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## Counting to Four: The History and Future of Wisconsin's Fractured Supreme Court

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# MARQUETTE LAW REVIEW

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## COUNTING TO FOUR: THE HISTORY AND FUTURE OF WISCONSIN'S FRACTURED SUPREME COURT

JEFFREY A. MANDELL\* & DANIEL J. SCHNEIDER\*\*

*Over the past decade, the Wisconsin Supreme Court has issued “fractured” opinions—decisions without majority support for any one legal rationale supporting the outcome—at an alarming clip. These opinions have confounded legal analysts, attorneys, and government officials due to their lack of majority reasoning, but also due to their length and the court’s particular procedures for assigning, drafting, and labelling opinions. This has become especially problematic where the court has issued fractured opinions in areas core to the basic functioning of state and local government, leaving the state without clear precedential guidance on what the law is. Yet, virtually no one has analyzed the deeper issues animating this predicament: how fractured opinions in Wisconsin have been handled in the past, what norms surround those choices, and why this problem has become so pronounced.*

*This Article details the history of fractured opinions at the Wisconsin Supreme Court, from the state’s founding to the present, with a particular focus on the past twenty years and the development of the court’s current crisis. With this history in mind, along with (i) foundational principles of state judicial practice and (ii) the shortcomings of the United States Supreme Court’s approach to fractured opinions in *Marks v. United States*, 430 U.S. 188 (1977), a series of potential reforms are proposed. In particular, this Article suggests that the Wisconsin Supreme Court clearly define and explain what this Article*

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*dubs “the Rationale Rule,” that is, the court-adopted principle that a “majority of the participating judges must have agreed on a particular point” of law for precedent to form on that point.*

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## I. INTRODUCTION

In the United States, legal precedent is created by case law that establishes generally applicable, repeatable rules based on shared reasoning. This process of legal accretion is vital to developing the common law, interpreting constitutional and statutory text, and applying prior precedential decisions. The core of our system of adjudication is a constant contest among competing analogies, probing and testing to see what precedent fits most closely and then tailoring that precedent to resolve new questions.

Because our judges are always building on what has come before, the reasoning behind appellate opinions—a collection of rules, sub-rules, foundational principles, and interpretative glosses—forms arguably the most important part of our legal system. This reasoning—the *ratio decidendi* that explains the outcome of a case—provides the analytical skeleton on which an opinion is built. It is vital not only to the parties’ understanding of how the court has resolved their immediate dispute, but also to the application of the court’s methodology in future cases.

Articulating a case’s *ratio decidendi* is not always easy. Chief Justice John Roberts, Jr. famously compared the work of a justice to “call[ing] balls and strikes,” radically understating the variety of paths a justice could theoretically take to decide a given case.<sup>1</sup> Whatever “reasoning” an ump may conjure up to justify a call, the options for responding to a given pitch pretty much always boil down to either “ball” or “strike.”<sup>2</sup> Appellate judges, on the other hand, often have far more leeway to express nuanced and complex disagreements based on diverging interpretations.

Sometimes, however, a high court is not able to agree on the “why” of a decision, in a way that can create problems. The most basic doctrines that undergird our legal system (e.g., *stare decisis*), along with the aspirational principles that guide its development (e.g., offering workable legal rules and standards), depend on concepts of finality and majority rule in the appeals process.<sup>3</sup> If cases end without a clear articulation of why the court ruled as it did, the judges’ failure to cohere around one clear rationale stunts the development of the law and risks creating confusion among parties, lawyers, judges, legislators, regulators, law enforcement, and members of the public.<sup>4</sup>

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1. *Chief Justice Roberts Statement – Nomination Process*, U.S. CTS., <https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process> [<https://perma.cc/ZQW6-HUFV>].

2. *See id.*

3. *See, e.g.*, *State v. Suriano*, 2017 WI 42, ¶ 32, 374 Wis. 2d 683, 893 N.W.2d 543 (rejecting defendant’s attempt to read intent element into statute because that “would not provide a workable standard”); *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 319 (2016) (explaining “the need for workable standards” drives statutory interpretation of a preemption provision); BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 29–30 (1928) (“What has once been settled by a precedent will not be unsettled over night, for certainty and uniformity are gains not lightly to be sacrificed. Above all is this true when honest men have shaped their conduct on the faith of the pronouncement.”).

4. *See* Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 *STAN. L. REV.* 798, 798–801 (2017).

These unfortunate occurrences can best be described as “**fractured**” **opinions**. They usually feature a plurality or a “lead” opinion, joined by one or more concurrences that rely upon different reasoning than the plurality or lead opinion.<sup>5</sup> In every state and in the federal court system, these fractured opinions carry persuasive weight at best, even if their mandates determine the specific outcome in that case.

As a result, appellate judges have every reason to avoid them. The judicial function, per *Marbury v. Madison*, is to “say what the law is.”<sup>6</sup> In striving to perform that function, appellate judges at every level navigate the tension between two competing pressures. On the one hand, if judges want to express their own views, free from the moderating influence of needing to compromise with colleagues, they can write separately. On the other hand, if they want the court’s decision to help build the law and guide future cases, they have an incentive to reach agreements that allow the court to issue cohesive majority opinions with precedential effect.

