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The Demise of the Law-Developing Function: A Case Study of the Wisconsin Supreme Court

Skylar Reese Croy

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ARTICLE

**THE DEMISE OF THE LAW-DEVELOPING
FUNCTION: A CASE STUDY OF THE WISCONSIN
SUPREME COURT**

Skylar Reese Croy¹

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I. INTRODUCTION

Antonin Scalia was appointed to the U.S. Supreme Court to be a “consensus builder.”² In other words, he was supposed to view himself as a member of a collegial court that worked together to create precedent. At his confirmation hearing, Senator Strom Thurmond (R-S.C.), the Chairman of the Committee on the Judiciary, stated:

[T]hose who have been associated with Judge Scalia throughout his life—even if they might disagree with him philosophically—consistently describe him as: A person who is open-minded, a consensus builder, and an individual with a keen intellect and sense of humor. These are unquestionably qualities we desire in a person who is to be elevated to the highest court in the land.³

However, during his tenure, Justice Scalia was not a consensus builder. Indeed, in an interview he gave with Charlie Rose in 2016, he exclaimed, “I can’t be a consensus builder”:

J. Scalia: Look, when I came on the Court, the word was, you know, Scalia will be a consensus builder, cause I’m such a charming fellow. I will be a consensus builder.

Rose: Is that what they said?

J. Scalia: No, they didn’t say the charming part, but they did expect me to be a consensus builder, he you know, he gathers the votes. I can’t be a consensus builder.

² *Nomination of Judge Antonin Scalia, Hearings Before the Committee on the Judiciary United States Senate, 99th Cong. 1-2 (1986),* <http://www.loc.gov/law/find/nominations/scalia/hearing.pdf>.

³ *Id.* at 2.

Rose: Because?

J. Scalia: Because I can't trade. You see [Justice] Bill Brennan, who was an evolutionist, he could deal. He could go to his colleague, you know, "I want to change the Constitution this far." And go, "God gee Bill, I can't go this far." And he'd go, "well what about this far." He can deal. Now I can't deal. If I'm, if I'm, doing the text, what can I say, you know, "half way between what the text really means and what'd you'd like it to mean?" Is that the deal I'm going to cut?

Rose: Yes, that would be it.

J. Scalia: You can't do it.⁴

Justice Clarence Thomas once made a similar statement, in which he suggested that compromising is inconsistent with his oath of office.⁵

Scholars have long been aware that some conservatives subscribe to an anti-consensus building philosophy. As one wrote: "As an ideologue, Justice Scalia preferred his subjectively 'correct' answer to the most mutually agreeable answer. Justice Scalia cite[d] his adherence to originalism and textualism as the reason for his inability to form coalitions."⁶ Conservatives tend to value the "great dissenter," who always views the resolution of a legal dispute through his or her subjective lens.⁷ Lest there be any doubt that conservatives have trouble forming coalitions, the five conservative justices authored sixty separate writings this past term at the U.S. Supreme Court.⁸ The four liberals authored thirty-six.⁹ Furthermore, con-

⁴ Charlie Rose, *Interview with Justice Antonin Scalia*, CBS THIS MORNING, at 0:31–1:30 (Feb. 15, 2016), https://www.youtube.com/watch?v=CNPUKv_pNks.

⁵ Bill Kristol, *Interview with Clarence Thomas*, CONVERSATIONS WITH BILL KRISTOL, at 6:50–8:20 (Oct. 22, 2016), <https://www.youtube.com/watch?v=Q3rZknW5gAk&t=2330s>.

⁶ Robert Stein, Foreword, *A Consequential Justice*, 101 MINN. L. REV. HEADNOTES 1, 9 (2016).

⁷ James Allan, *One of My Favorite Judges: Constitutional Interpretation, Democracy and Antonin Scalia*, 6 BR. J. AM. LEG. STUDIES 25, 31 (2017).

⁸ Nina Totenberg, Emmett Witkovsky-Eldred & Alyson Hurt, *In Supreme Court Term, Liberals Stuck Together While Conservatives Appeared Fractured*, NPR (July 15, 2020), <https://www.npr.org/2020/07/15/891185410/in-supreme-court-term-liberals-stuck-together-while-conservatives-appeared-fract>.

⁹ *Id.*

servative justices authored fifteen “solo” separate writings, while liberal justices authored four.¹⁰

Of course, there have been a few famous liberal justices who were not keen on compromise; but often, the trouble for liberals seems to be psychological and not jurisprudential.¹¹ In fairness, conservatives have the same psychological roadblocks to compromise. However, unlike conservatives, liberals have not made an unwillingness to compromise an integral part of their judicial philosophy. Indeed, law review articles have been authored praising liberals for their ability to form coalitions.¹²

The problem with conservatives’ anti-consensus building philosophy is that high courts exist to develop the law.¹³ When members of a high court refuse to work together, the result is often that the court has no majority opinion. This is a disservice to the public because it confuses, rather than clarifies, the law. As Chief Justice John Roberts explained: “I think that every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they’re writing separately, about the effect on the Court as an institution.”¹⁴ In the words of several scholars, “[w]hen the Supreme Court fails to generate a controlling precedent, the result arguably is an erosion of the Court’s credibility and authority as a source of legal leadership.”¹⁵

Conservatives’ anti-consensus building philosophy has found its way to the Wisconsin Supreme Court, as demonstrated by a rise in decisions with no majority opinion. This Article has three goals: (1) to persuade conservative justices to abandon their anti-consensus building phi-

¹⁰ *Id.*

¹¹ See Stein, *supra* note 6, at 4.

¹² See generally *id.*

¹³ Victor Eugene Flango, *State Supreme Court Opinions as Law Development*, 11 J. APPELLATE PRAC. & PROCESS 105 (2010); Skylar Reese Croy, Comment, *Step One to Recusal Reform: Find an Alternative to the Rule of Necessity*, 2019 WIS. L. REV. 623, 631–34. Notably, the Wisconsin Supreme Court and members thereof have stated that the court serves a law-developing function. See e.g., *State ex rel. Wis. Senate v. Thompson*, 424 N.W.2d 385, 387 (Wis. 1988) (“[I]t is this court’s function to develop and clarify the law.”); *State v. Brantner*, 939 N.W.2d 546, 525 (Wis. 2020) (Roggensack, C.J., concurring) (“Part of our obligation as supreme court justices is to take complicated legal issues and decide them in a way that simplifies and explains them.”); *State v. Hermann*, 867 N.W.2d 772, 804–05 (Wis. 2015) (Ziegler, J., concurring) (“Unlike a circuit court or the court of appeals, the supreme court serves a law development purpose; therefore, cases before the supreme court impact more than parties then before the court.”). See generally Patience Drake Roggensack, *Elected to Decide: Is the Decision-Avoidance Doctrine of Great Weight Deference Appropriate in this Court of Last Resort*, 89 MARQ. L. REV. 541 (2006).

¹⁴ Jeffrey Rose, *Robert’s Rules*, THE ATLANTIC (Jan.–Feb. 2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>.

¹⁵ Pamela C. Corley et al., *Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court*, 31 JUST. SYS. J. 180, 181 (2010).

losophy, (2) to document the problems the philosophy has caused and (3) to propose solutions. This Article focuses on the Wisconsin Supreme Court; although, as it notes at various points, this problematic philosophy is likely not unique to Wisconsin's high court.

This Article proceeds in four parts. Part I summarizes the history of judicial opinion writing. This context is helpful for understanding why a rise in decisions with no majority is a threat to the legitimacy of the judiciary. Part II documents the rise in opinions without a majority and argues it largely stems from the addition to the bench of conservatives with an anti-consensus building philosophy. Part III addresses consequences of this trend. Most importantly, and most obviously, the increase in decisions with no majority opinion indicates a failure of the Wisconsin Supreme Court to perform its law-developing function. There are less intuitive problems as well. These problems primarily affect conservative jurisprudence, and their existence indicates that some conservatives ought to rethink their anti-consensus building philosophy. Part IV discusses possible solutions.

II. HISTORICAL BACKGROUND ON JUDICIAL OPINION WRITING

This Part summarizes the history of judicial opinion writing. This history is helpful for understanding why majority opinions are so important. It also discusses the concept of a collegial court. Indeed, this concept developed because an inability to author majority opinions threatened the legitimacy of the judiciary.

A. *Opinion Writing in England*

English courts had long utilized *seriatim* opinions at the time of America's founding. "*Seriatim*" means, "[o]ccurring in a series."¹⁶ In the context of judicial opinions, "*seriatim* opinions" are "a series of opinions written individually by each judge on the bench, as opposed to a single opinion speaking for the court as a whole."¹⁷ Professor M. Todd Henderson, of the University of Chicago Law School, explains: "For almost a thousand years, decisions of multimember courts in England were delivered orally by each judge *seriatim* and without any prior intracourt consultation."¹⁸ This "long and unbroken tradition" temporarily changed when

¹⁶ *Seriatim*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁷ *Id.*

¹⁸ M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292.

William Murray (later known as Lord Mansfield) became Lord Chief Justice in 1756.¹⁹ He “introduced a procedure for generating agreement and consensus among judges and then issuing caucused opinions.”²⁰ In essence, Lord Mansfield created what scholars today would call a “collegial court.”²¹ “The judges met collectively in the secrecy of their chambers, worked out their differences into compromise decisions, and then wrote what was to be delivered as an anonymous and unanimous ‘opinion of the court.’”²² Lord Mansfield hoped that his approach would bring clarity to English commercial law, which had become extremely complicated.²³ Alas, his practice was abandoned shortly after his retirement.²⁴ Only recently has Lord Mansfield’s approach returned to England.²⁵

B. *Opinion Writing in the United States*

England’s legal traditions—including its use of *seriatim* opinions—became norms in colonial America.²⁶ Importantly, many courts had been operating before Lord Mansfield’s innovations, so it should not be surprising that they did not follow his approach.²⁷ Over time, courts were inspired by Lord Mansfield, but his ideas were controversial.²⁸ The first court to abandon *seriatim* opinions was the Virginia Supreme Court under the leadership of Chief Judge Edmund Pendleton.²⁹ Notably, Chief Judge Pendleton was condemned by the likes of Thomas Jefferson, who saw the practice as illegitimate.³⁰ Jefferson believed that *seriatim* opinions increased transparency and made individual judges accountable.³¹ Lord Mansfield’s approach was abandoned in Virginia when Chief Judge Pendleton’s successor took his seat, in part due to Jefferson’s efforts.³²

¹⁹ *Id.* at 294.

²⁰ *Id.*

²¹ *See infra* Section I.B.

²² Henderson, *supra* note 18, at 294.

²³ *See id.*

²⁴ *Id.* at 302.

²⁵ *Id.* at 303.

²⁶ *Id.* at 303–04.

²⁷ Henderson, *supra* note 18, at 304.

²⁸ *Id.* at 308.

²⁹ Joshua M. Austin, Comment, *The Law of Citations and Seriatim Opinions: Were the Ancient Romans and the Early Supreme Court on the Right Track?*, 31 N. ILL. U. L. REV. 19, 27 (2010).

³⁰ *See id.*

³¹ *Id.* at 28.

³² *Id.* at 27.

Despite the controversy, American courts soon became aware that they needed to consider Lord Mansfield's approach, or they risked being the weakest branch of government. For example, many early U.S. Supreme Court decisions were issued as *seriatim* opinions.³³ The Court was attacked by the other branches and the press, in part because of its inability to pronounce law in a clear manner; indeed, the nation's first Chief Justice, John Jay, left the Court and refused to return because he believed that the Court was unable to earn the "public confidence and respect."³⁴ *Calder v. Bull*³⁵ is a "classic" example of the confusion resulting from *seriatim* opinions.³⁶ Four justices participated and each authored an opinion. To this day, scholars debate the holding of this case.³⁷

The Court's practice of *seriatim* opinions was ended by none other than Chief Justice John Marshall.³⁸ He looked closely to the example of Lord Mansfield.³⁹ Based on that example, Chief Justice Marshall established the practice of "opinions of the court."⁴⁰ Scholars credit Chief Justice Marshall's decision with making the judiciary a co-equal branch of government.⁴¹ State courts soon followed suit.

Notably, Chief Justice Marshall's practice differed from the practice in use today. He normally delivered the opinions for the Court; his colleagues did not.⁴² This is why a large number of opinions appear to have been "authored" by Chief Justice Marshall.⁴³ It took time for the modern practice of individual justices authoring opinions on behalf of the Court to evolve. However, the central idea of Chief Justice Marshall has always remained: "each generation of the Court [has] adopted Chief Justice Marshall's belief that a unified voice [i]s necessary and practicable for the sur-

³³ Henderson, *supra* note 18, at 308; see also John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1940*, 77 WASH. U. L. Q. 137, 140 (1999).

³⁴ Henderson, *supra* note 18, at 308.

³⁵ 3 U.S. 386 (1798).

³⁶ Henderson, *supra* note 18, at 308.

