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STATE v. PARKER: SEARCHING THE BELONGINGS OF NONARRESTED VEHICLE PASSENGERS DURING A SEARCH INCIDENT TO ARREST

H. Matthew Munson

Abstract: The Fourth Amendment to the U.S. Constitution and Article I, Section 7 of the Washington Constitution generally require a warrant supported by probable cause to conduct a search or seizure. One exception to these requirements is a search incident to arrest, which permits the police to search arrested persons and the area within the arrestee's reach for weapons and evidence. Prior to State v. Parker, when police arrested an occupant of an automobile in Washington, they could search the entire passenger compartment of the vehicle with the exception of locked containers. In State v. Parker, a plurality of the Supreme Court of Washington declared that during the search of an automobile incident to arrest police may not search the belongings of individuals who are not arrested. The Parker plurality would not permit police to search a container they know or should know is owned by a nonarrested individual unless they have reasonable suspicion that the container holds a weapon or evidence of crime. This Note argues that the Parker plurality deviates from state and federal precedent by (1) using ownership instead of access to immunize items from search, (2) concluding that vehicle passengers have an increased level of privacy protection under the Washington Constitution, and (3) characterizing a search incident to arrest as a Terry search. This Note concludes that the plurality's failure to follow precedent and inability to formulate a clear majority rule will confuse lower courts and endanger officers by preventing them from searching any item in a car that may contain a weapon.

In 1997, a Washington State Patrol trooper stopped a car for speeding and arrested the driver for operating a vehicle with a revoked driver's license. The trooper removed the driver from the car, handcuffed him, and placed him in the patrol car. Before releasing the vehicle to Deborah Lee Parker, the only passenger, the trooper noticed an open beer can between the two front seats. Concerned Parker might be intoxicated, the trooper asked Parker to exit the car for a blood-alcohol test. Parker left her open purse on the passenger seat. As part of his search of the passenger compartment, the trooper searched the purse and found a bag of methamphetamine in a coin purse. The State charged Parker with

3. See id.
4. See id. at 490, 987 P.2d at 76.
5. See id.
6. See id.
possession of a controlled substance.\textsuperscript{7} In a motion to suppress the drugs, Parker claimed that the police had violated her constitutional right to be free from unreasonable search and seizure.\textsuperscript{8}

The Fourth Amendment to the U.S. Constitution\textsuperscript{9} and Article I, Section 7 of the Washington Constitution\textsuperscript{10} protect the privacy of individuals by prohibiting unreasonable searches and seizures. Generally, both constitutions require that searches be conducted with a warrant and probable cause,\textsuperscript{11} but courts recognize certain exceptions where a search is reasonable.\textsuperscript{12} One such exception to the warrant and probable cause requirements is the search incident to arrest: when law enforcement officers make arrests, police may search arrestees\textsuperscript{13} and the area within arrestees' immediate control\textsuperscript{14} to secure weapons and evidence. Before last year, when arresting a person in an automobile, police could search the entire passenger compartment of the vehicle, including containers,\textsuperscript{15} with the exception, in Washington, of locked containers.\textsuperscript{16}

In \textit{State v. Parker},\textsuperscript{17} a plurality of the Supreme Court of Washington stated that during vehicle searches incident to the arrest of an occupant, police may not search a container owned by a non-arrested vehicle occupant if the officer knows or should know that the container is owned

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{7}] See id.
\item[\textsuperscript{8}] See id. at 492, 987 P.2d at 77.
\item[\textsuperscript{9}] The federal Constitution provides that:
\texttt{The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.}
\texttt{U.S. Const. amend. IV.}
\item[\textsuperscript{10}] "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7.
\item[\textsuperscript{11}] Probable cause exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." \textit{Ornelas v. United States}, 517 U.S. 690, 696 (1996) (citing \textit{Brinegar v. United States}, 338 U.S. 160, 175–76 (1949)).
\item[\textsuperscript{16}] See \textit{State v. Stroud}, 106 Wash. 2d 144, 152, 720 P.2d 436, 441 (1986).
\item[\textsuperscript{17}] 139 Wash. 2d 486, 987 P.2d 73 (1999).
\end{itemize}
\end{footnotesize}
by that person.\textsuperscript{18} The plurality noted that persons retain privacy rights when in vehicles\textsuperscript{19} and that protection of the person may extend to personal effects, such as purses.\textsuperscript{20} Law enforcement’s interest in securing weapons and evidence did not overcome Parker’s privacy interest in her purse.\textsuperscript{21} In a concurring opinion, Justice Talmadge argued that only very small containers incapable of holding weapons should be immune from search.\textsuperscript{22} Justice Alexander, concurring in part and dissenting in part, would have limited the rule to restricting police from searching any container they know belongs to vehicle occupants who are not arrested.\textsuperscript{23}

This Note argues that the \textit{Parker} plurality’s rule deviates from state and federal precedent, endangers officers, and impedes effective law enforcement. Part I provides a survey of the search-and-seizure law necessary to understand \textit{Parker}, with an emphasis on the search-incident-to-arrest exception under the U.S. and Washington constitutions. Part II summarizes the facts and opinions of \textit{Parker}. Part III gives an overview of the treatment and meaning of plurality decisions so that \textit{Parker}’s status as precedent may be better understood. Part IV argues that the \textit{Parker} plurality’s deviation from Washington precedent threatens the safety of police officers and the efficacy of law enforcement.

\section{I. CONSTITUTIONAL PROTECTIONS AGAINST UNREASONABLE SEARCH AND SEIZURE}

The Fourth Amendment to the U.S. Constitution and Article I, Section 7 of the Washington Constitution generally protect the security of citizens in their persons and property.\textsuperscript{24} The protection is not, however, absolute under either constitution. In determining the contours of the constitutional protections, courts weigh the desire to be free from governmental intrusion against the interest in safe and effective law

\begin{itemize}
  \item \textsuperscript{18} \textit{See id.} at 505, 987 P.2d at 84 (plurality opinion). Justice Johnson was joined by Justices Smith, Madsen, and Sanders. \textit{See id.}
  \item \textsuperscript{19} \textit{See id.} at 494–98, 987 P.2d at 78–80 (plurality opinion).
  \item \textsuperscript{20} \textit{See id.} at 496–99, 987 P.2d at 80–81 (plurality opinion).
  \item \textsuperscript{21} \textit{See id.} at 499, 987 P.2d at 81 (plurality opinion).
  \item \textsuperscript{22} \textit{See id.} at 516–17, 987 P.2d at 90 (Talmadge, J., concurring).
  \item \textsuperscript{23} \textit{See id.} at 517–18, 987 P.2d at 90 (Alexander, J., concurring in part, dissenting in part).
\end{itemize}
enforcement. Courts have recognized that under certain circumstances the latter outweighs the former to such an extent that government action not meeting normal constitutional requirements is reasonable. One of the circumstances not subject to certain constitutional protections is the search incident to arrest.

A. Exceptions to the Warrant and Probable Cause Requirements of the Fourth Amendment Relevant to State v. Parker

The Fourth Amendment's prohibition on unreasonable searches and seizures typically requires police to have probable cause and obtain warrants before conducting searches or seizures. The U.S. Supreme Court, however, has recognized certain narrow exceptions where governmental interests outweigh private interests. Of the exceptions to the warrant and probable cause requirements, two are especially important to understanding Parker: stops and frisks pursuant to Terry v. Ohio and searches incident to arrest.

