is, well, ambiguous.¹⁹⁰ However, Desai fails to consider the other side of the problem—that *Kalal*'s first step gives the court *too many* tools. The unrestrained approach to malleable canons allows judges room to decontextualize text in a manner that suits them.

Between unrestrained canons and a lack of instruction on when the court should look to extrinsic sources as interpretive tools, *Kalal* leaves a lot to be desired. Recent concurrences show that the court is set for a battle over the extrinsic sources issue soon,¹⁹¹ but the court also needs to address the serious decontextualization problem prevalent with the canons. The remaining sections in this Part explore how the court has previously dealt with malleable canons and the new "eyes-open" approach that the liberal justices are working to implement.

B. *James v. Heinrich: The Opening Canon Fire*

The court's battle over canons of construction ignited when Justice R.G. Bradley, writing for a conservative majority, and Justice Dallet, writing for the liberal dissenters, sparred over the canons in the 2021 opinion *James v. Heinrich*.¹⁹² *James* asked whether the Wisconsin Statutes granted local health officials authority to close private schools amid the COVID-19 pandemic.¹⁹³ However, the broader ideological issues at play involved the reach of administrative power over private

186. Desai, *supra* note 11, at 1105.

187. Cf. SCALIA & GARNER, *supra* note 5, at 59 (emphasizing the need for discretion when evaluating canons).

188. Desai, *supra* note 11, at 1096.

189. *Id.* at 1092–93.

190. See *Serv. Emps. Int'l Union Healthcare Wis. v. Wis. Emp. Rels. Comm'n*, 2025 WI 29, ¶¶ 63–64, 22 N.W.3d 876, 892 (Dallet, J., concurring).

191. Compare *id.* ¶¶ 36–37 (R.G. Bradley, J., concurring) (suggesting that opening the door to extrinsic sources will condemn the rule of law to eternal damnation), with *id.* ¶ 50 (Dallet, J., concurring) (suggesting that extrinsic sources can be relevant to statutory interpretation).

192. 2021 WI 58, 960 N.W.2d 350.

193. *Id.* ¶ 1.

religious entities—a classic liberal versus conservative debate.¹⁹⁴ Both the majority and dissent relied heavily on canons of construction to reach their respective conclusions.¹⁹⁵

Despite a statutory provision granting local health officials the broad power to take “all measures necessary to prevent, suppress and control communicable diseases,”¹⁹⁶ the conservative majority ruled that local health officials do not have the authority to close schools.¹⁹⁷ Justice R.G. Bradley’s statutory analysis primarily relied on *expressio unius* and the surplusage canon.¹⁹⁸ Justice R.G. Bradley broadly applied *expressio unius* to two statutory provisions, claiming that the legislature expressly gave the local health officials discretionary powers to inspect schools and to forbid public gatherings; thus, the legislature’s silence regarding school closures was evidence that the legislature did not grant a local health official the power to close schools.¹⁹⁹ Justice R.G. Bradley also claimed that because the legislature expressly granted the State Department of Health Services the power to close schools in a separate provision, the legislature must have withheld the power to close schools from local health officials.²⁰⁰ Finally, Justice R.G. Bradley drew upon the surplusage canon.²⁰¹ She claimed that if the power to close schools qualified as “all measures reasonable and necessary,” as Heinrich alleged, then it would render the express discretionary power to inspect schools and forbid public gatherings redundant.²⁰²

194. See *id.* ¶¶ 9–10. *James* also touched on constitutional concerns that go beyond the scope of this Comment. See generally *id.* ¶¶ 15–21 (discussing whether the Wisconsin Constitution allows a local health official to close schools). It is worth noting, however, that SCOWIS usually does not address constitutional issues if the case can be decided on narrower grounds. See, e.g., *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 26, 913 N.W.2d 131, 141. *James* fits under this umbrella. However, the conservative majority disregarded this principle to expand the religious rights of private school parents. *James*, 2021 WI 58, ¶¶ 45–49. In recent years, the conservative dissenters have accused the liberal majority of much the same—especially in voting rights and abortion cases. See, e.g., *Kaul v. Urmanski*, 2025 WI 32, ¶¶ 68–71, 22 N.W.3d 740, 762 (Ziegler, J., dissenting); *id.* ¶¶ 102–03 (R.G. Bradley, J., dissenting); *id.* ¶¶ 158–62 (Hagedorn, J., dissenting); *Clarke v. Wis. Elections Comm’n*, 2023 WI 70, 995 N.W.2d 779, 802 (Hagedorn, J., dissenting).

195. See generally *James*, 2021 WI 58 (highlighting how both the majority and dissenters of a case can use various canons of statutory interpretation to support their position).

196. WIS. STAT. § 252.03 (2017–18).

197. *James*, 2021 WI 58, ¶ 49.

198. *Id.* ¶¶ 18–21.

199. *Id.* ¶¶ 17–18.

200. *Id.* ¶ 25.

201. *Id.* ¶ 21.

202. *Id.* ¶¶ 21–23. Regarding the legislature’s choice to include specific language conferring the Department of Health Services’ power to close schools, Justice Dallet did not find a redundancy. See *id.* ¶ 68 (Dallet, J., dissenting). In her view, the department’s broad reach—the entire state of Wisconsin—warrants the need for

Additionally, Justice R.G. Bradley read the discretionary power to inspect schools as a more specific enumeration of measures “reasonable and necessary” under the general/specific canon.²⁰³ The general/specific canon states that when “there is a conflict between a general provision and a specific provision, the specific provision prevails.”²⁰⁴ The canon’s trigger requires some conflict between the provisions. However, as Justice Dallet later pointed out, there is no conflict between section 252.03’s mandatory grant of authority and the statute’s discretionary grant of authority.²⁰⁵ Thus, the canon should be disregarded, as the trigger is not met.

Justice Dallet responded in a fiery dissent, stating that “[i]t takes no special ‘canons’ or abstract linguistic principles—only a common sense understanding of the English language—to see” that nothing in the Wisconsin Statutes prohibits a local health officer from closing schools.²⁰⁶ Justice Dallet lambasted Justice Scalia’s canons as a “flawed method[]” overly reliant on “grammar rules.”²⁰⁷ However, Justice Dallet also grounded her analysis in textual canons.²⁰⁸ She argued that the legislature granted local health officials two distinct kinds of powers: a mandatory duty to “take all measures necessary to prevent, suppress[,] and control” communicable diseases and a separate, discretionary authority to inspect schools and other public buildings—reasoning that aligns dutifully with the mandatory/permissive canon.²⁰⁹ According to Justice Scalia, because one express power is mandatory and one is discretionary, the two must be viewed as separate powers.²¹⁰ Otherwise, the legislature creates a legal paradox by imposing a mandatory duty that the local health official may decide not to act on.