³⁷ *Id.* (quoting DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 44, 45, 55 (1985)) (explaining that the "practice of *seriatim* opinions" creates difficulties in determining the holding of *Calder*, that "*Calder* illustrates the uncertainty that can arise when each Justice writes separately" and that the "practice of *seriatim* opinions . . . weakened the force of the [Court's] decisions").

³⁸ *Id.* at 313.

³⁹ *See id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Kelsh, *supra* note 33, at 141.

⁴³ *Id.* at 144.

vival and growth of the republic.”⁴⁴ As Chief Justice Marshall alluded to, high courts are legitimated by their collegial nature; it is what gives the judiciary its status as a co-equal branch of government. Furthermore, the rule of law cannot thrive when the law is unclear.⁴⁵

Collegiality furthers the rule of law not only by making law clear, but by giving its interpretation a sense of objectivity.⁴⁶ A high court’s ability to declare law extends beyond the sum-total of its members’ subjective views—in a sense, a majority opinion represents an objective view of law that can be achieved only by the work of an institution. Stated otherwise, the “correct” view of the law is not merely the sum-total of the subjective views of the members of the court—it is something else altogether. Today, high courts in the United States are viewed as collegial bodies.⁴⁷ High courts have the power to declare law—individual justices do not. The role of a judge on a collegial court requires judges to work with others. Two New York University professors developed a useful illustration to demonstrate what judges on a collegial court are not.⁴⁸ They explained that in gymnastics, each judge scores the performer by giving him or her a numerical number. The numbers are then added. The score given to the performer is, in essence, an average of the score assigned by each individual judge. Indeed, the result might not be considered credible if the judges communicated ahead of time.⁴⁹ Judging on a collegial court does not work in such a manner. It is a different sort of judging. In the words of the two scholars, it is a “team enterprise” in which “collaboration and deliberation are the trademarks.”⁵⁰

The language of opinions reflects the view that courts are collegial bodies. Majority opinions do not say “*I* decide the case this way,” they say, “*we* decide this case this way.”⁵¹ In the words of one Wyoming Supreme Court justice:

A majority opinion is the product of a collegiate court and,
when circulated for consideration by the other members of

⁴⁴ Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Context*, 4 WASH. U. J.L. & POL’Y 261, 273 (2000).

⁴⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992) (plurality) (“Liberty finds no refuge in a jurisprudence of doubt.”).

⁴⁶ See generally Meg Penrose, *Goodbye to Concurring Opinions*, 15 DUKE J. CONST. L. & PUB. POL’Y 25 (2020).

⁴⁷ See generally Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in the Collegial Courts*, 81 CALIF. L. REV. 1 (1993).

⁴⁸ *Id.* at 4.

⁴⁹ *Id.*

⁵⁰ *Id.* at 4–5.

⁵¹ *Id.* at 7.

the court, or, at least, when filed, it no longer retains any proprietary aspect so far as the drafter is concerned. It becomes an institutional product that is owned only by the court.⁵²

For this reason, the views represented in a majority opinion do not necessarily reflect the views of its author; they reflect the views of the court. The majority author may have drafted the opinion quite differently if he or she was unconstrained by the concerns of his or her colleagues. To be clear, there is nothing inherently wrong with separate writings. They are not inconsistent with a high court's collegial nature. A quality separate writing improves the deliberative process.⁵³ It is for this reason that Chief Justice William H. Rehnquist objected when critics suggested that he had an obligation to persuade his fellow justices to issue fewer separate writings.⁵⁴ The problem is not with separate writings generally; it is with the proliferation of separate writings at the expense of majority opinions.

III. THE RISE IN LEAD AND MAJORITY/LEAD OPINIONS AT THE WISCONSIN SUPREME COURT

The Wisconsin Supreme Court has forgotten the lessons of Lord Mansfield and Chief Justice Marshall. It is not operating as a collegial court. To a significant degree, this Part builds on the work of Professor Alan Ball, who teaches history at Marquette University. He has spent many years running a blog that provides empirical data on the Wisconsin Supreme Court,⁵⁵ and he has kindly allowed his raw data to be utilized for this Article. This Part first discusses the terminology used to signal that an opinion does not have the support of a majority. It then documents the rise in decisions with no majority opinion and argues that it is largely because of conservatives with an anti-consensus building philosophy joining the court.

⁵² *Engberg v. Meyers*, 820 P.2d 70, 170 (Wy. 1991) (Macy, J., concurring in part, dissenting in part).

⁵³ Kornhauser & Sager, *supra* note 47, at 9.

⁵⁴ See generally William H. Rehnquist, "All Discord, Harmony Not Understood": *The Performance of the Supreme Court of the United States*, 22 ARIZ. L. REV. 973 (1980).

⁵⁵ Alan Ball, SCOWSTATS, <http://www.scowstats.com/>.

A. *The Definition of a Plurality, Lead and Majority/Lead Opinion*

Understanding the rise in decisions with no majority opinion requires understanding some vocabulary. The terminology used to signal that the first opinion does not have the support of a majority varies. *Black's Law Dictionary* defines a "plurality opinion" as "[a]n opinion lacking enough judges' votes to constitute a majority but receiving more votes than any other opinion."⁵⁶ However, whether a plurality opinion needs to receive the most votes is unclear. A more accurate definition might be that a plurality opinion is an opinion that received fewer votes than a majority, but received the most votes of the opinions that agreed with the mandate.⁵⁷ A dissent, for example, could have more votes than any other opinion; in such a case, the first opinion might still be labeled a plurality. Members of the U.S. Supreme Court have often used the phrase "plurality" opinion.⁵⁸ Sometimes, they have used the phrase "lead" opinion to refer to the first opinion if the first opinion did not receive more votes than any other opinion.⁵⁹ Lead opinions are so-named because they come before other writings, such as concurrences and dissents.

Members of the Wisconsin Supreme Court occasionally have used the phrase plurality opinion;⁶⁰ however, more often, they have used the phrase lead opinion even if the first opinion garnered more votes than any other.⁶¹ Notably, Wisconsin is not the only state to refer to such opinions as lead opinions.⁶² The Wisconsin Supreme Court's Internal Operating Procedures say little about lead opinions but provide insight into their origins. As Justice Shirley Abrahamson and Justice Ann Walsh Bradley summarized:

⁵⁶ *Plurality opinion*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁵⁷ Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 294 (2019).

⁵⁸ See e.g., *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587 (2007) (plurality); *City of Los Angeles v. Alameda Books, Inc.*, 542 U.S. 507 (2004) (plurality); *Albright v. Oliver*, 510 U.S. 266 (1994); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (plurality).

⁵⁹ For example, in *Crawford v. Marion County Election Bd.*, the Court's first opinion, authored by Justice John Paul Stevens, garnered three votes, and a concurrence by Justice Scalia also garnered three votes. 553 U.S. 181 (2008). The justices referred to Justice Stevens' opinion as the lead opinion.

⁶⁰ *State v. Deadwiller*, 834 N.W.2d 362, 379 (Wis. 2013) (Abrahamson, C.J., concurring).

⁶¹ For example, in *State v. Lopez*, the first opinion, authored by Justice Annette Ziegler, was joined in full by three justices, more than any other opinion. 936 N.W.2d 125 (Wis. 2019). A concurrence by Justice Rebecca Bradley referred to it as a lead opinion.

⁶² See *Turner v. CertainTeed Corp.*, 119 N.E.3d 1260 (Ohio 2018).

The phrase “lead opinion” is not . . . defined in our Internal Operating Procedures or elsewhere in the case law. Our Internal Operating Procedures (IOPs) refer to “lead opinions,” but only in stating that if, during the process of circulating and revising opinions, “the opinion originally circulated as the majority opinion does not garner the vote of a majority of the court, it shall be referred to in separate writings as the ‘lead opinion.’” Wis. S. Ct. IOP II.G.4.⁶³

To summarize, sometimes a justice is assigned to draft a majority opinion, and the justice’s draft fails to garner the support of a majority. The draft is then referred to as a lead opinion.

The Wisconsin Supreme Court’s past practice helps further clarify the nature of a lead opinion. First, a lead opinion states the mandate of the court; however, under unusual circumstances, the reasoning in the lead opinion could be at odds with the mandate.⁶⁴ For example, in *State v. Lynch*,⁶⁵ the mandate was: “As a result of a divided court, the law remains as the court of appeals has articulated it.”⁶⁶ The analysis of the lead opinion, which had the support of three justices, explained that they would have reversed the Court of Appeals. Second, a lead opinion does not always have the most votes of the opinions agreeing with the mandate. Indeed, a draft initially circulated as a majority opinion that later becomes a lead opinion draft is likely to be published as the “lead opinion”—even if a concurring opinion garners more votes. This is so because of deadlines and internal court politics; time constraints may not permit an opinion that was written to read as a response to a lead opinion to be rewritten. An example of such a case is *State v. Outlaw*.⁶⁷ The lead opinion had the support of three justices while two concurring opinions each had the support of the remaining four justices.

The phrase “lead opinion” can be misleading because, sometimes, a portion of an opinion garners the votes of a majority. Some members of the Wisconsin Supreme Court have referred to such opinions, in their entirety, as lead opinions. Others have referred to the portions of the opinion that garnered less than a majority as a lead opinion while referring to the portions that garnered a majority as a majority opinion. Others have used

⁶³ *State v. Lynch*, 885 N.W.2d 89, 125 (Wis. 2016) (Abrahamson & A.W. Bradley, JJ., concurring in part, dissenting in part).

⁶⁴ *Id.*

⁶⁵ 885 N.W.2d at 89 (lead).

⁶⁶ *Id.* at 89.

⁶⁷ 321 N.W.2d 145 (Wis. 1982) (lead).

the phrase “majority/lead” opinion. For example, in *State v. Lopez*,⁶⁸ Justice Rebecca Bradley’s concurrence referred to the first opinion as a lead opinion, even though most of the opinion had the support of a majority.⁶⁹ Contrarily, Justice Daniel Kelly’s concurrence referred to the first opinion as a majority opinion.⁷⁰ In *Tetra Tech EC, Inc. v. Wisconsin Dep’t of Revenue*,⁷¹ the first opinion was referred to as a lead opinion in Justice Annette Ziegler’s concurrence, although when she cited those portions that garnered a majority, she used the phrase “majority opinion.”⁷² Justice Michael Gableman’s concurrence referred to the first opinion in a similar manner.⁷³ Because portions of the first opinions in *Lopez* and *Tetra Tech* garnered a majority, Justice Ann Walsh Bradley’s dissent in *Lopez* and her concurrence in *Tetra Tech* referred to the respective first opinions as a “majority/lead” opinion.⁷⁴ Justice Ann Walsh Bradley has used the phrase “majority/lead” opinion in other writings.⁷⁵ This phrase is helpful because it signals that some parts of the opinion are precedential, and others are not.

B. Documenting the Rise in Lead and Majority/Lead Opinions

Justice Abrahamson and Justice Ann Walsh Bradley noted the rise in lead opinions during the 2015–16 term, although they did not quantify it. In one separate writing, they stated, “[t]he proliferation of separate writings (as in this case) and ‘lead opinions’ is emblematic of the court’s work this ‘term’ (September 2015 to June 2016).”⁷⁶ They noted:

Although we have not done a statistical analysis, our perception is that few of the court’s decisions this term have been unanimous without any separate writings, and several, including this case, have begun with “lead opinions.” See, e.g., *Singh v. Kemper*, 2016 WI 67, 371 Wis.2d 127,

⁶⁸ 936 N.W.2d 125 (Wis. 2019) (majority/lead).

⁶⁹ *Id.* at 173 (R. Bradley, J., concurring).

⁷⁰ *Id.* at 179 (Kelly, J., concurring).

⁷¹ 914 N.W.2d 21 (Wis. 2018).

⁷² Compare *id.* at 67 (Ziegler, J., concurring) (“I concur and write separately because the analysis that the lead opinion employs to reach its conclusion is concerning.”), with *id.* (citing the “Majority op.”).

⁷³ Compare *id.* at 74 (Gableman, J., concurring) (referring to the first opinion as a “lead opinion”), with *id.* at n.2 (joining “parts of the majority opinion”).

⁷⁴ See *Lopez*, 936 N.W.2d at 180 (A.W. Bradley, J., dissenting); see also *Tetra Tech*, 914 N.W.2d at 63 (A.W. Bradley, J., concurring).

⁷⁵ *State v. Coffee*, 937 N.W.2d 579, 597 n.1 (Wis. 2020) (A.W. Bradley, J., dissenting).

⁷⁶ *State v. Lynch*, 885 N.W.2d 89, 125 (Wis. 2016) (Abrahamson & A.W. Bradley, JJ., concurring in part, dissenting in part).

