

## PIECING TOGETHER PRECEDENT: FRAGMENTED DECISIONS FROM THE WASHINGTON STATE SUPREME COURT

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*Abstract:* For decades, countless jurisdictions have grappled with the ambiguous precedential weight of court decisions that lack a majority opinion. In American jurisprudence, applying a “majority,” “lead,” “concurrence,” or “dissent” label to an appellate court opinion indicates agreement or disagreement with the judgment of the case. When a decision is fragmented (that is, there is no majority opinion), courts often express the judgment of the court with one opinion labeled as the “plurality” or “lead” opinion. Traditionally, labeling an opinion as a “lead opinion” indicates that the reasoning expressed within the opinion has more support than the other opinions written for the court. In some jurisdictions, a lead opinion may also carry greater precedential value than its accompanying opinions.

In Washington state, the precedent set by fragmented court opinions is complex and often misunderstood. When the Washington State Supreme Court issues fragmented decisions, it labels one opinion as the lead opinion that expresses the judgment of the court. But labeling this opinion as a “lead” opinion is *misleading*: these opinions frequently fail to garner a plurality of support and may have less precedential value than their accompanying concurrences and dissents. This practice has led to considerable confusion among those looking for precedential value within the Court’s fragmented decisions. If the lead opinion has less precedential value than an accompanying concurrence or dissent, why is it labeled as the lead opinion? And if not in the lead opinion, where do we find precedential value within a fragmented decision?

Labeling an opinion as a lead opinion misleadingly indicates greater precedential value than the opinion may actually warrant. This mislabeling is the result of a clash between the Court’s method for deriving precedential value from its fragmented decisions and its procedure for labeling its opinions. When deriving precedential value from its fragmented decisions, any point of reasoning that receives the assent of five justices—regardless of whether they concur or dissent in the judgment—is binding on a lower court. At the same time, the Court’s rules for designating an opinion as the “lead” ignore the reasoning within that opinion. The focus is only on the judgment. If a majority of the justices agrees in the judgment with the justice that created a prehearing report on the case, that justice writes a majority opinion and circulates it to the rest of the Court. After circulation, if the opinion fails to garner a majority of the court’s support, the Court labels it as a lead opinion. The main issue is this: the lead opinion retains that label even when a concurrence garners more

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signatures. In sum, the label that an opinion bears provides almost no useful information other than whether the justice agreed in the judgment.

This Comment argues that the Court should alleviate the confusion surrounding fragmented decisions with one simple solution: the Court should label its opinions in parts. If the Court fragments after the initial majority opinion circulates, the lead, concurring, and dissenting opinions should be broken down into separately labeled parts. Each justice should sign every part of each opinion that they agree with. The Court should then, if necessary, reassign the lead opinion label to the opinion garnering the most signatures that concurs in the judgment.

## INTRODUCTION

When an appellate court issues a decision that does not have unanimous support, each separately writing justice indicates whether they agree on the judgment, or in other words, whether they agree with the court's decision to uphold or overturn the lower court's ruling. How the court labels each opinion (as a majority, lead, concurrence, or dissent) indicates whether the writing justice agrees or disagrees on the judgment.<sup>1</sup> That label also indicates the opinion's precedential value and whether it is binding on a lower court: majority opinions have high precedential value, while dissenting opinions usually have no precedential value at all.

What an opinion label indicates regarding both the judgment and its precedential value is especially important in fragmented decisions. This Comment uses the term "fragmented decision" to refer to any decision that lacks a clear majority opinion. For example, a fragmented decision might have a plurality (4–3–2), two pluralities (4–1–4), or even a more splintered result (1–1–3–3–1).<sup>2</sup> Courts use different labels within their fragmented decisions to indicate whether an opinion agrees in the judgment and has greater precedential value. Generally, the opinion that agrees in the judgment and garners the most support bears a label indicating that it is the "plurality" or "lead" opinion.<sup>3</sup> If that court also

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1. See Michael I. Meyerson, *The Irrational Supreme Court*, 84 NEB. L. REV. 895, 899 (2005) (noting that each U.S. Supreme Court "opinion reflects the results of two different votes," one regarding the judgment and the other "on the opinion explaining the reasoning that supports the judgment.").

2. See *Marks v. United States*, 430 U.S. 188, 193 (1977) (referring to a "fragmented Court"); Richard Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1943, 1944 (2019) (using the term "fragmented decision").

3. See, e.g., *Faulder v. Texas*, 612 S.W. 2d 512, 516 n.3 (Tex. App. 1980) (Roberts, J., concurring in part and dissenting in part) ("By custom 'plurality' [] refers to the opinion on the prevailing side which has the most support."); GEORGE E. DIX & JOHN M. SCHMOLESKY, 40 TEX. PRAC., CRIMINAL PRACTICE AND PROCEDURE § 2.8 (3d ed. 2019) ("[In a fragmented decision from the Texas Court of Criminal Appeals, t]he opinion that is reprinted first in the Southwestern Reporter generally announces the disposition of the case—reversal, affirmance, or some other procedural outcome—

affords precedential value to fragmented decisions, generally that lead opinion has greater precedential value than any accompanying concurrences or dissents.

Almost 10% of the Washington State Supreme Court's 2018 decisions were fragmented.<sup>4</sup> Despite lacking a clear majority opinion, Washington courts still afford precedential value to parts of these fragmented decisions.<sup>5</sup> Actually determining what precedential value these decisions have, however, is a complicated endeavor.<sup>6</sup> The result is that many misinterpret how these cases will apply to a lower court.<sup>7</sup>

Many misinterpret these cases because of the way that the Court labels its fragmented decisions. While the Court labels one opinion as the lead opinion in its fragmented decisions, this label is *misleading*: the lead opinion does not always garner a plurality of the justices' votes, might not express the actual outcome of the case, and might not include any of the reasoning that the court used to arrive at the judgment. If a lead opinion has no precedential value, why is it the lead opinion? And if not in the lead opinion, where can we find precedential value?

Lead opinions often do not have precedential value because of a clash between the Court's method for extracting precedential holdings from its decisions and its procedure for denoting the precedential value of its

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that a majority of the judges has agreed upon. Under the practice of the United States Supreme Court, this opinion would be characterized as one 'of the Court' if—but only if—it was joined by a majority of the members of the court.”). Many scholars use lead opinion and “plurality opinion” somewhat interchangeably. *See, e.g.,* Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 756 n.1 (1980) (“This Note uses the term ‘plurality opinion’ or ‘the plurality’ to refer to the opinion designated as the lead opinion of the Court, which is not always the opinion subscribed to by the largest number of Justices. Other opinions that join the judgment are designated as ‘concurrences,’ even if they receive more votes than the lead opinion.”).

4. Of the 104 slip opinions issued by the Court in 2018, 10 were fragmented decisions. *See Available Slip Opinions for 2018*, WASH. CTS., <https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.byYear&fileYear=2018&crtlLevel=S&pubStatus=PUB> [https://perma.cc/2Q87-PPG8] (including links to ten fragmented cases: *El Centro de la Raza v. State*, 192 Wash. 2d 103, 428 P.3d 1143 (2018); *Eyman v. Wyman*, 191 Wash. 2d 581, 424 P.3d 1183 (2018); *In re Dependency of E.H.*, 191 Wash. 2d 872, 427 P.3d 587 (2018); *In re Pers. Restraint of Schley*, 191 Wash. 2d 278, 421 P.3d 951 (2018); *In re Pers. Restraint of Fero*, 190 Wash. 2d 1, 409 P.3d 214 (2018); *Roake v. Delman*, 189 Wash. 2d 775, 408 P.3d 658 (2018); *Schnitzer W. LLC v. City of Puyallup*, 190 Wash. 2d 568, 416 P.3d 1172 (2018); *State v. Jefferson*, 192 Wash. 2d 225, 429 P.3d 467 (2018); *State v. Sassen Van Elsloo*, 191 Wash. 2d 798, 425 P.3d 807 (2018); *State v. Schierman*, 192 Wash. 2d 577, 438 P.3d 1063 (2018)).

5. *See, e.g.,* *Wright v. Terrell (Wright II)*, 162 Wash. 2d 192, 195–96, 170 P.3d 570 (2007) (piecing together precedent from a fragmented case's concurrence and dissent).

6. *See infra* Part II (demonstrating confusion within the legal community regarding the precedential value of lead opinions issued by the Washington State Supreme Court).

7. *See id.*

opinions. The Court extracts precedential value from a fragmented decision when there is any single point of reasoning that at least five justices agree with, regardless of whether they concur or dissent in the judgment.<sup>8</sup> But the Court's procedure for denoting the precedential value of its opinions does not actually take precedential value into account.<sup>9</sup> Instead, the Court denotes the precedential value of its opinions based on the judgment of the case.<sup>10</sup>

If the justice who was assigned to prepare a pre-hearing report on the case is in the majority when the justices vote on the judgment, the Court assigns the task of writing the majority opinion to that justice.<sup>11</sup> This process for assigning the majority opinion ignores the reasoning behind each vote. If the justices disagree with the reasoning in the majority opinion, they frequently split off to write separate concurrences.<sup>12</sup> After splitting off to write separate opinions, if the number of justices signing on to the majority opinion is fewer than five, the Court relabels the majority opinion as the lead opinion.<sup>13</sup> That lead opinion frequently does not have a plurality of the justices' signatures and has little precedential value.<sup>14</sup> Until the Court fixes the clash between its method for extracting precedent and its procedure for denoting precedential value, the public must take the same approach as one would when reading seriatim<sup>15</sup> decisions: it will have to piece together precedent from all of the opinions without any guidance.<sup>16</sup>

*City of Shoreline v. McLemore*<sup>17</sup> illustrates the clash between the

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8. See *Wright II*, 162 Wash. 2d at 195–96, 170 P.3d at 571.

9. See *infra* notes 156–157 and accompanying discussion.

10. See *infra* note 157 and accompanying discussion.

11. See *infra* notes 120–122 and accompanying discussion.

12. See *supra* note 1 and accompanying discussion; *infra* notes 159–164 and accompanying discussion.

13. The Court's rules do not mention this practice, but the Court regularly does it. See INTERNAL PROCEDURES MANUAL OF THE WASHINGTON STATE SUPREME COURT (2019) [hereinafter INTERNAL PROCEDURES MANUAL], available at <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Documents/SupremeCourtInternalRules.pdf> [<https://perma.cc/ZS8Z-TSJS>].

14. See *infra* sections II.A.2, II.A.3.

15. In opposition to the modern practice of courts summarizing their agreement in an opinion of the court or a majority opinion, when courts used to issue seriatim opinions, each justice wrote a separate opinion.

16. See *Re*, *supra* note 2, at 2004. *Re* notes that deriving precedent from several opinions is “somewhat inefficient insofar as it requires interpreters to pore over multiple opinions rather than one” and that this is an “important reason why the Supreme Court stopped issuing seriatim decisions in favor of majority opinions.” *Id.* at 2004 n.331.

17. *City of Shoreline v. McLemore*, 193 Wash. 2d 225, 438 P.3d 1161 (2019), *appeal docketed*, No.19-202 (U.S. Aug. 16, 2019).

Court's method for extracting precedential holdings and its procedure for denoting precedential value of opinions. In *McLemore*, the lower court upheld McLemore's conviction for willfully obstructing police officers from their duties.<sup>18</sup> The Court issued a 4–4 decision, with one opinion marked as the lead opinion and one marked as a dissent.<sup>19</sup> Usually in a 4–4 decision, the ruling of the lower court stands.<sup>20</sup> But in this case the lead opinion purported to *overturn* the lower court's ruling, “hold[ing]” that because the city had not supported its case with sufficient evidence it must remand to the lower court.<sup>21</sup> Immediately after the release of the slip opinion, a flurry of contradictory interpretations ensued. McLemore's counsel asserted that his client won.<sup>22</sup> The Court's spokesperson implied that the conviction stood<sup>23</sup>—regardless of what the lead opinion said. Press headlines noted the confusion: “Washington Supreme Court baffles lawyers with split opinion.”<sup>24</sup>

The next day, the Court issued a correction, but instead of switching how the court denoted the precedential value of the opinions, it kept the lead and dissenting opinions' designations the same.<sup>25</sup> The Court amended the lead opinion to state that they “would hold” rather than “hold” and that they “recognize this opinion has garnered only four signatures,” so the judgment of the lower court was affirmed.<sup>26</sup> Even though the Court labeled one opinion in *McLemore* as the lead opinion—which implied some greater precedential value—that opinion

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18. *McLemore*, 193 Wash. 2d at 229, 438 P.3d at 1163.