Justice Dallet also flipped Justice R.G. Bradley’s surplusage argument on its head and relied upon the whole text and *in pari materia* canons to show that Justice R.G. Bradley’s reading created more surplusage than it staved.²¹¹ Justice Dallet referenced three other statutes in this argument: (1) Wisconsin Statutes section 115.01(10)(b), which defines school days to include “[d]ays on which school is closed *by order*

enumerated powers to limit government overreach, whereas a local health official’s limited jurisdiction minimizes that risk. *See id.* (Dallet, J., dissenting).

203. *Id.* ¶ 21–23.

204. SCALIA & GARNER, *supra* note 5, at 183.

205. *See James*, 2021 WI 58, ¶ 83 (Dallet, J., dissenting).

206. *Id.* ¶ 63 (Dallet, J., dissenting).

207. *Id.* ¶ 76 (Dallet, J., dissenting).

208. *Id.* ¶¶ 70–72 (Dallet, J., dissenting).

209. *Id.* ¶¶ 65, 70–72 (Dallet, J., dissenting) (alteration in original) (quoting WIS. STAT. § 252.03 (2017–18)).

210. *See SCALIA & GARNER*, *supra* note 5, at 112–13.

211. *James*, 2021 WI 58, ¶ 81 (Dallet, J., dissenting).

of a local health officer”²¹²; (2) Wisconsin Statutes section 118.60(12), which forbids “the department of public instruction from withholding payment to a private school . . . if that school ‘is closed for at least 10 school days . . . by a local health officer’ ”²¹³; and (3) Wisconsin Statutes section 120.12(27)(a), requiring notice to the Department of Public Instruction if a school is “closed *due to a local health officer’s order*.”²¹⁴ According to Justice Dallet, these three statutory schemes are meaningless if a local health officer cannot close schools.²¹⁵ While her argument is consistent with the predicate-act canon, she did not mention the canon by name.²¹⁶ The predicate-act canon states that the “[a]uthorization of an act also authorizes a necessary predicate act.”²¹⁷ Thus, because the legislature mentioned outcomes related to local health officers closing schools, local health officers inherently need some power to close schools.²¹⁸

Justice Dallet accused the *James* majority of falling back on Justice Scalia’s reputation to arbitrarily appeal to canons without adhering to their context-based nuances.²¹⁹ Instead, she advocated for an “eyes-open”

212. *Id.* ¶ 73 (Dallet, J., dissenting) (emphasis added) (quoting WIS. STAT. § 115.01(10)(b) (2017–18)).

213. *Id.* ¶ 73 (Dallet, J., dissenting) (emphasis added) (quoting WIS. STAT. § 118.60(12) (2017–18)).

214. *Id.* ¶ 73 (Dallet, J., dissenting) (emphasis added) (citing WIS. STAT. § 120.12(27)(a) (2017–18)).

215. *Id.* ¶ 74 (Dallet, J., dissenting).

216. *See id.* ¶¶ 73–74 (Dallet, J., dissenting). As Judge Easterbrook mentioned, the text-based canons are largely rooted in linguistics, so a judge’s logical reasoning may align with a particular canon without the judge actually being aware of the canon’s existence. *Cf.* Easterbrook, *The Absence of Method*, *supra* note 47, at 84–85 (describing how we use the canons in everyday language). Excepting the times when Justices Dallet and Karofsky specifically mentioned a canon’s rule in their reasoning, it is unclear if they are intentionally using certain canons, but that does not take away from the canon’s utility. If judges are reasoning with canons unintentionally, that is all the more reason to draw upon them if properly adhering to their respective triggers and stoppers.

217. SCALIA & GARNER, *supra* note 5, at 192.

218. *James*, 2021 WI 58, ¶¶ 72–74 (Dallet, J., dissenting). Both sides also resorted to statutory history for support. In a rare move, Justice R.G. Bradley even referenced legislative history—an opinion from the attorney general at the time the statute was enacted that instructed the legislature to limit the context of local health officials closing schools to disease related closures. *Id.* ¶ 30. The legislature then removed a list of specific powers from the statute, including closing schools, but it remains unclear if this was related to the attorney general’s opinion. *See id.* Justice Dallet, on the other hand highlighted that the legislature expanded the local health officials’ power by broadening the statute’s language. *Id.* ¶¶ 65–66 (Dallet, J., dissenting). Neither argument is particularly conclusive.

219. *Id.* ¶ 76 (Dallet, J., dissenting). Justice Dallet pointed out that *Reading Law* is not the law in Wisconsin, and some of its principles are in direct conflict with Wisconsin law. *Id.* ¶¶ 76–78 (Dallet, J., dissenting) (citing SCALIA & GARNER, *supra* note 5, at 364–66) (contrasting Wisconsin’s rule liberally construing remedial statutes with Justice Scalia’s presumption against liberally construing remedial statutes).

approach to the canons.²²⁰ Under such an approach, Justice Dallet stated that the court must find “a matching problem” before applying any particular canon as a fix-all solution.²²¹ She offered few specifics on what an approach would look like in her *James* dissent, but as the liberal justices penned more majority opinions, the “eyes-open” approach took shape. Even before Justice Protasiewicz’s election flipped the court’s majority in 2023, the liberal justices increasingly relied on canons with clear triggers and stoppers, paying close attention to context to restrain the malleable canons.²²²

C. Becker v. Dane County: The James Rematch

Before Justice Protasiewicz’s election flipped the court’s majority for the 2023–2024 term, the liberal justices incorporated an “eyes-open” textualist approach in a few instances thanks to Justice Hagedorn’s swing vote.²²³ During the 2021–2022 and 2022–2023 terms, Justice Hagedorn voted with liberal Justices Karofsky and Dallet more than he voted with Justice R.G. Bradley,²²⁴ giving the liberal justices control over high-stakes statutory opinions even when they sat in the minority. Following Justice Protasiewicz’s election, the four liberal justices have only broken rank twice.²²⁵ Both times involved constitutional rights in criminal cases, and in each case, the dissenter stood alone in 6–1 opinions.²²⁶ In statutory

220. *Id.* ¶ 79 (Dallet, J., dissenting).

221. *Id.* ¶ 82 (Dallet, J., dissenting).