883 N.W.2d 86 (lead op. of Ann Walsh Bradley, J., joined by Abrahamson, J.); Lands' End, Inc. v. City of Dodgeville, 2016 WI 64, 370 Wis.2d 500, 881 N.W.2d 702 (lead op. of Abrahamson, J., joined by Ann Walsh Bradley, J., and Gableman, J.); Coyne v. Walker, 2016 WI 38, 368 Wis.2d 444, 879 N.W.2d 520 (lead op. of Gableman, J. with Abrahamson, J., Ann Walsh Bradley, J., and Prosser, J., each concurring separately); State v. Smith, 2016 WI 23, 367 Wis.2d 483, 878 N.W.2d 135 (lead op. of Roggensack, C.J., joined by Prosser, J., and Gableman, J.); United Food & Comm. Workers Union, Local 1473 v. Hormel Foods Corp., 2016 WI 13, 367 Wis.2d 131, 876 N.W.2d 99 (lead op. of Abrahamson, J., joined by Ann Walsh Bradley, J.); Hoffer Props., LLC v. DOT, 2016 WI 5, 366 Wis.2d 372, 874 N.W.2d 533 (lead op. of Gableman, J., joined by Roggensack, C.J., and Ziegler, J.).⁷⁷

Empirical data leaves little doubt that they were correct.

Professor Ball has documented a rise in “fractured opinions” dating back to 1996.⁷⁸ A fractured opinion may be either a lead or majority/lead opinion. Indeed, in the terms from 1996–97 through 2014–15, a mere 2.3 percent of decisions issued by the Wisconsin Supreme Court were fractured.⁷⁹ From the 2015–16 term on, over 9.5 percent of opinions issued each term, on average, have been fractured. The dramatic rise is shown below in Figure 1.⁸⁰

⁷⁷ *Id.*

⁷⁸ Alan Ball, *A Spike in Fractured Decisions*, SCOWSTATS (May 30, 2017), <http://www.scowstats.com/2017/05/30/a-spike-in-fractured-decisions/>.

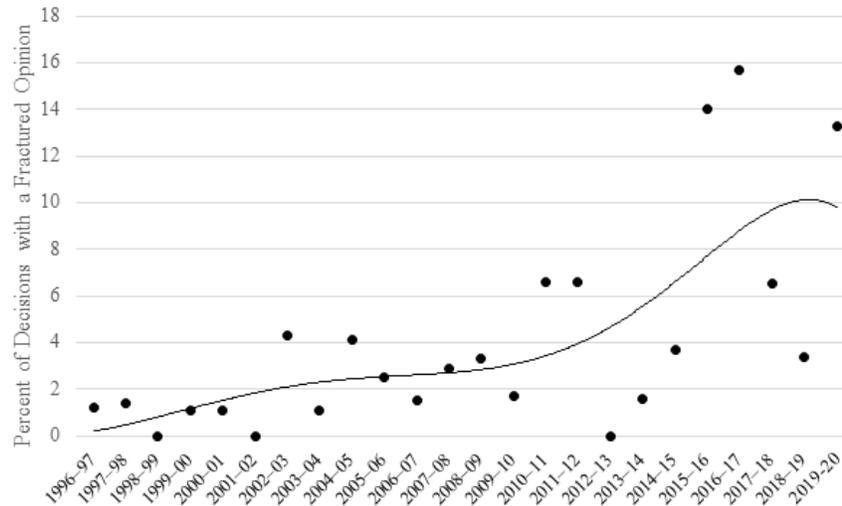
⁷⁹ *Id.*

⁸⁰ The data was compiled by Professor Ball with the exception of the data from the 2019–20 term. Note that Professor Ball excluded summary *per curiam* decisions from his data. For consistency, the same was done for data from the 2019–20 term. Recently, Professor Ball stated:

I settled on counting cases with “lead opinions” or “plurality opinions”—as opposed to “majority opinions”—thinking that sufficient to identify instances where the court could not assemble a majority to agree on a rationale. Yet, I was never entirely comfortable with this approach, because it excluded deadlocked *per curiam* decisions, which are at least as fractured (and of no precedential value) as any other decision in this category.

Alan Ball, *The 2019–20 Term: Some More Impressions*, SCOWSTATS (July 27, 2020), <http://www.scowstats.com/2020/07/27/the-2019-20-term-some-more-impressions/>.

Figure 1: Percentage of Decisions with a Fractured Opinion Each Term



Notably, Figure 1 does not account for several opinions that could be described as fractured but that do not fit within the label of “lead” or “majority/lead.” For example, in *Bartlett v. Evers*,⁸¹ an important partial veto case, the court issued a *per curiam* opinion announcing the mandate. Chief Justice Roggensack authored the first opinion that followed the *per curiam* opinion, which was a partial concurrence and partial dissent.⁸² Justice Ann Walsh Bradley’s partial concurrence and partial dissent followed, and it was joined by Justice Rebecca Dallet.⁸³ The third authored opinion was a partial concurrence and partial dissent by Justice Kelly, and it was joined by Justice Rebecca Bradley.⁸⁴ The last authored opinion was a concurrence by Justice Brian Hagedorn, and it was joined by Justice Ziegler.⁸⁵ No justice signed the *per curiam* opinion in *Bartlett*, so it was not a lead opinion; therefore, it was not counted as a fractured opinion in Figure 1. However, there can be little doubt that it is an important example of a fractured court.

*SEIU v. Vos*⁸⁶ is another example of an opinion that arguably represents a fractured court. In *SEIU*, the Wisconsin Supreme Court announced its mandate in two majority opinions. Like *Bartlett*, *SEIU* did not have a

⁸¹ 945 N.W.2d 685 (Wis. 2020) (*per curiam*).

⁸² *Id.* at 688 (Roggensack, C.J., concurring in part, dissenting in part).

⁸³ *Id.* at 710 (A.W. Bradley, J., concurring in part, dissenting in part).

⁸⁴ *Id.* at 719 (Kelly, J., concurring in part, dissenting in part).

⁸⁵ *Id.* at 740 (Hagedorn, J., concurring).

⁸⁶ 946 N.W.2d 35 (Wis. 2020).

lead opinion; however, having the mandate announced by two different majorities reflects divide. A third example is *State v. Roberson*.⁸⁷ For context, *Roberson* discussed whether social science could be used to formulate a rule of constitutional law. A majority of the court said that it cannot. Two paragraphs in the first opinion read:

Historically, there have been times when social science has been used by courts as an excuse to justify disturbing decisions. Indeed, entire law review articles and book chapters have been dedicated to analyzing how Plessy v. Ferguson and the line of cases that followed Plessy grounded their decisions in the social science of the time. E.g., Herbert Hovenkamp, Social Science and Segregation Before Brown, 1985 Duke L.J. 624. . . .

The United States Supreme Court cited social science in Brown, but it did so as a response to social science employed at the time of Plessy. Brown v. Board of Educ., 347 U.S. 483, 494 n.11, 74 S.Ct. 686, 98 L.Ed. 873 (1954). . . . The Court stated, “[w]hatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding [of negative psychological impact] is amply supported by modern authority.” Id.⁸⁸

Justice Rebecca Bradley wrote a concurrence to state:

I join the majority opinion in full, except to the extent paragraphs 41–42 [the quoted material above] suggest that courts may consult social science research to interpret the Constitution. Historically, when courts contaminate constitutional analysis with then-prevailing notions of what is “good” for society, the rights of the people otherwise guaranteed by the text of the Constitution may be trampled.⁸⁹

Her concurrence was joined by Justice Kelly, which means that, in a sense, two paragraphs of the first opinion did not have a majority. Justice Rebecca Bradley’s concurrence was probably unnecessary. The first sentence of paragraph 41 read, “[h]istorically, there have been times when social science has been used by courts as an excuse to justify disturbing deci-

⁸⁷ 935 N.W.2d 813 (Wis. 2019).

⁸⁸ *Id.* at 207.

⁸⁹ *Id.* at 223 (R. Bradley, J., concurring) (citation omitted).

sions.”⁹⁰ There was little disagreement of any significance on the use of social science, and the concurrence may breed confusion.

If *Bartlett*, *SEIU*, and *Roberson* are added to the number of lead and majority/lead opinions issued during the 2019–20 term, the percentage of decisions with fractured opinions rises to over 19 percent.⁹¹ The empirical data in Figure 1, while demonstrating a significant problem, does not paint the full picture. The problem is even worse. A fifty-state survey of fractured opinions demonstrates the magnitude of Wisconsin’s problem. From 2009 through 2019, most state high courts issued approximately one to two fractured opinions per year. In contrast, the Wisconsin Supreme Court has issued twenty-six fractured opinions since the start of the 2015–16 term. Although this problem is not unique to Wisconsin, Wisconsin has experienced an extreme version of it.

The U.S. Supreme Court is experiencing a rise like the Wisconsin Supreme Court; however, the rise at the U.S. Supreme Court is less novel. One study noted a slight rise in plurality decisions at the U.S. Supreme Court between 1953 and 2006, although the rise was not too pronounced.⁹² Another study noted that the U.S. Supreme Court issued 45 plurality decisions between 1801 and 1955 compared to 195 plurality decisions between 1953 and 2006.⁹³ A third study found 41 plurality decisions between the 2007 and 2016 terms.⁹⁴

C. Hypotheses that May Be Disregarded

Before discussing what has caused the rise, it is worth considering what has not triggered it. Various hypotheses have been proposed regarding why the U.S. Supreme Court has experienced a rise. Whatever merit these hypotheses may have in regard to the U.S. Supreme Court, they are not the problem in Wisconsin.

⁹⁰ *Id.* at 207 (majority).

⁹¹ This percentage includes summary *per curiam* decisions in the denominator but not the numerator (9 divided by 47). If the two summary *per curiam* decisions are assumed to be fractured, the percentage increases to over 23 percent (11 divided by 47).

⁹² Corley et al., *supra* note 15, at 181.

⁹³ James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 519 (2011).

⁹⁴ Varsava, *supra* note 57, at 292–93.

1. Increasing Complexity and Controversy

One hypothesis for the rise in lead and majority/lead opinions might be that cases are becoming more complex and controversial. Commentators have noted that the U.S. Supreme Court tends to issue plurality decisions in significant cases.⁹⁵ As one student note stated, “[m]any plurality decisions address fundamental—or even politically charged—legal issues.”⁹⁶ An often-cited example is *Planned Parenthood of Southeast Pennsylvania v. Casey*.⁹⁷ The decision reaffirmed a woman’s right to procure an abortion.⁹⁸

Surprisingly, lead and majority/lead opinions at the Wisconsin Supreme Court often issue in cases that present relatively simple and non-controversial questions. The Wisconsin Supreme Court issued six lead and majority/lead opinions during the 2019–20 term. None were in cases that should have been particularly stirring. *Lopez* was a statutory interpretation case, wherein the court concluded that multiple acts of retail theft could be aggregated into a single charge.⁹⁹ *Marathon County v. D.K.*¹⁰⁰ was a typical mental commitment case, wherein the court concluded that the expiration of a mental commitment order did not moot an appeal because the appellant was still not allowed to own a firearm; however, the court also concluded that the appellant was dangerous such that the order was properly issued.¹⁰¹ *State v. Coffee I*¹⁰² was a sentencing dispute. *Lang v. Lions Club of Cudahy Wisconsin, Inc.*¹⁰³ dealt with the definition of agent within the context of Wisconsin’s recreational immunity statute. *State v. Coffee II*¹⁰⁴ analyzed whether a search incident to a lawful arrest for operating while intoxicated could encompass a search of the vehicle’s passenger compartment. *State v. Muth*¹⁰⁵ was a criminal restitution case, wherein the court concluded that a civil settlement agreement could not bar liability for

⁹⁵ See *id.*; see also Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RES. 30, 32 (2009); John F. Davis & William L. Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 80–81 (1974).

⁹⁶ James A. Bloom, Note, *Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of United States v. Winstar Corp.*, 85 WASH. U. L. REV. 1373, 1374 (2008).

⁹⁷ 505 U.S. 833 (1992) (plurality).

⁹⁸ *Id.*

⁹⁹ *State v. Lopez*, 936 N.W.2d 125, 127 (Wis. 2019) (majority/lead).

¹⁰⁰ 937 N.W.2d 901 (Wis. 2020) (majority/lead).

¹⁰¹ *Id.* at 903.

¹⁰² *State v. Coffee*, 937 N.W.2d 579 (Wis. 2020) (majority/lead).

¹⁰³ 939 N.W.2d 582 (Wis. 2020) (lead).

¹⁰⁴ 943 N.W.2d 845 (Wis. 2020) (lead).