Currently, the Wisconsin Supreme Court (SCOWIS) is hamstrung by this tension. This is not an attack on individual justices but a description of an apparent institutional problem that has metastasized over the past two decades. Since the beginning of the twenty-first century, the court has failed at a record clip to form true majorities in deciding cases.<sup>7</sup> This problematic trend spawned an all-time record number of fractures in the 2021–22 term.<sup>8</sup> Without a majority voting for a decision on a key point (or points) of law, the future applicability of these decisions is murky at best. Exacerbating the problem, the fractures

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5. In many courts, the opinion signed by the most justices is issued first, whether as a majority or a plurality. That is not the practice at the Wisconsin Supreme Court. According to the court’s Internal Operating Procedures, after a case is argued and the justices meet in conference to discuss it, the drafting of an opinion to decide the case is assigned by lot. WIS. SUP. CT. INTERNAL OPERATING PROC. III(F). Once the assigned justice circulates their draft opinion, other justices can suggest edits, join the opinion, or write separately. If the justice assigned the initial opinion shares views with at least three other justices, then their opinion presumably becomes the court’s majority opinion. If another justice writes separately and their draft draws support from at least three other justices, that may turn out to become the majority opinion. But sometimes, the court fails to cohere around any majority opinion. When that happens, the justice initially assigned the case winds up writing a “lead” opinion, even if there are other concurring opinions that have equal or more support. Consider, for example, *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, where Justice Gableman wrote a “lead” opinion that none of his colleagues joined.

6. 5 U.S. 137, 177 (1803).

7. See *infra* Sections II.A–B.

8. Alan Ball, *The 2021–22 Term: Some More Impressions*, SCOWSTATS (July 18, 2022), <https://scowstats.com/2022/07/18/the-2021-22-term-some-more-impressions/> [<https://perma.cc/VE4Y-JKTF>].

dividing the court are generally not over legal minutiae or technical squabbles among lawyers. Instead, they have often touched on vital issues at the intersection of law and politics—the rights of victims and criminal defendants, the governor’s partial veto authority, pandemic response, judicial deference to decisions of state administrative agencies, and more.<sup>9</sup> Leaving these issues unsettled, even after extensive litigation, undermines the rule of law and creates instability in state government.

To avoid any doubt that these fractures have come to represent an outsized portion of SCOWIS’s decisions, consider data compiled by Alan Ball of Marquette University. Dr. Ball, who has spent years collecting empirical evidence about SCOWIS’s practices, identified the following progression of fractured opinions for the twenty-six years beginning with the 1996–97 term and ending with the 2021–22 term:<sup>10</sup>

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9. See, e.g., *State v. Nimmer*, 2022 WI 47, 402 Wis. 2d 416, 975 N.W.2d 598 (exemplifying a fractured opinion regarding a criminal defendant’s Fourth Amendment rights); *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685 (per curiam) (exemplifying a fractured opinion regarding the governor’s veto powers); *Becker v. Dane Cnty.*, 2022 WI 63, 403 Wis. 2d 424, 977 N.W.2d 390 (exemplifying a fractured opinion regarding a local health officer’s authority to issue public health orders); *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21 (exemplifying a fractured opinion regarding the level of judicial deference owed to state administrative agency decisions).

10. Ball, *supra* note 8.

Table 4. Fractured Decisions as a Percentage of All Decisions

|         | Number of fractured decisions | Total number of decisions filed | Percentage of total that were fractured |
|---------|-------------------------------|---------------------------------|---|
| 2021-22 | 9                             | 52                              | 17.3% (9/52)                            |
| 2020-21 | 2                             | 51                              | 3.9% (2/51)                             |
| 2019-20 | 7                             | 45                              | 15.6% (7/45)                            |
| 2018-19 | 2                             | 58                              | 3.4% (2/58)                             |
| 2017-18 | 4                             | 62                              | 6.5% (4/62)                             |
| 2016-17 | 8                             | 51                              | 15.7% (8/51)                            |
| 2015-16 | 6                             | 43                              | 14% (6/43)                              |
| 2014-15 | 2                             | 54                              | 3.7% (2/54)                             |
| 2013-14 | 1                             | 62                              | 1.6% (1/62)                             |
| 2012-13 | 0                             | 46                              | 0% (0/46)                               |
| 2011-12 | 4                             | 61                              | 6.6% (4/61)                             |
| 2010-11 | 4                             | 61                              | 6.6% (4/61)                             |
| 2009-10 | 1                             | 59                              | 1.7% (1/59)                             |
| 2008-09 | 2                             | 60                              | 3.3% (2/60)                             |
| 2007-08 | 2                             | 70                              | 2.9% (2/70)                             |
| 2006-07 | 1                             | 67                              | 1.5% (1/67)                             |
| 2005-06 | 2                             | 81                              | 2.5% (2/81)                             |
| 2004-05 | 4                             | 98                              | 4.1% (4/98)                             |
| 2003-04 | 1                             | 90                              | 1.1% (1/90)                             |
| 2002-03 | 4                             | 92                              | 4.3% (4/92)                             |
| 2001-02 | 0                             | 89                              | 0% (0/89)                               |
| 2000-01 | 1                             | 93                              | 1.1% (1/93)                             |
| 1999-00 | 1                             | 89                              | 1.1% (1/89)                             |
| 1998-99 | 0                             | 82                              | 0% (0/82)                               |
| 1997-98 | 1                             | 74                              | 1.4% (1/74)                             |
| 1996-97 | 1                             | 85                              | 1.2% (1/85)                             |

This table covers only most of the past three decades. Yet, even a quick review of earlier eras at SCOWIS reveals that the justices not only used to generally write shorter opinions but also wrote dissenting (or concurring) opinions less often. Back in the 1950s (and even earlier), the justices regularly

issued unanimous or near-unanimous decisions in almost all of their cases.<sup>11</sup> Today, that happens less than half of the time.<sup>12</sup>