222. *See Becker v. Dane County*, 2022 WI 63, ¶¶ 14, 18, 977 N.W.2d 390, 397–98 (relying on the predicate-act canon to establish that local health officials can issue orders). *Becker* can be considered a sequel to *James*. Lawyers from the Wisconsin Institute for Law and Liberty—a conservative legal advocacy group—represented James. *See generally James*, 2021 WI 58 (stating that the Wisconsin Institute for Law and Liberty represented the petitioners). *See Guiding Principles*, WIS. INST. FOR L. & LIBERTY, <https://will-law.org/guiding-principles> [<https://perma.cc/VS38-66XG>] (last visited Oct. 25, 2025). After the court decided *James*, the same lawyers filed *Becker*—this time asserting that every order issued by a local health official was illegal. *Becker*, 2022 WI 63, ¶¶ 1–2, 12–13. However, in *Becker*, Justice Hagedorn sided with the liberal justices to flip the decision in Heinrich’s favor on the statutory issues. *Id.* ¶ 47 (Hagedorn, J., concurring). In typical Justice Hagedorn fashion, he concurred on constitutional issues to create a plurality. *See id.* (Hagedorn, J., concurring).

223. *See generally Becker*, 2022 WI 63 (showing that Justice Hagedorn joined the majority opinion with the liberal justices).

224. *See Ball*, 2021–22 *Statistics*, *supra* note 6; *Ball*, 2022–23 *Statistics*, *supra* note 6.

225. *See State v. Grady*, 2025 WI 22, ¶ 32, 21 N.W.3d 353, 364 (Protasiewicz, J., dissenting); *State v. Stetzer*, 2025 WI 34, ¶ 44, 22 N.W.3d 893, 906 (Karofsky, C.J., dissenting).

226. *See Grady*, 2025 WI 22, ¶ 2; *Stetzer*, 2025 WI 34, ¶¶ 1–2, 4.

interpretation cases, since 2023, the liberal justices have always voted together.²²⁷

Late 2022 indicated what the new approach to *expressio unius* and the surplusage canon would look like moving forward. Justice Karofsky illustrated a different approach to both canons in *Becker v. Dane County*.²²⁸ In *Becker*, the plaintiffs argued that local health officials lacked the power to issue *any* orders.²²⁹ The plaintiffs’ argument relied heavily on *James*, particularly R.G. Bradley’s broad application of *expressio unius*.²³⁰ In contrast, Justice Karofsky’s majority opinion closely mirrored Justice Dallet’s *James* dissent and implicitly relied on text-specific canons like the predicate-act canon.²³¹

Justice Karofsky also implicated the surplusage canon, but she only used the canon as a broad principle to test whether the predicate-act canon or *expressio unius* gave meaning to more words in the statute.²³² She concluded that the plaintiffs’ reliance on *expressio unius* rendered the power to “forbid public gatherings” meaningless without the ability to issue orders.²³³ She also concluded that the plaintiffs’ reading rendered another statutory section—Wisconsin Statutes section 252.06(5)—meaningless because without the ability to issue orders, the local health official would have no reason to “employ as many persons as are necessary to execute his or her orders.”²³⁴

Justice Karofsky’s application of the surplusage canon in *Becker* differed from Justice R.G. Bradley’s application in *James* where Justice R.G. Bradley used a narrow grant of discretionary power to hamstring a broad grant of mandatory power. Instead, Justice Karofsky grounded her application in a textual canon and limited the surplusage canon to a “check your work” tool against the other side’s argument. By viewing the surplusage canon as useful but not dispositive, Justice Karofsky’s restrained use allows drafters to keep the political redundancies identified in Gluck and Bressman’s study without risking courts striking down

227. Ball, *2023–24 Statistics*, *supra* note 6; Ball, *2024–25 Statistics*, *supra* note 16.

228. 2022 WI 63, 977 N.W.2d 390.

229. *Id.* ¶ 13.

230. Opening Brief of Plaintiffs-Appellants at 17, 20–21, *Becker v. Dane County*, 2022 WI 63, 977 N.W.2d 390 (No. 2021AP1343).

231. *See Becker*, 2022 WI 63, ¶¶ 11–12, 14 (“[H]ow else would a local health officer forbid a public gathering if not through an order?”).

232. *Id.* ¶¶ 11–14.

233. *Id.* ¶¶ 11, 14.

234. *Id.* ¶ 14 (emphasis omitted) (quoting WIS. STAT. § 252.06(5) (2019–20)).

statutes.²³⁵ The canon thus serves as a tool for weighing the validity of canons when they conflict.²³⁶

Becker further illustrates an attempt to rein in *expressio unius* by canceling the canon when clearer canons, such as the predicate-act canon, suggest an alternate result. *Expressio unius* is one of Justices Ziegler and R.G. Bradley's favorite canons, and the two employ it with broad strokes.²³⁷ For instance, in *State ex rel. Kaul v. Prehn*,²³⁸ Justice Ziegler implicated the canon to emphasize that Prehn, a state official appointed by the governor, could overstay his term limit because "term expiration" was not listed in the statute's causes of vacancy.²³⁹ She held this despite plenty of statutory context, legal principles, and democratic concerns pointing to the opposite result, such as another statutory section limiting Prehn's term to six years.²⁴⁰ Dispositions such as *James* and *Prehn* highlight the need for a more sound approach to *expressio unius* in Wisconsin.

D. "Eyes-Open" Textualism in Practice

When the court flipped to a liberal majority in 2023, the liberal justices continued to flex their textualist muscles, as seen in *Sojenhomer LLC v. Village of Egg Harbor*.²⁴¹ The controversy leading up to *Sojenhomer* stemmed from the Village of Egg Harbor condemning Sojenhomer's property to build a sidewalk next to a dangerous road.²⁴² Sojenhomer sued Egg Harbor because the Wisconsin Statutes expressly forbid a municipality from condemning

235. Gluck & Bressman, *supra* note 37, at 934–35.

236. Perhaps recognizing the petitioner's weak statutory argument, Justice R.G. Bradley only dedicates a mere 449 words in her dissent to challenge Justice Karofsky's analysis for not applying the *James* reasoning. *Becker*, 2022 WI 63, ¶¶ 142–45 (R.G. Bradley, J., dissenting). The majority of Justice R.G. Bradley's dissent focuses primarily on constitutional issues. *Id.* ¶¶ 76–78 (R.G. Bradley, J., dissenting). However, Justice R.G. Bradley's convictions quickly betray her neutrality in the case against Heinrich. In her dissent, she titles an entire section "Heinrich's Tyranny." *Id.* ¶ 84 (R.G. Bradley, J., dissenting). There, she directly and implicitly classifies Heinrich—a county official—as a "tyrant," "dictator," and "autocrat." *Id.* ¶¶ 84, 88, 99, 135 (R.G. Bradley, J., dissenting). Throughout the dissenting opinion, Justice R.G. Bradley appeals to lesser-known legal sources: *The Wizard of Oz*, Frank Herbert's *Dune*, and Coldplay's hit song *Viva la Viva*. *Id.* ¶¶ 73, 89, 148 (R.G. Bradley, J., dissenting).