¹⁰⁵ 945 N.W.2d 645 (Wis. 2020) (lead).

restitution and analyzed the intersection of marital property and restitution. While every case the Wisconsin Supreme Court decides is important, none of these cases should have been particularly controversial. They did not, for example, deal with hotly-debated political issues. Seemingly, justices are not just disagreeing on relatively complex and controversial cases. They are disagreeing on cases that are quite ordinary.¹⁰⁶

2. Increasing Opinion Length

Similarly, commentators have been quick to discuss fractured opinions and opinion length as if there is a correlation—maybe even a causation.¹⁰⁷ The hypothesis seems to be closely related to the hypothesis that cases are becoming more complicated. Chief Justice Roberts has questioned whether some of the most important cases in U.S. history could have been decided had the justices of the U.S. Supreme Court not been willing to author short opinions. He cites *Brown v. Board of Education*¹⁰⁸ to illustrate his point:

Keep in mind, I don't know how many people could guess how long the opinion was in *Brown v. Board of Education*. It was less than 10 pages. You think it is this great decision—it is—probably the greatest decision of the Supreme Court since *Marbury v. Madison*. It was 10 pages because Warren knew that if he wrote another sentence, the unanimous consensus he had would start to fall apart.¹⁰⁹

Intuitively, the longer an opinion, the more room for disagreement. Shorter opinions may further the collegial interest of a high court.¹¹⁰ How-

¹⁰⁶ Of course, sometimes lead and majority/lead opinions issue in complex and controversial cases. For example, the Wisconsin Supreme Court ended great weight deference to administrative agencies' interpretations of law in *Tetra Tech*, which involved a majority/lead opinion. *See* 914 N.W.2d 921 (Wis. 2018) (majority/lead).

¹⁰⁷ *SCOW, the Boss, and Justice Hagedorn*, ON POINT: WIS. ST. PUB. DEFENDERS (Aug. 4, 2020), http://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/scow-the-boss-and-justice-hage-dorn/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wisconsinappeals%2FfXYi+%28On+Point%29.

¹⁰⁸ 347 U.S. 483 (1954).

¹⁰⁹ *Interview with Chief Justice John G. Roberts, Jr.*, RENSSLAER POLYTECHNIC INSTITUTE (Apr. 12, 2017), <https://www.youtube.com/watch?v=TuZEKIRgDEg>.

¹¹⁰ Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 807–08 (1982). Of course, shorter opinions cannot become “skeletal opinions.” *See, id.* In the words of Judge Frank Easterbrook, “a complete statement of the Court’s rationale, of all major and minor

ever, according to Professor Ball, the length of the average opinion has not varied much at the Wisconsin Supreme Court over the past decade.¹¹¹ Furthermore, the average fractured opinion issued during the 2019–20 term was shorter than the average first opinion. The average first opinion was about twenty-seven pages; the average fractured opinion was about twenty-five pages. While efforts to decrease page length might help reduce the number of lead and majority/lead opinions, opinion length does not seem to be the cause.

3. Increasing Caseload

Another hypothesis might be that the caseload of the court has increased. In the 1970s, some scholars suggested that the rise in plurality opinions issued by the U.S. Supreme Court was caused by its increasing caseload, which was thought to take away from time that could have been spent “resolving differences.”¹¹² But the caseload of the Wisconsin Supreme Court has not increased. Indeed, in the late 90s and early 2000s, the court heard almost double the number of cases compared to recent terms.

D. *The Cause*

Professor Ball has indicated that the dramatic increase in lead and majority/lead opinions may be attributable to a divide between conservative justices.¹¹³ This is the most persuasive hypothesis because the increase correlates with two conservative justices joining the court, Justice Rebecca Bradley and Justice Kelly. For context, Justice Rebecca Bradley joined the court early in the 2015–16 term, and Justice Kelly joined the court at the start of the 2016–17 term. Notably, Justice Kelly’s term recently ended; however, another conservative has joined the court: Justice Hagedorn. These justices—supposedly—are or were a part of a majority conservative bloc of the Wisconsin Supreme Court.¹¹⁴ However, the statistics do not

premises necessary to the decision, or of the limits of the holding may be invaluable. The more the Court says, the more help it offers in planning.” *Id.* Skeletal opinions are also a threat to a high court’s law-developing function. *See id.* at 808.

¹¹¹ *See* Ball, *supra* note 78.

¹¹² Davis & Reynolds, *supra* note 95, at 77.

¹¹³ Ball, *supra* note 78 (“[I]t is difficult to imagine the growing share of fractured decisions without justices authoring or joining separate opinions more frequently than they did just a few years ago. And here, the addition of Justices Kelly and R. Bradley may be as significant as the widening stream of concurrences and dissents flowing from the offices of the court’s two liberals.”).

¹¹⁴ According to the media, the Wisconsin Supreme Court had five conservative members, who acted as a bloc, during the 2019–20 term. *See e.g.*, Wis. Democracy Campaign, *Special In-*

demonstrate a conservative bloc at all. Rather, they demonstrate a conservative divide. The number of separate writings by these three justices is enormous. Table 1 is a breakdown of separate writings during the 2019–20 term.¹¹⁵

Table 1: Breakdown of Separate Writings During the 2019–20 Term

Justice	Number of Concurrences	Number of Dissents	Number of Concurrence/Dissents	Total Writings	Number of Withdraws /Do Not Participate
Ann Walsh Bradley	1	4	1	6	5
Roggensack	3	2	2	7	0
Ziegler	2	1	0	3	0
Rebecca Bradley	8	7	1	16	0
Kelly	7	1	3	11	1
Dallet	3	8	1	12	2
Hagedorn	5	7	1	13	9

Table 1 shows that members of the supposed conservative bloc write separately even more than the two supposed liberal justices—Justice Ann Walsh Bradley and Justice Dallet. Justice Ann Walsh Bradley and Justice Dallet, combined, authored 18 separate writings. Justice Rebecca Bradley and Justice Kelly authored 27, despite being a part of the bloc that supposedly controls the court. Justice Hagedorn, who did not participate in 9 cases, wrote separately on 13 occasions. In contrast, two members of the supposed conservative bloc, Chief Justice Roggensack and Justice Ziegler, authored a mere 10 separate writings combined.

Curiously, every lead and majority/lead opinion issued during the 2019–20 term was authored by either Chief Justice Roggensack or Justice Ziegler. In each of the six cases, one or more of the members of the supposed conservative bloc authored a separate writing. In *Lopez*, both Justice

terests Battle on High Court Case, URBAN MILWAUKEE (May 5, 2020, 1:08 PM), <https://urbanmilwaukee.com/2020/05/05/special-interests-battle-on-high-court-case/>; Linda Greenhouse, Opinion, *The Supreme Court Fails Us*, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/opinion/wisconsin-primary-supreme-court.html>; *Wisconsin GOP Will Ask U.S. Supreme Court to Block Extended Absentee Voting*, L.A. TIMES (Apr. 4, 2020), <https://www.latimes.com/world-nation/story/2020-04-04/wisconsin-gop-vows-supreme-court-appeal-on-extended-voting>.

¹¹⁵ Table 1 does not account for two summary *per curiam* decisions issued in the 2019–20 term.

Rebecca Bradley and Justice Kelly authored concurrences.¹¹⁶ In both *Marathon County* and *Lang*, Justice Rebecca Bradley filed a concurring opinion joined by Justice Kelly.¹¹⁷ In *Coffee I*, Justice Kelly concurred and Justice Rebecca Bradley joined his concurrence in part as well as a dissent by Justice Ann Walsh Bradley.¹¹⁸ In *Coffee II*, Justice Kelly authored a concurrence and Justice Rebecca Bradley joined a dissent authored by Justice Dallet.¹¹⁹ In *Muth*, Justice Kelly concurred in part and dissent in part, Justice Hagedorn dissented and Justice Rebecca Bradley joined a concurrence by Justice Dallet.¹²⁰

The disunity of the supposed conservative bloc cannot be explained by reference to the personality of its members. The reason for the disunity is a matter of jurisprudence and not psychology. The disunity reflects a philosophical position, held by some members of the supposed bloc, that their role does not permit compromise.

Notably, the theory that conservatives are struggling to work together does not hold for all jurisdictions experiencing the problem of fractured opinions. Washington has a very liberal court, and yet, it is highly fractured. There are likely different causes depending on the jurisdiction. This Article is merely a case study of one jurisdiction, and additional research is needed to understand the larger phenomenon.

IV. PROBLEMS RELATED TO THE RISE OF FRACTURED OPINIONS

This Part explains why the rise in fractured opinions is problematic. Generally, they are confusing—a problem for everybody. There are harms, however, specific to conservative jurisprudence related to the rise in lead and majority/lead opinions. At the Wisconsin Supreme Court, fractured opinions tend to occur because conservatives cannot compromise and that places conservative jurisprudence at a disadvantage: the supposedly conservative court struggles to make conservative law. Additionally, “minority vote pooling,” a concept that conservatives have fought against, has recently reappeared as a matter of popular discussion because of fractured opinions. Minority vote pooling would allow justices that disagree with the majority on an issue to cobble together with members of a different minori-

¹¹⁶ *State v. Lopez*, 936 N.W.2d 125 (Wis. 2019) (majority/lead).

¹¹⁷ *Marathon County v. D.K.*, 937 N.W.2d 901 (Wis. 2020) (majority/lead); *Lang v. Lions Club of Cudahy Wis., Inc.*, 939 N.W.2d 582 (Wis. 2020) (lead).

¹¹⁸ *State v. Coffee*, 937 N.W.2d 579 (Wis. 2020) (majority/lead).

¹¹⁹ *State v. Coffee*, 943 N.W.2d 845 (Wis. 2020) (lead).

¹²⁰ *State v. Muth*, 945 N.W.2d 645 (Wis. 2020) (lead).

ty to produce a mandate. For example, a case could have four issues. As to each issue, there could be a majority in favor of affirming the lower court. However, if one justice believes that the court should reverse on the first issue, and another on the second, and so on, there could be four justices that believe the lower court should be reserved.¹²¹ Minority vote pooling leads to bizarre results.

This Part begins by examining how Wisconsin law treats lead and majority/lead opinions. The confusing nature of these opinions cannot be fully appreciated otherwise. Furthermore, one proposed solution to the problematic nature of these opinions could be the adoption of the *Marks* rule. But understanding why the Wisconsin Supreme Court has not already adopted the *Marks* rule lessens the persuasive force of this idea. The problem must be addressed by decreasing the number of lead and majority/lead opinions.

A. *Lead and Majority/Lead Opinions Under Wisconsin Law*

Notably, Wisconsin law differs from federal law in its handling of fractured opinions. As explained previously, the U.S. Supreme Court uses the term “plurality.” In *Marks v. United States*,¹²² the Court instructed that a case with a plurality opinion can have precedential value “[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 judgment on the narrowest grounds’”¹²³ Under *Marks*, a court does not “ask whether a single rule of decision has the express support of at least [a majority of] Justices.”¹²⁴ Instead, there are two understandings of how the *Marks* rule works.¹²⁵ The first, which would seem to be the majority rule, gives precedential value to whichever opinion is narrowest. As one scholar wrote:

Freeman v. United States is the most striking example [of an application of the *Marks* rule]. After the Court divided 4-to-1-to-4 on an important question of federal sentencing that affected thousands of criminal defendants, most courts

¹²¹ See generally *State v. Gustafson*, 359 N.W.2d 920 (Wis. 1985) (per curiam).

¹²² 430 U.S. 188 (1977).

¹²³ *Id.* at 193 (omission in original) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality)).

¹²⁴ Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1944 (2019).

¹²⁵ Ryan C. William, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 798–99 (2017).

applying *Marks* concluded that Justice Sotomayor's solo concurrence in the judgment should control. Yet the other eight Justices in *Freeman* thoroughly criticized Justice Sotomayor's position as "erroneous" and "arbitrary." Bizarrely, the Court's least popular view became law¹²⁶

The other approach, according to the D.C. Circuit, searches for a "common denominator of the Court's reasoning" that "must embody a position implicitly approved by at least five Justices who support the judgment."¹²⁷

Some state courts use the *Marks* rule,¹²⁸ but the Wisconsin Supreme Court has never applied the *Marks* rule to interpret Wisconsin case law.¹²⁹ Instead, the law in Wisconsin appears to be "that a majority of the participating judges must have agreed on a particular point for it to be considered the opinion of the court."¹³⁰ For example, in *Outlaw*, the lead opinion was joined by three justices.¹³¹ *Outlaw* also included two concurrences, each joined by the four remaining justices. One of the concurrences disagreed with a conclusion in the lead opinion, believing it went too far. In *State v. Dowe*,¹³² the Wisconsin Supreme Court addressed a case where the circuit court applied the rule from the lead opinion in *Outlaw* that a concurrence suggested was incorrect. *Dowe* explained that the lead opinion was binding only as to the issues on which four justices agreed; for other issues, in particular the one that had been addressed by the circuit court, the concurrences were binding.¹³³ Notably, one similarity between the *Marks* rule and Wisconsin practice seems to be that the conclusions of law in dissenting opinions are not to be considered.¹³⁴

¹²⁶ Re, *supra* note 124, at 1944–45.

¹²⁷ *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)).

¹²⁸ Re, *supra* note 124, at 1961.

¹²⁹ The Wisconsin Supreme Court, on numerous occasions, has applied the *Marks* rule but only in the context of interpreting U.S. Supreme Court precedent. See *Vincent v. Voight*, 614 N.W.2d 388, 406 n.18 (Wis. 2000) ("We have adopted the United States Supreme Court's treatment of plurality opinions in applying the holdings of that Court.").