Far more importantly, the justices rarely ever used to be unable to decide a case clearly by a majority articulating shared reasoning. It takes a fine-toothed comb to locate truly fractured cases in the *Wisconsin Reports* prior to 2000. After 2000, it starts to become easier. After 2010, it's not even hard, with the court issuing thirty-eight fractured opinions since 2015 alone and as many as nine—a new record—in the 2021–22 term.<sup>13</sup>

Local commentators have taken notice, identifying with discomfort the court's growing tendency to fracture.<sup>14</sup> In a 2021 law review article, one commentator plainly laid out the issue and—rightfully—decried the increasing

11. In 1940, “92 percent of Wisconsin Supreme Court decisions were unanimous.” Alan J. Borsuk, *Law School's Schoone Fellow Describes Wisconsin's Legal History in “On the Issues” Program*, MARQ. UNIV. L. SCH. FAC. BLOG (Jan. 31, 2018), <https://law.marquette.edu/facultyblog/2018/01/law-schools-schoone-fellow-describes-wisconsin-legal-history-in-on-the-issues-program/> [https://perma.cc/7FYG-72S9]. Between 1954 and 1958, SCOWIS decided nearly 1,000 cases, of which more than 87% were unanimous and fewer than twenty-seven (2.75%) were decided 4–3. Alan Ball, *Wisconsin Supreme Court Decisions, 1954–55: Decisions by Vote Split*, SCOWSTATS (Nov. 2, 2021), <https://scowstats.com/wp-content/uploads/2021/10/decisions-by-vote-split-1954-55.pdf> [https://perma.cc/9PZ7-T2R3]; Alan Ball, *Wisconsin Supreme Court Decisions, 1955–56: Decisions by Vote Split*, SCOWSTATS (Sept. 25, 2021), <https://scowstats.com/2021/09/25/wisconsin-supreme-court-statistics-1955-56/> [https://perma.cc/JPP3-K7PT]; Alan Ball, *Wisconsin Supreme Court Decisions, 1956–57: Decisions by Vote Split*, SCOWSTATS (July 6, 2021), <https://scowstats.com/2021/07/06/wisconsin-supreme-court-statistics-1956-57/> [https://perma.cc/3NCV-L3JK]; Alan Ball, *Wisconsin Supreme Court Decisions, 1957–58: Decisions by Vote Split*, SCOWSTATS (July 29, 2021), <https://scowstats.com/2021/06/29/wisconsin-supreme-court-statistics-1957-58/> [https://perma.cc/PZ3M-ZTKE].

12. See, e.g., Katelyn Ferral, *The Outlier: Brian Hagedorn Explains Why He Breaks Rank with Other State Supreme Court Conservatives*, CAP TIMES (Dec. 24, 2020), [https://captimes.com/news/local/govt-and-politics/the-outlier-brian-hagedorn-explains-why-he-breaks-rank-with-other-state-supreme-court-conservatives/article\\_771e01d7-9e52-5e30-a8b2-36c9c8ec9432.html](https://captimes.com/news/local/govt-and-politics/the-outlier-brian-hagedorn-explains-why-he-breaks-rank-with-other-state-supreme-court-conservatives/article_771e01d7-9e52-5e30-a8b2-36c9c8ec9432.html) [https://perma.cc/JLP7-FWMJ].

13. Ball, *supra* note 8.

14. See, e.g., Michael Brennan, *Forbush and the Riddle of a Fragmented Court*, ON POINT (May 24, 2011) <https://www.wisconsinappeals.net/on-point-by-the-wisconsin-state-public-defender/guest-post-forbush-and-the-riddle-of-a-fragmented-court/> [https://perma.cc/5RL4-GNKR]; Joseph Kearney, *The Wisconsin Supreme Court: Can We Help?*, MARQ. LAW., Fall 2015, at 48, 48–49; *Wisconsin Supreme Court Faces an Increase in Fractured Decisions*, CROOKS, LOW & CONNELL, S.C. (July 7, 2017), <https://crooks-law.com/wisconsin-supreme-court-increase-fractured-decisions/> [https://perma.cc/WKJ4-P5N2]; Jeffrey A. Mandell & Barbara A. Neider, *Sea Change: No More Great Weight Deference to Administrative Agencies*, STATE BAR WIS. (July 18, 2018), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=10&Issue=12&ArticleID=26460> [https://perma.cc/32A4-5CKE].



frequency with which the court has failed to form majorities in important cases.<sup>15</sup> However, no one has taken a close look at the historical or theoretical foundations for how Wisconsin approaches these fractured opinions.

Thus, this Article marks an original attempt to theorize SCOWIS's approach to fractured opinions and to identify the legal norms fundamental to Wisconsin's common-law system. We aim to offer judges and practitioners alike a sensible way to interpret and apply the court's fractured opinions. Even further, we genuinely hope these words reach the justices themselves and that they make a concerted effort to reconsider the court's approach to decision-making in light of the history and legal theory set out below. Whatever you think about the court's recent run of fractured decisions, in *every* case the court indisputably owes the public an answer to the all-important question: *why*? If it really is, as Chief Justice Marshall wrote, "the duty of the Judicial Department to say what the law is," then Wisconsinites ought to be worried.<sup>16</sup> Because the state's highest court isn't always meaningfully saying "what the law is," and often when the stakes are highest.<sup>17</sup>

This Article proceeds as follows: Part II discusses the history of SCOWIS's fractured appellate opinions and compares its issue-by-issue approach to interpreting these cases—which we dub **the Rationale Rule**—to the U.S. Supreme Court's mandate-focused approach.<sup>18</sup> We also discuss the justices' recent problem of writing (or rather, overwriting) seriatim opinions that too often obscure more than they illuminate. Part III sets out the theory behind and elements of the Rationale Rule, then uses this theory to make proposals for how SCOWIS could self-regulate to address its fracturing problem.