237. See, e.g., *Andruss v. Divine Savior Healthcare Inc.*, 2022 WI 27, ¶ 30, 973 N.W.2d 435, 442–43; *A.M.B. v. Cir. Ct. for Ashland Cnty. (In re Adoption of M.M.C.)*, 2024 WI 18, ¶ 3, 5 N.W.3d 238, 241.

238. 2022 WI 50, 976 N.W.2d 821.

239. *Id.* ¶¶ 25–26, 56.

240. *Id.* ¶¶ 66–67 (Dallet, J., dissenting).

241. 2024 WI 25, ¶¶ 16–20, 7 N.W.3d 455, 460–61.

242. *Id.* ¶¶ 1, 12–14.

property to build a “pedestrian way.”²⁴³ Thus, the question in *Sojenhomer* was simple: Is a sidewalk a pedestrian way?²⁴⁴

Writing for the liberal majority, Justice Dallet answered no—a sidewalk is not a pedestrian way.²⁴⁵ How did she come to such a facially strange result? Textualist canons of construction. Justice Dallet implicated a multitude of “fancy-sounding canons”²⁴⁶ in her majority opinion.²⁴⁷ Beginning with the ordinary-meaning canon, she pointed to the statutory definitions of “sidewalk” and “pedestrian way.”²⁴⁸ The Wisconsin Statutes define a sidewalk as “that portion of a highway between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, constructed for use of pedestrians.”²⁴⁹ In contrast, the statutes define a pedestrian way as “a walk designated for the use of pedestrian travel.”²⁵⁰ Justice Dallet’s analysis is consistent with the ordinary-meaning canon and the interpretive-direction canon, which holds that definition sections are particularly instructive.²⁵¹

Next, Justice Dallet applied the presumption of consistent usage to a paragraph stating that “the applicable provisions of this chapter pertaining to highways, streets, alleys, roadways and sidewalks also apply to pedestrian ways.”²⁵² According to Justice Dallet, if the court presumes that different words have different meanings as the presumption of consistent usage states, then the legislature signified that sidewalk and pedestrian way have “separate, non-overlapping meanings” when it used the terms separately in the same section.²⁵³ Justice Dallet implicated and then discounted the surplusage canon, despite the fact that the canon is consistent with her analysis.²⁵⁴ Here, the presumption of consistent usage—underpinned by, but more specific than, the surplusage canon—appeared to be enough.²⁵⁵ Justice Dallet then implicitly drew on *expressio unius* by comparing the finite lists in Wisconsin Statutes section 346.02 that contain “pedestrian way,” but not “sidewalk,” with those that contain both “pedestrian way” and “sidewalk,” concluding that the

243. *Id.* ¶¶ 12, 16–17.

244. *Id.* ¶ 12.

245. *Id.* ¶ 3.

246. *See James*, 2021 WI 58, ¶ 79, 960 N.W.2d 350, 381 (Dallet, J., dissenting) (quoting Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2161 (2016) (book review)).

247. *Sojenhomer*, 2024 WI 25, ¶¶ 15, 17–19.

248. *Id.* ¶¶ 15–18.

249. *Id.* ¶ 21 (quoting WIS. STAT. § 340.01(58) (2021–22)).

250. *Id.* ¶ 17 (quoting WIS. STAT. § 346.02(8)(a) (2021–22)).

251. *See* SCALIA & GARNER, *supra* note 5, at 225.

252. *Sojenhomer*, 2024 WI 25, ¶ 16 (quoting § 346.02(8)(a)).

253. *Id.* ¶ 19.

254. *See id.* ¶ 19.

255. *Id.* ¶¶ 19–20 (“[W]e do not rely on the surplusage canon.”).

legislature intentionally omitted sidewalks from the condemnation statute.²⁵⁶ She pointed out that the definition of sidewalk indicates that sidewalks are merely “that portion of a highway.”²⁵⁷ Accordingly, when Egg Harbor condemned Sojenhomer’s property to build a sidewalk, it was not building a pedestrian way, but rather expanding the highway—an action it had express authority to take.

Justice Dallet does not end there, however. Justice Dallet implicitly relied on the contextual *in pari materia* canon to conclude that section 346.02(8)(a) and (b) indicate that rules which “would not otherwise apply to pedestrian ways” inherently apply to sidewalks²⁵⁸—thus suggesting different meanings between the terms.²⁵⁹ In the end, Justice Dallet wrote something of a textualist opus, effectively connecting and comparing textual and contextual canons without a single conflict to argue that the ordinary reading indicates that a sidewalk is not a pedestrian way.²⁶⁰

Justice Ziegler championed the conservative’s dissent. Her analysis went something like this: She first looked to the statutory definition of “pedestrian way.”²⁶¹ However, instead of comparing it to the statutory definition of “sidewalk,” Justice Ziegler decided the usage of the term “walk” within the definition was vague enough to warrant a dictionary definition.²⁶² Her definition of “walk” was “a place laid out or set apart for walking, or resorted to by those who walk; a path, avenue, sidewalk, or promenade for pedestrians.”²⁶³ Thus, Justice Ziegler concluded that because a pedestrian way is a walk, and the definition of walk from a dictionary includes a sidewalk, a sidewalk falls into the statutory definition of “pedestrian way.”²⁶⁴

In an attempt to refute Justice Dallet’s use of the presumption of consistent usage and *expressio unius*, Justice Zeigler dreamt up a reading that would seemingly reconcile the two express definitions coexisting by claiming that the definition is intentionally broad.²⁶⁵ Despite her offering little support for this reading, Justice Ziegler still fails to reconcile with

256. *Id.* The two canons are closely related and often implicitly paired in instances where one finite list expresses a term that another finite list excludes, as is the case in *Sojenhomer*. *Cf. id.* ¶ 20 (blending the principles behind the presumption of consistent usage and *expressio unius*).

257. *Id.* ¶¶ 21–22.

258. *Id.* ¶ 20.

259. *Id.* Additionally, Justice Dallet relied on the reenactment canon regarding the difference in the terms “designate” and “construct” in the respective definitions of pedestrian way and sidewalks. *Id.* ¶ 23.