19. Justice Madsen did not participate in this decision or have a pro-tempore replacement.

20. See, e.g., *McIntyre v. State of Wash. Dep't of Health, Med. Disciplinary Bd.*, 133 Wash. 2d 859, 860, 949 P.2d 347, 347 (1997) (mem.) (“One of the Justices of this court having recused, this case was argued to the remaining eight Justices. These eight Justices are divided in their opinions, and there is no majority for either affirmance or reversal as required by Const. art. IV, § 2. Therefore, the decision of the Court of Appeals . . . is affirmed.”).

21. *City of Shoreline v. McLemore*, No. 95707-0, slip op. at 17 (Wash. Apr 18, 2019) (lead opinion), amended by Order Amending Opinion, No. 95707-0 (Wash. Apr. 19, 2019).

22. Gene Johnson (@GeneAPSeattle), TWITTER (Apr. 18, 2019, 11:17 AM), <https://twitter.com/GeneAPSeattle/status/1118941600992751616> [<https://perma.cc/E7UE-3QDH>].

23. *Id.*

24. Gene Johnson, *Washington Supreme Court Baffles Lawyers with Split Opinion*, Q13 FOX (Apr. 18, 2019, 7:14 PM), <https://q13fox.com/2019/04/18/washington-supreme-court-baffles-lawyers-with-split-opinion/> [<https://perma.cc/7M3Y-FL2J>].

25. Order Amending Opinion, No. 95707-0, *McLemore v. City of Shoreline*, 193 Wash. 2d 225, 438 P.3d 1161 (Wash. Apr. 19, 2019), <https://www.courts.wa.gov/opinions/pdf/957070.pdf> [<https://perma.cc/RHK6-JW65>].

26. *Id.*

had no precedential value at all.<sup>27</sup>

The real question following the Court's correction to the *McLemore* decision is why the Court designated the lead opinion as the lead in the first place. While the Court will not confirm whether the author of the lead opinion in *McLemore* was also the justice who reported on the case,<sup>28</sup> the Court's internal procedures favor assigning the lead designation to that justice.

This Comment proceeds in three Parts. Part I describes the three factors that make these fragmented decisions so confusing: the Court's method of extracting precedential value from its decisions, its procedure for denoting the precedential value of the opinions, and the justices' reluctance to join their colleagues' opinions. Part II discusses some of the most confusing fragmented decisions and provides examples of how these cases have been misinterpreted. Part III provides recommendations to alleviate the confusion: updating the Court's internal procedures to complement its method of precedent formation and labeling the opinions in parts.

## I. THREE FACTORS CONTRIBUTE TO THE CONFUSION

Three interacting practices of the Court combine to create confusion: its method for extracting precedential value from fragmented decisions, its procedure for denoting the precedential value of opinions, and the justices' reluctance to join their colleagues' opinions.

### A. *The First Factor: How the Court Pieces Together Precedent from Fragmented Decisions*

The first factor contributing to the confusion is the Court's method for deriving precedent from its fragmented decisions. This section discusses how the Court arrived at this method of precedent formation; it also identifies complexities of the method that are important for understanding how this method clashes with the court's internal procedures for designating the precedential value of opinions.

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27. Federal courts of appeals handle 4-4 split decisions by issuing per curiam opinions, and unlike the Washington State Supreme Court, allow separate dissents. See *United States v. Holmes*, 537 F.2d 227, 227-28 (5th Cir. 1976) (per curiam) ("[The lower court's holdings] are [] affirmed by an equally divided court."); *id.* at 228 (Ainsworth, J., dissenting); INTERNAL PROCEDURES MANUAL, *supra* note 13, at II-8 ("Per curiam opinions will be unanimous and will not include separate dissents or concurrences.").

28. E-mail from Wendy Ferrell, Assoc. Dir. of the Admin. Office of the Courts, to author (May 6, 2019, 12:50 PM) (on file with author).

1. *Marks v. United States: A Federal Precedent with Multiple Interpretations*

When piecing together precedent from fragmented decisions, the Washington State Supreme Court ascribes precedential value to any point of reasoning that receives the assent of five justices, regardless of whether they concur or dissent in the judgment. This practice has its roots in federal precedent.<sup>29</sup>

In traditional American jurisprudence, fragmented decisions held no precedential value other than in their result.<sup>30</sup> Few took issue with this practice because prior to 1938 the United States Supreme Court rarely ever issued fragmented decisions.<sup>31</sup> After the Court began to issue fragmented decisions more frequently in the 1940s, some started to argue that these decisions could have precedential value.<sup>32</sup> During this time, a split developed in the lower federal courts: some held that fragmented decisions had value only in their results, others held that the plurality opinion had precedential value, and the rest “looked for a logical connection or implicit agreement between the plurality and concurring opinions.”<sup>33</sup> In 1977, the United States Supreme Court attempted to resolve this split in *Marks v. United States*.<sup>34</sup>

In *Marks*, the United States Supreme Court held that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”<sup>35</sup> But the seemingly simple solution advanced by the *Marks* rule is illusory: no one can agree on how to determine what the “narrowest grounds” are.<sup>36</sup> Lower federal

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29. See *infra* section II.A.1.

30. See HENRY C. BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS 135–36 (1912); EUGENE WAMBAUGH, THE STUDY OF CASES § 48 n.1 (2d ed. 1894) (“If . . . less than a majority concur in a rule, no one will claim that it has the force of the authority of the court.”).

31. Mark A. Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 420 (1992) (“[T]he Supreme Court rendered fewer than twenty no-clear-majority decisions before 1938.”).

32. *Id.*

33. *Id.*

34. 430 U.S. 188, 193 (1977).

35. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

36. See *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (noting that *Marks* has “baffled and divided the lower courts that have considered it” (quoting *Nichols v. United States*, 511 U.S. 738, 745–46 (1994))). For a thorough explanation of the different interpretations of the *Marks* rule, see Re, *supra* note 2, and Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795 (2017).

courts have interpreted and applied the *Marks* rule in vastly different ways, but the United States Supreme Court has repeatedly refused to provide a clear standard.<sup>37</sup>

One major debate among those interpreting the *Marks* rule is whether cross-judgment majorities (where assertions within dissents contribute to the “narrowest grounds”) are permissible.<sup>38</sup> Courts that approve of this interpretation, including the Washington State Supreme Court, afford weight to any “specific proposition[]” that the majority of the justices in any of the opinions have “explicitly or implicitly” agreed upon.<sup>39</sup> This is called the “all opinions approach.”<sup>40</sup> Many argue that this approach is technically a departure from the *Marks* rule, because *Marks* states that the narrowest grounds of agreement among “those [justices] who concurred in the judgments” may contribute to precedent.<sup>41</sup>

One positive aspect of this approach is that it allows lower courts to find precedent more frequently than with other interpretations of the *Marks* rule,<sup>42</sup> which frequently require a specific configuration of votes (e.g. 4–1–4),<sup>43</sup> or for a concurrence to be an almost identical but narrower version of the lead opinion.<sup>44</sup> It is also attractive because for each proposition that has precedential value, a majority of the justices on the court have approved of it.<sup>45</sup>

Those against letting dissents contribute to the narrowest grounds argue that this practice is at odds with the judicial tradition of considering anything outside of what is necessary for arriving at the judgment to be dicta.<sup>46</sup> Since dissents “by definition, are not necessary to the judgment,” it is arguable that most assertions within them are dicta.<sup>47</sup> But, under the all opinions approach, dissents are sometimes necessary

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37. See, e.g., *Nichols*, 511 U.S. at 745–46; *Grutter*, 539 U.S. at 325; *Hughes v. United States*, 584 U.S. \_\_\_, 138 S. Ct. 1765, 1771–72 (2018) (punting the issue of how lower federal courts should interpret *Marks*). Despite initial attempts to punt the issue of proper plurality interpretation, the majority of the Washington State Supreme Court justices at least appears to have implicitly agreed on a method of interpretation; see also *infra* section I.A.2.

38. See *Williams*, *supra* note 36, at 799 n.9, 818–19.

39. See *id.* at 817.

40. See *Re*, *supra* note 2, at 1988. Professor Ryan Williams also discusses this approach but calls it the “issue-by-issue approach.” *Williams*, *supra* note 36, at 803.

41. *Marks v. United States*, 430 U.S. 188, 193 (1977); see *Re*, *supra* note 2, at 1988.

42. See *Re*, *supra* note 2, at 1989.

43. See *Williams*, *supra* note 36, at 813–15 (describing the “fifth vote approach”).

44. See *id.* at 808 (describing the “implicit consensus approach”).

45. See *id.* at 817.

46. See *id.* at 819.

47. See *id.*



to the judgment.<sup>48</sup>

Another issue with the all opinions approach is that it is susceptible to voting paradoxes if the Court's internal procedures do not take reasoning into consideration when voting on the judgment.<sup>49</sup> A voting paradox occurs when a party wins on each of the issues considered by the court, but the judgment goes against them.<sup>50</sup> This is more likely to occur when a court ignores the reasoning for each justice's vote. On a basic level, the court has two options for voting on the judgment: "outcome voting" or "issue-voting."<sup>51</sup> Outcome voting looks to the conclusions at the end of each opinion and ignores the reasoning (the justice's conclusions regarding each issue).<sup>52</sup> Alternatively, issue-voting takes those conclusions reached on each issue into account while ignoring the conclusions at the end of the opinions.<sup>53</sup>

As an example of a voting paradox, consider the following scenario. A court is deciding whether a plaintiff has standing overall, but focuses on aspects of standing: whether the injury is (1) traceable or (2) too speculative. Three justices think that the plaintiff has standing because the injury is traceable and not too speculative; three think that the plaintiff does not have standing because injury is traceable but too speculative; and three think the plaintiff does not have standing because the injury was not traceable despite the injury not being too speculative. If the justices decide to vote based on each justice's opinion on the judgment in its totality, the plaintiff will lose: two of the opinions come to the overall conclusion that the plaintiff does not have standing. But if the justices decide to vote based on the conclusions reached for each issue, the plaintiff prevails: within the opinions, six justices agree both that the injury was traceable and not too speculative. See Table 1 below:

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48. See *infra* notes 89–97 and accompanying text.

49. See Re, *supra* note 2, at 2005. Re notes that voting on issues, rather than the judgment, might make deriving precedent from cross-judgment majorities "worthwhile." *Id.* Further, he states that "so long as outcome voting remains in place, majority agreement across the judgment would paradoxically create a precedent that contradicted the judgment in that very case." *Id.* at 2005–06.

50. Meyerson, *supra* note 1, at 901.

51. David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743, 743–44 (1992).

52. *Id.*

53. *Id.* at 744.

**Table 1:  
Voting Paradox**

<b>Opinion label and number of votes</b>	<b>Is the injury traceable to the conduct of the defendant?</b>	<b>Is the injury too speculative?</b>	<b>Judgment</b>
Lead Opinion (3 votes)	No	No	Plaintiff loses
Concurrence (3 votes)	Yes	Yes	Plaintiff loses
Dissent (3 votes)	Yes	No	Plaintiff wins
	<b>Plaintiff wins (6–0)</b>	<b>Plaintiff wins (6–0)</b>	<b>Plaintiff loses (6–0)</b>

Voting paradoxes can create instability within the justice system. In the case discussed in Table 1, the plaintiff loses. But if a lower court used the all opinions approach to derive precedent from the case in Table 1 to rule on a new case with identical facts and issues, that plaintiff would *prevail*.