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15. Skylar Reese Croy, *The Demise of the Law-Developing Function: A Case Study of the Wisconsin Supreme Court*, 26 SUFFOLK J. TRIAL & APP. ADVOC. 1, 21–22 (2021).

16. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

17. The justices understand the consequences of these majority-less opinions, repeatedly asserting that they have no precedential value. *See, e.g.*, *Sanders v. State of Wis. Claims Bd.*, 2023 WI 60, ¶ 33, 408 Wis. 2d 370, 992 N.W.2d 126; *Town of Madison v. Cnty. of Dane*, 2008 WI 83, ¶ 48 n.5, 311 Wis. 2d 402, 752 N.W.2d 260 (Roggensack, J., dissenting); *Pitts v. Tr. of Kneuppel*, 2005 WI 95, ¶ 57 n.12, 282 Wis. 2d 550, 698 N.W.2d 761; *Landis v. Physicians Ins. Co. Wis.*, 2001 WI 86, ¶ 65, 245 Wis. 2d 1, 628 N.W.2d 893 (A.W. Bradley, J., concurring); *Ives v. Coopertools, Div. of Cooper Indus., Inc.*, 208 Wis. 2d 55, 58, 559 N.W.2d 571 (1997) (per curiam).

18. In the interest of full disclosure: Mr. Mandell, one of the Authors, worked on several of the cases discussed in Section II.B.2 and elsewhere. The contents of this Article represent his own views and not those of his clients, colleagues, or law firm.

## II. BACKGROUND

SCOWIS has instructed lower courts that, when confronted with a fractured opinion, they should apply the rule that a “majority of the participating judges must have agreed on a particular point” of law for precedent to form on that point.<sup>19</sup>

This is the core of the Rationale Rule. The justices have never defined the contours of the Rationale Rule beyond the above-quoted statement of law. Read all of the cases you like, but you’ll not find a single opinion clearly defining what “a particular point” of law means; what it means to “agree”; why Wisconsin courts chose this approach to fractured decisions over trying out SCOTUS’s “narrowest grounds” approach (discussed in Section II.D, *infra*); or whether the Rule should apply differently in different situations (e.g., an appeal from a lower-court decision versus an original action). However, the case law provides ample material for us to understand how SCOWIS arrived at this moment.

This Part of the Article traces the history of SCOWIS’s approach to fractured opinions. Given the paucity of opinions—or even law review articles—addressing the Rationale Rule and the norms supporting its application, arguments about how it should be applied remain somewhat “up for grabs.” We attempt to elaborate on the theoretical outlines of the Rationale Rule, and the concepts that underlie it, in the next Part. But we cannot begin to discuss how SCOWIS can pull out of its current rut until we understand how it got there.

One final aside before diving in. As you may notice, this Article avoids getting too deep into the weeds of any given case. This is by design. The problem of fractured opinions is not limited to a single area of law and, as we show, has cropped up in cases dealing with everything from the rights of fishermen to the Confrontation Clause to gerrymandering. To address fractured opinions as a concept, we have done our best to distill each case and its attendant fracture down to the briefest explanation possible, without getting bogged down in the details. (Given the variety and complexity of issues involved in this area, and the amount of labor needed to divine meaning from these often-lengthy fractured opinions, we promise it’s better this way.)

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19. *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995) (citing *State v. Dowe*, 120 Wis. 2d 192, 194–95, 352 N.W.2d 660 (1984) (per curiam)).

A. Wisconsin's Era of Infrequent Fractured Opinions, 1848–2000

i. Origins

For the first century and a half of Wisconsin jurisprudence, fractured decision-making seems to have been a relative non-issue. Across the sixty-thousand-plus cases addressed by SCOWIS since the state's founding through the end of the twentieth century, the justices issued their fair share of dissents and concurrences. These side opinions virtually never had an appreciable effect on the cohesion of the high court's rulings. In nearly every case, a majority ruled, and by all appearances that was that.<sup>20</sup>

That base level of agreement may have been born from necessity as much as judicial convention. With SCOWIS originally comprising only three justices—until the court's size was increased to five members in 1877, then seven in 1903—there was minimal room for error in forming an identifiable majority.<sup>21</sup> Consider what happened in *Lathrop v. Knapp*, an 1870 contracts case where Chief Justice Luther S. Dixon and Justice Orasmus Cole diverged in their decision and reasoning.<sup>22</sup> Because Justice Byron Paine had not participated in the case, the decision was 1–1, and “[u]pon a division of opinion between the . . . two [sitting] members of the court, the order of the circuit court was affirmed.”<sup>23</sup> This not only states a common rule of appellate practice that SCOWIS still follows—tie votes affirm lower-court decisions—but also hints at an early incentive for SCOWIS to decide cases by a clear majority.<sup>24</sup>

Notably, in two landmark cases the justices made the task more difficult. One was the original decision in *In re Booth*, part of a series of famous cases

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20. See, e.g., *Slauson v. Racine*, 13 Wis. 398, 405 (1861) (Justice Cole concurring in the judgment); *Harrington v. Smith*, 28 Wis. 43, 72 (1871) (Justice Lyon “concur[s]” without further elaboration; Justice Cole “dissent[s]” without further elaboration); *Curtis’s Adm’r v. Whipple*, 24 Wis. 350, 356 (1869) (Justice Paine “assent[s] to the decision of the court” though openly doubting its “correctness”); *Clark v. City of Janesville*, 10 Wis. 136, 185 (1859) (Justice Dixon “fully concur[s]” with majority without elaboration; Justice Cole dissents); *Hogan v. State*, 30 Wis. 428, 442–43 (1872) (Justice Cole “concur[s]” without further elaboration; Justice Dixon dissents).