¹³⁰ *State v. Fitzgerald*, 538 N.W.2d 249, 250 (Wis. 1995) (per curiam) (citing *State v. Dowe*, 352 N.W.2d 660, 662 (Wis. 1984) (per curiam)) (emphasis added).

¹³¹ 321 N.W.2d 145 (Wis. 1982) (lead).

¹³² 352 N.W.2d 660 (Wis. 1984) (per curiam).

¹³³ *Id.* at 662.

¹³⁴ *Piper v. Jones Dairy Farm*, 940 N.W.2d 701, 708 (Wis. 2020) (citing *State v. Griep*, 863 N.W.2d 567, 579 n.16 (Wis. 2015); *State v. Coffee*, 937 N.W.2d 627, 662 n.1 (Wis. 2020) (A.W. Bradley, J., dissenting)). Notably, most scholars agree that dissenting opinions should not be considered when determining the precedential value of a decision; however, one has recently challenged that assertion. See Varsava, *supra* note 57.

The Wisconsin Supreme Court has squabbled about the adoption of a *Marks* rule and has appeared to reject it. For example, in *Estate of Makos v. Wisconsin Masons Health Care Fund*,¹³⁵ Justice Donald Steinmetz authored a lead opinion. Justice William Bablitch authored a concurring opinion, which was joined by Justice Jon Wilcox. Justice Bablitch's concurrence stated, "I join the mandate of the lead opinion but not its rationale."¹³⁶ Justice N. Patrick Crooks also authored a concurrence. He seemed to agree with the holding set forth in the lead opinion.¹³⁷ Two weeks later, the court stated in another case that "none of [*Makos*] has any precedential value."¹³⁸ *Marks* was never mentioned. In a subsequent case, *Tomczak v. Bailey*,¹³⁹ one concurring justice wanted to apply the *Marks* rule to *Makos* and another did not.¹⁴⁰

Members of the Wisconsin bar are generally under the impression that Wisconsin has no *Marks* rule.¹⁴¹ For the time being, that understanding matches reality. As Justice Abrahamson and Justice Ann Walsh Bradley wrote, "[a]re lead opinions in this court comparable to plurality opinions in the United States Supreme Court? Apparently, the court of appeals considers a plurality decision of this court persuasive but does not always consider it binding."¹⁴² Notably, in an earlier concurrence, then-Chief Justice Abrahamson stated, "[t]his court has followed *Marks* in applying plurality opinions of the United States Supreme Court and in applying plurality decisions of this court."¹⁴³ However, a cite-check of this assertion proves that it is incorrect. The writing cites three opinions; in two of them, the *Marks* rule was applied to interpret U.S. Supreme Court precedent. The only opinion cited where the *Marks* rule was applied to a Wisconsin case

¹³⁵ 564 N.W.2d 662 (Wis. 1997) (lead), *overruled by* Aicher ex rel. LaBarge v. Wis. Patients Compensation Fund, 613 N.W.2d 849 (Wis. 2000).

¹³⁶ *Id.* at 59 (Bablitch, J., concurring).

¹³⁷ *Id.* at 67 (Crooks, J., concurring).

¹³⁸ Doe v. Archdiocese of Milwaukee, 565 N.W.2d 94, 102 n.11 (Wis. 1997).

¹³⁹ 578 N.W.2d 166 (Wis. 1998).

¹⁴⁰ Compare *id.* at 182–83 (Crooks, J., concurring) (asserting *Makos* had precedential value because he would apply the *Marks* rule), with *id.* at 181 (Geske, J., concurring) (asserting *Makos* had no precedential value).

¹⁴¹ Philip C. Babler, *The Need for a Marks Rule in Wisconsin*, FOLEY: WIS. APPELLATE L. (Nov. 14, 2018), <https://www.foley.com/en/insights/publications/2018/11/need-for-marks-rule-in-wisconsin>; Scotus May Clarify Rules for Interpreting Plurality Decisions, ON POINT: WIS. STATE PUB. DEFENDER (Dec. 14, 2017), <http://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/scotus-may-clarify-rules-for-interpreting-plurality-decisions/>.

¹⁴² State v. Lynch, 371 Wis. 2d 1, 77 (Wis. 2016) (Abrahamson & A.W. Bradley, JJ., concurring in part, dissenting in part).

¹⁴³ State v. Deadwiller, 834 N.W.2d 362, 379 (Wis. 2013) (Abrahamson, C.J., concurring).

was a concurrence in *Tomczak*, where the use of the *Marks* rule was disputed.¹⁴⁴

Even if the Wisconsin Supreme Court were to adopt the *Marks* rule, lead opinions would still prove problematic. This is because a lead opinion often lacks a common legal rationale with other writings.¹⁴⁵ To give an example, *Koschkee v. Taylor*¹⁴⁶ overturned *Coyne v. Walker*.¹⁴⁷ As *Koschkee* noted:

[O]ur mandate in *Coyne* arises from a lead opinion, joined by one justice, a two-justice concurrence, and a one-justice concurrence. When we are asked to overturn one of our prior decisions, lead opinions that have no common legal rationale with their concurrences are troublesome. For example, we cannot analyze whether “[c]hanges or developments in the law have undermined the rationale behind a decision,” if there is no “rationale” to analyze. We are in such a circumstance in the matter now before us. Accordingly, for the reasons set forth below, we conclude that an independent analysis of the issues presented herein better serves the interests of the public.¹⁴⁸

Of course, Wisconsin could adopt the version of the *Marks* rule that considers the narrowest opinion binding, with no need to analyze the writings for a common rationale. However, that would arguably encourage justices to write separately, and narrowly, with hopes that their view becomes binding.¹⁴⁹ Furthermore, that version of the *Marks* rule has been considered problematic because it has permitted bizarre legal views to become precedent.¹⁵⁰ Rather than adopt a version of the *Marks* rule, the better solution is to minimize the number of lead and majority/lead opinions.

¹⁴⁴ *Id.* (citing *Vincent v. Voight*, 614 N.W.2d 388, 406 n.18 (Wis. 2000); *Lounge Mgmt., Ltd. v. Town of Trenton*, 580 N.W.2d 156, 160 (Wis. 1998); *Tomczak*, 578 N.W.2d at 182–83 (Crooks, J. concurring)).

¹⁴⁵ *Koschkee v. Taylor*, 929 N.W.2d 600, 604 n.5 (Wis. 2019).

¹⁴⁶ 929 N.W.2d 600 (Wis. 2019).

¹⁴⁷ 368 Wis. 2d 444 (Wis. 2016), *overruled by Koschee*, 929 N.W.2d 600.

¹⁴⁸ *Koschkee*, 929 N.W.2d at 604 n.5 (internal citation omitted).

¹⁴⁹ *See Re*, *supra* note 124, at 2000.

¹⁵⁰ *Id.* at 1944–45.

B. *A Failure of the Law-Developing Function*

Evidently, lead and majority/lead opinions are the antithesis of law-development. Members of the Wisconsin bar dislike them.¹⁵¹ And, no doubt, they and the public at-large are growing increasingly frustrated with the Wisconsin Supreme Court. Lead and majority/lead opinions are at odds with the law-developing function of the court for at least two reasons. First, they result in the court declaring less law. Second, they are confusing, and confusing jurisprudence—even when it garners a majority—does little to develop the law.

1. Less Law

The Wisconsin Supreme Court is a law-developing—not an error-correcting—court. As one law review article explained:

Appellate courts have two primary functions: “error correction” to ensure that law is interpreted correctly and consistently and “law making” to provide a means for the development of law through their decisions and explanations of decisions. In states with only one appellate court, that one court must perform both functions. In states with two levels of appellate courts, the intermediate appellate court is often assigned the error-correcting role and the court of last resort, most often called the supreme court, is primarily concerned with the development and declaration of law.¹⁵²

One of the reasons states have created intermediate appellate courts is to allow state supreme courts to focus on a limited number of cases and thereby improve the quality of their opinions.¹⁵³ Indeed, many may not realize that state intermediate appellate courts are a recent phenomenon

¹⁵¹ See Jeffrey A. Mandell & Barbara A. Neider, *Sea Change: No More Great Weight Deference to Administrative Agencies*, WIS. LAW., July 2018, <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=10&Issue=12&ArticleID=26460> (“The result of these fractured opinions is that most of the analysis in the lead opinion lacks enough support to be considered law and to provide clear guidance to agencies, private parties, and lower courts.”); Michael B. Brennan, *Guest Post: Forbush and the Riddle of a Fragmented Court*, ON POINT: WIS. STATE PUBLIC DEFENDER (May 24, 2011), <http://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/guest-post-forbush-and-the-riddle-of-a-fragmented-court/>.

¹⁵² Flango *supra* note 13, at 105.

¹⁵³ *Id.*

brought about in part because state supreme courts had excessive caseloads.¹⁵⁴ For example, in 1978, Wisconsin, following the lead of several other states, established an intermediate appellate court, the Wisconsin Court of Appeals. The intent was to reduce the caseload bogging down the Wisconsin Supreme Court.¹⁵⁵ As one student comment wrote shortly after the adoption, “Supreme Court case selection—coupled with intermediate appellate courts which hear all trial court appeals as of right—has long been seen as a solution to the problem of delayed or nonreflective high court decisions caused by increasing appellate caseloads.”¹⁵⁶ To summarize the caseload problem:

In the 1962 term, there were 331 filings with the supreme court. In 1971, the number grew to 765 filings. The supreme court disposed of 291 cases in the 1962 term compared with 431 in the 1971 term. More importantly, the number of unfinished cases carried over into the next term rose from forty in 1962 to 335 in 1971.¹⁵⁷

Clearly, justices of the Wisconsin Supreme Court bore a heavy burden.¹⁵⁸ A report to the governor indicated concern that the quality of judicial opinions was suffering.¹⁵⁹ It stated:

[T]o describe the increasing appellate court backlog is merely to state the most obvious, but perhaps not the most important, deficiency of our appellate system. In the rush to cope with its increasing calendar, the Supreme Court must invariably sacrifice quality for quantity. Increasing appellate backlogs necessarily produce a dilution in craftsmanship. . . . The Supreme Court is cast in the role of a “case-deciding court”—one which merely reacts to the individual cases and thus slights its law-stating function. . . . The size of this caseload can only have a detrimental effect on the quality of the Supreme Court’s work.

¹⁵⁴ Gary C. Karch, Comment, *Petitions for Review by the Wisconsin Supreme Court*, 1979 WIS. L. REV. 1176, 1176; see also Matthew E. Garbys, Comment, *A Shift in the Bottleneck: The Appellate Caseload Problem Twenty Years After the Creation of the Wisconsin Court of Appeals*, 1998 WIS. L. REV. 1547.

¹⁵⁵ Karch, *supra* note 154, at 1176.

¹⁵⁶ *Id.* at 1178.

¹⁵⁷ Garbys, *supra* note 154, at 1548.

¹⁵⁸ *Id.*

¹⁵⁹ CITIZENS STUDY COMM. ON JUDICIAL ORG., REPORT TO GOVERNOR PATRICK J. LUCEY 78 (1973).

Cases involving major questions of substantive law may be decided on the basis of superficial issues.¹⁶⁰

In summary, the Wisconsin Court of Appeals was created so that the Wisconsin Supreme Court could focus on its law-developing function.¹⁶¹

Wisconsin's court reform was part of a nationwide movement that viewed state supreme courts as law-developing institutions. As a group of scholars wrote in 1978, the changing structure of state appellate courts "suggested an emerging societal consensus that state supreme courts should not be passive, reactive bodies, which simply applied 'the law' to correct 'errors' or miscarriages of justice in individual cases, but that these courts should be policy-makers and, at least in some cases, legal innovators."¹⁶² No longer were state supreme courts to hear cases for the sole purpose of correcting error; as one American Bar Association document stated, the "lawmaking function of appellate courts" became clearly recognized.¹⁶³

The rise in lead and majority/lead opinions at the Wisconsin Supreme Court indicates that the Wisconsin Supreme Court is not developing as much law; instead, it is operating like the Wisconsin Court of Appeals. A lead opinion resolves the issue for the parties, but it provides little guidance to future litigants. In some ways, the Wisconsin Supreme Court has become a very expensive trial court, and the purpose of court reform in the 1970s was to prevent such a tragedy from occurring.

2. Confusing Law

Furthermore, lead and majority/lead opinions are confusing. Even if Wisconsin were to adopt a version of the *Marks* rule, such that fractured opinions could technically constitute precedent, the precedent that relied on the *Marks* rule would lack clarity. Much has been written about the confusion caused by plurality opinions issued by the U.S. Supreme Court.¹⁶⁴ A group of scholars, writing under the pseudonym "Berkolow," has stated that plurality opinions strike at the very heart of precedent. As they argue:

¹⁶⁰ *Id.*

¹⁶¹ Garbys, *supra* note 154, at 1548.