## 2. *Washington Chooses an Interpretation of the Marks Rule*

In 1989, the Court implicitly used the *Marks* rule to interpret one of its own prior decisions,<sup>54</sup> but went back and forth for almost a decade on whether *Marks* actually applied.<sup>55</sup> When the Court officially adopted the *Marks* rule in the 1998 decision *Davidson v. Hensen*,<sup>56</sup> it mirrored

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54. *Southcenter Joint Venture v. Nat'l Democratic Policy Comm'n*, 113 Wash. 2d 413, 780 P.2d 1282 (1989) (determining the holding of the fragmented decision in *Alderwood Assocs. v. Wash. Envtl. Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981)).

55. *Compare Zeuger v. Pub. Hosp. Dist. No. 2*, 57 Wash. App. 584, 789 P.2d 326 (1990) (applying the *Marks* rule explicitly in a state law matter), *with State v. Zakei (Zakei II)*, 119 Wash. 2d 563, 568, 834 P.2d 1046, 1048 (1992) (punting the issue of whether the Court would use the *Marks* rule to analyze a previous fragmented decision, *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980)).

56. 135 Wash. 2d 112, 128, 954 P.2d 1327 (1998).

*Marks*'s language: "[w]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds."<sup>57</sup>

But adopting federal precedent resulted in further confusion. The federal debate on *Marks* application was not well developed at the time that the rule was adopted by state courts.<sup>58</sup> While the Court seemed to have settled what precedential value fragmented decisions held,<sup>59</sup> the Court never explicitly stated *which* version of *Marks* they intended to use.

The story of how the Court chose an interpretation begins with *Bosteder v. City of Renton*.<sup>60</sup> In *Bosteder*, the plaintiff filed trespass claims against several city employees in their individual capacities after they allegedly searched his building without legal authority.<sup>61</sup> The lower court dismissed the plaintiff's claims against the individuals in summary judgment because he failed to follow the requirements of a claim-filing statute: namely, he gave the city notice that he was filing a claim but did not wait sixty days to actually do so as required by statute.<sup>62</sup> The plaintiff appealed, arguing that his failure to wait did not matter because the claim-filing statute did not apply to individuals.<sup>63</sup>

The Court's *Bosteder* decision was fragmented.<sup>64</sup> The four justices in the lead opinion stated that the statute applied to individuals for acts in the scope of employment and dismissed *Bosteder*'s claim for failing to comply with the sixty day waiting period.<sup>65</sup> Four justices concurred in part, agreeing with the lead opinion that the plaintiff had not filed correctly, and dissented in part, stating that the claim-filing statute was inapplicable to individuals.<sup>66</sup> The one remaining justice concurred in part and dissented in part "agree[ing] with the [lead opinion] except as it

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57. *Id.* at 1335 (first citing *State v. Zakel (Zakel I)*, 61 Wash. App. 805, 808, 812 P.2d 512, 514 (1991), then citing *Marks v. United States*, 430 U.S. 188 (1977)).

58. *See Re*, *supra* note 2, at 1960 (discussing how the *Marks* rule laid dormant until the early 1990s, and rapidly increasing "in the early 2000s").

59. *See* section I.A.2.

60. 155 Wash. 2d 18, 117 P.3d 316 (2005).

61. *Bosteder*, 155 Wash. 2d at 25, 117 P.3d at 319. The plaintiff also filed a claim under 42 U.S.C. § 1983 (2012), which adds to the complexity of the decision in this case and how the Court labeled the opinions. *Bosteder*, 155 Wash. 2d at 27, 117 P.3d at 320.

62. *Wright v. Terrell (Wright I)*, 135 Wash. App. 722, 145 P.3d 1230 (2006), *rev'd*, *Wright II*, 162 Wash. 2d 192, 170 P.3d 570 (2007); *see* WASH. REV. CODE § 4.96.020(4) (2001).

63. *Bosteder*, 155 Wash. 2d at 27, 41, 117 P.3d at 320, 327.

64. *Id.* at 51, 59, 117 P.3d at 332, 336.

65. *Id.* at 24, 117 P.3d at 318 (lead opinion).

66. *Id.* at 51, 117 P.3d at 332 (Sanders, J., concurring in part and dissenting in part).

[held] that the claim filing statute applies to individuals.”<sup>67</sup> Ultimately, five justices agreed that the claim-filing statute did not apply to individuals, and all nine agreed that Bosteder had failed to comply with the filing procedure. See Table 2 below:

**Table 2:**  
***Bosteder* Holdings**

<b>Opinion label and number of votes</b>	<b>Is the statute applicable to individuals?</b>	<b>Judgment</b>
<b>Lead opinion</b> (4 votes) <sup>68</sup>	Yes	Dismissal of Bosteder’s claim affirmed
<b>Dissent</b> <sup>69</sup> (4 votes) <sup>70</sup>	No	Dismissal of Bosteder’s claim reversed
<b>Dissent</b> (1 vote) <sup>71</sup>	No	Dismissal of Bosteder’s claim reversed
	<b>Statute not applicable to individuals</b> <b>(5–4)</b>	<b>Dismissal of Bosteder’s claim reversed</b> <b>(5–4)</b>

The lack of clarity in the *Bosteder* decision was apparent when the Division II Court of Appeals applied *Bosteder*’s holding to a new set of facts in *Wright v. Terrell (Wright I)*.<sup>72</sup> The appellants in *Wright I* argued that the same claim-filing statute at issue in *Bosteder* was inapplicable to individuals.<sup>73</sup> They cited *Davidson* to direct the court to interpret the

67. *Id.* at 59, 117 P.3d at 336 (Ireland, J., concurring in part and dissenting in part).

68. *Id.* at 24, 117 P.3d at 318 (lead opinion).

69. The justices who dissented on the claim-filing statute issue concurred in the judgment with the lead opinion on the § 1983 claim, so these opinions were technically only partial dissents.

70. *Bosteder*, 155 Wash. 2d at 51, 117 P.3d at 332 (Sanders, J., concurring in part and dissenting in part).

71. *Id.* at 59, 117 P.3d at 336 (Ireland, J., concurring in part and dissenting in part).

72. 135 Wash. App. 722, 145 P.3d 1230 (2006), *rev’d*, *Wright II*, 162 Wash. 2d 192, 170 P.3d 570 (2007).

73. *Id.* at 735, 145 P.3d at 1238.

“narrowest grounds” of the *Bosteder* opinion to include the dissenting opinions.<sup>74</sup> The court of appeals rejected this argument, because the judgment in *Bosteder* implied that the court’s holding was that the claim-filing statute applied to individuals.<sup>75</sup> The court also opined that plurality opinions only had “limited precedential value and [are] not binding on the courts.”<sup>76</sup>

The Washington State Supreme Court reversed *Wright I*, stating that the court had “misread” *Bosteder*.<sup>77</sup> But the main issue was not that the court of appeals had misread *Bosteder*—it was that they were using the wrong method of deriving precedential value from fragmented decisions. While the court of appeals seemed to endorse either no *Marks* rule at all, or an implied emphasis on concurrences being necessary to form the “narrowest grounds,” the *Wright II* Court announced that dissents could contribute to precedent formation.<sup>78</sup> The Court noted that while *Bosteder*’s lead opinion stated that the claim-filing statute did not apply to individual government employees, that opinion had only four votes.<sup>79</sup> Then the Court combined Justice Sanders’s dissent, which had four total votes, and Justice Ireland’s concurrence/dissent to create binding precedent: “[a] majority of this court thus concluded that [the] former [claim-filing statute] does not apply to claims against individuals. On this point, *Bosteder* [was] not a plurality decision.”<sup>80</sup> Thus, *Wright II* created a rule that endorsed the all-opinions approach.<sup>81</sup>

Despite approving the *Wright* rule unanimously, the Court did not fully embrace the *Wright* rule until 2015.<sup>82</sup> In fact, it was as if the decision was forgotten for several years. In the interim, the Court battled against itself, with some supporting a version of *Marks* that required concurrence in the judgment, and others insisting that dissents could count as well.<sup>83</sup> That debate cooled off after the Court explicitly clarified

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74. *Id.*

75. *Id.* The idea was that if the case was dismissed on the grounds that filing was improper, it was implied that it was also applicable to individuals. *See id.*

76. *Id.* (first citing *In re Pers. Restraint of Isadore*, 151 Wash. 2d 294, 302, 88 P.3d 390, 394 (2004), then citing *State v. Gonzalez*, 77 Wash. App. 479, 486, 891 P.2d 743, 746–47 (1995)).

77. *Wright II*, 162 Wash. 2d at 194, 170 P.3d at 570; *see also Bosteder v. City of Renton*, 162 Wash. 2d 192, 170 P.3d 570 (2007).

78. *Wright II*, 162 Wash. 2d at 195–96, 170 P.3d at 571 (citing no prior authority for this method of interpretation).

79. *Id.*

80. *Id.*

81. *See supra* notes 38–41 and accompanying text (discussing the all-opinions approach).

82. *See In re Det. of Reyes*, 184 Wash. 2d 340, 358 P.3d. 394 (2015).

83. *Id.*

that it would be using the *Wright* rule in *In re Detention of Reyes*.<sup>84</sup> Even though *Reyes* cited *Wright II*—which was a unanimous decision<sup>85</sup>—not every justice deciding *Reyes* agreed with the majority’s reassertion of the *Wright* rule.<sup>86</sup> This is because there is an inherent problem with the *Wright* rule: no clear line exists between what actually has precedential value and what is merely dicta.<sup>87</sup>

### 3. *Dicta as Precedent? Issues with the Wright Rule*

The Court has not expressly outlined the boundaries of what counts as precedent under *Wright* rule. As a result, the line between dicta and precedent has become blurry. This has led at least one justice on the Court who previously endorsed the *Wright* rule to reject it.<sup>88</sup>

*Wright*’s blurriness between dicta and holdings became apparent when the Court tried to interpret the fragmented decision, *Colorado Structures, Inc. v. Ins. Co. of the West*.<sup>89</sup> *Colorado Structures* concerned whether an insurance company was liable under a surety bond, and whether the court could impose *Olympic Steamship* fees<sup>90</sup> on the insurance company if they were.<sup>91</sup> Four justices agreed that the insurance company was liable under the surety bond, and that they could apply *Olympic Steamship* fees.<sup>92</sup> Two concurring justices agreed that the

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84. 184 Wash. 2d 340, 346, 358 P.3d 394, 379 (2015). Two years earlier, the Court implicitly used the *Wright* rule to interpret *In re Det. of D.F.F.*, 172 Wash. 2d 37, 256 P.3d 357 (2011) (en banc). See *Saleemi v. Doctor’s Assocs., Inc.*, 176 Wash. 2d 368, 385–86, 292 P.3d 108, 116 (2013) (citing both the concurrence and dissent from *In re D.F.F.*, the majority opinion asserted that “[f]ive justices of this court explicitly rejected the proposition that the concept of ‘structural error’ had a place outside of criminal law”).

85. *Wright II* was a per curiam opinion. 162 Wash. 2d 192, 170 P.3d 570 (2007). According to the Court’s internal rules, all per curiam opinions are unanimous decisions. INTERNAL PROCEDURES MANUAL, *supra* note 13, at II-8.

86. Justice McCloud disagreed with the majority’s use of the *Wright* rule in *Reyes* and was not sitting on the Court at the time *Wright II* was decided. See *In re Det. of Reyes*, 184 Wash. 2d at 353–54, 358 P.3d at 401 (McCloud, J., concurring); Justice Sheryl Gordon McCloud, WASH. CTS., [https://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/bios/?fa=scbios.display\\_file&fileID=gordon\\_mccloud](https://www.courts.wa.gov/appellate_trial_courts/supreme/bios/?fa=scbios.display_file&fileID=gordon_mccloud) [<https://perma.cc/NU24-N3Q3>].