1. Terry Allowed Stop-And-Frisk Searches To Protect Officer Safety and Permit Effective Law Enforcement

Under the U.S. Supreme Court's decision in Terry v. Ohio, a law enforcement officer may stop a person and conduct a limited search for weapons if the officer has a reasonable suspicion that the person is armed and dangerous. Terry searches must "last no longer than is necessary to effectuate the purpose of the stop," entail only a frisk for weapons, and require suspicion of each person searched. Importantly, Terry searches require neither a warrant nor probable cause to believe a person

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27. Although the Fourth Amendment protects a variety of private interests, see, e.g., United States v. Jacobsen, 466 U.S. 109, 113 (1984) (possessory interest) and Payton v. New York, 445 U.S. 573, 585 n.24 (1980) (liberty interest), the interest it is most often said to protect is the reasonable expectation of privacy. See generally Katz v. United States, 389 U.S. 347 (1967).
29. See id. at 27.
32. See Ybarra, 444 U.S. at 93–94.
has committed a crime. Rather, a police officer must have a reasonable suspicion that "his safety or that of others [is] in danger." The Court in Terry recognized two government interests in permitting such an exception to the Fourth Amendment: effective law enforcement and officer safety. These governmental interests outweighed individuals' privacy interest in avoiding limited searches of their person.

The police also may conduct a Terry search of a vehicle. In Michigan v. Long, the U.S. Supreme Court held that officers may frisk a car for weapons if they reasonably suspect that a passenger or a person near the car is dangerous and that the passenger may grab a weapon from the car. In so holding, the Court noted that "roadside encounters between police and suspects," like Terry stops, are especially dangerous to officers. The enhanced danger of the roadside encounter justifies police frisking cars on less than probable cause.

2. **Without a Search Warrant or Probable Cause, Officers May Conduct Searches Incident to Arrest of Automobiles' Passenger Compartments and Containers**

A long-recognized exception to the warrant and probable cause requirements, the search incident to arrest permits law enforcement officers to search arrested persons and, to some extent, their surroundings. The search incident to arrest is designed to allow officers to obtain evidence of the crime for which an arrest is made and to prevent an arrested person's access to weapons or means of escape. The search must occur at the time of the arrest or soon thereafter and it does not require a warrant or probable cause to believe that a weapon or

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33. See Terry, 392 U.S. at 22, 27.
34. Id. at 27.
35. See id. at 23.
36. See id. at 24–27.
38. See id. at 1049.
39. Id.
40. See id. at 1048–49.
41. See, e.g., Weeks v. United States, 232 U.S. 383, 392 (1914) (noting that it has been "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime").
43. See United States v. Vasey, 834 F.2d 782, 786 (9th Cir. 1987).
evidence will be found, as long as there is probable cause for arrest. 44 Whenever officers arrest a person, they may search that person, regardless of the grounds for arrest. 45

The scope of a search of houses 46 incident to arrest, which mirrors in some ways the search of vehicles incident to arrest, is limited. In Chimel v. California, 47 the U.S. Supreme Court confined the search of a house where a person is arrested to the area within the arrestee’s immediate control, which meant those areas within his or her reach. 48 The Chimel Court emphasized officer safety as a primary reason for searching the area within a person’s reach incident to his or her arrest. 49 Weapons within reach, the Court noted, are as accessible to arrestees as weapons on their person. 50 The search may also extend beyond the place of arrest to immediately adjoining areas from which an attack may be launched. 51

Searches of vehicles incident to the arrest of an occupant are permitted to be broader in scope than searches of premises incident to arrest. In New York v. Belton, 52 the Court held that after a lawful arrest of a vehicle occupant, an officer may search the entire passenger compartment regardless of whether the area was in the arrestee’s immediate control. 53 The Court also allowed the search of any containers within the passenger compartment so long as the containers were “capable of holding another object.” 54 Although it said that it was not deviating from the rule created in Chimel, the Belton Court did not limit the scope of the search to the area within reach of the arrestee, as the Chimel decision did in the non-automobile context. Under Belton, every occupant is presumed to have access to everything within the car’s passenger compartment. 55

44. See Chimel, 395 U.S. at 763.
45. See United States v. Robinson, 414 U.S. 218, 235 (1973) (referring to extent of search incident to arrest without mentioning need for probable cause beyond that necessary to make arrest).
46. The term “houses,” as used in the remainder of this Note, includes any private premises used for habitation, such as apartments.
48. See id. at 763.
49. Id.
50. See id.
53. See id. at 460.
54. Id. at 460 n.4 (noting that trunk is not included in definition of passenger compartment).
55. See id. at 460.
In *Belton*, the Court created a bright-line rule permitting search of the passenger compartment out of a concern for officer safety and ease of administration. The Court noted that prior cases regarding vehicle searches incident to arrest had not delineated an easily administered rule,\(^{56}\) and that without a clear rule police and citizens would remain uncertain of what the U.S. Constitution permitted.\(^{57}\) Citing *Chimel*, the *Belton* Court also recognized that the search incident to arrest protects officer safety by permitting officers to remove weapons within reach of the arrestee.\(^{58}\)

Although the Court did not mention the issue of container ownership in *Belton*,\(^{59}\) most courts have interpreted *Belton* to permit the search of all containers during an automobile search incident to the arrest of an occupant, regardless of who owns the containers.\(^{60}\) While the *Belton* Court found that the search of containers could be justified by the decreased expectation of privacy caused by the arrest,\(^{61}\) the Court also noted that anything within the passenger compartment could be searched because of the danger the contents of containers might pose to police.\(^{62}\) Because lack of ownership of a container does not prevent access to that container, placing certain containers off-limits to search because someone other than the arrestee owns the object seems to contradict the Court’s intention of limiting an arrestee’s ability to reach for a weapon.\(^{63}\)

A recent U.S. Supreme Court case upheld a search of containers in the passenger compartment irrespective of ownership when the police had

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56. See id. at 458.
57. See id. at 459–60.
58. See id. at 457.
59. See id. at 455–56.
61. See *Belton*, 453 U.S. at 461.
62. See id. (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)).
63. See, e.g., *Staten*, 562 A.2d at 92 (“Third party ownership of the auto or ‘containers’ therein would not necessarily prevent the arrestee from gaining access to those items.”).
probable cause to believe the automobile held evidence of a crime. In *Wyoming v. Houghton*, the Court upheld the search of a purse owned by a nonarrested passenger under the “automobile exigency” exception to the warrant requirement, which allows police to search an automobile stopped on the roadway without a warrant if they have probable cause to believe they will find evidence in the automobile. The automobile-exigency exception is based on the idea that the reduced expectation of privacy in automobiles on the roadway, combined with their mobility, permits warrantless searches on probable cause. The automobile-exigency exception is different than the search incident to arrest because the former requires probable cause and the latter does not. Nevertheless, *Houghton* provides insight into the U.S. Supreme Court’s approval of searches of containers in vehicles owned by persons other than the arrestee.

**B. Washington Constitution Permits Searches of Vehicles Incident to Arrest and Protects Certain Privacy Rights of Vehicle Passengers**

The Washington Constitution also confines the power of law enforcement officers to conduct searches and seizures. Washington law provides greater protection of privacy than the Fourth Amendment from certain searches and seizures, although its privacy protections are not uniformly greater than those of the U.S. Constitution. In searches of automobiles incident to arrest, Washington law closely follows federal law.