260. *Id.* ¶¶ 12–26.

261. *See id.* ¶¶ 37, 43–44 (Ziegler, C.J., dissenting).

262. *See id.* ¶¶ 43–48 (Ziegler, C.J., dissenting).

263. *Id.* ¶ 44 (Ziegler, C.J., dissenting).

264. *Id.* ¶¶ 62–63 (Ziegler, C.J., dissenting).

265. *Id.* ¶¶ 55–56 (Ziegler, C.J., dissenting).

the statutory definition of sidewalk, which labels it as part of a highway.²⁶⁶ Thus, Justice Ziegler inadvertently triggered a conflict between a broad provision—the broad and inclusive definition of pedestrian way, which would seemingly render the village’s actions illegal—and a narrow provision—the statutory definition of sidewalk, which incorporates sidewalks as parts of highways—which would render the village’s actions legal.²⁶⁷ As previously discussed, the general/specific canon states that when a general and specific provision conflict, the narrower provision prevails;²⁶⁸ therefore, Justice Zeigler’s attempt to rebut Justice Dallet’s analysis is still inherently flawed under textualist principles.

Justice Ziegler’s departure from a context-based approach is astounding and contrary to both *Reading Law* and *Kalal*. Most alarming is that at no point was the term “walk” ever an issue until Justice Ziegler decided it warranted a clear definition. Justice Ziegler separated the principles of ordinary meaning from plain meaning,²⁶⁹ decontextualized the text by selecting a particular word, gave it a meaning not supplied by the statute, and used it to override the statutory definition of sidewalk. Justice Ziegler’s analysis is inconsistent with the ordinary-meaning canon, interpretive-direction canon, *in pari materia* canon, and the presumption of consistent usage. Justice Ziegler then resorted to repetition. Without reconciling her “sidewalk” definition with the statutory definition, Justice Ziegler explicitly stated that her reading is based on “common sense” rather than statutory context,²⁷⁰ a reading at odds with *Kalal* and textualism broadly.²⁷¹

The holes in Justice Ziegler’s textual analysis are easy to spot, even for one unfamiliar with the ins and outs of the canons. Thus, her dissenting opinion weakens Justice Scalia’s presumption that textualists will apply “common sense” to protect textualism from becoming a judicial activist machine.²⁷² However, familiarity with the canons and *Kalal*’s framework increases the ability of onlookers to spot bad textual analysis.²⁷³ Since Justice Dallet’s wake-up call dissent in *James*, the liberal justices are working to supplement *Kalal*’s shortcomings by

266. See *id.* ¶¶ 32–33 (Ziegler, C.J., dissenting) (focusing on *where* a sidewalk is rather than *what* a sidewalk is).

267. See *id.* ¶¶ 55–56 (Ziegler, C.J. dissenting).

268. SCALIA & GARNER, *supra* note 5, at 183.

269. 2024 WI 25, ¶¶ 43–48 (Ziegler, C.J., dissenting).

270. See *id.* ¶¶ 49–50 (Ziegler, C.J., dissenting) (declaring eleven times throughout the opinion that the plain language of the statute suggests a sidewalk is not a pedestrian way).

271. See *supra* notes 90, 160.

272. SCALIA & GARNER, *supra* note 5, at 107.

273. See Desai, *supra* note 11, at 1088.

identifying the canons' nuances, when they trigger, and when they should cancel.

The decontextualization problem under the *Kalal* framework can be broken down into two layers. First, at the most basic layer, judges can use the ordinary-meaning canon to change the meaning of individual terms by resorting to dictionary definitions.²⁷⁴ Second, judges can use canons like the surplusage canon with poorly defined triggers to alter the contextual meaning of a statute.²⁷⁵ The rest of this Comment explores steps that the court and legislature can take to ensure the court partakes in good-faith textualist interpretation.

III. LOOKING AHEAD: OPPORTUNITY FOR A NEW PARADIGM

James highlights that Justice Scalia's "common sense" approach lacks the necessary teeth to inhibit judges from cherry-picking canons that support their preferred disposition.²⁷⁶ The lack of a formal hierarchy or better-defined stoppers puts too much discretion in the hands of judges. While Justice Scalia admitted there are times when certain canons cancel others based on the text's context, he refused to create a canon hierarchy because he felt the canons should be approached on a case-by-case basis contingent on the statutory context.²⁷⁷ However, SCOWIS opinions show that policy determinations still find their way into statutory analyses within *Kalal*'s existing framework.

Rigid canon hierarchies may not be an attainable solution due to the ever-shifting context of statutory questions,²⁷⁸ but approaching the canons through a formal trigger/stopper lens can increase transparency and further limit the malleable canons' fluidity. Gluck argues that judges preaching textualist restraint yearn for flexibility—thus, according to Gluck, the formalist approach is bound to fail from the start.²⁷⁹ But recent Wisconsin case law shows that a deeper understanding of the canons can

274. See *supra* notes 262–264 and accompanying text.

275. See *supra* notes 197–204 and accompanying text.

276. SCALIA & GARNER, *supra* note 5, at 107; *James v. Heinrich*, 2021 WI 58, ¶ 79, 960 N.W.2d 350, 381 (Dallet, J., dissenting).

277. SCALIA & GARNER, *supra* note 5, at 59. Some textualists judges have constructed personal hierarchies. For instance, Justice Amy Coney Barrett prefers to cancel substantive canons when ordinary meaning predominates the inquiry. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 111 (2010).

278. See Krishnakumar, *supra* note 52, at 998.

279. Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways that Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 178–79 (2017) [hereinafter Gluck, *The Failure of Formalism*].

encourage robust textual analysis²⁸⁰ and highlight the “levers of decision” when the analysis goes astray.²⁸¹ When a problem is spotted, it often prompts a solution. Thus, the remainder of this Comment suggests formal action to memorialize “eyes-open” textualism and further refine *Kalal*.