87. See *In re Det. of Reyes*, 184 Wash. 2d at 353–54, 358 P.3d at 401 (McCloud, J., concurring).

88. See *infra* notes 100–104 and accompanying text (discussing Justice Madsen’s repudiation of the *Wright* rule).

89. 161 Wash. 2d 577, 167 P.3d 1125 (2007).

90. *Olympic Steamship* fees apply when “[a]n insured who is compelled to assume the burden of legal action to obtain the benefit of its insurance contract is entitled to attorney fees.” *Olympic S.S. Co. v. Centennial Ins. Co.*, 117 Wash. 2d 37, 54, 811 P.2d 673, 682 (1991).

91. See *Colo. Structures*, 161 Wash. 2d at 586, 167 P.3d at 1129.

92. *Id.* at 581, 167 P.3d at 1127.

insurance company was liable under the surety bond, but that *Olympic Steamship* fees did not apply.<sup>93</sup> Justice Sanders, dissenting on the issue of whether the insurance company was liable under the surety bond, concurred in part on the issue of whether *Olympic Steamship* fees applied.<sup>94</sup> He noted that liability and fees were separate issues.<sup>95</sup> Combining the four votes in the lead opinion with Justice Sanders's dissent, the Court awarded *Olympic Steamship* fees.<sup>96</sup> This decision implicitly supported the *Wright* rule because it based a judgment on a cross-judgment majority.<sup>97</sup> See Table 3 below:

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93. *Id.* at 608–10, 167 P.3d at 1142–43 (Alexander, J., concurring in part and dissenting in part).

94. *Id.* at 638, 167 P.3d at 1145–46 (Sanders, J., dissenting).

95. *Id.*

96. See Clerk's Ruling Regarding Setting of Att'y Fees & Am. Clerk's Ruling on Costs at 2 & n.2, Colo. Structures, Inc. v. Ins. Co. of the W., 161 Wash. 2d 577, 167 P.3d 1125 (2007) (No. 76973-7) (awarding *Olympic Steamship* fees, citing the conclusion of the lead opinion as the court's holding: "This Court's opinion in the CONCLUSION section in part states: '*Olympic Steamship* attorney fees apply to performance bonds.'"). Writing for the majority in *Vinci*, Justice Yu cited this Clerk's ruling to demonstrate that Justice Sanders's dissent contributed to the outcome of the case. See *King Cty. v. Vinci Constr. Grands Projets/Parsons RCI/Frontier-Kemper, JV*, 188 Wash. 2d 618, 626, 398 P.3d 1093, 1097 (2017). The implication is that Justice Sanders's opinion regarding *Olympic Steamship* fees should not be considered dictum. See also *id.* at 626 n.1, 398 P.3d at 1097 n.1 (citing *Matsyuk v. State Farm Fire & Casualty Co.*, 173 Wash. 2d 643, 660 n.5, 272 P.3d 802, 811 n.5 (2012)) (noting that although *Matsyuk* stated that *Colorado Structures* created no precedent regarding *Olympic Steamship* fees, that statement itself was not essential to the *Matsyuk* decision and was just dictum).

97. Note that while the Court issued *Colorado Structures* two months before *Wright II*, it implicitly supports the rule that *Wright II* expressly supported.

**Table 3:**  
***Colorado Structures Holdings***

<b>Opinion label and number of votes</b>	<b>Is the Insurance Company liable under the bond?</b>	<b>Do <i>Olympic Steamship</i> fees apply?</b>	<b>Judgment</b>
<b>Lead Opinion (4 votes)</b>	Yes	Yes	Insurance company liable and must pay <i>Olympic Steamship</i> fees
<b>Dissent 1 (2 votes)</b>	Yes	No	Insurance company liable but no <i>Olympic Steamship</i> fees
<b>Dissent 2 (2 votes)</b>	Yes	No	Insurance company liable but no <i>Olympic Steamship</i> fees
<b>Dissent 3 (1 vote)</b>	No	Yes	Insurance company not liable and no <i>Olympic Steamship</i> fees
	<b>Liable under bond, 8–1</b>	<b><i>Olympic Steamship</i> fees apply, 5–4</b>	<b>Insurance company is liable and must pay <i>Olympic Steamship</i> fees</b>

In *King County v. Vinci Construction Grands Projets*,<sup>98</sup> the Court revisited *Colorado Structures*. In *Vinci*, a six-justice majority of the Court reasoned that it was completely appropriate to apply *Olympic Steamship* fees under the precedent set in *Colorado Structures*, and endorsed the *Wright* rule.<sup>99</sup> But Justice Madsen dissented, arguing that *Colorado Structures* “did not create binding precedent” because the lead

98. 188 Wash. 2d 618, 398 P.3d 1093 (2017).

99. *Id.* at 626, 398 P.3d at 1097 (citing *In re Det. of Reyes*, 184 Wash. 2d 340, 346, 358 P.3d 394, 397 (2015)).



opinion only had four votes.<sup>100</sup> Essentially, Justice Madsen was unwilling to count Justice Sanders's vote because his opinion was labeled as a dissent.<sup>101</sup> But by 2015, Justice Madsen had implicitly approved the *Wright* rule twice<sup>102</sup>—so what happened?

We can't be sure, but Justice Madsen's concurrence from the 2010 decision, *State v. Rhone*<sup>103</sup> provides some insight. The defendant in *Rhone* argued that the prosecuting attorney's peremptory challenge against the only remaining member of the defendant's racial group amounted to a prima facie case for a *Batson* violation.<sup>104</sup> Four justices in the lead opinion did not accept the prosecutor's peremptory challenge as sufficient evidence to amount to a prima facie case for discrimination under *Batson*.<sup>105</sup> Going the other way, four dissenting justices advocated for a bright-line rule that *would* count this kind of peremptory challenge as satisfying a prima facie case for a *Batson* violation.<sup>106</sup> Justice Madsen concurred, agreeing with the lead opinion in the case at hand, but "going forward" endorsed using the dissent's bright line rule.<sup>107</sup> See Table 4 below:

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100. *Id.* at 635, 398 P.3d at 1105–06 (Madsen, J., dissenting).

101. *See Colorado Structures v. Ins. Co. of the W.*, 161 Wash. 2d 577, 638, 167 P.3d 1125, 1145–46 (2007) (Sanders, J., dissenting).

102. Madsen approved of the *Wright* rule in *Wright II* itself and in *Reyes*. *See Wright II*, 162 Wash. 2d at 192, 195, 170 P.3d at 570–71; *In re Det. of Reyes*, 184 Wash. 2d at 346, 349, 358 P.3d at 397, 399 (Madsen, J., concurring).

103. 168 Wash. 2d 645, 229 P.3d 752 (2010).

104. *Id.* at 648, 229 P.3d at 753; *see also Batson v. Kentucky*, 476 U.S. 79, 100 (1986) ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that [the] petitioner's conviction be reversed.").

105. *Rhone*, 168 Wash. 2d at 658, 229 P.3d at 758 (lead opinion).

106. *Id.* at 658–59, 229 P.3d at 758 (Alexander, J., concurring).

107. *Id.* at 658, 229 P.3d at 758 (Madsen, J., concurring).

**Table 4:**  
***Rhone* Holdings**

<b>Opinion label and number of votes</b>	<b>Prima facie case for discrimination?</b>	<b>Outcome</b>
<b>Lead Opinion</b> (4 votes)	No	Rhone's conviction upheld
<b>Concurrence</b> (1 vote)	Yes, but prospectively only	Rhone's conviction upheld
<b>Dissent</b> (4 votes)	Yes	Rhone's conviction overturned
	<b><i>This case: No prima facie case, 5–4</i></b> <b><i>Prospective: Prima facie case, 5–4</i></b>	<b>Rhone's conviction upheld</b>

If the Court were to apply the *Wright* rule to *Rhone*, would Justice Madsen's prospective ruling have precedential value? It is not easy to say. Facing an almost identical situation three years later in *State v. Meredith*,<sup>108</sup> the Court held that Madsen's prospective ruling was "merely dicta."<sup>109</sup> This was because her statement "[did] not relate to the disposition of *Rhone*."<sup>110</sup> In her concurrence, Justice Madsen countered that she thought the rule should apply only "going forward" because she would add an extra requirement that courts, prosecutors, and defendants have notice of the rule before applying it.<sup>111</sup> Justices González and Chambers opined in their dissents that they would have given precedential weight to Justice Madsen's *Rhone* concurrence.<sup>112</sup> It is unclear why Justice Madsen chose to sign on to the majority opinion in *Reyes*, which endorsed the *Wright* rule, without mentioning the contradiction that *Meredith* posed.

In Justice Madsen's *Vinci* dissent, she then used the *Meredith/Rhone* issue to argue that the *Wright* rule was expressly rejected by the Court.<sup>113</sup>

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108. 178 Wash. 2d 180, 306 P.3d 942 (2013).

109. *Id.* at 184, 306 P.3d at 944.

110. *Id.*

111. *Id.* at 185, 306 P.3d at 945 (Madsen, J., concurring).

112. *Id.* at 189–90, 306 P.3d at 947 (González, J., dissenting); *id.* at 191–92, 306 P.3d at 948 (Chambers, J., dissenting).

113. See King Cty. v. Vinci Constr. Grands Projets, 188 Wash. 2d 618, 635–37, 398 P.3d 1093,

She argued that under *Meredith*, the Court must hold that language supporting prospective rulings is dicta because it does not contribute to the judgment of the case at hand.<sup>114</sup> Thus, following Justice Madsen's line of reasoning, Justice Sanders's assertion in *Colorado Structures* regarding the application of *Olympic Steamship* fees was a prospective ruling.<sup>115</sup> This is because he disagreed with a majority of the court on whether the insurance company was liable under the surety bond, which is a prerequisite to an *Olympic Steamship* fee award.<sup>116</sup> Accordingly, Justice Madsen advocated for adopting a version of the *Marks* rule that requires concurrence in the judgment, and admitted that the Court's "jurisprudence has been less than clear on how to determine what, if any, legal principles from a fractured opinion are precedential."<sup>117</sup>

Justice McCloud's dissent in *Reyes* also pointed out the problem that *Meredith* posed for the majority's *Wright* rule.<sup>118</sup> She agreed with the majority that separate opinions could contribute to the holding in a case, but that "two additional prerequisites" must be present: "(1) that principle of law must be *necessary* for the decision in the case rather than just dicta and (2) that principle of law must be the *narrowest* ground of agreement rather than the broadest."<sup>119</sup> Justices McCloud and Madsen highlight an important issue with the *Wright* rule: does the *Wright* rule conflate dicta with statements that have precedential value?

*B. The Second Factor: The Court's Internal Procedures for Assigning Opinions*

The Court's procedures assign lead opinions based on efficiency at the expense of increased fragmentation. When a case first comes to the court, one justice prepares a pre-hearing report on the case.<sup>120</sup> After arguments, the justices vote on whether to affirm, reverse, or remand on each of the major issues in the case.<sup>121</sup> If five justices agree on the

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1106 (2017) (Madsen, J., concurring).

114. *Id.* at 635, 398 P.3d at 1106.

115. *Id.*

116. *Id.*

117. *Id.* at 636, 398 P.3d at 1106.

118. *In re Det. of Reyes*, 184 Wash. 2d 340, 353–54, 358 P.3d 394, 401 (2015) (McCloud, J., concurring).