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64. 526 U.S. 295 (1999).
65. This Note will use the term “nonarrested” rather than “unarrested” to accord with the usage found in *Parker*.
70. *See id.*
1. *Washington Constitution Provides Greater Privacy Protection than the Fourth Amendment in Certain Contexts*

Article I, Section 7 of the Washington Constitution provides at least as much protection of privacy as the U.S. Constitution, and it provides that protection using a similar analytic framework. The application of the Fourth Amendment to the states through the Fourteenth Amendment's Due Process Clause\textsuperscript{71} prevents the states from maintaining a lower level of protection against unreasonable search and seizure than the Fourth Amendment.\textsuperscript{72} Like the U.S. Constitution, the Washington Constitution protects against unreasonable searches and seizures\textsuperscript{73} and requires warrants for any search unless a warrant exception exists.\textsuperscript{74} Similar to the Fourth Amendment, the exceptions to Section 7's warrant requirement entail balancing privacy interests against law-enforcement interests.\textsuperscript{75} While federal courts have interpreted the Fourth Amendment to protect privacy interests even though the amendment does not contain the word privacy,\textsuperscript{76} the Washington Constitution expressly uses the word "private."\textsuperscript{77} The seminal difference between the provisions is that rather than protecting a reasonable expectation of privacy, as the Fourth Amendment does, Section 7 protects those "privacy interests which citizens [of Washington] have held, and should be entitled to hold, safe from governmental trespass absent a warrant."\textsuperscript{78} Commentators generally deem this definition of privacy to be more expansive than its federal counterpart because Section 7's protection does not rely on the expectations of citizens.\textsuperscript{79}

The Washington Constitution’s provision provides greater protection of privacy than the Fourth Amendment in some, but not all, search-and-

\textsuperscript{72} See *State v. Chrisman*, 100 Wash. 2d 814, 817–18, 676 P.2d 419, 422 (1984); see also *State v. Coss*, 87 Wash. App. 891, 905 n.6, 943 P.2d 1126, 1133 n.6 (1997) (Brown, J., dissenting).
\textsuperscript{74} See *Chrisman*, 100 Wash. 2d at 818, 676 P.2d at 422.
\textsuperscript{77} Wash. Const. art. I, § 7.
\textsuperscript{78} *Myrick*, 102 Wash. 2d at 511, 688 P.2d at 154.
seizure contexts. In some areas of search-and-seizure law, the Washington Constitution takes advantage of the federal constitutional principle permitting states to expand civil liberties protection beyond that provided by the U.S. Constitution. Whether a provision of the Washington Constitution grants greater rights than the U.S. Constitution depends on an analysis of the Washington constitutional provision under State v. Gunwall’s six-factor analysis. Using this analysis, the Supreme Court of Washington has decided that Article I, Section 7 does generally provide an enhanced protection of privacy. When courts approach the question of whether Section 7 provides enhanced protection in a particular context, they concentrate on preexisting state law, the fourth Gunwall factor; the other five factors “all lead to the conclusion art. I, §7 provides greater protection to privacy than the Fourth Amendment.” The protections guaranteed by Section 7 need not be uniformly greater than those guaranteed by the U.S. Constitution: “A determination that a given state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context.” Thus, the level of privacy protection provided by Section 7 may be greater than that provided by the Fourth Amendment.


82. 106 Wash. 2d 54, 58, 720 P.2d 808, 811 (1986) (requiring Washington courts to determine whether Washington Constitution extends broader rights than U.S. Constitution using six factors: (1) constitutions’ text, (2) differences in text, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern).

83. See, e.g., State v. Ferrier, 136 Wash. 2d 103, 118–19, 960 P.2d 927, 934 (1998) (holding that under Section 7 police must inform residents of rights when asking for consent to search house); State v. Boland, 115 Wash. 2d 571, 575–78, 800 P.2d 1112, 1114–16 (1990) (holding that contents of trash near house are protected by Section 7).


2. **Supreme Court of Washington Recognized that Search of Vehicles Incident to Arrest of Occupant Provide for Safe and Efficient Law Enforcement**

Before its decision in *Parker*, the Supreme Court of Washington created an exception to permit warrantless searches of automobiles incident to arrest, largely following the exception established in *Belton*. In *State v. Stroud*,\(^8\) the court held that officers could search the passenger compartment of a vehicle incident to the arrest of the driver\(^7\) except for locked containers found inside.\(^8\) Overruling an earlier Washington case,\(^9\) the *Stroud* court rejected the requirement for police officers to have probable cause to believe a search would uncover a weapon or evidence of crime.\(^9\) The court reasoned that asking law enforcement officers to conduct a case-by-case analysis of what can and cannot be searched during a search incident to arrest would inhibit effective law enforcement.\(^9\) Citing *Belton*, the court said that a clear line should be drawn to "aid police enforcement."\(^9\) The court also noted that, as in *Belton*, the threat to officer safety presented an exigency to be considered in determining the boundaries of the search incident to arrest.\(^9\) The court recognized the exception for locked containers not only because passengers had demonstrated a heightened expectation of privacy in the locked container but because a lock would limit access to weapons in containers.\(^9\)

Cases following *Stroud* upheld the balance it struck between privacy interests and the need for efficient and safe law enforcement.\(^9\) The Supreme Court of Washington has held that a purse owned by an arrested vehicle passenger could be searched pursuant to the arrest even though

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86. 106 Wash. 2d 144, 720 P.2d 436 (1986).
88. *See Stroud*, 106 Wash. 2d at 152, 720 P.2d at 441.
91. *See id.* at 152, 720 P.2d at 441.
92. *Id.* at 151, 720 P.2d at 440.
93. *See id.*
94. *See id.* at 152, 720 P.2d at 441.
the privacy interest in the purse might be high. In *State v. Johnson*, the court determined that the reduced expectation of privacy in vehicles supports the broad search permitted under *Stroud*: "Vehicles traveling on public highways are subject to broad regulations not applicable to fixed residences. This broad regulation does not afford [a car occupant] the same heightened privacy protection . . . that he would have in a fixed residence or home." The Supreme Court of Washington has upheld the rule announced in *Stroud*, finding support for the rule in vehicle occupants’ low expectation of privacy.

3. The Washington Constitution’s Protection of Privacy of Nonarrested Persons During Searches Depends on Where and If an Arrest Takes Place

Where no vehicle occupant is arrested, the extent of the intrusion on the privacy of vehicle occupants is limited by Section 7. When police stop a car for a traffic violation, they may not order a passenger whom they do not suspect of being dangerous into or out of the automobile. Nor can police ask vehicle occupants for identification when police approach a vehicle for a parking violation without reasonable suspicion that the passengers are engaged or have engaged in criminal conduct. Section 7 also prohibits random stops of automobiles to check the sobriety of drivers.

Officers may, in certain circumstances, conduct a limited search for weapons without arresting any occupant if they have a reasonable suspicion that an occupant might be armed or dangerous. In *State v. Kennedy*, the Supreme Court of Washington held that when an officer has a reasonable suspicion that the occupants are armed, the officer can

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97. 128 Wash. 2d 431, 909 P.2d 293 (1996) (holding sleeper compartment of tractor-trailer rig subject to search incident to arrest of occupant).
98. Id. at 449, 909 P.2d at 303; see also, e.g., *State v. Cantrell*, 124 Wash. 2d 183, 190, 875 P.2d 1208, 1211–1212 (1994); *State v. Young*, 123 Wash. 2d 173, 185 n.2, 867 P.2d 593, 599 n.2 (1994) ("[I]n examining our state constitution’s explicit protection of the home the fact the search occurs at a home is central to the analysis.").
100. See *State v. Larson*, 93 Wash. 2d 638, 642–43, 611 P.2d 771, 774 (1982).
102. 107 Wash. 2d 1, 726 P.2d 445 (1986).
search the area within the immediate control of a driver and passenger. The court allowed the search to encompass the area within the companion's control because a companion of the suspect "presents a similar danger to the approaching officer."  

During house searches, which are analogous but not identical to vehicle searches, Section 7 protects persons from being searched if they are not independently suspected of criminal activity. Under Washington law, a thorough search of such a person's personal effects tantamount to a search of the person. In State v. Worth, police made two searches of the defendant's purse, which was resting on a chair where she sat during a warranted search of a house. The first search was for weapons; the second was a more probing search that revealed drugs. Holding the second search unconstitutional, the Washington Court of Appeals reasoned that the defendant's purse deserved the same privacy protections as her person because her purse was a personal effect under her control that she sought to preserve as private. In sum, under Washington law, persons arrested in premises have greater privacy protections than vehicle occupants.