21. WIS. SUP. CT., PORTRAITS OF JUSTICE: THE WISCONSIN SUPREME COURT’S FIRST 150 YEARS, at vii (Trina E. Gray, Karen Leone de Nie, Jennifer Miller & Amanda K. Todd eds., 2d ed. 2003), <https://www.wicourts.gov/courts/supreme/docs/portraitsjustice.pdf> [<https://perma.cc/52G3-C3F6>].

22. 27 Wis. 214, 214–15 (1870).

23. *Id.* at 238.

24. See, e.g., *State v. Lynch*, 2016 WI 66, ¶ 87 n.1, 371 Wis. 2d 1, 885 N.W.2d 89; *Nelson v. Fairchild & NER Co.*, 163 Wis. 300, 306, 156 N.W. 943 (1916).

involving Wisconsin's attempt to nullify the Fugitive Slave Act.<sup>25</sup> The other was the court's decision in *In re Kemp*, a case about the application of President Lincoln's order suspending the writ of habeas corpus during the Civil War.<sup>26</sup> These cases are interesting for at least two reasons beyond their historical significance. First, they saw the justices deliver their opinions seriatim, that is, according to the old English practice of each justice delivering a separate opinion from which future rules of law are divined.<sup>27</sup> Chief Justice John Marshall informally abolished the practice of seriatim opinions at SCOTUS in 1801, so that the Court could attempt to speak to the fledgling nation clearly and with one voice.<sup>28</sup> By all appearances, this approach was utilized in Wisconsin the vast majority of the time, with the justices only rarely choosing to pen lengthy opinions that neither dissented nor elaborated on the majority's ruling.<sup>29</sup> Second, foreshadowing the court's approach to high-profile cases 150 years later, both *Booth* and *Kemp* involved dire questions of the utmost national importance, and, in both cases, the justices chose to each speak their piece rather than have a single majority opinion state the court's view, though neither case featured fractured reasoning.<sup>30</sup>

Despite the justices' overwhelming tendency towards unanimity, SCOWIS's first years did see a few opinions that could be considered

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25. 3 Wis. 157 (1854).

26. 16 Wis. 359 (1863).

27. Ronald D. Rotunda, *The Fall of Seriatim Opinions and the Rise of the Supreme Court*, VERDICT (Oct. 9, 2017), <https://verdict.justia.com/2017/10/09/fall-seriatim-opinions-rise-supreme-court> [<https://perma.cc/K6VM-XANJ>].

28. John F. Davis & William L. Reynolds, *Judicial Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 60.

29. *But see* State *ex rel.* Weiss v. Dist. Bd. of Sch. Dist. No. 8, 76 Wis. 177, 203, 217, 44 N.W. 967 (1890) (Cassoday, J., concurring) (noting that while "[t]he writing of the formal opinion has fallen to the lot of Mr. Justice Lyon[,] [a]t his suggestion, a separate presentation of one branch of the case is made here," even though "[t]he unanimous result of our deliberations is as directed by Mr. Justice Lyon"); State *ex rel.* Att'y Gen. v. Cunningham, 81 Wis. 440, 486, 51 N.W. 724 (1882) (noting in the majority opinion that "[t]he decision of the court is unanimous" but that two of the other justices will write separate opinions, with said justices then setting out those opinions seriatim); Foster v. Gile, 50 Wis. 603, 609, 7 N.W. 555 (1880) (Cassoday, J., concurring).

30. *In re Booth*, 3 Wis. at 175, 216 (noting that Justice Smith and Chief Justice Whiton "concur" in Justice Crawford's opinion without reservation); *In re Kemp*, 16 Wis. at 367, 375, 382 (agreeing in separate writings that President Lincoln's suspension of habeas corpus was not valid and required an act of Congress).

“fractured.”<sup>31</sup> One may be the 1898 case *Willow River Club v. Wade*.<sup>32</sup> There, a property owner sued a fisherman for trespass, claiming he had no right to fish in waters adjacent to privately owned land.<sup>33</sup> Four of five justices held that the fisherman had a right to fish in the stream, but a close look at the opinions reveals a 2–2 split in their reasoning.<sup>34</sup> For two justices, the right to fish in a public waterway was adjacent to the right of navigation; but two others reasoned that the right to fish in a waterway was a right in and of itself.<sup>35</sup> Either approach compelled the same result, so the court held in favor of the fisherman.<sup>36</sup> However, the issue of how this might affect future cases was left undecided, and no opinion addressed this tension in the justices’ reasoning. (Later on, there may have been some confusion about which proposition *Willow River* stood for.<sup>37</sup>)

Still, since fracturing was rare in SCOWIS’s early years, there was little effort to define what these splits meant, or what rules applied when various justices’ overlapping opinions failed to produce a majority decision with a clear *ratio decidendi*.<sup>38</sup> That is, until 1908, when SCOWIS was asked to rule in a case involving a disputed will. *In re McNaughton’s Will* is prototypical of the

31. See also, e.g., *Smith v. Lewis*, 20 Wis. 350 (1866); *State ex rel. Hickox v. Widule*, 166 Wis. 113, 115, 163 N.W. 648 (1917) (reversing lower-court opinion even though “no four justices agreed upon the reason for their conclusions,” in a case with a brief majority opinion and two longer concurrences, composing a split—if not fractured—five-justice majority).