119. *Id.*

120. See INTERNAL PROCEDURES MANUAL, *supra* note 13 at II-4.

121. Laura Anglin, Law Clerk to the Honorable Justice González, Wash. Superior Court, Presentation at the King County Bar Association Appellate Practice September Section Meeting: Did You Know the Temple of Justice Has a West Wing?: A Judicial Factotum Answers (Some of

judgment on “at least one of the major issues,”<sup>122</sup> and the justice who prepared the pre-hearing report is in the majority, that justice is assigned to write the majority opinion.<sup>123</sup> At this conference, or after circulation of the majority opinion, the justices may decide to draft concurring or dissenting opinions.<sup>124</sup>

The author of the majority opinion may change after the concurrences and dissents circulate.<sup>125</sup> After reading the circulated opinions, the justices sign on to their preferred opinions and the chief justice determines whether the majority opinion still has five signatures on “at least one of the major issues.”<sup>126</sup> If a concurrence or dissent now garners a “majority” of the signatures, the chief justice will reassign the duty of writing the majority opinion to the author of that concurrence or dissent.<sup>127</sup>

The Court’s process for assigning opinions contributes to the confusion. Although the Court’s reassignment process accounts for shifts of opinion in the court, it only does so when a majority, not a *plurality*, signs on to a concurrence or a dissent.<sup>128</sup> This accounts for why certain fragmented decisions handed down by the court have lead opinions which garner only one signature.<sup>129</sup> Furthermore, the Court’s procedure completely disregards whether a rule promoted by a concurrence actually has the assent of the majority of the court.<sup>130</sup> This mismatch between the Court’s method for precedent generation and its voting procedures poses the risk of the court issuing a paradoxical decision.<sup>131</sup>

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Your Burning Questions (Sept. 9, 2019) [hereinafter Anglin KCBA Presentation]. This is an “issue vote,” which focuses on the outcome of each issue *without* considering the rationale behind such a decision. *See Post & Salop, supra* note 51, at 743–44.

122. INTERNAL PROCEDURES MANUAL, *supra* note 13, at II-6.

123. Anglin KCBA Presentation, *supra* note 121.

124. INTERNAL PROCEDURES MANUAL, *supra* note 13, at II-5.

125. *Id.*

126. *Id.* at II-6.

127. *Id.* If the author of the concurring opinion and the original majority opinion writer can agree within two days on how to compromise to change the majority opinion so it garners the majority of signatures, the opinion is not reassigned. *Id.* at II-5.

128. *See id.*

129. *See State v. Schierman*, No. 84614-6, slip op. at 203 (Wash. Apr. 12, 2018).

130. *See State v. Schierman*, 192 Wash. 2d 577, 438 P.3d 1063 (2018) (fragmented decision). Within the various opinions, a majority of the court assented to the rules supporting Justice Yu’s resolution of the case on both issues. Despite the lead opinion writer’s disagreement with the majority of the court in the judgment on one of the issues, Justice Yu was *not* assigned the lead opinion. *See id.* at 593–94, 438 P.3d at 1072 (lead opinion); *infra* section II.B.

131. *See supra* notes 49–53 and accompanying text.

C. *The Third Factor: How the Justices Sign On to Opinions*

As demonstrated by the frequency that the Washington State Supreme Court issues fragmented decisions, the justices struggle to garner the signatures of their colleagues.<sup>132</sup> The resulting array of concurrences, partial concurrences, and dissents resembles antiquated and disfavored seriatim opinions.<sup>133</sup> In seriatim opinions, instead of issuing a single opinion speaking for the court, each justice sitting on the case writes a separate opinion.<sup>134</sup> This practice forces readers to piece together precedent on their own without any guidance.

Prior to Chief Justice John Marshall's arrival at the United States Supreme Court, the Court frequently issued seriatim opinions.<sup>135</sup> Justice Marshall established the practice of one "particular Justice speaking for the Court . . . [while the] other Justices were able to express their views separately" in concurrences and dissents.<sup>136</sup> Although this switch simplified the task of determining precedent, it has also elicited criticism.<sup>137</sup> Thomas Jefferson disfavored the switch because it decreased the individual accountability of the justices.<sup>138</sup> Others have noted that this emphasis on the Court speaking with a "single voice" . . . meant that differences among the justices were adjusted internally and, consequently, hidden from public view . . . [and] the contributions of individual justices were difficult, if not impossible, to discern."<sup>139</sup>

In Washington State, most of the fragmented decisions involve important constitutional issues or matters of public interest.<sup>140</sup> And

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132. See *supra* note 4 and accompanying text.

133. See, generally *Schierman*, 192 Wash. 2d 577, 438 P.3d 1063 (2018) (issuing a 1–1–3–3–1 decision). Seriatim decisions have repeatedly been recognized as an inefficient method of interpretation. See *Re*, *supra* note 2, at 2004 n. 331.

134. *Seriatim*, BLACK'S LAW DICTIONARY (10th ed. 2014).

135. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 140 (1999). The Court borrowed this practice from the common law courts of England. *Id.* The Court also issued opinions "By the Court" (which were essentially per curiam opinions) that were mostly unanimous. *Id.* Likely reasons for issuing a seriatim decision were that there was disagreement among the Justices and for discussion of constitutional issues. *Id.* at 140–41.

136. Kelsh, *supra* note 135, at 138.

137. *Id.* at 145.

138. *Id.*

139. Scott Douglas Gerber, *The Supreme Court Before John Marshall*, in *SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL I*, 20 (Scott Douglas Gerber ed., 1998).

140. See generally *In re Pers. Restraint of Fero*, 190 Wash. 2d 1, 409 P.3d 214 (2018) (appealing a conviction for first-degree child assault); *Roake v. Delman*, 189 Wash. 2d 775, 408 P.3d 658

because the justices are elected, they have a higher incentive to protect their own records than federal justices with lifetime appointments. Many would see these disjointed opinions as a sign of dysfunction on the Court.<sup>141</sup> But others have pointed out that the style that the Court disseminates its opinions in is an alternative mode of expressing its power, rather than a sign of dysfunction.<sup>142</sup>

Justice J.M. Johnson expressed a similar sentiment in his concurrence/dissent in *State v. Ruem*.<sup>143</sup> In *Ruem*, Justice Johnson voiced his support for the *Wright* rule, arguing that it was inappropriate for the Washington State Supreme Court to use an interpretation of the federal *Marks* rule that requires concurrence in the judgment because the state and Federal judiciaries are inherently different.<sup>144</sup> He noted that these inherent differences begin with the very way that the justices arrive on the court: “[w]e are elected directly by the people rather than appointed. We interpret two constitutions, not just one.”<sup>145</sup> If part of the Court’s power lies within each justice’s ability to freely concur or dissent in separate opinions, it makes sense for the court to update its procedures so readers can find precedential value within cases more easily.

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(2018) (concerning a motion to dismiss a temporary sexual assault protection order); *State v. Jefferson*, 192 Wash. 2d 225, 429 P.3d 467 (2018) (ruling on a *Batson* challenge raised by an individual convicted of attempted first degree murder and unlawful possession of a firearm); *State v. Sassen Van Elsloo*, 191 Wash. 2d 798, 425 P.3d 807 (2018) (addressing whether a trial error warranted granting a new trial to an individual convicted of drug trafficking with several firearm enhancements); *State v. Schierman*, 192 Wash. 2d 577, 438 P.3d 1063 (2018) (appealing a conviction for four counts of aggravated first-degree murder and a resulting death sentence); *El Centro de la Raza v. State*, 192 Wash. 2d 103, 428 P.3d 1143 (2013) (addressing whether an act establishing charter schools was permissible under the state constitution).

141. See Chief Justice John Roberts, Address at Georgetown University, Class of 2006, at 13:22 (May 21, 2006), <https://www.c-span.org/video/?192685-1/georgetown-university-law-center-commencement-address> [<https://perma.cc/6ALW-QTXV>] (describing the benefits of unanimous decisions and compromise on the Court) (“It is the obligation of each member on the Court to be open to the considered views of the others. We are a collegial and collegiate Court, not simply because we act after voting, but because we work together to function as a Court in deciding the cases and in crafting the opinions.”).

142. M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 285 (2007).

143. 179 Wash. 2d 195, 220, 313 P.3d 1156, 1170 n.7 (2013) (Johnson, J., concurring in part and dissenting in part).

144. *Id.*

145. *Id.*

## II. EXAMPLES OF WASHINGTON'S FRAGMENTED DECISIONS

The clash between the Washington State Supreme Court's method of precedent formation and ascribing precedential value to its opinion results in a common set of reoccurring questions: Where is the holding within the various opinions? Why does the lead opinion only have one vote? And does the lead opinion have any precedential value at all?

### A. *Where's the Holding?*

Frequently, the fifth vote for a major holding might be hiding in what seems to be a hastily added final line in a concurrence or dissent. This unfortunately results in many first-time readers coming to the wrong conclusion about the holding. *El Centro de la Raza v. State*<sup>146</sup> is just that kind of case. In *El Centro de la Raza*, the Court had to decide whether four separate provisions of the Charter School Act were unconstitutional, and if any of them were, if they were severable from the rest of the act.<sup>147</sup>

Justice Yu wrote the lead opinion of the court.<sup>148</sup> The lead opinion, with four total signatures, said that one provision of the Act concerning collective bargaining<sup>149</sup> was unconstitutional, but that the rest of the act could survive because that provision was severable.<sup>150</sup> Justices González and Fairhurst concurred with the entirety of Justice Yu's opinion except for the conclusion that the collective bargaining provision violated the state constitution.<sup>151</sup> In the second-to-last line of his opinion, González quickly stated that he agreed with Justice Yu on the severability of the

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146. 192 Wash. 2d 103, 428 P.3d 1143 (2018).

147. The five issues were: (1) whether the act satisfied the Washington State Constitution's uniformity requirement for public schools; (2) whether the act facially violated the superintendent of public instruction's supervisory role; (3) whether the act on its face violated the Washington State Constitution's requirement that all revenue from the common school fund be exclusively applied to common schools; (4) whether the act's provision revising collective bargaining rights of charter school employees violated the Washington State Constitution's prohibition of amendments by reference; and (5) whether any offending provisions would be severable from the remainder of the Act. *El Centro de la Raza*, 192 Wash. 2d at 110, 428 P.3d at 1146–47. The Court had previously struck down a prior version of the Charter School Act in *League of Women Voters of Wash. v. State*, 184 Wash. 2d 393, 413, 355 P.3d 1131, 1141 (2015).

148. *Id.* at 108, 428 P.3d at 1145. Justices Johnson, Stephens, and McCloud joined Justice Yu's lead opinion to form a plurality. *Id.*

149. See WASH. REV. CODE § 41.56.0251 (2019).

150. *El Centro de la Raza*, 192 Wash. 2d at 133, 428 P.3d at 1158 (lead opinion).

151. *Id.* (González, J., concurring in part and dissenting in part).

collective bargaining provision.<sup>152</sup> So, among those justices concurring in the judgment (the four justices who signed the lead opinion and the two justices who signed the concurrence), four agreed that the collective bargaining provision is unconstitutional, and six agreed that the provision is severable.

The remaining three Justices dissented, finding that different challenged provisions within the Act were unconstitutional and non-severable.<sup>153</sup> Justice Madsen dissented, joined by Justice Owens, stating that she thought that the Act violated the uniformity requirement for public schools, and that the superintendent provision was unconstitutional and non-severable.<sup>154</sup> Justice Wiggins also dissented, and Justice Owens signed on to his opinion as well.<sup>155</sup> But what Justice Wiggins labeled as a “dissent,” was not completely a dissent; it was *actually* a concurrence-in-part and a dissent-in-part. In his opinion, Justice Wiggins expressly concurred with the lead opinion except for where his and Justice Madsen’s differed from it.<sup>156</sup>

Justice Wiggins and Justice Madsen both believed that the superintendent provision violated the state constitution and was non-severable.<sup>157</sup> On this point they disagreed with the lead opinion. But Justice Wiggins only addressed the severability of the superintendent provision, *not* the collective bargaining provision.<sup>158</sup> Since neither Justice Wiggins nor Justice Madsen stated that they found the collective bargaining provision non-severable, it could be inferred that both justices agreed with the lead opinion on *both* the unconstitutionality of the collective bargaining provision *and* its severability.<sup>159</sup> See Table 5 below:

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152. *Id.* at 134, 428 P.3d at 1159.