¹⁶² Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 983 (1978).

¹⁶³ ROBERT LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS, 1-2, 5-6 (Am. B. Found. 1976).

¹⁶⁴ Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 VA. J. SOC. POL'Y & L. 299 (2008).

Throughout the historical development of the rule of law, there has been sensitivity to the law's role in securing predictability, stability, confirmation of investment-backed expectations, as well as confidence in the enforceability of transactions, transferability, transparency, and trustworthiness. None of these things, however, could exist without confidence in precedent.¹⁶⁵

Plurality opinions, “[q]uite often (and increasingly)” force the public to “navigate the confusing cacophony that results to identify what constitutes controlling precedent.”¹⁶⁶ Stated otherwise, “[c]onflicts created by concurrences and pluralities in court decisions may be the epitome of confusion in law and lower court interpretation.”¹⁶⁷

The rise in majority/lead opinions has caused further confusion: identifying what portions of an opinion are precedential. Before the 2019–20 term, readers of Wisconsin Supreme Court opinions had to search footnotes in opinions to determine what portions were joined by what justices. For example, in *Tetra Tech*, a footnote in the first opinion states:

Justice Rebecca Bradley joins the opinion in toto. Chief Justice Roggensack joins Sections I., II.A.1., II.A.2., II.A.6. as limited in Justice Gableman's concurrence, II.B. and III. Justice Gableman joins Paragraphs 1–3, Sections I. II. (introduction), II.A. (introduction), II.A.1., II.A.2., II.A.6., II.B., and III., and the mandate, although he does not join Section II.A.6. to the extent that the first sentence of Paragraph 84 implies a holding on constitutional grounds. Therefore, this opinion announces the opinion of the court with respect to Sections I., II.A.1., II.A.2., II.B., and III.¹⁶⁸

This practice stood in sharp contrast to the practice of some courts, such as the U.S. Supreme Court, which put a designation block at the beginning of the opinion. Particularly if someone is reading on Lexis or Westlaw, where footnotes appear at the end of the opinion, the reader is unlikely to realize that portions of the opinion are not precedent. Indeed, arti-

¹⁶⁵ *Id.* at 301.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 300.

¹⁶⁸ *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21, 29 n.4 (Wis. 2018) (majority/lead).

cles about *Tetra Tech* dedicated substantial space to simply telling readers what portions of *Tetra Tech* were joined by what justices.¹⁶⁹

The bar should not have to spend so much time identifying what portions of an opinion are precedent. For this reason, in the 2019–20 term, the Wisconsin Supreme Court adopted new practice: designation blocks. It adopted this practice from the U.S. Supreme Court, which has long utilized it. Table 2 provides majority/lead opinions from the term and their respective designation blocks.

¹⁶⁹ Mandell & Neider, *supra* note 153.

Table 2: Decisions with Lead/Majority Opinions During the 2019–20 Term

Case	Explanation
State v. Lopez	ZIEGLER, J., delivered the majority opinion of the Court, in which ROGGENSACK, C.J., KELLY, and HAGEDORN, JJ., joined. REBECCA GRASSL BRADLEY, J., filed a concurring opinion, in which KELLY, J., joined in part. KELLY, J., filed a concurring opinion. ANN WALSH BRADLEY, J., filed a dissenting opinion, in which DALLET, J., joined.
Marathon County v. D.K.	ZIEGLER, J., delivered the majority opinion of the Court with respect to Parts I., II., III., IV.A., IV.B., and IV.C.1, in which ROGGENSACK, C.J., REBECCA GRASSL BRADLEY, KELLY, and HAGEDORN, JJ., joined, the majority opinion of the Court with respect to Part V., in which ROGGENSACK, C.J., KELLY and HAGEDORN, JJ., joined, and an opinion with respect to Parts IV.C.2., and IV.D., in which ROGGENSACK, C.J., and HAGEDORN, JJ., joined. REBECCA GRASSL BRADLEY, J., filed a concurring opinion, in which KELLY, J., joined. DALLET, J., filed a dissenting opinion, in which ANN WALSH BRADLEY, J., joined.
State v. Coffee II	ZIEGLER, J., announced the mandate of the Court and delivered the majority opinion of the Court with respect to Parts I, II, III, and IV.C. and D., in which ROGGENSACK, C.J., KELLY, and HAGEDORN, JJ., joined. KELLY, J., filed a concurring opinion, in which REBECCA GRASSL BRADLEY, J., joined ¶¶59-63. ANN WALSH BRADLEY, J., filed a dissenting opinion, in which REBECCA GRASSL BRADLEY and DALLET, JJ., joined.
State v. Muth	ROGGENSACK, C.J., announced the mandate of the Court, and delivered an opinion, in which ZIEGLER, J., joined as to Parts II.A, B. and D., except for ¶¶58–60, and in which KELLY, J., joined as to Parts II.A, B., and D. DALLET, J., filed a concurring opinion, in which ANN WALSH BRADLEY and REBECCA GRASSL BRADLEY, JJ., joined, and in which ZIEGLER, J., joined as to ¶¶63–70 and ¶¶72–78. KELLY, J., filed an opinion concurring in part and dissenting in part, in which HAGEDORN, J., joined as to Parts I. and II. HAGEDORN, J., filed a dissenting opinion.

The designation blocks are an improvement, but there are still problems. First, if the wording is not precise, the designation blocks could be wrong. A fair reading of the designation block in *Coffee II*—indeed, the best reading—indicates that Chief Justice Roggensack and Justice Hagedorn did not join the entirety of the majority/lead opinion. However, whether they intended to join only a portion of the opinion is unclear.

Second, the Wisconsin Supreme Court has not adopted consistent language. As already explained, members of the court have not settled on the terminology to use. For example, the designation block in *Lopez* says, “ZIEGLER, J., delivered a majority opinion.” However, parts of the opinion did not have a majority.¹⁷⁰ Therefore, the designation block may do more harm than good. A quick reader on Lexis or Westlaw could mistakenly cite portions of *Lopez* as binding precedent, and the reader’s mistake would be forgivable because the opinion designation block suggests as much.

Third, the opinion designation blocks are difficult to discern. For example, Justice Ziegler joined parts of the lead opinion in *Muth*: “Parts II.A, B. and D., except for ¶¶58–60.” Ideally, readers should be able to focus on the reasoning of an opinion without questioning whether small portions of it are binding. Notably, other jurisdictions appear to have a similar problem with labeling opinions. A recent student comment in the *Washington Law Review* lamented:

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

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.¹⁷¹

The labelling issue in Washington appears to be even more complicated because, according to the comment, “[t]he [Washington Supreme]

¹⁷⁰ *State v. Lopez*, 936 N.W.2d 125, 133 (Wis. 2019) (Bradley, R., J., concurring); *id.* at 136 (Kelly, J., concurring).

¹⁷¹ Rachael Clark, Comment, *Piecing Together Precedent: Fragmented Decisions from the Washington State Supreme Court*, 94 WASH. L. REV. 1989, 1991 (2019).

Court extracts precedential value from a fragmented decision when there is any single point of reasoning that at least five [of nine] justices agree with, regardless of whether they concur or dissent in the judgment.”¹⁷² As already noted, Wisconsin courts do not consider the statements of justices in the dissent for counting purposes.

Evidently, lead and majority/lead opinions are difficult to label, and that in and of itself is a problem.

C. *Problems for Conservatives*

In addition to confusing the law, lead and majority/lead opinions—at least in Wisconsin—are disproportionately a problem for conservatives. If conservatives cannot learn to compromise the way that liberals have, they always will be at a disadvantage in a common law jurisdiction where precedent plays a key role. Additionally, conservatives at the Wisconsin Supreme Court have long opposed minority vote pooling; however, it is unclear how much longer they can fend off requests for minority vote pooling if the court remains fractured.

1. Conservative Jurisprudence’s Disadvantage

For context, much has been written about how justices of the U.S. Supreme Court vote in blocs. Interestingly, conservative justices struggle to maintain bloc cohesion while liberal justices do not. Ilya Shapiro of the Cato Institute, wrote: “[O]f the 20 cases [during the 2018 term] where the court split 5-4, only seven had the ‘expected’ ideological divide of conservatives over liberals. By the end of the term, each conservative justice had joined the liberals as the deciding vote at least once.”¹⁷³ He concluded: “[I]f lockstep voting and a results-driven court concerns us, it isn’t the conservatives we should be worried about. While senators, journalists, and academics love decrying the Roberts Five, it’s the (Ruth Bader) Ginsburg Four that represent a bloc geared toward progressive policy outcomes.”¹⁷⁴

Other experts have made similar observations. Merrill Matthews, a resident scholar at the Institute for Policy Innovation, noted:

¹⁷² *Id.* at 1992.

¹⁷³ Ilya Shapiro, *Liberal Supreme Court Justices Vote in Lockstep, Not the Conservative Justices*, CATO INSTITUTE (Sept. 10, 2019), <https://www.cato.org/publications/commentary/liberal-supreme-court-justices-vote-in-lockstep-not-the-conservative-justices>.

¹⁷⁴ *Id.*

[W]hen the issue before the court has a clear ideological or partisan divide, the four liberals march in lockstep. It's one of the court's conservatives who provides the fifth vote to give liberals a victory. . . .

The irony in all this is that when Senate Democrats grill a Republican Supreme Court nominee, they scathingly predict the nominee will be closed minded and vote along ideological lines. The truth is that only liberal justices do that, which is why no liberal justice ever becomes the swing vote.¹⁷⁵

Bloc voting has a negative connotation in the sense that it implies judges are result-oriented. Perhaps a better way of understanding what is happening is through the lens of judicial philosophy. Conservatives struggle to compromise, so voting as a bloc is hard.

For the 2019–20 term, the Wisconsin Supreme Court supposedly had a 5-2 conservative-liberal split.¹⁷⁶ If the conservatives were acting as a bloc, there should be very few lead and majority/lead opinions. But alas, the anti-consensus building philosophy of some conservatives has produced a high number of such opinions, and all of them were authored by conservative justices. At least portions of each of these opinions lack the protection of *stare decisis*.

While liberal justices may write separately in cases where another liberal justice is the majority author, they are cautious to do so when the result will be that the first opinion no longer has a majority. Less caution ex-

¹⁷⁵ Merrill Matthews, Opinion, *Liberal Supreme Court Justices Never Wear the 'Swing Vote' Mantle*, THE HILL (June 23, 2020, 5:30 PM), <https://thehill.com/opinion/judiciary/504134-liberal-supreme-court-justices-never-wear-the-swing-vote-mantle>; see also Fred Barnes, *The Supreme Court's Real Bloc Is Liberal*, WASH. EXAMINER (Oct. 10, 2019, 11:00 PM), <https://www.washingtonexaminer.com/opinion/columnists/the-supreme-courts-real-bloc-is-liberal>; Mark Sherman & Jessica Gresko, *Roberts' Supreme Court Defies Easy Political Labels*, AP NEWS (June 28, 2019), <https://apnews.com/article/222dd32b7609458f98a811cb00c44848>.

¹⁷⁶ The labeling of justices is often inappropriate in that it suggests justices actively consider politics. It can cause substantial harm to the institution. Patience Drake Roggensack, *Tough Talk and the Institutional Legitimacy of Our Courts*, MARQ. LAW., Fall 2017, at 45, <https://law.marquette.edu/assets/marquette-lawyers/pdf/marquette-lawyer/2017-fall/2017-fall-p45.pdf>. Notably, judges in Wisconsin run in non-partisan elections. Moreover, to the extent that judges can be grouped together, as either conservative or liberal, those groupings may reflect shared judicial philosophy as opposed to shared politics. See *id.* at 49; see also *Scalia Discusses His Relationship With John Roberts After 'Obamacare'*, CNN (July 19, 2012), <https://www.youtube.com/watch?v=TEt67H4rD9E>; *Wis. Supreme Court Justice Rebecca Bradley speaks on oral arguments, briefs and research*, TMJ4 NEWS (June 17, 2020), <https://www.youtube.com/watch?v=LPOUxajkoW8>.

ists with respect to conservative justices. Remarkably, Justice Ann Walsh Bradley and Justice Dallet, combined, authored 13 majority opinions during the 2019–20 term; neither authored a single lead opinion. During the 2018–19 term, Justice Abrahamson, Justice Ann Walsh Bradley and Justice Dallet authored 20 majority opinions; none authored a single lead opinion. During the 2017–18 term, Justice Abrahamson and Justice Ann Walsh Bradley authored 16 majority opinions; Justice Abrahamson authored a single lead opinion.

The Wisconsin Supreme Court is destined to become a liberal court. Indeed, with the recent spring election, the court has already lost one member of the supposed conservative bloc: Justice Kelly. When it becomes liberal, the disagreement among conservative justices from the 2015–16 term on will inevitably result in many decisions being disregarded because they were not majority opinions. The future liberal court will not even have to consider *stare decisis*. Liberal justices will simply note—correctly—that the cases never constituted precedent.