32. 100 Wis. 86, 76 N.W. 273 (1898).

33. *Id.* at 86.

34. *Id.* at 103, 118.

35. Compare *id.* at 102 (“The question recurs whether the public right of fishery is included in, or an incident of, such public right of navigation.”), with *id.* at 103–04 (Marshall, J., concurring) (discussing Justice Marshall’s belief that “the right of fishing in navigable waters is common to all,” but he “regard[s] the opinion of the chief justice as being so framed as to lead to the belief that the common right of fishing in navigable streams in this state is a mere incident to the right of navigation”).

36. *Id.* at 103.

37. Compare *Diana Shooting Club v. Husting*, 156 Wis. 261, 145 N.W. 816 (1914) (referring to “navigation” and “fishing” as separate public rights), and *Rossmiller v. State*, 114 Wis. 169, 89 N.W. 839 (1902) (same), with *State v. Sutherland*, 166 Wis. 511, 521–22, 166 N.W. 14 (1918) (referring to “the public right of navigation with all its incidents”), and *Nekoosa Edwards Paper Co. v. R.R. Comm’n*, 201 Wis. 40, 46, 228 N.W. 144 (1930) (“Being navigable, the public may use it for the public rights incidental thereto of hunting, fishing, or pleasure boating.”).

38. In Wisconsin, as elsewhere, the *ratio decidendi* generally refers to the reasoning on which a decision is based, to the exclusion of extraneous and unnecessary matters. See, e.g., *Pleasant Prairie v. Dep’t of Loc. Affs. & Dev.*, 113 Wis. 2d 327, 343, 334 N.W.2d 893 (1983) (referring to the court’s reconsideration of two earlier cases as “not relevant to the *ratio decidendi* of this case”); *State v. Koput*, 142 Wis. 2d 370, 386, 418 N.W.2d 804 (1988) (dismissing a statement in a prior case as “irrelevant to the *ratio decidendi* of the case”).

disputed-will genre.<sup>39</sup> An elderly woman left most of her estate to a Minnesota college, and her heirs tried to get the will invalidated, claiming their grandmother lacked mental capacity and had been the victim of undue influence.<sup>40</sup> At trial, the judge decided that the heirs had not met their burden as to either issue (diminished capacity or undue influence).<sup>41</sup> On appeal, SCOWIS agreed—sort of.

Three justices voted to affirm the lower court; two voted to reverse on both issues; and one justice each voted to reverse only on the issues of mental capacity or undue influence.<sup>42</sup> Thus, a clear majority believed the trial court erred and the will was invalid, but, in the absence of a majority agreement to reverse *as to a specific legal issue*, the court deemed itself obliged to uphold the trial court's judgment.<sup>43</sup> "A majority must agree on some one specific ground of error fatal to the judgment or it must be affirmed. Otherwise, there would be a reversal without any guide for the trial court upon a new hearing."<sup>44</sup>

It is hard to argue against that logic. If the court cannot clearly identify *why* the trial court got it wrong the first time, what specifically is the trial court to do differently next time? (Though, as we explore in the next Part, the rigid application of this rule can lead to deeply problematic outcomes in other contexts, like criminal appeals.)

This issue-based approach to divided reasoning appears to have been consistent with SCOWIS's past practice. Nearly fifty years before *McNaughton's Will*, the court was called to address a judgment for a defendant in a contract case, *Ford v. Mitchell*.<sup>45</sup> There, defendant had sold plaintiff a debt for a \$176 certificate of deposit issued by a "hopelessly insolvent" bank, and plaintiff sued defendant to recover the money.<sup>46</sup> Chief Justice Luther S. Dixon's opinion held that the contract was enforceable as a non-negotiable instrument, based on the original consideration offered for the debt.<sup>47</sup> However, the opinion went further, commenting on various other contract-law issues that Dixon believed merited a reversal in their own right.<sup>48</sup> Unfortunately for him, brief

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39. 138 Wis. 179, 118 N.W. 997 (1908).

40. *Id.* at 183.

41. *Id.* at 188.

42. *Id.* at 190.

43. *Id.* at 191.

44. *Id.*

45. 15 Wis. 304 (1862).

46. *Id.* at 307.

47. *Id.* at 308.

48. *Id.* at 308–10.

concurrences by Justices Paine and Cole disclaimed all of these other conclusions. They agreed only that the contract could be enforced “for the original consideration,” and nothing more.<sup>49</sup>

Although never stated explicitly, the court apparently treated *Ford*'s holding as limited to the bounds of what the concurrences signed onto. Future cases citing *Ford* did not rely on it as authority for any proposition broader than the holding supported by all three justices.<sup>50</sup> (The same was true in *Wright v. Sperry*, where a concurrence by Justice Cole appears to have denied one of the three conclusions in a “majority” opinion force of law, merely by Cole saying he had “not examined [it] sufficiently to express an opinion upon it.”<sup>51</sup>) That makes sense: What point would there have been for the other two justices to issue these concurring opinions at all, if a single justice's opinion could bind the court as to every issue it discussed, even without the consent of that justice's colleagues?