153. *Id.* at 135, 428 P.3d at 1159 (Madsen, J., dissenting); *id.* at 151–52, 428 P.3d at 1167 (Wiggins, J., dissenting). Justice Owens joined both the dissents of Justices Madsen and Wiggins. *Id.* at 135, 142, 428 P.3d at 1162, 1167.

154. *Id.* at 135, 428 P.3d at 1159 (Madsen, J., dissenting).

155. *Id.* at 142, 428 P.3d at 1162 (Wiggins, J., dissenting).

156. *Id.* It is curious that Wiggins did not also add his signature on to Madsen’s dissent, or that both of their opinions could not be combined into one dissent with three signatures, seeing as his statement here is an implicit agreement with her opinion. *See id.*

157. *Id.* at 151–52, 428 P.3d at 1167 (Wiggins, J., dissenting); *id.* at 135 (Madsen, J., dissenting).

158. *See id.* at 151–52, 428 P.3d at 1166–67 (Wiggins, J., dissenting) Each unconstitutional provision requires a separate severability analysis. *See id.* at 152, 428 P.3d at 1167 (“A severability clause indicates that the legislature would have passed the statute without the severed language, but it is not dispositive. The court must still evaluate whether the act would have been passed even without unconstitutional provisions.”).

159. *See id.* at 142, 428 P.3d at 1162 (Wiggins, J., dissenting).



**Table 5:**  
*El Centro de la Raza Holdings*

<b>Opinion label and number of votes</b>	<b>Collective bargaining provision unconstitutional?</b>	<b>Collective bargaining provision severable?</b>	<b>Other parts of the act unconstitutional and non-severable?</b>	<b>Outcome</b>
<b>Lead Opinion</b> (4 votes) <sup>160</sup>	Yes	Yes	No	Act survives
<b>Concurrence</b> (2 votes) <sup>161</sup>	No	Yes	No	Act survives
<b>Dissent 1</b> (2 votes) <sup>162</sup>	Yes	Yes	Yes	Act fails
<b>Dissent 2</b> (2 votes) <sup>163</sup>	Yes	Yes	Yes	Act fails
	<b>Collective bargaining is unconstitutional, 7–2</b>	<b>Collective bargaining provision is severable, 9–0</b>	<b>No other parts of the act are both unconstitutional and non-severable, 6–3</b>	<b>Act survives, 6–4</b>

It's unclear even upon a careful reading of the opinions whether Justices Wiggins and Madsen agree that the collective bargaining provision is severable. Perhaps that is why Justice González felt like he needed to include the hasty sentence at the end of his concurrence

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160. *El Centro de la Raza*, 192 Wash. 2d at 133, 428 P.3d at 1158 (lead opinion).

161. *Id.* at 133, 135, 428 P.3d at 1158, 1159 (González, J., concurring in part and dissenting in part).

162. *Id.* at 135, 428 P.3d at 1159 (Madsen, J., dissenting). Justice Owens joined both the dissents of Justices Madsen and Wiggins. *Id.* at 135, 142, 428 P.3d at 1162, 1167.

163. *Id.* at 142, 151–52, 428 P.3d at 1162, 1167 (Wiggins, J., dissenting).

regarding the severability provision. Regardless, the holdings are unclear and can only be found through combing through four opinions and counting up both express and implied statements made by the justices.

*B. Lead Opinions with Only One Vote?*

Frequently the Court will issue an opinion that does not garner a plurality of the Court's support.<sup>164</sup> This occurred in *State v. Schierman*,<sup>165</sup> where the lead opinion garnered only the author's signature.<sup>166</sup> In *Schierman*, Conner Schierman appealed his convictions on four counts of aggravated first-degree murder and subsequent death sentence.<sup>167</sup> The Court faced two issues: (1) whether errors in the guilt phase of the trial required reversal of his convictions, and (2) whether his death sentence was statutorily disproportionate and warranted resentencing.<sup>168</sup>

After reading the entire 254-page opinion, a reader can piece together specific holdings in this case.<sup>169</sup> Three separate opinions contained a five-justice majority holding on the guilt phase issue, upholding Schierman's conviction.<sup>170</sup> Those five justices held that although there were errors that violated Schierman's public trial rights, these errors were de minimis and did not warrant reversal.<sup>171</sup> On this issue, a

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164. See generally, e.g., *Eyman v. Wyman*, 191 Wash. 2d 581, 424 P.3d 1183 (2018) (garnering three signatures on the lead opinion); *State v. Sassen Van Elsloo*, 192 Wash. 2d 103, 425 P.3d 807 (2018) (garnering only one signature on the lead opinion); *State v. Schierman*, 192 Wash. 2d 577, 438 P.3d 1063 (2018) (same); *State v. Barnes*, 189 Wash. 2d 492, 403 P.3d 72 (2017) (same); *State v. Smith*, 189 Wash. 2d 655, 405 P.3d 997 (2017) (same); *State v. Wilcoxon*, 185 Wash. 2d 324, 373 P.3d 224 (2016) (same); *Schmidt v. Coogan*, 181 Wash. 2d 661, 335 P.3d 424 (2014) (same); *Int'l Marine Underwriters v. ABCD Marine LLC*, 179 Wash. 2d 274, 313 P.3d 395 (2013) (same); *McDevitt v. Harborview Med. Ctr.*, 179 Wash. 2d 59, 316 P.3d 469 (2013) (same); *State v. Saintcalle*, 178 Wash. 2d 34, 309 P.3d 326 (2013) (garnering two signatures on the lead opinion).

165. 192 Wash. 2d 577, 438 P.3d 1063 (2018).

166. *State v. Schierman*, No. 84614-6, slip op. at 203 (Wash. Apr. 12, 2018) (Justice McCloud wrote the lead opinion.). In fact, there was no plurality opinion in this case: Justice Madsen concurred independently, Justice Yu's concurrence garnered the signatures of Justices González and Wiggins, Justice Stephens dissented and concurred in part and garnered the signatures of Justices Johnson and Owens, and Justice Fairhurst dissented independently. *Id.* at 207 (Madsen, J., concurring); *id.* at 232 (Yu, J., concurring); *id.* at 253 (Stephens, J., concurring in part and dissenting in part); *id.* at 255 (Fairhurst, J., dissenting).

167. *Schierman*, 192 Wash. 2d at 593, 438 P.3d at 1072.

168. *Id.*

169. The original slip opinion was 254 pages long. See *Schierman*, No. 84614-6 (Wash. Apr. 12, 2018).

170. *Schierman*, 192 Wash. 2d at 593, 438 P.3d at 1072 (lead opinion); *id.* at 747, 438 P.3d at 1145 (Madsen, J., concurring); *id.* at 763, 438 P.3d at 1152 (Yu, J., concurring).

171. *Schierman*, 192 Wash. 2d at 593, 438 P.3d at 1072 (lead opinion).

majority of the Court agreed with Justice McCloud’s analysis. A separate majority upheld Schierman’s death sentence,<sup>172</sup> but on this issue a majority of the Court disagreed with Justice McCloud’s lead opinion.<sup>173</sup> Confusingly, Justice Yu’s concurrence opinion agrees with the holding of the majority of the Court on both issues, while the lead opinion does not.<sup>174</sup> See Table 6 below:

**Table 6:**  
***Schierman* Holdings**

<b>Opinion label, author, and number of votes</b>	<b>Did a violation of Schierman’s rights warrant reversal of his conviction?</b>	<b>Was the death sentence disproportionate?</b>	<b>Outcome</b>
<b>Lead Opinion, McCloud (1)</b> <sup>175</sup>	No	Yes	Conviction: Affirm Sentence: Remand
<b>Concurrence, Madsen (1)</b> <sup>176</sup>	No	Yes	Conviction: Affirm Sentence: Remand

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172. *Id.* at 764, 438 P.3d at 1152 (Yu, J., concurring); *id.* at 749–50, 438 P.3d at 1146 (Stephens, J., concurring). Both Justice Yu’s and Justice Stephens’s opinions garnered two additional signatories, creating a six-justice majority on this issue. *Id.* at 577, 438 P.3d at 1163.

173. *Id.* at 593, 438 P.3d at 1072.

174. Justice McCloud summarized the majority’s holdings at the outset of her opinion: “For the reasons given below, we affirm all of his convictions. As further discussed below, a majority of this court also rejects Schierman’s challenges to his death sentence.” *Schierman*, 192 Wash. 2d at 593, 438 P.3d at 1072. But she also addressed the sentencing issue in her own dissent within the lead opinion: “[h]owever, I would hold that two critical, erroneous evidentiary rulings . . . require reversal of that death sentence.” *Id.*

175. *Id.* at 593, 438 P.3d at 1072.

176. *Id.* at 747, 438 P.3d at 1145 (Madsen, J., concurring).

<b>Concurrence/Dissent, Yu (3)</b> <sup>177</sup>	No	No	Conviction: Affirm Sentence: Remand
<b>Concurrence/Dissent, Stephens (3)</b> <sup>178</sup>	Yes	No	Conviction: Reverse Sentence: Affirm
<b>Dissent, Fairhurst (1)</b> <sup>179</sup>	Yes	Yes	Conviction: Reverse Sentence: Vacate
	<b>No: affirm the conviction (5–4)</b>	<b>No: affirm the death sentence (6–3)</b>	<b>Uphold the conviction and the sentence</b>

Another perplexing element of this case is that a significant part of the precedential value isn't even in the lead opinion. In fact, lower court opinions and briefs cite directly to Justice Yu's concurrence as the holding of the court rather than McCloud's lead opinion.<sup>180</sup> Despite the guilt-phase issue being the only part of the opinion that the majority agreed with, Justice McCloud's discussion did not even contain the complete holding on that issue.<sup>181</sup> A majority of the Court agreed to apply the test established in *Peterson v. Williams*,<sup>182</sup> but Justice McCloud's opinion did not discuss the case.<sup>183</sup> Instead, Justice McCloud referred the reader to Justice Yu's concurrence for a discussion of why applying *Peterson* was appropriate.<sup>184</sup> In her concurrence, Justice Yu asserted with the authority of a majority opinion that "[w]e adopt the de minimis inquiry established by federal appellate courts' the wise and

177. *Id.* at 763, 764, 438 P.3d at 1152 (Yu, J., concurring).

178. *Id.* at 749–50, 781, 438 P.3d at 1146, 1161 (Stephens, J., concurring).

179. *Id.* at 781, 480 P.3d at 1161 (Fairhurst, J., dissenting).

180. *State v. Karas*, 6 Wash. App. 2d 610, 612–13, 620–24, 431 P.3d 1006, 1008, 1013–14 (2018); Brief of Appellant at 12–13, *State v. Ali*, 8 Wash. App. 2d 1041 (Wash. App. 2018) (No. 77523-5-1).

181. *See Schierman*, 192 Wash. 2d at 614, 438 P.3d at 1082 (Justice McCloud's references to Justice Yu's concurrence provide a more in-depth discussion of the Court's opinion).

182. 85 F.3d 39, 43 (2d Cir. 1996).

183. *Id.*

184. *Schierman*, 192 Wash. 2d at 614, 438 P.3d at 1082.

widely-accepted *Peterson* test . . . .”<sup>185</sup>

The Court’s fragmented decisions also make it hard to discern what the rule going forward will be. For instance, five justices agreed to affirm on the guilt-phase issue, but there was no agreement as to whether the matter was one of first impression or whether prior cases needed to be overruled to allow de minimis courtroom closures.<sup>186</sup> Justices McCloud and Madsen agreed that this was a matter of first impression,<sup>187</sup> but Justices Yu, González, and Wiggins thought that the prior cases had to be overturned.<sup>188</sup> On this issue, there is no precedential holding aside from the result.