A. Cementing Guardrails to Malleable Canons Through Legislative Action

The implicit constraints that the liberal majority has imposed on *expressio unius* and the surplusage canon are a start to a more robust paradigm, but this Comment advocates for concrete solutions rather than case-by-case judicial self-restraint. Thus, this Comment first calls on the Wisconsin State Legislature to codify restraints on the more malleable canons.²⁸² Wisconsin’s legislature has codified a few of Justice Scalia’s canons and many more of its own making.²⁸³ Therefore, the legislature already guides the court to some extent on what canons it expressly endorses and rejects.²⁸⁴ To start, the legislature can place guardrails upon the surplusage canon and *expressio unius* to limit intense decontextualization. Regarding *expressio unius*, the legislature can better define the canon’s trigger by creating factors for the court to assess before applying the canon. These factors could include limiting the canon to finite lists, as Justice Dallet does in *Sojenhomer*,²⁸⁵ adding an elements test like the Sutherland treatise suggests or creating a list of factors to weigh against the canon as California does.²⁸⁶ Similarly, the legislature can codify an adequate stopper for the canon. For example, the legislature could instruct courts not to apply the canon when safer textual and contextual canons point to an alternate reading.²⁸⁷ Under these circumstances, any arbitrary use of *expressio unius* could be obvious

280. Gluck concedes that even pluralistic justices like Shirley Abrahamson and A.W. Bradley submitted to *Kalal*’s textualist nature. Gluck, *The States as Laboratories of Statutory Interpretation*, *supra* note 65, at 1802.

281. Desai, *supra* note 11, at 1087.

282. See Gluck, *The States as Laboratories of Statutory Interpretation*, *supra* note 65, at 1825–27, for a general discussion on the power struggle over interpretive methodology between courts and legislatures. Some courts have resisted legislative efforts to govern methodology, but SCOWIS has not displayed resistance thus far. *Id.* at 1825–26.

283. See WIS. STAT. §§ 990.001–.01 (2023–24).

284. *Id.*

285. See *supra* note 256 and accompanying text.

286. See *supra* notes 114–118 and accompanying text.

287. Compare *A.M.B. v. Cir. Ct. for Ashland Cnty. (In re Adoption of M.M.C.)*, 2024 WI 18, ¶ 3, 5 N.W.3d 238, 241 (applying *expressio unius* to a finite enumerated list), with *James v. Heinrich*, 2021 WI 58, ¶ 18, 960 N.W.2d 350, 359–60 (applying *expressio unius* to broad statutory provisions).

enough to the legislature, which may warrant abrogation in extreme circumstances.

Like *expressio unius*, the surplusage canon needs a well-defined stopper. Because the ordinary-meaning canon often holds power over the surplusage canon, the legislature can safeguard its intent through technical definitions of important statutory terms;²⁸⁸ it can also provide strict trigger/stopper instructions to courts on when and how the surplusage canon should be used. This approach could include clarifying the two trigger steps courts make before applying the canon²⁸⁹: Is there an actual redundancy in the statute? And is it possible to alleviate the redundancy without rendering another statutory provision meaningless? Moreover, defining the canon's stopper would limit the court from arbitrarily applying the canon. As illustrated by Justice Scalia in *Reading Law* and Justice Dallet in *James*, a good-faith reading of a statute suggests that the surplusage canon yields to better-defined canons such as the mandatory/permissive canon.²⁹⁰ Additionally, the surplusage canon can be limited to a "check-your-work canon" to test the applicability of other canons, such as the predicate-act canon.²⁹¹

The obvious objection to the legislature codifying canons is that it violates the separation of powers by forcing the court to play within the legislature's interpretive rules. However, this concern is unfounded. The purpose of statutory interpretation is to uncover the *legislature's* intent—not the court's.²⁹² The legislature should be empowered to give the courts all the tools necessary to read the law. Moreover, the legislature frequently directs interpretation when it adds statutory definitions for terms, statements of legislative intent, and findings sections, or when it instructs courts to construe statutes broadly or narrowly.²⁹³ Statutory interpretation turns on context, so it is difficult to imagine a textualist court unhappy with a legislature providing the court with more

288. However, Justice Ziegler's dissent in *Sojenhomer* may suggest that technical definitions alone may not always be enough to stop a policy-driven textualist judge. See *supra* notes 262–263 and accompanying text.

289. See *supra* Section I.B.3.

290. *James*, 2021 WI 58, ¶¶ 79–81 (Dallet, J., dissenting); SCALIA & GARNER, *supra* note 5, at 176.

291. See *Sojenhomer LLC v. Village of Egg Harbor*, 2024 WI 25, ¶ 19, 7 N.W.3d 455, 461 (opting to progress through statutory analysis dependent on canons narrower than the surplusage canon).

292. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419 (2005).

293. For examples of the legislature guiding the court through interpretation, see WIS. STAT. § 111.15 (2023–24); WIS. STAT. § 199.18 (2023–24); WIS. STAT. § 802.02 (2023–24); WIS. STAT. § 939.01 (2023–24); WIS. STAT. §§ 990.001, 990.01 (2023–24).

guidance.²⁹⁴ Thus, the legislature creates no problems when it instructs a court to apply canons in a certain way to effectuate meaning if such direction enhances clarity.

Furthermore, Wisconsin should replicate Justice Paul Thissen’s and Gluck and Bressman’s surveys in Wisconsin.²⁹⁵ Empirical research would help the court and legislature determine what canons remain active for drafters. Thus, the court would gain insight into which canons resolve statutory interpretation questions and which canons the legislature rejects. With more acute data, the court can better assess which canons the legislature incorporated into its drafting and then decide the canon’s value to the case at bar. One issue this approach solves is the misapplication of the surplusage canon. If empirical data suggests that the legislature disregards the surplusage canon, as is seen at the federal level and in Minnesota,²⁹⁶ the court would know the surplusage canon is not determinative.

Kalal already gives SCOWIS a substitute for resolving redundancies without the surplusage canon. Presuming conflicting canons would justify moving to *Kalal*’s second step, the court can inquire into extrinsic sources to look for clues explaining any redundancy before overzealously gutting a statute. Conversely, if data from a comprehensive survey shows the Wisconsin legislature actively considers the surplusage canon, the court can assign weight to the canon accordingly, albeit with the appropriate guardrails in place. While replicating the federal drafter and Minnesota drafter surveys is a small step that ultimately depends on judicial self-restraint, it still provides the public with insight into the court’s adherence to the legislature’s lawmaking function.

B. Cementing Guardrails Through Judicial Action

If the legislature fails to act, the court can embed similar restraints into case law. *Kalal* provides a unique statutory interpretation framework that passes down the canons as precedent from court to court. The new majority has the ability to alter the canons to enact guardrails. Even though the liberal majority appears poised to overturn, or at the very least refine *Kalal*, whatever interpretive framework (or lack thereof) that replaces *Kalal*’s is sure to place great weight on the statutory text—meaning the canons will still play a major role in interpretive questions.

294. Some of Justice Scalia’s canons endorse this approach, such as the interpretive-direction canon. *See* SCALIA & GARNER, *supra* note 5, at 225.

295. *See* Gluck & Bressman, *supra* note 37, at 905–07; Thissen, *supra* note 135, at 29 n.24.