## ii. Mid-Twentieth-Century Developments

So far as we can tell, SCOWIS had few opportunities to develop its approach to fractured decisions over the next several decades and many thousands of cases. Indeed, during the middle of the twentieth century the court was able to form strong—often unanimous—majorities in virtually every case it heard.<sup>52</sup> Even in the court's 4–3 decisions, the majority opinions were almost always just that—majorities without qualification. (Though in at least sixty-three cases between 1910 and 1980, the court divided evenly after one justice recused.<sup>53</sup>)

During this period, Wisconsin's judiciary underwent a dramatic structural change. In 1959, the legislature abolished Wisconsin's special courts to create a uniform system of jurisdiction and procedure for the entire state.<sup>54</sup> In 1977,

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49. Compare *id.* at 308–10, with *id.* at 310 (Paine, J., concurring), and *id.* at 310 (Cole, J., concurring).

50. See, e.g., *Wagener v. Old Colony Life Ins. Co.*, 170 Wis. 1, 5, 172 N.W. 729 (1919); *Willow River Lumber Co. v. Luger Furniture Co.*, 102 Wis. 636, 638, 78 N.W. 762 (1899); *Challoner v. Boyington*, 83 Wis. 399, 408, 53 N.W. 694 (1892).

51. Compare *Wright v. Sperry*, 21 Wis. 331, 339 (1867), with *Burchard v. Roberts*, 70 Wis. 111, 119, 35 N.W. 286 (discussing *Wright*, 21 Wis. 331).

52. See *supra* note 11.

53. See *Smith v. Kleynerman*, 2017 WI 22, 374 Wis. 2d 1, 892 N.W.2d 734, Attachments A–B (Abrahamson, J., concurring).

54. *History of the Courts*, WIS. CT. SYS., <https://www.wicourts.gov/courts/history/index.htm> [<https://perma.cc/Y5JY-TYX7>].

Wisconsin voters ratified a state-constitutional amendment creating an intermediate court of appeals between the circuit courts and SCOWIS.<sup>55</sup> Down the road, this would “dramatically” lower the justices’ caseload and give them greater discretion over which cases to accept on appeal.<sup>56</sup>

However, much like the U.S. Supreme Court’s own mid-twentieth-century drift in favor of concurring opinions, during the 1960s and 1970s SCOWIS’s justices appear to have become increasingly willing to offer up opinions that meaningfully elaborated on or diverged from the majority’s thinking.<sup>57</sup> Meanwhile, even as the vast majority of SCOWIS’s decisions during this period featured majority-supported reasoning, the court also began to show signs of jurisprudential cracking.

For example, there was *State v. Midell*, a criminal case where a defendant allegedly sold \$20 worth of marijuana to an undercover cop but was not charged until one year later.<sup>58</sup> While a three-justice opinion concluded that “a statute of limitations is not the sole standard by which delay between offense and arrest is to be measured,”<sup>59</sup> Justices Horace Wilkie and Nathan Heffernan argued in separate writings that the lead opinion failed “to state any criteria for determining when a delay . . . in prosecution amounts to a denial of due process.”<sup>60</sup> As such, Wilkie and Heffernan concurred in the judgment denying

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55. *Id.*

56. See, e.g., Ann Walsh Bradley & Joseph A. Ranney, *New Cases and Changing Faces: The Wisconsin Supreme Court in 2003*, WIS. MAG. OF HIST., Spring 2003, at 2, 4–5.

57. Thomas B. Bennett, Barry Friedman, Andrew D. Martin & Susan Navarro Smelcer, *Divide & Concur: Separate Opinions & Legal Change*, 103 CORNELL L. REV. 817, 833 (2018) (discussing a staggering increase in U.S. Supreme Court Justices’ rate of issuing concurring and dissenting opinions beginning in the 1930s); *id.* at 860 (documenting collapse of “acquiescence” to majority opinion in the twentieth century and noting that “[i]t turns out the Justices had been *intentionally suppressing* their disagreement from public view in order to present a unified face”); see also Jeffrey Rosen, *Roberts’s Rules*, ATLANTIC (Jan. 2007), <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/> [<https://perma.cc/7W64-EHUC>] (noting Chief Justice Roberts stated that “nowadays . . . everybody has to have their say”); see also, e.g., *State v. Reynolds*, 28 Wis. 2d 350, 361, 364, 137 N.W.2d 14 (1965); *Madison v. Geier*, 27 Wis. 2d 687, 698, 135 N.W.2d 761 (1965); *Virgil v. State*, 84 Wis. 2d 166, 194, 267 N.W.2d 852 (1978); *Schmidt v. Chapman*, 26 Wis. 2d 11, 27, 131 N.W.2d 689 (1964); *In re Reynolds*, 58 Wis. 2d 424, 426, 206 N.W.2d 428 (1973).

58. 40 Wis. 2d 516, 520, 162 N.W.2d 54 (1968).

59. *Id.* at 521.

60. *Id.* at 528 (Wilkie, J., concurring).