This lengthy opinion caused considerable confusion as to what the justices actually agreed upon. Multiple news articles misunderstood and thereby mischaracterized the justices’ agreement with McCloud’s opinion.<sup>189</sup> After relating Justice McCloud’s reasoning for upholding Schierman’s conviction, one article stated that Justices Fairhurst and Madsen “agreed with McCloud’s opinion.”<sup>190</sup> But Justice Fairhurst did not agree with McCloud’s judgment *or* reasoning in the guilt phase portion of the trial.<sup>191</sup> And Justice Madsen agreed in the judgment but not the reasoning in the sentencing-phase portion of Justice McCloud’s opinion; she thought that the death penalty sentence was disproportionate only as applied to Schierman’s conviction, rather than agreeing with McCloud that all death penalty cases were disproportionate sentences.<sup>192</sup>

In effect, this opinion diminishes accountability of the court and creates unclear standards for lower courts. If citations for binding authority point future litigants and courts to a concurrence, there will

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185. *Id.* at 768, 438 P.3d at 1154 (quoting *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003))

186. *Id.* at 748, 438 P.3d at 1145.

187. *Id.* at 610–11, 438 P.3d at 1080 (lead opinion); *id.* at 747, 438 P.3d at 1145 (Madsen, J., concurring).

188. *Id.* at 767, 438 P.3d at 1154 (Yu, J., concurring).

189. Martha Bellisle, *Supreme Court Upholds Conviction, Death Sentence*, ASSOCIATED PRESS NEWS (Apr. 12, 2018), <https://www.apnews.com/abf05b11eb8c416db38f7117b25d733c> [<https://perma.cc/3FV8-5454>]; Sarah J. Green, *Divided Supreme Court Upholds Death Sentence for Man Who Killed Kirkland Family in 2006*, SEATTLE TIMES (June 12, 2018, 2:02 PM), <https://www.seattletimes.com/seattle-news/crime/divided-supreme-court-upholds-death-sentence-for-man-who-killed-kirkland-family-in-2006/> [<https://perma.cc/5NQR-72JA>].

190. Green, *supra* note 189.

191. *See Schierman*, 192 Wash. 2d at 781, 438 P.3d at 1161 (Fairhurst, J., concurring).

192. *Id.* at 747, 438 P.3d at 1145 (Madsen, J., concurring). Madsen actually specifically states her agreement with the reasoning on the validity of death sentences in general within Justice Yu’s concurrence. *Id.*

inevitably be confusion as to whether that opinion is actually binding or not.

*C. Is the Lead Opinion Authoritative at All?*

Sometimes a lead opinion is misleading when looking for the holding in a case. *Affiliated FM Ins. Co. v. LTK Consulting Services, Inc.*<sup>193</sup> is an example of such a case. This case arose as a result of an electrical fire on the Seattle monorail in 2004, after which Seattle Monorail Services lost millions of dollars in revenue.<sup>194</sup> Seattle Monorail Services had a contract with the city to operate the monorail that required them to take out fire insurance.<sup>195</sup> The city had a separate contract with LTK Consulting Services (LTK) to maintain the monorail.<sup>196</sup> Seattle Monorail Services's insurance company, Affiliated, sued to recoup the lost revenue from LTK for negligently maintaining the monorail's electrical system.<sup>197</sup> LTK countered that it was not liable in tort for the lost revenue because the economic loss rule barred Affiliated's claim.<sup>198</sup> A federal district court granted summary judgment to LTK, and when Affiliated appealed, the Ninth Circuit Court of Appeals sent a certified question to the Washington State Supreme Court:<sup>199</sup> it asked whether Affiliated had the right to sue LTK when Seattle Monorail Services and LTK were not in privity of contract.<sup>200</sup>

All nine justices agreed on the judgment in the case: that LTK was not barred from tort recovery against LTK.<sup>201</sup> But ironically, the only *reasoning* that a majority of the Court agreed upon was that the lead opinion's reasoning was incorrect.<sup>202</sup>

On the same day, the Court issued a companion case: *Eastwood v. Horse Harbor Foundation*.<sup>203</sup> In *Eastwood*, the Court replaced the

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193. 170 Wash. 2d 442, 243 P.3d 521 (2010).

194. *Id.* at 443–44, 243 P.3d at 523.

195. *Id.* at 445, 243 P.3d at 523–24.

196. *Id.* at 445, 243 P.3d at 524.

197. *Id.*

198. *Id.*

199. *Id.* at 447, 243 P.3d at 524–25.

200. *Id.* at 449, 243 P.3d at 525.

201. *Id.* at 461, 243 P.3d at 532 (lead opinion); *id.* (Chambers, J. concurring); *id.* at 476, 243 P.3d at 539–540.

202. *See Affiliated*, 170 Wash. 2d at 461, 243 P.3d at 532 (Chambers, J., concurring); *id.* at 476, 243 P.3d at 539–40 (Madsen, J., concurring in part and dissenting in part).

203. 170 Wash. 2d 380, 241 P.3d 1256 (2010).

economic loss rule with the independent duty doctrine.<sup>204</sup> The economic loss rule was a defense to contract suits which would bar recovery for any injury that was purely economic in nature.<sup>205</sup> Essentially, instead of looking at whether the injury was economic loss, the Court would look to see if the defendant had a duty arising independent of an existing contract.<sup>206</sup> Despite there being no privity of contract between the parties in *Affiliated*, the lead opinion applied the independent duty doctrine and found that LTK owed Seattle Monorail Services a duty.<sup>207</sup> Seven justices agreed that the lead opinion erroneously applied the independent duty doctrine because the case only concerned an ordinary tort action, and the independent duty doctrine was a defense only to contract suits.<sup>208</sup> Due to this agreement, the precedential holding in *Affiliated* is that applying the independent duty doctrine is inappropriate in tort suits.<sup>209</sup> This sharply contrasts with the lead opinion's assertion that *Affiliated* could sue because it was *permissible* under an independent duty doctrine analysis.<sup>210</sup> This may seem like a fairly benign distinction, but it has far-reaching effects for the future scope of the independent duty doctrine's application. Under the lead opinion's analysis, this contract law defense would extend to defend tort actions as well.<sup>211</sup>

As discussed below, even though a majority of the justices agreed that the independent duty doctrine was inapplicable in this case, many citations to this case erroneously indicate that the reasoning from the lead opinion has precedential value. Despite what the lead opinion says, the only precedent formed in *Affiliated* was that the Court will *not* apply the independent duty analysis to ordinary tort claims.<sup>212</sup>

One law review article mistakenly cites the analysis in *Affiliated*'s lead opinion as the holding of the Court: "*Affiliated* established a new framework to determine when economic loss is recoverable in tort."<sup>213</sup>

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204. *Id.*

205. *Id.* at 387, 241 P.3d at 1261.

206. *See id.* at 383, 241 P.3d at 1259 (lead opinion).

207. *Affiliated*, 170 Wash. 2d at 460–461, 243 P.3d at 532.

208. *Affiliated*, 170 Wash. 2d at 461, 243 P.3d at 532 (Chambers, J., concurring); *id.* at 476, 243 P.3d at 539–40 (Madsen, J., concurring in part and dissenting in part).

209. *Id.*

210. *Id.*

211. *Id.* at 461, 243 P.3d at 532 (Chambers, J., concurring).

212. *See id.* at 461, 243 P.3d at 532 (Chambers, J., concurring); *id.* at 476, 243 P.3d at 539–40 (Madsen, J., concurring in part and dissenting in part).

213. *See* Benjamin J. McDonnell, *Finding a Contract in the "Muddle": Tracing the Source of Design Professionals' Liability in the Construction Context Under Washington's Independent Duty Doctrine*, 48 GONZ. L. REV. 627, 653 (2012).

At most, two justices in *Affiliated* suggested this.<sup>214</sup> At the same time, the author also recognized that Justice Madsen’s concurrence/dissent strongly opposed using the independent duty doctrine.<sup>215</sup> What the author was missing is that Justice Chambers also disagreed with the lead opinion’s analysis, and that the lead opinion did not actually reflect the court’s precedential holding.<sup>216</sup>

The author of that article is not alone—others are confused as well. Litigants have had a hard time drawing the line between the broad reaching dicta within the lead opinion and the holding. For instance, one litigant cited the lead opinion in *Affiliated* for the proposition that the Court “expressly did not overrule any of its prior decisions on the economic loss doctrine” by adopting the independent duty doctrine.<sup>217</sup> It is true that the two justices signing the lead opinion expressly stated that they were not overruling any of the Court’s prior cases, but it is also true that the three justice concurrence/dissent said that applying the independent duty doctrine *did* expressly overrule economic loss doctrine precedent.<sup>218</sup> The remaining justices did not contribute to this argument.<sup>219</sup> Effectively, the Court did not speak on the continuing validity of the economic loss doctrine’s precedent. Thus, this dialogue between the lead opinion and the concurrence/dissent is arguably dicta.

### III. THE SOLUTION: REVISING THE COURT’S APPROACH TO FRAGMENTED DECISIONS

#### A. *Remedying Confusion with the Wright Rule*

A majority of the Court now subscribes to using the *Wright* rule,<sup>220</sup> but there are still issues that need to be addressed before it can be workable. Specifically, the Court has not expressed what role dicta plays

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214. Compare *Affiliated*, 170 Wash. 2d at 444, 243 P.3d at 523, 525–26, with *id.* at 461, 243 P.3d at 532 (Chambers, J., concurring), and *id.* at 476, 243 P.3d at 539–40 (Madsen, J., concurring in part and dissenting in part).

215. McDonnell, *supra* note 213, at 653.

216. See *Affiliated*, 170 Wash. 2d at 461, 243 P.3d at 532 (Chambers, J., concurring).

217. Supplemental Brief of Appellant, at \*9, *Donatelli v. D.R. Strong Consulting Engineers, Inc.*, 179 Wash. 2d 84, 312 P.3d 620 (2013) (No. 86590-6), 2012 WL 3072102 (citing *Affiliated*, 170 Wash. 2d at 450 n.3, 243 P.3d at 526 n. 3 (lead opinion)).

218. See *Affiliated*, 170 Wash. 2d at 450 n.3, 243 P.3d at 526 n.3 (lead opinion); *id.* at 463–64, 243 P.3d at 533 (Madsen, J., concurring in part and dissenting in part).

219. See *id.* at 461–63, 243 P.3d at 532–33 (Chambers, J., concurring).

220. See *In re Det. of Reyes*, 184 Wash. 2d 340, 346, 358 P.3d 394, 379 (2015); *supra* section I.A.2.



in the *Wright* rule or updated its internal procedures to match the new rule.

The *Wright* rule lacks a clear complementary decision by the Court on what constitutes dicta for the purposes of the rule. Assuming that a dissent in and of itself is dicta “presumes its conclusion: dissents are said to be unreliable because they do not generate precedent.”<sup>221</sup> But in applying the *Wright* rule, dissents *do* have an effect on the judgment. This was the case in *Colorado Structures*, when the Court based the award of *Olympic Steamship* fees from a cross-judgment majority.<sup>222</sup> This still leaves us to address the contradiction posed by the precedent formed in *Rhone*, that “if a separate opinion does not concur in the judgment, any language expressing how the law should be applied in future cases . . . is dicta.”<sup>223</sup> There is a significant difference between Justice Sanders’s dissent in *Colorado Structures* and Justice Madsen’s concurrence in *Rhone*. Justice Sanders’s dissent in *Colorado Structures* actually applied to the litigants at bar and affected the judgment.<sup>224</sup> A dissent also had an effect on the judgment of the case in *El Centro de la Raza*, when a cross-judgment majority held that the superintendent provision of the charter school act was unconstitutional.<sup>225</sup>

The line between dicta and statements that hold precedential value does need not need to be revolutionary: if a cross-judgment majority has an actual outcome on the case at bar, that reasoning forms precedent. And this line would be clearer if a “dissenting” opinion that actually affects the judgment were properly labeled as a “concurrence in part and dissent in part.” This resolves the conflict between *Wright* and *Rhone* regarding dicta and precedent.<sup>226</sup>

### *B. The Wright Rule Should Factor into Assigning Lead Opinions*

The benefits that the *Wright* rule provides are completely obscured by the internal procedures that the Court uses to assign opinions. This is because the court’s voting procedures do not match its stated preferences and practices for generating precedent.<sup>227</sup> While the precedent going

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221. Re, *supra* note 2, at 1990.