2. Rehashing “Minority Vote Pooling”

Fractured opinions also lead to calls for minority vote pooling. For context, minority vote pooling goes by various names, such as “case-by-case adjudication.”¹⁷⁷ The gist of the idea is that outcomes are determined by “pooling” together justices’ votes on different issues. Two New York University professors gave the following illustration.¹⁷⁸

Table 3: Minority Vote Pooling

Justices	Fourth Amendment Violated?	Fifth Amendment Violated?	New Trial (Outcome)
1	N	N	N
2	N	N	N
3	N	N	N
4	N	N	N
5	Y	Y	Y
6	Y	Y	Y
7	Y	Y	Y
8	N	Y	Y
9	Y	N	Y

¹⁷⁷ Kornhauser & Sager, *supra* note 47, at 15.

¹⁷⁸ *Id.*

In the above example, five justices agreed that the Fourth Amendment was not violated. A different five justices agreed that the Fifth Amendment was not violated. A logical case resolution would be that no new trial occurs. The scholars called this “issue-by-issue adjudication.”¹⁷⁹ But, if the votes of the four justices who believe that the Fourth Amendment was violated are pooled with the votes of the four justices who believe that the Fifth Amendment was violated, the alliance of the two minority positions could change the outcome. Minority vote pooling is deeply inconsistent with a collegial court. To explain:

In case-by-case adjudication, we picture the Court as expecting each Justice to express a final view on the outcome of the case, and as then simply counting noses. In issue-by-issue adjudication, in contrast, we picture the Court as expecting an expression of views on each issue, and as discouraging or at least ignoring any references made by the Justices to their personal view of the outcome, since the outcome will be a matter of simple doctrinal arithmetic.¹⁸⁰

To explain further, minority vote pooling imagines a world in which the proper resolution of a case is little more than the sum-total of the individual justices’ subjective views. Recall that judges on a collegial court are not like judges of a gymnastics competition. A collegial court acts collectively, not as merely the sum-total of its justices. Using the above example, the court, collectively, did not conclude that either the Fourth or the Fifth Amendment was violated. Therefore, the collective decision of the court ought to be that there is no new trial.

To illustrate the problem, imagine that the case had to be remanded with guidance. What rule of law does the lower court apply? Imagine a future court attempting to apply the precedent going forward. What do the judges in that case do? Simply put, minority vote pooling creates a substantial problem. Notably, the U.S. Supreme Court has a tradition—rejected by some justices, although perhaps they did not realize what they were doing—of minority vote pooling.¹⁸¹ The Wisconsin Supreme Court has rejected the practice.¹⁸²

¹⁷⁹ *Id.* at 11.

¹⁸⁰ *Id.* at 16.

¹⁸¹ *See generally id.*

¹⁸² *State v. Gustafson*, 359 N.W.2d 920, 922 (1985) (per curiam).

In 2016, an attorney at a prominent Wisconsin law firm blogged: “[G]iven the complexity of the issues often presented to the [Wisconsin Supreme] Court and the apparent fractiousness of the current Court, is it time to consider reversing the prohibition on minority vote pooling?”¹⁸³ The attorney continued, “if vote pooling is problematic across the board, how will the Court proceed, given the frequency with which the Court seems unable or unwilling to build consensus among a majority?”¹⁸⁴ The attorney raises fair points; however, the conservatives of the Wisconsin Supreme Court have long been concerned with minority vote pooling because it can lead to “arbitrary and illogical results.”¹⁸⁵

For example, consider the recent case of *Wisconsin Legislature v. Palm*,¹⁸⁶ wherein the Wisconsin Supreme Court struck down most of Wisconsin’s COVID-19 Safer-at-Home order. Chief Justice Roggensack authored the majority opinion, as well as a concurrence. In her concurrence, she wrote:

We have declared that Emergency Order 28 is invalid and therefore, unenforceable. Earlier, the Legislature asked us to issue an injunction but to stay such an injunction for six days, and at oral argument, the Legislature implied that a longer stay may be appropriate if we were to enjoin Order 28.

Requesting a stay for a requested injunction is a very unusual request, but we understand that it is driven by the Legislature’s concern that confusion may result if Order 28 is declared invalid and actions to enforce our declaration immediately commence. People, businesses and other institutions may not know how to proceed or what is expected of them.¹⁸⁷

¹⁸³ Jeffrey A. Mandell, *Supreme Court’s Non-Decision in State v. Lynch Raises Questions About How the Court Does Its Work*, STAFFORD ROSENBAUM LLP (July 21, 2016), <https://www.staffordlaw.com/blog/appellate-practice/supreme-courts-non-decision-in-state-v-lynch-raises-questions-about-how-th/>.

¹⁸⁴ *Id.*

¹⁸⁵ *Gustafson*, 359 N.W.2d at 922.

¹⁸⁶ 942 N.W.2d 497 (Wis. 2020).

¹⁸⁷ *Id.* at 918 (Roggensack, C.J., concurring).

She went on to state, “although our declaration of rights is effective immediately, I would stay future actions to enforce our decision until May 20, 2020.”¹⁸⁸

Justice Ann Walsh Bradley’s dissent indicated that she and the other two dissenting justices should have been permitted to join Chief Justice Roggensack to provide a stay.¹⁸⁹ But this would have been illogical. The dissenting justices did not agree that the Safer-at-Home order was illegal; they completely disagreed with the majority’s reasoning. Unlike Chief Justice Roggensack, who thought a stay might be prudent policy, the three dissenting justices simply disagreed with the majority opinion outright. In essence, they wanted to pool their votes for not striking down the Safer-at-Home order with Chief Justice Roggensack’s vote to grant a stay. But granting a stay is entirely dependent on there being something to stay. If they were allowed to pool their votes, they would effectively have been able to block a decision from going into effect solely because they did not agree with it. A major problem with minority vote pooling is that it gives justices that agree with very little of the majority substantial power over the outcome of a particular case and the rule of law going forward.

Table 4 illustrates the vote breakdown in *Palm* to demonstrate the attempt at minority vote pooling.

Table 4: Minority Vote Pooling Attempt in *Palm*

Justices	Safer-at-Home Order Unlawful?	If Yes, Stay the Declaration?	Outcome
1	N	N/A	No Relief
2	Y	Y	Relief—Stayed
3	Y	N	Relief
4	Y	N	Relief
5	Y	N	Relief
6	N	N/A	No Relief
7	N	N/A	No Relief

As Table 4 makes clear, Justice Ann Walsh Bradley wanted to pool her minority position—that the order was lawful—with Chief Justice Roggensack’s minority position—that the declaration should be stayed.

If the Wisconsin Supreme Court continues to be as fractured as it has been, additional conversations about minority vote pooling are inevitable. This is so because dissenting justices often want control—as demon-

¹⁸⁸ *Id.* at 919.

¹⁸⁹ *Id.* at 941 (A.W. Bradley, J., dissenting).

strated by Justice Ann Walsh Bradley’s attempt to stay the declaration in *Palm*. A fractured court offers those in dissent the opportunity to suggest minority vote pooling. For example, after the Wisconsin Supreme Court decided *Coffee II*, it received an explicit request for minority vote pooling. For context, *Coffee II* involved interpreting *Arizona v. Gant*.¹⁹⁰ *Gant* states: “[W]e . . . conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.”¹⁹¹ Courts are split on the meaning of this statement. Some have adopted a “categorical approach.” As the lead opinion in *Coffee II* summarized, under the categorical approach, a search of a vehicle is justified if the offense of arrest is the type of offense for which there might be physical evidence.¹⁹² In contrast, other courts apply the “reasonableness approach,” which involves “looking at common sense factors and evaluating the totality of the circumstances” to determine whether it was reasonable to conclude that evidence of the crime of the arrest might be found within the vehicle.”¹⁹³

In *Coffee II*, a two-justice lead opinion interpreted *Gant* as imposing the reasonableness approach.¹⁹⁴ However, the lead opinion concluded that no violation of the Fourth Amendment occurred because the search was justified by the totality of the circumstances.¹⁹⁵ In contrast, a one-justice concurrence applied the categorical approach and concluded that the search was justified because the offense of arrest—operating while intoxicated—is a type of offense for which physical evidence might exist.¹⁹⁶ The remaining two justices dissented. They concluded that the reasonableness approach was correct; however, they did not believe that the totality of the circumstances justified the search.¹⁹⁷ Hence, four justices agreed that the reasonableness approach was the correct interpretation of *Gant*. However, the four were split between the lead and dissent. Importantly, the Court of Appeals had applied the categorical approach.¹⁹⁸ The State Public Defender’s Office filed a motion for reconsideration, arguing:

The court of appeals in a published decision in *State v. Coffee* . . . held “as a matter that when an officer lawfully

¹⁹⁰ 556 U.S. 332 (2009).

¹⁹¹ *Id.* at 335.

¹⁹² *State v. Coffee*, 943 N.W.2d 845, 850–52 (Wis. 2020) (lead).

¹⁹³ *Id.* at 852 (quoting *United States v. Reagan*, 713 F. Supp. 2d 724 (E.D. Tenn. 2010)).

¹⁹⁴ *Id.* at 854.

¹⁹⁵ *Id.* at 856.

¹⁹⁶ *Id.* at 868–69 (Kelly, J., concurring).

¹⁹⁷ *Coffee*, 943 N.W.2d at 870–71 (Dallet, J., dissenting).

¹⁹⁸ *State v. Coffee*, 929 N.W.2d 245 (Wis. Ct. App. 2019).

arrests a driver for OWI . . . a search of the interior of the vehicle, including containers therein, is lawful . . . [.]” After granting review four justices of this court rejected the court of appeals’ declaration and application of a categorical approach to the 4th Amendment issue presented and ruled that U.S. Supreme Court precedent requires a totality-of-circumstances reasonableness approach. However, those four justices split two-two on the outcome when applying that standard to the particular facts, with one justice applying a categorical approach joining the two voting to affirm the judgment. . . . [T]he rejected categorical legal standard in the published court of appeals case arguably remains the law in Wisconsin, though only one justice of this court so ruled. The court is not asked to reconsider its analysis or rationale, but rather to reconsider how it characterizes the lead and dissenting opinions and to clarify its holding on the point of law a four justice majority of this court resolved.¹⁹⁹

In essence, the Public Defenders wanted the Wisconsin Supreme Court to permit minority vote pooling. The court denied the motion. Therefore, arguably, lower courts in Wisconsin are bound by the Court of Appeals decision that applied the categorical approach even though four justices rejected it. That may be problematic, but it is the price that Wisconsin jurisprudence must pay if the Wisconsin Supreme Court remains fractured and continues to reject minority vote pooling.

V. POSSIBLE SOLUTIONS

This Part discusses possible solutions. Rather than fashion a *Marks*-like rule or advocate for minority vote pooling, it recommends solutions aimed at reducing the number of lead and majority/lead opinions. To do otherwise would be to propose solutions that do not go to the heart of the problem. Some of these solutions are aimed at persuading conservatives to change their judicial philosophy while others are not. This dual approach is taken because many justices have spent years developing their judicial philosophy and are unlikely to change.

¹⁹⁹ Motion to Reconsider, No. 2018AP1209-CR, *State v. Coffee*, 943 N.W.2d 845 (Wis. 2020) (lead).

A. Judicial Humility

Judicial humility is often a value associated positively with conservative jurisprudence.²⁰⁰ Broadly defined, judicial humility is “a deep awareness of the fallibility of human judgment and the risk of error when met with the difficult, sometimes excruciating, choices that must be made by a judge.”²⁰¹ Judicial humility requires a “tempering” of “judicial arrogance,” and it “counsels an openness to hearing the views of others and listening to the wisdom of other authorities and sources.”²⁰² To quote Justice Kelly, “[t]o err is human, and judges are nothing if not human—especially when the mellifluousness of ‘your honor’ makes the humility necessary to recognize mistakes harder to maintain.”²⁰³ A humble judge ought to consider seriously the views of his or her colleagues. Arrogance is no doubt demonstrated when a judge regularly assumes that the views of his or her colleagues are incorrect.

Unfortunately, judicial humility is often discussed in terms of deference to nearly everyone but a judge’s colleagues. For example, a humble judge is supposed to pause and seriously consider whether striking down legislation as unconstitutional is justified.²⁰⁴ This pause comes, partly, out of respect for a co-equal branch of government, which should not be assumed to have acted unconstitutionally. But, for whatever reason, conservative judges often do not display judicial humility with respect to their colleagues.

Judges must learn to show a degree of deference to their colleagues. For example, Justice George Sutherland, who was generally considered a conservative, once wrote to his colleagues: “I was inclined the other way, but I think no one agreed with me. I, therefore, yield my not very positive views to those of the majority.”²⁰⁵ This statement demonstrates that Justice Sutherland was hesitant to assume that he was right

²⁰⁰ See generally Marath Stith McLeod, *A Humble Justice*, 127 YALE L. REV. FORUM 196 (2017).