II. IN STATE v. PARKER, THE PLURALITY DECLARED THAT POLICE MAY NOT SEARCH CONTAINERS OWNED BY NONARRESTED INDIVIDUALS DURING A SEARCH OF A VEHICLE INCIDENT TO ARREST

The three cases consolidated in State v. Parker each involved the arrest of the driver of an automobile, the search of personal effects owned by a nonarrested passenger of the automobile, and a seizure of drugs contained in those personal effects. In reversing the denials of motions to suppress, the plurality stated that the police may not legally

103. See id. at 12, 726 P.2d at 452.
104. Id.
107. See id. at 891, 683 P.2d at 623–24.
108. See id. at 893, 683 P.2d at 624–25.
search containers they know or should know are owned by individuals not arrested.\textsuperscript{110}

\section*{A. Facts and Procedural History}

In \textit{Parker}, the Supreme Court of Washington consolidated three cases: \textit{State v. Parker},\textsuperscript{111} \textit{State v. Jines},\textsuperscript{112} and \textit{State v. Hunnel}.\textsuperscript{113} In \textit{Parker}, police stopped a speeding car in which Parker was a passenger.\textsuperscript{114} An officer arrested the driver for driving the vehicle with a revoked driver’s license.\textsuperscript{115} Before permitting Parker to drive away, the officers asked Parker to perform a sobriety test because they had seen an open beer can in the car.\textsuperscript{116} During Parker’s sobriety test, an officer noticed some cash lying on a purse in the passenger seat.\textsuperscript{117} After determining that the cash belonged to the driver, the officers searched the purse and found a bag of methamphetamine in a two-by-three-inch coin purse.\textsuperscript{118} Charged with unlawful possession of a controlled substance, Parker moved to suppress the evidence.\textsuperscript{119} The court of appeals upheld the trial court’s decision to deny Parker’s motion.\textsuperscript{120}

In \textit{Jines}, an Olympia police officer stopped a vehicle for a traffic violation and arrested the driver for driving with a suspended license.\textsuperscript{121} Jines, a passenger, left his jacket between the two front seats as he exited the car after the officer asked to search its interior.\textsuperscript{122} During the search of the car, police found in the jacket two small boxes containing

\begin{itemize}
\item \textsuperscript{110} See \textit{id.} at 487, 987 P.2d at 75. Chief Justice Guy dissented and Justice Dolliver joined him. See \textit{id.} Justice Ireland, the ninth justice on the court, did not participate in \textit{Parker}. See \textit{id.}
\item \textsuperscript{114} See \textit{Parker}, 139 Wash. 2d at 489, 987 P.2d at 76.
\item \textsuperscript{115} See \textit{id.}
\item \textsuperscript{116} See \textit{id.} at 490, 987 P.2d at 76.
\item \textsuperscript{117} See \textit{id.}
\item \textsuperscript{118} See \textit{id.}
\item \textsuperscript{119} See \textit{id.} at 490, 987 P.2d at 76.
\item \textsuperscript{120} See \textit{id.} at 522, 987 P.2d at 92.
\item \textsuperscript{121} See \textit{id.} at 490, 987 P.2d at 76.
\item \textsuperscript{122} See \textit{id.} at 522, 987 P.2d at 93.
\end{itemize}
methamphetamine. Jines then told the officer that he owned the jacket. As in *Parker*, the trial court and the court of appeals both found the search permissible.

In the third case, a Kitsap County deputy sheriff pulled over John Hunnel’s car because the officer knew of outstanding warrants for Mr. Hunnel’s arrest. After arresting Mr. Hunnel, the deputy sheriff asked Mr. Hunnel’s wife to exit the car and leave everything inside. The officer found methamphetamine in a matchbox in a purse that was sitting on the passenger side floor. The State conceded that the officer knew the purse belonged to Ms. Hunnel. She was charged with possession of a controlled substance, and the court of appeals upheld the denial of her motion to suppress.

B. *The Parker Plurality Formulated a New Exception to the Search of a Vehicle Incident to Arrest, and the Concurring Opinions Proposed Yet Other Rules*

In an opinion written by Justice Johnson, the plurality formulated a new exception to the scope of a search of a vehicle incident to arrest by protecting any container owned by someone other than the arrested person. The plurality ruled that “if an officer knows or should know the container is a personal effect of a passenger who is not independently suspected of criminal activity” the police may not search the container.

The plurality’s analysis assumed that searches of individuals’ possessions are searches of their persons. The plurality determined that nonarrested vehicle passengers “hold an independent, constitutionally protected privacy interest.” To support the assertion that the
Washington Constitution recognizes a privacy interest for vehicle passengers, the plurality cited *State v. Mendez*,¹³⁵ *State v. Hendrickson*,¹³⁶ and *State v. Mesiani*,¹³⁷ cases in which the court protected the rights of vehicle passengers.¹³⁸ The plurality deemed vehicle occupants and their belongings to have a greater degree of privacy protection under the Washington Constitution than under the U.S. Constitution. This greater protection requires that vehicle passengers’ belongings remain outside the scope of a search incident to arrest.¹³⁹

The *Parker* plurality analyzed these cases as searches of persons associated with, or in proximity to, arrestees.¹⁴⁰ Finding the fact that the defendants had not been arrested “determinative,” the plurality considered the searches of the defendants’ belongings impermissible searches of their person, rather than permissible searches of objects:¹⁴¹ “personal belongings clearly and closely associated with non-arrested vehicle occupants [should not be] subject to full blown police searches merely because some other occupant in the vehicle is arrested.”¹⁴² The plurality opinion relied upon premise-search cases holding that during searches of premises such as houses, the police may not search persons not named in a warrant without having some degree of suspicion of that person.¹⁴³ Citing *State v. Worth*,¹⁴⁴ a premise-search case, the plurality noted that the prohibition on searches of persons not suspected of a crime extends to their personal effects: “personal effects are protected from search to the same extent as the person to whom they belong.”¹⁴⁵

The *Parker* plurality determined that officers must have a reasonable suspicion that items owned by nonarrested passengers contain weapons

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¹³⁵ 137 Wash. 2d 208, 220–21, 970 P.2d 722, 728 (1999) (holding police may not order vehicle passengers into or out of car during routine traffic stop).

¹³⁶ 129 Wash. 2d 61, 71, 917 P.2d 563, 568 (1996) (stating work-release inmates have same expectation of privacy in vehicle as other citizens).

¹³⁷ 110 Wash. 2d 454, 460, 755 P.2d 775, 778 (1988) (holding that random stops of vehicles to check sobriety of drivers are unconstitutional).

¹³⁸ See *Parker*, 139 Wash. 2d at 494, 987 P.2d at 79–80 (plurality opinion).

¹³⁹ See id. at 498–99, 987 P.2d at 80–81 (plurality opinion).

¹⁴⁰ See id. at 496, 987 P.2d at 79 (plurality opinion).

¹⁴¹ Id. at 497, 987 P.2d at 80 (plurality opinion).

¹⁴² Id. at 501, 987 P.2d at 81 (plurality opinion).