296. *See* Gluck & Bressman, *supra* note 37, at 934; Thissen, *supra* note 135, at 29.

Susan Crawford's recent election victory cemented the liberal majority until at least 2028.²⁹⁷ This gives the court three uninterrupted years to embed the "eyes-open" textualist approach in Wisconsin jurisprudence. The justices can achieve this by adding triggers and stoppers to canons' common law descriptions. For example, the common law rule explaining *expressio unius* could be altered to state that the express mention of one matter *in an enumerated list* excludes other similar matters that are not mentioned, *notwithstanding other contextual evidence indicating otherwise*. Accordingly, if a future judge does not apply *expressio unius* to an enumerated list and fails to cancel it in the face of conflicting canons, it would clearly indicate an erroneous decision.

Nourse, a fierce critic of textualism, would likely argue that this inherently fosters decontextualization and policy-driven rulings.²⁹⁸ Similarly, Gluck and Judge Frank Easterbrook doubt the practicality of a refined formalist approach.²⁹⁹ Gluck observes that Congress no longer predicts court rulings, seeing the judiciary as result-oriented rather than objective.³⁰⁰ She argues that judges prefer interpretive flexibility and that the failure to establish canons as doctrine undermines legislative efforts to follow them.³⁰¹ Judge Easterbrook, while acknowledging that many canons stem from linguistics and are inevitable, believes they are too numerous and broad to be meaningful, advocating instead for a case-by-case plain-meaning approach.³⁰² This Comment addresses all three critiques in turn.

First, "eyes-open" textualism mitigates decontextualization. While "eyes-open" textualism lacks a formal hierarchy, a trigger/stopper-centered approach enhances transparency, strengthens the role of safer text-based canons, and discourages overreliance on tools like *expressio unius*. Judge Easterbrook concedes that "[language-based] canons are inevitable, because . . . language depends on them,"³⁰³ and the new majority has so far been favoring stable linguistic canons over substantive

297. Olivia Herken, *Susan Crawford Wins Wisconsin Supreme Court Election, Cementing Liberal Majority*, WIS. INDEP. (Apr. 2, 2025), <https://wisconsinindependent.com/politics/susan-crawford-wins-wisconsin-supreme-court-election-cementing-liberal-majority/> [https://perma.cc/5RPL-YUT7].

298. Nourse, *Textualism 3.0*, *supra* note 19, at 681–82.

299. Gluck, *The Failure of Formalism*, *supra* note 279, at 183; see Easterbrook, *The Absence of Method*, *supra* note 47, at 82–83.

300. Gluck, *The Failure of Formalism*, *supra* note 279, at 185.

301. *Id.*

302. See Easterbrook, *The Absence of Method*, *supra* note 47, at 84–85 (providing examples of commonsense conclusions drawn from somewhat vague statements to advocate for a plain meaning approach to interpretation).

303. *Id.* at 84.

canons.³⁰⁴ Therefore, by restraining decontextualizing canons by clarifying their triggers and stoppers, “eyes-open” textualism discourages canons as one-size-fits-all solutions.

Furthermore, the approach has the potential to reduce judicial inconsistency by treating guardrails as precedent. Lower courts adeptly picked up on *Kalal*’s methodological *stare decisis* and the canons that SCOWIS subsequently recognized.³⁰⁵ Additionally, contrary to Gluck’s federal-level concern about interpretive flexibility, Wisconsin’s doctrinal approach *promotes* consistency. Passing down the canons, complete with trigger/stopper descriptions through precedent, encourages courts to decide similarly structured statutes consistently. Thus, Wisconsin’s current formalist approach possesses some key understandings between different levels of courts that are lacking at the federal level.³⁰⁶ Limiting flexible canons would only reinforce that stability.

Although no solution can completely solve judicial cherry-picking, the “eyes-open” approach provides Justice Scalia’s interpretive theory with a significant update. This Comment places the ball in the legislature’s and the new SCOWIS majority’s court. The two branches—whether working together or unilaterally—can implement an “eyes-open” textualist paradigm that re-centers textualism around the goals it claims to achieve.

C. Eyes-Open Pluralism?

As previously mentioned, the *Kalal* framework has holes. Justice Scalia’s methodology was left largely unfinished, and *Kalal*’s second step does little to protect against arbitrary canon use absent a finding of ambiguity. Moreover, the relevant section of the opinion is confusing,³⁰⁷ the instructions covering extrinsic sources and ambiguities are vague,³⁰⁸ and the opinion provides little to no guidance on how to answer difficult questions of statutory interpretation, such as questions of implied repeal.³⁰⁹ Although the liberal majority has remained mostly faithful to

304. See generally *supra* Sections II.B–D (discussing the liberal majorities’ preference for narrow canons over broad canons).

305. Gluck, *The States as Laboratories of Statutory Interpretation*, *supra* note 65, at 1800–03.

306. Cf. Gluck & Bressman, *supra* note 37, at 917 (highlighting the disconnect between Congress and the U.S. Supreme Court).

307. At least one legal writing professor at the University of Wisconsin Law School uses *Kalal* to showcase unclear writing.

308. See *Serv. Emps. Int’l Union Healthcare Wis. v. Wis. Emp’t Relations Comm’n*, 2025 WI 29, ¶¶ 62–64, 22 N.W.3d 888, 892 (Dallet, J., concurring).

309. See Desai, *supra* note 11, at 1089 (noting that *Kalal* is silent on many substantive canons). In 2025, SCOWIS split 4–3 in deciding *Kaul v. Urmanski*, which asked whether the doctrine of implied repeal—a cautiously used substantive canon—applied to Wisconsin’s 1849 abortion ban. See *Kaul v. Urmanski*, 2025 WI 32, ¶¶ 7, 11,

Kalal thus far, Justice Dallet has fired warning shots that *Kalal* may be on its last legs.³¹⁰

Justice Dallet has been *Kalal*'s loudest critic in recent years and—now joined by a majority of the court—appears ready to move Wisconsin to a more “holistic” approach.³¹¹ Justice Dallet's major issue lies with *Kalal*'s formalist divide between intrinsic and extrinsic sources.³¹² She emphasizes a lack of instruction on what constitutes the ambiguous language the court must identify before it may consult extrinsic sources, and that extrinsic sources may be relevant to the initial inquiry rather than kept on standby in the case of textual ambiguities.³¹³ Yet, beyond the term “holistic,” Justice Dallet has not elaborated much on what the new framework would look like.³¹⁴ Regardless, the canons will still play a crucial part in SCOWIS's future.