222. See *supra* section I.A.2 (discussing *Colorado Structures* and *Olympic Steamship* fee awards).

223. *King Cty. v. Vinci Constr. Grands Projets*, 188 Wash. 2d 618, 635, 398 P.3d 1093, 1106 (2017) (Madsen, J., dissenting).

224. See *supra* notes 89–96 and accompanying text.

225. See *supra* notes 147–163 and accompanying text.

226. See *supra* section I.A.3 (discussing the conflict between the *Wright* rule and that in *Rhone*).

227. See *Post & Salop*, *supra* note 51 and accompanying text (discussing outcome and issue

forward focuses on the *reasoning* supporting each issue,<sup>228</sup> the vote to assign the lead opinion is determined by what the *judgment* is for each issue irrespective of the reasoning.<sup>229</sup> But the justice who writes the lead opinion only needs to get the unqualified assent of at least four other justices on *one* issue addressed by the court.<sup>230</sup> The result is lead opinions that do not end up garnering even a plurality of the Justices' assent.<sup>231</sup>

*State v. Schierman* is an illustrative example. Using the *Wright* rule, a majority of the Court agreed to affirm the lower court's ruling on both the guilt and conviction phase issues.<sup>232</sup> Justice McCloud's lead opinion only agrees in the judgment on one of the issues, and on that issue it doesn't even contain a complete picture of the reasoning.<sup>233</sup> But the precedential holding for courts going forward exactly matches Justice Yu's concurring opinion in both the reasoning and the judgment on both issues, which is why lower courts cite to this opinion.<sup>234</sup> See Table 6 (*Schierman* Holdings), reprinted below:

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voting); Anglin KCBA Presentation, *supra* note 121 and accompanying text (discussing Washington's metavoting procedures); section I.A.2 (discussing Washington's practices for generating precedent from fragmented decisions); Re, *supra* note 2 at 1990 (discussing the weight of dissenting opinions and its relation to dicta).

228. See *supra* section I.A.2.

229. See Anglin KCBA Presentation, *supra* note 118 and accompanying text.

230. INTERNAL PROCEDURES MANUAL, *supra* note 13, at II-6; see *supra* section II.A.2.

231. See *State v. Sassen Van Elsloo*, 191 Wash. 2d 798, 425 P.3d 807 (2018); *State v. Schierman*, 192 Wash. 2d 577, 438 P.3d 1063 (2018).

232. See *id.* at 593, 438 P.3d at 1072 (lead opinion); *id.* at 747, 438 P.3d at 1145 (Madsen, J., concurring); *id.* at 763–64, 438 P.3d at 1152 (Yu, J., concurring); *id.* at 749–50, 781, 438 P.3d at 1146, 1161 (Stephens, J., concurring).

233. *Id.* at 577, 438 P.3d at 1063 (lead opinion) (referring the reader to Justice Yu's concurring opinion for discussion of key reasoning contributing to the judgment).

234. See, e.g., *State v. Karas*, 6 Wash. App. 2d 610, 612–13, 431 P.3d 1006, 1008 (2018).

**Table 6:**  
***Schierman Holdings***

<b>Opinion label, author, and number of votes</b>	<b>Did a violation of Schierman's rights warrant reversal of his conviction?</b>	<b>Was the death sentence disproportionate?</b>	<b>Outcome</b>
<b>Lead Opinion, McCloud (1)</b> <sup>235</sup>	No	Yes	Conviction: Affirm Sentence: Remand
<b>Concurrence, Madsen (1)</b> <sup>236</sup>	No	Yes	Conviction: Affirm Sentence: Remand
<b>Concurrence/Dissent, Yu (3)</b> <sup>237</sup>	No	No	Conviction: Affirm Sentence: Remand
<b>Concurrence/Dissent, Stephens (3)</b> <sup>238</sup>	Yes	No	Conviction: Reverse Sentence: Affirm
<b>Dissent, Fairhurst (1)</b> <sup>239</sup>	Yes	Yes	Conviction: Reverse Sentence: Vacate
	<b>No: affirm the conviction (5–4)</b>	<b>No: affirm the death sentence (6–3)</b>	<b>Uphold the conviction and the sentence</b>

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235. *Id.* at 593, 438 P.3d at 1072.

236. *Id.* at 747, 438 P.3d at 1145 (Madsen, J., concurring).

237. *Id.* at 763, 764, 438 P.3d at 1152 (Yu, J., concurring).

238. *Id.* at 749–50, 781, 438 P.3d at 1146, 1161 (Stephens, J., concurring).

239. *Id.* at 781, 480 P.3d at 1161 (Fairhurst, J., dissenting).

The Court could easily fix this problem by switching its initial vote from an outcome vote to an issue vote. That would allow the Court to gauge where the majority of the Court actually stands on each issue and allows them to better predict who should write the initial lead opinion.

*C. Other Structural and Organizational Tactics Can Bring Clarity to Decisions*

The Washington State Supreme Court should change its internal procedures to encourage clarity in its opinions. The Court should require that any written opinion within a fragmented decision be labeled in parts. The justices would then sign each part of every opinion that they agree with. The opinion that concurs in the judgment that has the most signatures would then be classified as the lead opinion. Without reassigning the lead opinion to the justice that can garner the most signatures, the pluralities and majorities of the court are obscured—thus detracting from the Court’s authoritative power.<sup>240</sup>

This labeling is preferable to encouraging or forcing the justices to sign on to each other’s opinions. Encouraging disingenuous agreement provides the public with the illusion of a false consensus on the Court. As discussed in section I.C above, dissent is an expression of the Court’s power.<sup>241</sup>

*D. A Confusing Case Revisited: How it Could Have Been Done*

In *State v. Schierman*, certain changes to the Court’s internal

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240. One fragmented decision issued near the time of this Comment’s publication summarizes how the justices voted on each of the major issues of the case. *See* *Washington v. Muhammad*, No. 96090-9, slip op. at 38 (Wash. Nov. 7, 2019) (“Seven members of this court agree that a cell phone ping constitutes a search under the state and federal constitutions. However, six members of this court agree that the ping was permissible, thus affirming the Court of Appeals in part. Five members of the court hold that Muhammad’s first degree rape and felony murder convictions violate double jeopardy. Therefore, five members of this court reverse the Court of Appeals in part and remand to trial court for the dismissal of the lesser-included offense and for other proceedings consistent with our opinions.”). While this is a useful summary of the basic holdings of the case, the Court should update its rules to provide consistent clarity to the public when issuing fragmented decisions. Clarity in the lead opinion as to the exact holdings also allows the Clerk of the Supreme Court to make accurate awards to the parties at the conclusion of the case. *See* Clerk’s Ruling Regarding Setting of Att’y Fees & Am. Clerk’s Ruling on Costs at 2, 2 n.2, *Colo. Structures, Inc. v. Ins. Co. of the W.*, 161 Wash. 2d 577, 167 P.3d 1125 (2007) (No. 76973-7) (awarding *Olympic Steamship* fees, relying on the conclusion of the lead opinion to accurately state the court’s holding).

241. Perhaps this is what Justice J.M. Johnson alluded to in *Ruem*. *See* *State v. Ruem*, 179 Wash. 2d 195, 220, 313 P.3d 1156, 1170 (2013) (Johnson, J., concurring in part and dissenting in part); *supra* section II.C.

procedures, like those recommended above, would have provided clarity to lower courts and the public.<sup>242</sup> To clarify precedential effect of *Schierman*, the Court should have designated Justice Yu's opinion as the lead opinion. To arrive at that decision, the Court would essentially engage in two rounds of voting before labeling the opinions. After oral arguments, the justices would engage in an outcome vote<sup>243</sup> based on whether to affirm or reverse on both the guilt and sentencing issues.

First, the justices would engage in an issue vote on the guilt phase issue. Justices McCloud, Madsen, Yu, González, and Wiggins would form a majority vote to affirm in the judgment on the guilt issue.<sup>244</sup> Next, the justices would engage in an issue vote on the sentencing phase issues. The issue vote on the sentencing phase issues would result in six justices agreeing to affirm Schierman's death sentence.<sup>245</sup> See the outcome of this first round of voting in Table 7:

**Table 7:**  
***Schierman* after issue voting**

<b><i>Guilt phase issue</i></b> <sup>246</sup>		<b><i>Sentencing phase issue</i></b> <sup>247</sup>	
<b>Majority (5)</b>	<b>Non-majority (4)</b>	<b>Majority (6)</b>	<b>Non-majority (3)</b>
McCloud	Stephens	Yu	McCloud
Madsen	Johnson	González	Madsen
Yu	Owens	Wiggins	Fairhurst
González	Fairhurst	Stephens	
Wiggins		Johnson	
		Owens	

At this point, the responsibility for writing a lead opinion should be

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242. See *supra* sections III.A–C.

243. See Post & Salop, *supra* note 51 and accompanying text.

244. See *supra* notes 170–171 and accompanying text; *supra* notes 235–239 and text accompanying tbl.6.

245. See *supra* notes 172–174; *supra* notes 235–239 and text accompanying tbl.6.

246. See *supra* notes 170–71 and accompanying text; *supra* notes 235–239 and text accompanying tbl.6.

247. See *supra* notes 172–74 and accompanying text; *supra* notes 235–239 and text accompanying tbl.6.

assigned to one of the justices who is in the majority for both issues.<sup>248</sup> The candidates for writing the lead opinion in this case would be Justices Yu, González, or Wiggins. Say that Justice Yu receives the duty of writing the opinion and circulates her opinion to the other justices. When Justice Yu fails to receive a majority of the justices' signatures, the Court would move towards a second round of voting in anticipation that it will be issuing a fragmented decision. Justices McCloud, Madsen, Stephens, and Fairhurst would likely break off to write their own opinions. Justice Yu would then label the parts of her opinion, as would the justices breaking off to write concurrences and dissents.

The second vote would not be a formal vote but would occur by the justices signing on to the parts of the circulating opinions that they agree with. After all the justices are done signing on to the parts of the opinions they agree with—and possibly switching sides a few times—the Court would determine which opinion that agreed with the issue voting.

Next, the Chief Justice would then assign the opinion to the justice that was in the majority for the vote on the judgment and gained a plurality of votes in the reasoning. In this case, Justice Yu is the most appropriate choice for drafting the lead opinion because the majority agreed with her in the judgment and the rules she promoted garnered the assent of the most the justices on the guilt-phase issue and the majority of the justices on the sentencing-phase issue.<sup>249</sup> To make the separate plurality and majority parts of the opinion clear, it would make sense to include a caption before the lead opinion.

## CONCLUSION

The Washington State Supreme Court's current method for labeling opinions clashes with its method for piecing together precedent from its fragmented decisions. The Court's current methods create confusion among the public and in lower courts. To alleviate this confusion, the Court needs to update its administrative procedures to take the reasoning of its decisions into account when labeling opinions. The Court can achieve this by engaging in two voting rounds at the close of each case. First, the justices would vote on whether to affirm or overturn the ruling

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248. Or, if there are multiple issues and no justice is in the majority for both issues, the justice that is in the majority for the most issues. If that fails, the Court could default to the justice that prepared the pre-hearing report.

249. See *supra* notes 174–84 and accompanying text; *supra* notes 235–239 and text accompanying tbl.6.

of the lower court in each discrete issue addressed by the Court. Next, the Court would circulate opinions that bear labels separating each distinct line of reasoning. The justices would essentially engage in a second vote by signing on to each part in every opinion that they agree with. Then, the final decision of whose opinion bears the lead opinion label in a fragmented decision would be based on which opinion concurring with the judgment obtained the most signatures for each issue addressed. Adopting this policy would increase the strength and authoritative power of the Court and save future litigants and members of the public from having to piece together precedent without guidance.