¹⁴⁵ *Parker*, 139 Wash. 2d at 498–99, 987 P.2d at 80–81 (plurality opinion).
or evidence to search the containers.\textsuperscript{146} If a police officer has a reasonable suspicion that persons other than the arrested occupant are armed or dangerous, the officer may search that person.\textsuperscript{147} \textit{Parker}'s plurality quoted from the U.S. Supreme Court's decision in \textit{Terry v. Ohio}, which created the frisk-for-weapons exception to the warrant requirement, to support the idea that a search for weapons and a search incident to arrest are distinct\textsuperscript{148} and that a search for weapons in Parker's purse could not be conducted without reasonable suspicion.\textsuperscript{149} The plurality declared that the rights of nonarrested passengers to be free from search of their persons should not be compromised by the search of another passenger.\textsuperscript{150}

Justice Alexander's opinion concurred with the result in \textit{Jines} and \textit{Hunnell} but not \textit{Parker}.\textsuperscript{151} He agreed with the plurality that ownership of a container by a nonarrested vehicle occupant should exempt it from search.\textsuperscript{152} He did not agree, however, with the plurality's use of "should know" in the formulation of its rule. Claiming the "should know" portion of the plurality's rule was subjective,\textsuperscript{153} Justice Alexander would have held that police officers could not search containers that they \textit{know} belong to nonarrested occupants.\textsuperscript{154} In what seemed to be a departure from the rule he formulated, Justice Alexander dissented in \textit{Parker} even though the officer knew the purse belonged to the passenger. Justice Alexander would have upheld the search in \textit{Parker} because the purse was in the immediate control of the driver.\textsuperscript{155} This opinion distinguished the fact that access to a container by the arrested person would permit a search of the container even though the container was owned by a

\begin{itemize}
\item \textsuperscript{146} \textit{See id. at 505, 987 P.2d at 84 (plurality opinion).}
\item \textsuperscript{147} \textit{See id. at 489, 505, 987 P.2d at 76, 83 (plurality opinion).}
\item \textsuperscript{148} \textit{See id. at 499–500, 987 P.2d at 81 (plurality opinion) (quoting \textit{Terry v. Ohio}, 392 U.S. 1, 25–26 (1968)).}
\item \textsuperscript{149} \textit{See id. at 504–05, 987 P.2d at 84 (plurality opinion).}
\item \textsuperscript{150} \textit{See id. at 501, 987 P.2d at 82 (plurality opinion).}
\item \textsuperscript{151} \textit{See id. at 517, 987 P.2d at 90 (Alexander, J., concurring in part, dissenting in part).}
\item \textsuperscript{152} \textit{See id. at 518, 987 P.2d at 90 (Alexander, J., concurring in part, dissenting in part).}
\item \textsuperscript{153} \textit{See id. Objective standards are usually formulated in terms of what a reasonable person would or should do. See, e.g., Wash. Sup. Ct. Comm. on Jury Instructions, \textit{Washington Pattern Jury Instructions—Civil} § 10.01, at 97 (3d ed. 1989) ("[Negligence] is the doing of some act which a reasonably careful person would not do . . . .").}
\item \textsuperscript{154} \textit{See \textit{Parker}, 139 Wash. 2d at 517–18, 987 P.2d at 90 (Alexander, J., concurring in part, dissenting in part).}
\item \textsuperscript{155} \textit{See id. at 518-19, 987 P.2d at 91 (Alexander, J., concurring in part, dissenting in part).}
\end{itemize}
nonarrested individual.\(^{156}\) Justice Alexander's comparatively short opinion did not discuss *Terry* searches or premise searches, as the plurality did.\(^{157}\)

In his concurrence, Justice Talmadge indicated that he would have limited the search of passenger compartments to containers large enough hold weapons.\(^{158}\) Justice Talmadge stated that his bright-line rule would protect officer safety and would ease administration of vehicle searches incident to arrest.\(^{159}\) Because the containers in the three cases—a matchbox,\(^ {160}\) a "small black box,"\(^ {161}\) and a coin purse\(^ {162}\)—were too small to contain weapons, Justice Talmadge believed the searches violated the owners' constitutional right to be free from unreasonable search and seizure.\(^ {163}\)

III. STARE DECISIS AND THE INTERPRETATION OF PLURALITY OPINIONS

Plurality decisions\(^ {164}\) receive treatment different from majority opinions because the doctrine of stare decisis\(^ {165}\) generally requires a legal rule to command a majority of a court's members to carry precedential weight.\(^ {166}\) Courts are often uncertain about how to interpret plurality

\(^{156}\) See id. (Alexander, J., concurring in part, dissenting in part).

\(^{157}\) See id. at 517–19, 987 P.2d at 90–91 (Alexander, J., concurring in part, dissenting in part).

\(^{158}\) See id. at 516–17, 987 P.2d at 90 (Talmadge, J., concurring).

\(^{159}\) See id. at 517, 987 P.2d at 90 (Talmadge, J., concurring).

\(^{160}\) See id. at 492, 987 P.2d at 77 (plurality opinion).

\(^{161}\) Id. at 491, 987 P.2d at 76 (plurality opinion).

\(^{162}\) See id. at 490, 987 P.2d at 76 (plurality opinion).

\(^{163}\) See id. at 516, 987 P.2d at 90 (Talmadge, J., concurring).


decisions167 because the outcome of the case can be supported by multiple legal rules.168

Washington courts take a restrictive approach in defining the authority for which plurality decisions stand. Generally, Washington courts rule that the precedential value of a plurality decision is limited to subsequent cases with very similar facts169 or to the narrowest ground supporting the judgment.170 The latter method seems to be derived from the opinions of the U.S. Supreme Court,171 though neither that Court172 nor the Supreme Court of Washington has precisely defined the meaning of “narrowest grounds.” Two commentators have concluded that under U.S. Supreme Court decisions, the narrowest ground for an opinion is the one that will affect the fewest future cases.173 In Washington, if a plurality opinion is treated as a majority opinion in subsequent cases, courts may adhere to the interpretation for the sake of stare decisis despite the lack of a majority opinion in the original case.174

Courts disfavor plurality decisions not only because of their questionable authority but because of judicial policy concerns. If a rule cannot command a majority of a court, the rule is unlikely to last or to form the basis for the development of a body of case law.175 The confusion over how to treat pluralities can lead to instability and unpredictability, both of which undermine the judicial function.176

167. See id. at 1600–10; see also Linda Novak, Note, The Precedential Value of Supreme Court Plurality Decisions, 80 Colum. L. Rev. 756, 761–78 (1980) (explaining various approaches to divining meaning from plurality decisions).
168. See Hardisty, supra note 165, at 52–57; Kimura, supra note 166, at 1594–95.
171. See, e.g., Zakel, 61 Wash. App. at 808, 812 P.2d at 814 (citing Marks v. United States, 430 U.S. 188, 193 (1977)).
172. See Novak, supra note 167, at 763–64.
173. See Kimura, supra note 166, at 1603–04; Novak, supra note 167, at 764.
175. See Davis & Reynolds, supra note 164, at 66; Novak, supra note 167, at 765.
IV. THE PARKER PLURALITY’S RULE DEVIATES FROM WASHINGTON PRECEDENT TO THE DETRIMENT OF SAFE AND EFFECTIVE LAW ENFORCEMENT

The balance struck by the plurality in Parker between privacy interests and law-enforcement interests is not supported by precedent and will lead to ineffective and unsafe law enforcement in three ways. First, the plurality failed to define clearly the extent to which the ownership of an item will prevent the police from searching it and neglects precedent by basing a search’s permissible scope on access to containers, not ownership. Second, the Parker plurality deviated from precedent by incorrectly analogizing vehicle searches incident to arrest cases to other search cases. Third, the Parker plurality’s rule endangers officer safety and confuses courts.

A. The Parker Plurality’s Determination of the Characteristics that Exempt an Item from Search Are Confusing and Deviate from Precedent

The Parker plurality’s rule fails to state unambiguously what items in the passenger compartment may not be searched during a search incident to arrest. The plurality’s rule also fails to achieve the primary goal of the search incident to arrest, which is the prevention of access to containers that may hold weapons.

1. Items to Which the Parker Plurality’s Rule Applies Are Difficult to Discern

The Parker plurality left open the question of whether ownership alone or ownership combined with proximity to the container should make a search of the container impermissible. In its conclusion, the plurality stated that containers “officers know or should know . . . belong to nonarrested passengers” may not be searched. The use of the word “belong” strongly suggests that Justice Johnson contemplated ownership of containers as the quality making it impermissible to search them. Earlier in the opinion, however, the plurality emphasized that control over a container, not ownership, places it off-limits to search. The citation to State v. Worth, which protected a purse during a search of a

house because the owner of the purse controlled it,\textsuperscript{178} indicates that the plurality considered control the element that determined whether a container could be legally searched.\textsuperscript{179} Thus, the \textit{Parker} plurality created confusion over whether control or ownership makes a container immune to search.