Opening the door to extrinsic sources at the outset does not displace the canons' utility; nearly every judge inherently begins any statutory inquiry with the text.³¹⁵ Therefore, whatever new framework replaces *Kalal* will still act heavily on the context-based approach currently employed by the court. As Justice Dallet has acknowledged, legislative

22 N.W.3d 740, 742–44. When a case turns on whether or not to apply an overreaching substantive canon, *Kalal*'s framework is essentially useless, and it becomes all too easy for judges to implement policy decisions. See Desai, *supra* note 11, at 1104. In *Urmanski*, the *Kalal* framework largely fell to the wayside. See generally *Kaul v. Urmanski*, 2025 WI 32 (holding that the legislature impliedly repealed Wisconsin's 1849 abortion ban despite legal principles cautioning against implied repeal).

310. *Serv. Emps. Int'l Union Healthcare Wis.*, 2025 WI 29, ¶¶ 50, 55–57 (Dallet, J., concurring); *Clean Wis., Inc. v. Wis. Dep't of Nat. Res.*, 2021 WI 71, ¶¶ 41–43, 961 N.W.2d 346, 358–59 (Dallet, J., concurring).

311. *Serv. Emps. Int'l Union Healthcare Wis.*, 2025 WI 29, ¶ 65 (Dallet, J., concurring).

312. *Id.* ¶¶ 52–53 (Dallet, J., concurring).

313. *Id.* ¶¶ 62–64 (Dallet, J., concurring).

314. A “holistic” framework could take a myriad of forms. Perhaps the most surgical approach would be to only clarify *Kalal*'s step two instructions. The court could specify when an ambiguity exists—perhaps when canons conflict. But there are other options. Oregon used to follow a three-step textualist structure that first considered text-based canons, then legislative history in the result of an ambiguity, and then substantive canons if the court still could not determine a result. *State v. Gaines*, 206 P.3d 1042, 1046 (Or. 2009) (en banc). Eventually, the Oregon legislature abrogated the framework and required the court by statute to examine legislative history presented by a party regardless of any ambiguous language, but the court retains the power to assign weight to the extrinsic evidence. *Id.* at 1050–51. However, SCOWIS may dispense with a methodological framework altogether.

315. See Gluck, *The States as Laboratories of Statutory Interpretation*, *supra* note 65, at 1764–65 (“[T]extualism has had a significant impact across the spectrum, leading ‘even nonadherents to give great weight to statutory text.’” (quoting Jonathan Molot, *supra* note 70, at 3); see also *Serv. Emps. Int'l Union Healthcare Wis.*, 2025 WI 29, ¶ 55 (Dallet, J., concurring) (“Everyone, myself included, agrees that we should of course start with the text of the statute, since it is the best available evidence of what the statute means.” (cleaned up)).

history is often inconclusive and will not readily solve every case.³¹⁶ But just as Justice Dallet has admitted that the canons are useful to solve “a matching problem,”³¹⁷ she offers that legislative history may be used in certain circumstances to aid the court.³¹⁸

Thus, Justice Dallet’s desire to drop *Kalal*’s formalist curtain should not be mistaken for an inherent desire to use extrinsic sources to decide every case. The liberal justices have shown a strong commitment to robust textual analysis,³¹⁹ and Justice Dallet has expressly rebuked the process of searching for any inkling of extrinsic evidence to outweigh textual context.³²⁰ Yet, with the court divided as it is, a new framework will not stop textualists from eschewing extrinsic sources.³²¹ For instance, Justices R.G. Bradley, Ziegler, and Hagedorn are unlikely to give much weight to extrinsic sources, so in many cases, a text-heavy analysis is still crucial for the court’s collegiality—otherwise, unanimous 7–0 judgments are likely to contain two analyses.³²² Therefore, to keep some sort of collegiality on the court, the need for a robust approach to textual interpretation—one complete with stronger guardrails around malleable canons—will have to remain even if *Kalal* is put to rest.

CONCLUSION

While textualism purports to offer an objective framework for statutory interpretation, its tools—particularly the surplusage canon and *expressio unius*—are wielded inconsistently, encouraging judicial activism. However, the recent liberal majority has introduced a more

316. *Clean Wis., Inc. v. Wis. Dep’t of Nat. Res.*, 2021 WI 71, ¶ 44, 961 N.W.2d 346, 359 (Dallet, J., concurring) (“Of course, the same extrinsic sources will not be helpful in every case, and some sources are more reliable than others.”).

317. *James v. Heinrich*, 2021 WI 58, ¶¶ 81–82, 960 N.W.2d 350, 381–82 (Dallet, J., dissenting).

318. *Clean Wis., Inc.*, 2021 WI 71, ¶ 45 (Dallet, J., concurring) (“When clear and reliable, such [extrinsic] sources can provide valuable context, regardless of whether a statute is ambiguous.”).

319. *See generally supra* Sections II.B–D (employing a context-, structure-, and canon-based approach to statutory interpretation).

320. *See Clean Wis., Inc.*, 2021 WI 71, ¶ 44 (Dallet, J., concurring) (“The extrinsic materials the dissent uses are uninformative and unreliable and therefore have minimal value.”).

321. Justice R.G. Bradley is especially unlikely to embrace a “holistic” approach. She stated that a holistic approach would condemn the rule of law “to burn in perdition’s flames.” *Serv. Emps. Int’l Union Healthcare Wis. v. Wis. Emp’t Relations Comm’n*, 2025 WI 29, ¶¶ 46–47, 22 N.W.3d 876, 888 (R.G. Bradley, J., concurring). Justice Dallet labeled Justice R.G. Bradley’s claim as “hyperbolic.” *Id.* ¶ 66 (Dallet, J., concurring).

322. Although, this would not be a significant change in Wisconsin. Justice R.G. Bradley is fond of including her own complete analysis in concurring opinions even when she joins the majority’s judgement. *See supra* note 184.

restrained, “eyes-open” approach to textualism, prioritizing textual canons and limiting the arbitrary use of flexible canons. The shift suggests a potential path forward for reducing policy-driven interpretations and fostering greater consistency in statutory construction. The legislature could codify guardrails around problematic canons, and the court could write a more transparent, trigger/stopper-focused approach into case law to solidify the “eyes-open” approach. With the liberal majority positioned to determine doctrine for the years to come, the court can engrain its commitment to a principled, restrained approach to malleable interpretive canons. The court should not squander this opportunity. “Eyes-open” textualism presents an opportunity for Wisconsin to show whether textualism can finally fulfill its promise of objectivity or remain a tool for ideological maneuvering.