²⁰¹ BENJAMIN L. BERGER, WHAT HUMILITY ISN’T: RESPONSIBILITY AND THE JUDICIAL ROLE 3 (2018).

²⁰² *Id.*

²⁰³ *Bartlett v. Evers*, 945 N.W.2d 685, 729 (Wis. 2020) (Kelly, J., concurring in part, dissenting in part) (quoting McLeod, *supra* note 203).

²⁰⁴ See Richard S. Myers, *The Virtue of Judicial Humility*, 13 AVE MARIA L. REV. 207 (2015); see also LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 72 (1990).

²⁰⁵ Walter F. Murphy, *Marshalling the Court: Leadership, Bargaining, and the Judicial Process*, 29 U. CHI. L. REV. 640, 668 (1962).

when many of his colleagues told him otherwise. His example ought to be followed. In the words of one scholar:

A Justice engaged in practical reasoning might, after failing to persuade his colleagues of the correctness of his own initial views, defer to their views as part of his effort to identify the correct answer on the merits. In brief, his decision to “go along” with his colleagues may signify a humility about his own tentative judgment and an overarching commitment to the process of practical reasoning as an ongoing enterprise, in light of which individual decisions matter less than the health of the continuing enterprise as a whole. In other words, in his view the “rightness” of a decision is, at least in part, grounded in the process and fact of group agreement.²⁰⁶

To summarize, forming a sincere judgment regarding the meaning of the law should be viewed as a collegial exercise. Judges should not feel that their subjective views necessarily obligate them to vote a certain way.

B. *Screws Rule*

Judicial humility may require a judge to yield to the views of his or her colleagues when he or she is not confident in his or her opinion. Occasionally, a judge might be justified in voting against his or her sincerely held belief so that the court on which he or she sits can act as an institution. *Screws* rule, as it has come to be known, may justify a judge voting against a sincerely held belief to create a mandate or to produce a majority opinion on an important point of law.

In *Screws v. United States*,²⁰⁷ the U.S. Supreme Court almost deadlocked. Four justices wanted to remand, three wanted to reverse and one wanted to affirm. The remaining justice, Wiley Blount Rutledge, also wanted to affirm, which would have created a 4-3-2 split. The case would have had no mandate. Justice Rutledge voted with the four justices that wanted to remand “in order that disposition may be made of this case.”²⁰⁸ Justices have followed his lead in subsequent cases.²⁰⁹ The authority to

²⁰⁶ Evan H. Carninker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297, 2311 (1999).

²⁰⁷ 325 U.S. 91 (1945).

²⁰⁸ *Id.* at 134 (Rutledge, J., concurring).

²⁰⁹ H. Ron Davidson, *The Mechanics of Judicial Vote Switching*, 38 SUFFOLK U. L. REV. 17, 18 (2004).

switch a vote to create a mandate has since been called the *Screws* rule.²¹⁰ Professor Richard M. Re, who teaches at the UCLA School of Law, has explained:

Screws itself involved a Justice's vote to join the judgment of the Court, not the opinion of the Court. In other words, Justice Rutledge created a majority on the judgment but did not join the majority opinion of the Court and so avoided the creation of precedent under the majority rule. Perhaps the *Screws* rule should be limited to votes on the judgment akin to Justice Rutledge's, and so should not extend to authorize votes in favor of precedential majority opinions where the voting Justice disagrees with those opinions. But that extension is justifiable, for much the same reasons as the core use of the *Screws* rule. Compromise majorities can effectuate the Justices' views of the law, without unfairly harming a party or violating principles of candor.²¹¹

He continued:

One might object that the *Screws* rule is illegitimate because it authorizes Justices to vote for dispositions that they believe are legally incorrect. *Screws* thus implicates, and arguably contravenes, the essence of judicial obligation: to decide in accordance with law. But that objection does not grapple with the crisis of legal fidelity that gives to the problem that the *Screws* rule means to solve. The relevant choice is between two plausible but imperfect means of discharging the oath of office: voting in accord with one's views to the detriment of those views' future realization, or voting differently from one's views in order to realize those views imperfectly.²¹²

To explain further, Professor Re notes that sometimes a justice can make a relatively minor compromise to achieve precedent that is close to his or her views.²¹³ If the justice cannot join a "compromise majority,"

²¹⁰ Re, *supra* note 124, at 1998.

²¹¹ *Id.* at 1999.

²¹² *Id.*

²¹³ *Id.* at 1999–2000.

then the result may be much further from the justice's ideal opinion.²¹⁴ An example of such a situation is *Coffee II*. Arguably, the precedent going forward is the categorical approach. While the dissenting justices may have disagreed with the application of the reasonableness approach by the lead opinion, the rule being the categorical approach seems much further away from their desired outcome.

Quite interestingly, while Justice Scalia was publicly opposed to consensus building, one of the best examples of a compromise majority is *Gant*, wherein Justice Scalia served as the fifth vote for the majority.²¹⁵ Indeed, it is the case that Professor Re used to illustrate the concept of a compromise majority.²¹⁶ *Gant* concluded that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search”²¹⁷ Previous precedent had been interpreted as always permitting police to search the passenger compartment incident to a lawful arrest of a recent occupant because of concerns for officer safety. Four justices would have retained this reading. Justice Scalia wanted to entirely abandon the officer safety justification. However, he compromised and joined the majority. He wrote:

No other Justice . . . shares my view that application of [the officer safety justification] in this context should be entirely abandoned. It seems to me unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of [previous precedent] in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by Justice STEVENS. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.²¹⁸

Had Justice Scalia not compromised, great confusion would have resulted. Moreover, whether the officer safety justification, which he so strongly opposed, would have been reined in, is uncertain. However, he

²¹⁴ See *id.*; see also Carninker, *supra* note 206, at 2313.

²¹⁵ *Arizona v. Gant*, 556 U.S. 332 (2009).

²¹⁶ Re, *supra* note 124, at 2001.

²¹⁷ *Id.* at 351.

²¹⁸ *Gant*, 556 U.S. at 354 (Scalia, J., concurring).

was able to create precedent closer to what he ultimately believed was correct.²¹⁹ Similarly, Justice Thomas, who has also publicly opposed consensus building,²²⁰ has joined majority opinions for the sake of creating precedent. In *AT&T Mobility LLC v. Conception*,²²¹ another example discussed by Professor Re,²²² Justice Thomas authored a concurrence, stating:

I think that the Court's test will often lead to the same outcome as my textual interpretation and that, when possible, it is important in interpreting statutes to give lower courts guidance from a majority of the Court Therefore, although I adhere to my views . . . I reluctantly join the Court's opinion.²²³

Justice Sandra Day O'Connor has similarly joined an opinion to produce a majority. She wrote in one concurrence, "in order that the Court may adopt a rule, and because I believe the Court's rule will often lead to the same outcome as the one I would have adopted, I join the Court's opinion despite my concerns."²²⁴

Based on the implicit applications of *Screws* rule by Justice Scalia, Justice Thomas and Justice O'Connor, two principles can be derived. First, a justice should employ *Screws* rule only if the rule utilized by the first opinion is likely to lead to outcomes similar to those that would be produced by the justice's preferred rule. Second, the rationale for employing *Screws* rule is strongest when the failure to do so will result in jurisprudence that is even further away from the justice's desired jurisprudence.

C. *Compromise Without a Separate Writing*

Screws rule seems to require the judge to disclose, in a separate writing, that a compromise was made. But notably, justices have compromised without feeling obligated to write separately. There are numerous examples. Justice Lewis F. Powell, Jr. once sent a private memo to Chief Justice Warren E. Burger, stating:

It is evident that a Court opinion is not assured if each of us remains with our first preference votes. . . . As I view

²¹⁹ Re, *supra* note 124, at 2001.

²²⁰ *Interview with Justice Thomas*, *supra* note 5, at 6:50–8:20.

²²¹ 563 U.S. 333 (2011).

²²² Re, *supra* note 124, at 2001.

²²³ *AT&T Mobility*, 563 U.S. at 353 (Thomas, J., concurring).

²²⁴ *US Airways, Inc. v. Barnett*, 535 U.S. 391, 408 (2002) (O'Connor, J., concurring).

the *Nixon* case as uniquely requiring a Court opinion, I am now prepared to defer to the wishes of you, Bill Rehnquist, and Sandra [O'Connor] and prepare a draft opinion holding that the President has absolute immunity from damage suit liability.²²⁵

Similarly, Chief Justice Rehnquist wrote in one private memo:

I prefer the position taken in the most recent circulation of my proposed opinion for the Court, but I want very much to avoid a fractionated Court on this point. . . . If a majority prefers Nino's [Scalia's] view, I will adopt it. . . . If there is some "middle ground" that will attract a majority, I will even adopt that.²²⁶

Compromises on relatively minor points represent a simple, long-followed unwritten principle: If a court is to ever act institutionally, the majority opinion author must be given some leeway. On complex issues, a court with seven members (like the Wisconsin Supreme Court) could easily produce seven different opinions. However, American courts have long rejected the practice of *seriatim* opinions.

D. Reestablishing *Dicta*

One problem, perhaps unique to Wisconsin, is that the Wisconsin Supreme Court has abandoned the concept of *obiter dictum*.²²⁷ No sentence in an opinion of the court can be disregarded. That being so, justices on the Wisconsin Supreme Court may be concerned—and fairly—that compromising on a relatively minor premise (for example, a single footnote) is problematic. A footnote on a topic unrelated to the case at hand has every bit the precedential value as the court's holding.

The reason that the Wisconsin Supreme Court got rid of *obiter dictum* may well be the reason it should bring it back. The court was concerned that if lower courts could disregard statements in its opinions, "predictability, certainty, and finality" would suffer.²²⁸ But if the lack of *obiter dictum* is a justification for justices to write separately, whether it results in clarity is questionable.

²²⁵ LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 96 (1998).

²²⁶ BERNARD SCHWARTZ, *HOW THE SUPREME COURT MAKES DECISIONS* 21 (1996).

²²⁷ *Zarder v. Humana Ins. Co.*, 782 N.W.2d 682, 694 (Wis. 2010).

²²⁸ *Id.*

E. Moving Material that Fails to Garner a Majority to a Separate Writing

Another way to address the rise in lead and majority/lead opinions may be for opinion authors to consider authoring two writings. Material in an opinion that was circulated with the intent of garnering a majority should be removed and put in a separate writing if it fails to garner the support of a majority. *Palm* would be an example. As already mentioned, Chief Justice Roggensack wanted to stay proceedings to enforce the court's declaration. There was not a majority. Had she insisted on putting this content in the first opinion, it likely would have become a majority/lead opinion. By moving it to a concurrence, she was able to say what she wanted to without calling into question the legitimacy of the majority opinion by creating a fractured court.

F. Reducing the Issues Taken Per Case on Review

Generally, the Wisconsin Supreme Court's practice has been to grant review on all or many of the issues presented in a case. More issues may correlate with more lead and majority/lead opinions. This is so because justices may have different approaches for each issue. Some may want to write separately on one issue while others want to write separately on another. Furthermore, the overall complexity of a case may hinder the court's ability to reach a consensus on any one issue. The result may be that, instead of the court developing some law on some issues, it develops no law.

VI. CONCLUSION

To conclude, the rise of lead and majority/lead opinions at the Wisconsin Supreme Court should be of concern. It represents a demise of the court's law-developing function. Chief Justice Roberts has made consensus building at the U.S. Supreme Court a priority. As summarized by Jeffrey Rosen, a law professor at George Washington University:

[U]nder [Chief Justice Roberts] leadership, the Court issued more consecutive unanimous opinions than at any other time in recent history. But [Chief Justice] Roberts was frustrated by the degree to which his colleagues were inclined to act more like law professors than members of a collegial court: his first term had ended in what Justice John Paul Stevens called a "cacophony" of discordant

voices, with opposing justices addressing each other in unusually personal terms. As a result, [Chief Justice] Roberts looked to the example of his greatest predecessor—Chief Justice John Marshall, who served from 1801 to 1835, for a model of how to rein in a group of unruly prima donnas. “If the Court in Marshall’s era had issued decisions in important cases the way this Court has over the past thirty years, we would not have a Supreme Court today of the sort that we have,” he said. “That suggests that what the Court’s been doing over the past thirty years has been eroding, to some extent, the capital that Marshall built up.” [Chief Justice] Roberts added, “I think the Court is also ripe for a similar refocus on functioning as an institution, because if it doesn’t, it’s going to lose its credibility and legitimacy as an institution.” In particular, [Chief Justice] Roberts declared, he would make it his priority, as [Chief Justice] Marshall did, to discourage his colleagues from issuing separate opinions.²²⁹

The concern Chief Justice Roberts voiced for the U.S. Supreme Court is actually more widespread than perhaps even he realized. It is an aspect, primarily of conservative judicial philosophy, that has found its way to the Wisconsin Supreme Court. At a minimum, steps must be taken to address the problem.

²²⁹ JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 7–8 (2006).