The confusion between control and ownership of containers is exacerbated by Justice Johnson's use of terms with different meanings to describe items in the passenger compartment that may not be searched. In its penultimate paragraph, the plurality opinion used the term "container,"\textsuperscript{180} a word that does not connote an item personal or closely held, to describe those items subject to the plurality's opinion. Elsewhere in the opinion, however, the plurality used other words and phrases that do connote control. For example, the plurality described its rule as protecting from search "personal possessions," "recognizable personal effects," and "personal belongings clearly associated with nonarrested individuals."\textsuperscript{181} Each of these terms, because of the word "personal," suggest control over an item. The court's language failed to make clear distinctions about what can and cannot be searched incident to arrest.

The plurality also failed to clarify whether privacy rights prevent searches of items owned by any nonarrested individual or only items owned by nonarrested occupants. In the first paragraph of its opinion, the plurality stated that personal possessions belonging to "nonarrested individuals" could not be searched.\textsuperscript{182} The plurality also referred to the defendants as "individuals who were not under arrest."\textsuperscript{183} Using the word "individuals" seems to indicate that the possessions of non-occupants—possessions of persons not in the vehicle at the time of arrest—may not be searched. In other parts of the opinion, the plurality used the term "nonarrested occupants" to refer to those persons whose possessions cannot be searched.\textsuperscript{184} When the plurality used the word "occupant" it appeared to suggest that only the possessions of persons in the car at the time of arrest are off-limits to search. Thus, the plurality failed to clarify to whom the search rule applies: those who are not in the car at the time

\begin{itemize}
  \item \textsuperscript{178} See 37 Wash. App. 889, 893, 683 P.2d 622, 624 (1984).
  \item \textsuperscript{179} See \textit{Parker}, 139 Wash. 2d at 498, 683 P.2d at 80.
  \item \textsuperscript{180} \textit{Id}.
  \item \textsuperscript{181} \textit{Id.} at 489, 505, 987 P.2d at 76, 84 (plurality opinion).
  \item \textsuperscript{182} \textit{Id.} at 489, 987 P.2d at 76 (plurality opinion).
  \item \textsuperscript{183} \textit{Id}.
  \item \textsuperscript{184} \textit{Id.} at 505, 987 P.2d at 84 (plurality opinion).
\end{itemize}
of arrest but have items in the car, or only those who are in the car at the
time of the arrest.

Justice Alexander's opinion contributes to the confusion over the role
of ownership in *Parker*. This confusion is vexing because Justice
Alexander's opinion failed to clarify the relationship between his opinion
and the majority, a clarification that could have produced a sounder
holding.\(^{185}\) Despite agreeing with the plurality that containers owned by
nonarrested passengers may not be searched,\(^{186}\) Justice Alexander
apparently believed that because Parker's purse was within the reach of
the driver, it could be searched incident to arrest.\(^{187}\) Thus, Justice
Alexander's position seems to contradict his assertion that police officers
may not search a container they know is owned by a nonarrested
passenger. Justice Alexander's application of his rule calls into question
the rule itself, which contributes to the opinion's confusion.

### 2. *The Parker Plurality Failed to Realize that Precedent Calls for*
### Determining the Scope of a Search Based on Access

The plurality deviated from Washington precedent when it
differentiated between containers based on ownership or control, rather
than access. The search incident to arrest has always aimed to limit
access to all weapons within the reach of the arrestee, not just those
owned by the arrestee.\(^ {188}\) Following the U.S. Supreme Court's rule in
*New York v. Belton*,\(^ {189}\) *Stroud* and subsequent Washington cases declared
that prevention of access to weapons is one of the primary reasons for the
search incident to arrest.\(^ {190}\) By prohibiting searches of locked containers,
*Stroud* placed off-limits to search only those objects to which access was
already limited, hence minimizing “the danger that the individual either
could destroy or hide evidence located within the container...”\(^ {191}\)
Thus, any rule attempting to exempt certain objects in the passenger

\(^{185}\) See infra section IV.C.2.b.
\(^{186}\) See *Parker*, 139 Wash.2d at 505, 987 P.2d at 84 (plurality opinion).
\(^{187}\) See *id.* at 518–19, 987 P.2d at 91 (Alexander, J., concurring in part, dissenting in part).
\(^{190}\) See *State v. Johnson*, 128 Wash. 2d 431, 447, 909 P.2d 293, 302–03 (1996); *State v. Fladebo*, 113 Wash. 2d 388, 395, 779 P.2d 707, 711–12 (1989); *State v. Stroud*, 106 Wash. 2d 144,
152, 720 P.2d 436, 441 (1986).
\(^{191}\) *Stroud*, 106 Wash. 2d at 152, 720 P.2d at 441.
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compartment from search must account for the accessibility of the contents of the container rather than ownership of the container.

B. The Parker Plurality’s Assessment of the Privacy Protection of Nonarrested Vehicle Occupants and Their Belongings Deviated from Precedent

The plurality’s assertion in Parker that vehicle passengers have a degree of privacy protection under the Washington Constitution that they do not have under the U.S. Constitution is not supported by precedent. Also unsupported by precedent is the plurality’s use of premise-search cases to find a heightened protection of privacy for vehicle occupants. Because of New York v. Belton and Wyoming v. Houghton, it is almost certain that the Fourth Amendment would not protect the items in Parker. The erroneous conclusion regarding the protection offered by Section 7 rested on the plurality’s misleading analogy between searches of premises and searches of cars, and led the plurality to place Terry limits on searches incident to arrest.

1. The Parker Plurality Overstated the Privacy Protections Afforded by the Washington Constitution to Vehicle Passengers

The Parker plurality erroneously cited a number of car-search cases to support its finding that Article I, Section 7 grants vehicle passengers certain privacy protections they do not have under the U.S. Constitution. The Parker plurality wrongly implied that State v. Hendrickson stands for the proposition that Section 7 grants more privacy protection than the Fourth Amendment. In Hendrickson, the police conducted a warrantless inventory search of a car owned by a work-release inmate. Hendrickson did not purport to state a general rule regarding vehicles. The case only said a work-release inmate’s subjective expectation of privacy, even if lower than another citizen’s, cannot form the basis for a warrantless search or seizure. Hendrickson did not address the issue of

196. 129 Wash. 2d at 67, 917 P.2d at 566.
197. See id. at 71, 917 P.2d at 568.
whether the privacy protection of vehicle passengers is any greater under the Washington Constitution than it is under the U.S. Constitution.\textsuperscript{198}

Washington cases that do support the finding that vehicle passengers have a greater protection of privacy under the Section 7 than under Fourth Amendment did not involve arrests. In one such case cited by the plurality, \textit{State v. Mendez},\textsuperscript{199} the Supreme Court of Washington held that officers may not order vehicle passengers into or out of vehicles during traffic stops unless the officer has a reasonable suspicion that a passenger is armed or dangerous.\textsuperscript{200} The \textit{Parker} plurality used this case to assert that vehicle passengers have greater protection under Section 7 than under the Fourth Amendment.\textsuperscript{201} The \textit{Parker} plurality was mistaken when it analogized \textit{Mendez} to \textit{Parker} because arrests present greater dangers than situations where no one is arrested. In \textit{State v. Kennedy},\textsuperscript{202} a case involving a \textit{Terry} frisk of a passenger compartment, the court made clear that nonarrested persons present less danger to officers than arrested persons: “Because the risk to a \textit{Terry} suspect is substantially less than that presented a \textit{Stroud} arrestee, the risk to the officer is correspondingly reduced.”\textsuperscript{203} Thus, the concern for officer safety in arrest situations limits \textit{Mendez}’s finding of heightened constitutional protection to non-arrest situations.

2. \textit{The Parker Plurality’s Use of Premise Search Cases to Support a Finding of Heightened Privacy Protection Is Misplaced}

The \textit{Parker} plurality mistakenly relied on a variety of house-search cases to justifyaffording a vehicle passenger’s belongings a heightened privacy protection. For instance, the \textit{Parker} plurality cited \textit{State v. Broadnax},\textsuperscript{204} in which the court upheld a motion to suppress evidence seized when police frisked a nonarrested person in a house.\textsuperscript{205} However, \textit{Broadnax} and other premise-search cases do not support the court’s

\begin{itemize}
\item \textsuperscript{198} See \textit{id}.
\item \textsuperscript{199} State v. Mendez, 137 Wash. 2d 208, 212, 970 P.2d 722, 724 (1999).
\item \textsuperscript{200} Id. at 212, 970 P.2d at 724; see also State v. Mesiani, 110 Wash. 2d 454, 460, 755 P.2d 775, 778 (1988) (holding invalid random stops of vehicles to check sobriety of drivers).
\item \textsuperscript{201} See 139 Wash. 2d at 493–94, 987 P.2d at 78 (plurality opinion).
\item \textsuperscript{202} 107 Wash. 2d 1, 726 P.2d 445 (1986).
\item \textsuperscript{203} Id. at 12, 726 P.2d at 451.
\item \textsuperscript{204} 98 Wash. 2d 289, 302, 654 P.2d 96, 104 (1982) (cited in \textit{Parker}, 139 Wash. 2d at 497–98, 987 P.2d at 78–79 (plurality opinion)).
\item \textsuperscript{205} See \textit{Parker}, 139 Wash. 2d at 497–98, 987 P.2d at 80–81 (plurality opinion).
\end{itemize}
reasoning for two reasons. First, the threat to the safety of law enforcement officers is greater during arrests of vehicle occupants than during searches of premises. By employing a different standard that allows a broader search, Stroud implicitly recognized the greater danger of roadside encounters. The U.S. Supreme Court has also recognized the heightened risk to safety during roadside encounters.

A second reason premise search cases do not support the Parker plurality’s contention is that the privacy interest in premises is higher than the privacy interest in vehicles. Washington courts have declared repeatedly that the privacy and liberty interests of vehicle passengers may not be as great as those of persons in premises. For example, in State v. Johnson, the court upheld the search of a sleeper compartment of a truck incident to the arrest of the driver, declaring that the person’s privacy interest in the sleeper compartment was not as great as his privacy interest in a house. The Johnson court declined to apply a rule of search and seizure derived from premise searches to the case. Thus, the conclusion that the Parker plurality drew from its comparison of searches of persons in premises to searches of persons in vehicles did not comply with precedent.

3. The Parker Plurality Deviated from Precedent by Placing Terry Limits on Searches Incident to Arrest

By concluding that Section 7 grants vehicle passengers heightened privacy protection, the Parker plurality incorrectly treated searches of containers in Parker as Terry searches of a person. Under the plurality’s rule in Parker, police need reasonable suspicion that a container holds a weapon or evidence to overcome the new-found heightened privacy protection of vehicle passengers.

208. See supra notes 37–40 and accompanying text.
209. See supra note 98 and accompanying text.
211. See id. at 449, 909 P.2d at 303–04.
Under the Fourth Amendment, the containers in *Parker* would almost certainly be subject to search without probable cause or reasonable suspicion. The U.S. Supreme Court would likely formulate the same rule for searches of automobiles incident to arrest that it formulated for automobile-exigency searches in *Houghton*. Like the search-incident-to-arrest exception, the "car exigency" line of cases out of which *Houghton* grew did not make ownership-based distinctions between containers within a vehicle, a distinction the *Houghton* Court found persuasive for car-exigency searches. Moreover, a search incident to arrest is conducted to secure weapons as well as evidence, whereas the probable-cause search is conducted only for evidence and contraband. The danger that the search incident to arrest is intended to diffuse makes it even more inadvisable to place greater restrictions on it than on automobile-exigency searches.

The *Parker* plurality selectively quoted *United States v. Robinson* and *Terry v. Ohio* to support the assertion that police need reasonable suspicion to search a container owned by a vehicle occupant who is not arrested. *Parker* quoted *Robinson* to support the idea that a search incident to arrest "cannot constitutionally derive from the need to secure officer safety alone." *Robinson*, which held that an officer can search the person of an arrestee incident to arrest, disavowed the *Parker* plurality's approach in the paragraph following the one quoted by *Parker*: "*Terry*, therefore, affords no basis to carry over to a probable cause arrest the limitations this Court placed on a stop-and-frisk search permissible without probable cause." *Robinson* made clear that *Terry* searches are different from searches incident to arrest because the latter require probable cause to arrest rather than reasonable suspicion. Neither

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215. See id.

216. See Knowles v. Iowa, 525 U.S. 113, 116–17 (1998); State v. Mendez, 137 Wash. 2d 208, 214 n.2, 970 P.2d 722, 725 n.2 (1999); see also Supreme Court, 1980 Term, supra note 60, at 255 ("When the police have arrested an individual . . . a failure to search may afford the arrestee an opportunity to destroy evidence or seize a weapon.") (footnote omitted).


Belton nor Stroud suggested that Terry limitations should be placed on searches incident to arrest. In other words, neither required reasonable suspicion to search anything in the car once an arrest had taken place. In sum, the Parker plurality was mistaken when it equated the search of containers incident to arrest to Terry searches of their owners.

C. Parker Will Endanger Officers, Hinder Law Enforcement, and Confuse Lower Courts

The confusion created by the Parker plurality's rule will complicate police officers' administration of searches. The plurality's ownership-based rule and its characterization of searches incident to arrest as Terry searches will threaten the safety of officers. Moreover, Parker's lack of clarity and multiple opinions will confound lower courts.

1. The Parker Plurality Threatens the Safety of Officers and Hinders Effective Law Enforcement

The Supreme Court of Washington, in Stroud, emphasized that the scope of the search of a vehicle incident to arrest must follow a bright-line rule to protect officers. Stroud declared that a totality-of-the-circumstances test asks police to use a complex, multifaceted legal rule to make a quick, ad hoc decision. According to Stroud, complex rules must be avoided to prevent danger to officers and to "aid police enforcement."221

The rule advanced by the plurality is precisely the sort of complicated formulation that should be avoided when crafting a search-incident-to-arrest rule. The plurality also left unanswered the question of how an officer should know an item is owned or controlled by a nonarrested occupant. Satisfied that "it is not overly difficult to determine to whom a personal effect belongs," the four justices did not specify what factors an officer might use to determine who owns a container.223 Although the placement and type of container might provide clues to its ownership, those clues often will not provide a clear answer.224 In addition, officers

222. Id.
223. Parker, 139 Wash. 2d at 503, 987 P.2d at 83 (plurality opinion).
224. The U.S. Supreme Court addressed the difficulty faced by officers in determining the scope of the search in Wyoming v. Houghton, 526 U.S. 295, 305 (1999): "[if the court were to adopt a]
may or may not be able to rely on the statements of nonarrested passengers regarding ownership of containers. While the \textit{Parker} plurality’s test may not present questions any more complex than those common to police work, such as the determination of probable cause,\textsuperscript{225} the policy in \textit{Stroud} favoring clarity suggests that complexities should be avoided when delineating the extent of a vehicle search incident to arrest.

The difficulty of determining if a personal effect belongs to a nonarrested occupant could pose difficulties to an officer. For instance, before initiating a search, an officer may have to hesitate while trying to determine if a container belonged to a nonarrested occupant; yet, officers “must make a decision to search with little more than a moment’s reflection.”\textsuperscript{226} In addition to determining ownership, an officer may have to confront the confusion the plurality’s rule creates over the protection afforded items owned by nonarrested individuals.\textsuperscript{227} For example, officers may not know for certain if they can search an item owned by a nonarrested individual who is not in the car at the time of arrest.

The \textit{Parker} plurality’s rule makes searches of vehicles incident to arrest less safe to law enforcement officers and more difficult to administer. Because containers owned or controlled by someone other than the arrestee may be accessible to the arrestee, the \textit{Parker} plurality’s prohibition of searches of those containers threatens officer safety. The court of appeals recognized as much in \textit{Hunnel} when it found that “even a purse under the control of a nonarrested occupant of the car is... accessible to the arrested occupant for weapons.”\textsuperscript{228} The \textit{Parker} plurality’s rule fails to prevent the arrestee’s access to weapons because ownership and control are inapposite when determining accessibility.

Analogizing the search of the items in \textit{Parker} to \textit{Terry} searches poses a danger to officers because searches incident to arrest are more

\textsuperscript{225} See \textit{Parker}, 139 Wash. 2d at 503, 987 P.2d at 83 (comparing determination of ownership to determinations of probable cause).

\textsuperscript{226} See \textit{Stroud}, 106 Wash. 2d at 151, 720 P.2d at 440.

\textsuperscript{227} See supra notes 179–83 and accompanying text.

\textsuperscript{228} See supra notes 179–83 and accompanying text.

Note: The text includes citations that are not fully visible in the image. The full citations are as follows:

- \textit{Stroud}, 106 Wash. 2d at 151, 720 P.2d at 440.
- \textit{Hunnel}, 89 Wash. App. 638, 643, 949 P.2d 847, 850 (1998); see also \textit{Staten v. United States}, 562 A.2d 90, 92 (D.C. 1989) (“Third-party ownership of the auto or ‘containers’ therein would not necessarily prevent the arrestee from gaining access to those items. It should not, therefore, bar the police from searching them in the same manner as if they were owned by the arrestee.”).
dangerous than stop-and-frisk searches. The U.S. Supreme Court has differentiated between the danger faced by officers during *Terry* stop-and-frisk searches and searches incident to arrest. The Court found that a stop without a formal arrest, such as *Terry*, is less dangerous to police:

"Where there is no formal arrest... a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence..."229 Unlike a person stopped pursuant to *Terry*, an arrested person is typically taken into custody, and thus will be in contact with police for a longer period of time, thereby exposing police to more danger.230 In *Robinson*, the Court recognized the danger of an arrest situation,231 regardless of the grounds for arrest.232 Thus, the *Parker* plurality fails to acknowledge the threat to officer safety created by the analogy to *Terry*.

2. *Parker* Decreases Judicial Efficiency

In addition to endangering police officers, *Parker* fails to give guidance to lower courts. The murkiness of the opinions of the plurality and Justice Alexander, and the failure of the court to recognize the lack of a majority opinion, create confusion. The confusion *Parker* creates cannot be avoided simply by reading the case narrowly because it is not clear which of the three opinions supporting the judgment is the narrowest opinion.

a. The *Parker* Plurality's Opinion Will Confuse Lower Courts

*Parker*'s plurality decision is likely to create uncertainty and confusion among lower courts. The plurality’s confusing references to control and ownership, and the issue of whether an officer should know that a container is owned by someone other than an arrestee could lead to many appeals and greater uncertainty in the area of searches incident to arrest.233 Given the plurality opinion’s lack of clarity, lower courts will

232. *See id. at 234 n.5.
233. *See supra* notes 177–88 and accompanying text.
likely create confusing or contradictory rulings regarding the scope of the search, which will only add to the difficulty of performing searches.

The most confusing aspect of *Parker* is the court’s failure to formulate a rule in a majority opinion. The concurring opinions of Justices Talmadge and Alexander cannot be construed to support fully the plurality’s rule. Justice Talmadge limited the search of containers to those that could hold weapons; he did not differentiate between containers based on ownership or control, as the plurality did. Justice Alexander’s excision of “should know” from the plurality’s rule is a major departure from the plurality because his rule appears to be subjective, despite his intentions to the contrary. A search that depends on the actual knowledge of an officer, and not objective facts, is subjective. The plurality, on the other hand, would also have prohibited searches of containers that an officer did not know but should have known were owned by nonarrested occupants, a subjective and objective standard.

Adding to the uncertainty of the meaning of the case, the court did not appear to have realized that no opinion commands a majority of justices. The plurality repeatedly referred to its opinion as a statement of the holding, when it had no authority to announce one. Justice Talmadge, Justice Alexander, Chief Justice Guy, and Justice Dolliver compounded the problem when they called the plurality opinion a majority opinion. Lower courts have also failed to notice that *Parker* has no majority. Their failure to recognize *Parker* as an opinion

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235. *Id.* at 518, 987 P.2d at 90 (Alexander, J., concurring in part, dissenting in part) (“[T]he majority opinion injects a subjective standard that runs counter to the rationale we set forth in *Stroud*.”).
236. See *supra* note 153.
237. See *Parker*, 139 Wash. 2d at 489, 987 P.2d at 76 (plurality opinion); see also *supra* Part. III.
238. See *id.* at 505, 987 P.2d at 84 (Talmadge, J., concurring).
239. See *id.* at 517, 987 P.2d at 90 (Alexander, J., concurring in part, dissenting in part).
240. See *id.* at 519, 987 P.2d at 91 (Guy, C.J., dissenting).
dev, of a majority is important because plurality opinions do not carry the same precedent weight as majority opinions; plurality opinions should not be accorded the same recognition as majority opinions.242

b. Lower Courts Must Decide the Narrowest Grounds on Which Parker Rests

If lower courts realize, as they should, that the Parker plurality is not a majority, they will have the difficult task of discerning which of the concurring opinions is the narrowest ground on which Parker rests.243 Justice Alexander’s opinion probably represents Parker’s narrowest opinion supporting the judgment. His opinion is narrower than the plurality because it limits searches to those items officers know are owned by nonarrested passengers, rather than those they should know are owned by nonarrested passengers.244 His opinion may also affect fewer cases than Justice Talmadge’s opinion because Justice Talmadge’s rule would affect every search incident to arrest, even those where all passengers are arrested.245

It is not certain, however, that Justice Alexander’s opinion should be considered Parker’s holding. The conclusion that Justice Alexander’s opinion is the narrowest is thrown into doubt by his application of his rule, in which he implied that the proximity of a container to an arrestee would make the container open to search, regardless of the container’s ownership.246 Justice Alexander’s characterization of the “should know” test as subjective also casts doubt on the meaning of his rule because it is contrary to the widely accepted definition of subjective.247 Finally, it is uncertain that Justice Alexander’s rule would arise any less frequently than Justice Talmadge’s, even though Justice Talmadge’s rule would apply to all searches incident to arrest. In sum, the precise rule of Parker is in serious doubt.

242. See supra Part III.
243. See, e.g., Davis & Reynolds, supra note 164, at 66–75.
244. See Parker, 139 Wash. 2d at 517–18, 987 P.2d at 90 (Alexander, J., concurring in part, dissenting in part).
245. See id. at 517, 987 P.2d at 90 (Talmadge, J., concurring).
246. See id. at 518–19, 987 P.2d at 91 (Alexander, J., concurring in part, dissenting in part).
247. See supra notes 153, 235.
V. CONCLUSION

The search-incident-to-arrest exception to the warrant requirement of the Fourth Amendment and Article I, section 7 of the Washington Constitution is the result of a careful weighing of the interest in law enforcement against the interest in privacy. By ignoring precedent, the Parker plurality upsets the balance the Supreme Court of Washington had struck between those competing concerns. Although the plurality pursued the laudable goal of strengthening civil liberties, it did so without a basis in case law and at the expense of safe and efficient law enforcement. The court’s ambiguous explanation of its proposed holdings and its inability to articulate a genuine holding will frustrate law enforcement by police and by the courts; its failure to distinguish between access and ownership, and between Terry searches and searches incident to arrest, will endanger officers. To cure these deficiencies, the court should adopt a rule that provides for searches of vehicles incident to arrest that do distinguish between objects based on ownership, and that do not require reasonable suspicion to search objects within a car. The court should adopt such a rule that commands the support of a majority of justices to avoid police and judicial inefficiencies and protects the safety of law enforcement officers.