Midell's due process claim but explicitly proposed a standard for future delayed-prosecution cases, one the lead opinion did not mention.<sup>61</sup>

The clearest fracture came in a 1966 case dealing with the appropriate jury instruction for the insanity defense. In *State v. Shoffner*, the court splintered in a confusing way.<sup>62</sup> Four justices voted to uphold the constitutionality of Wisconsin's take on the classic common-law definition of insanity.<sup>63</sup> (That definition required that "at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know what he was doing was wrong."<sup>64</sup>) However, a different configuration of four justices (including two in the so-called "majority," Wilkie and E. Harold Hallows) voted to allow Wisconsin's longstanding instruction to be used *only if* the trial court gave the defendant the option to use a more lenient definition written by the American Law Institute.<sup>65</sup>

The fracture in this case arose because, in a concurring opinion, Justice Wilkie stated that he would find the use of Wisconsin's longstanding jury instruction to be "reversible error"—that is, the use of the instruction would deprive the defendant of the fair trial guaranteed by the state and federal constitutions.<sup>66</sup> No other opinion addressed the apparent contradiction in Justice Wilkie's concurrence, in which he signed onto the majority's result of allowing alternative jury instructions, but then explicitly stated that he believed one of those instructions to be illegitimate. Perhaps it was because SCOWIS recognized the concept of dicta at the time and viewed concurrences like this as only so much wasted ink and paper.<sup>67</sup> Perhaps it was easier to let the matter

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61. *Id.*; see also, e.g., *State v. Wilson*, 77 Wis. 2d 15, 29, 252 N.W.2d 64 (1977) (C. Hansen, J., concurring) (declining, explicitly, to agree with a three-justice lead opinion's "reasoning" while concurring in the result).

62. 31 Wis. 2d 412, 427–28, 143 N.W.2d 458 (1966).

63. *Id.* at 424–25.

64. M'Naghten's Case, 8 Eng. Rep. 718, 722 (HL 1843).

65. *Shoffner*, 31 Wis. 2d at 427. The key difference between the two definitions of insanity, aside from their actual formulations, was that the traditional definition placed a somewhat heavier burden of *disproving* insanity on the state while the ALI definition placed a somewhat lighter burden of *proving* insanity on the defendant. *Id.* at 425–26.

66. *Id.* at 435 (Wilkie, J., concurring).

67. In the 2010 case *Zarder v. Humana Insurance Co.*, 2010 WI 35, ¶¶ 51–58, 324 Wis. 2d 325, 782 N.W.2d 682, the court unanimously held that a lower court may not dismiss language in a prior supreme court opinion as "dicta." However, the court has also said that "[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court

slide and, hopefully, be resolved in a future case. Whatever the reason, *Shoffner* hardly represents the apex of clarity and cohesion in Wisconsin judicial history.<sup>68</sup>

The few fractures of this era were not limited to criminal cases.<sup>69</sup> In *Knutter v. Bakalarski*, a volunteer fire chief was hit by a car while crossing a highway in response to a call about a grass fire.<sup>70</sup> The call turned out to be a false alarm.<sup>71</sup> The fire chief, Knutter, sued the driver of the car.<sup>72</sup> The trial court denied Knutter's request for a jury instruction that would have applied a lower standard of care to him based on his profession, since at the time of the accident, he was a fire chief responding to a potential (if false) emergency.<sup>73</sup> The trial court instructed the jury to apply an "ordinarily prudent man" standard to assess Knutter's own negligence, and the jury found against him.<sup>74</sup>

On appeal, SCOWIS ruled that the jury instruction on Knutter's negligence was reversible error, albeit with an unmistakable fracture.<sup>75</sup> A three-justice plurality held that the court should have instructed the jury to assess Knutter's negligence in the context of what "an ordinarily prudent workman" in his profession would have done.<sup>76</sup>

But Justice Robert W. Hansen chastised this approach, in an opinion whose tone and substance ring more like a dissent than a concurrence:

'Rich man, poor man, beggar man, thief. Doctor, lawyer,  
fireman chief.' So, or nearly so, rope-skipping youngsters once  
were wont to chant. What if the seven mentioned in the rhyme

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case." *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). The state of play appears to be that "dicta" does not exist as a concept for lower courts, and SCOWIS alone may ultimately decide whether prior language in an opinion was "germane" to the decision, such that it is binding. *Brandenburg v. Briarwood Forestry Servs.*, 2014 WI 37, ¶ 66 n.2, 354 Wis. 2d 413, 847 N.W.2d 395 (Abrahamson, C.J., dissenting).

68. Upon remand, Shoffner elected to use the ALI standard. However, another dispute arose over whether he had a constitutional right to a bifurcated trial that addressed his guilt and his insanity claim separately. *See State ex rel. La Follette v. Raskin*, 34 Wis. 2d 607, 613, 150 N.W.2d 318 (1967). This second opinion made no mention of the apparent fracture in the first case.

69. *See Knutter v. Bakalarski*, 52 Wis. 2d 751, 191 N.W.2d 235 (1971); *see also, e.g., Sec. Sav. & Loan Ass'n v. Wauwatosa Colony, Inc.*, 71 Wis. 2d 174, 185, 237 N.W.2d 729 (1976) (R. Hansen, J., concurring in part and dissenting in part).

70. 52 Wis. 2d at 753–54.

71. *Id.* at 760.

72. *Id.* at 752.

73. *Id.*

74. *Id.* at 753–55.

75. *Id.* at 759.

76. *Id.*

set out to walk across a public highway? What degree of care must each or all exercise in taking the walk or crossing the road? . . . [I]t seems clear that the creation of varying standards of due care for particular professions or occupations will not end with the recognition of the special circumstance of a firefighter responding to an alarm.<sup>77</sup>

Hansen would have held the “ordinarily prudent man” jury instruction insufficient because it “did not adequately inform the jury that what the plaintiff fire chief was engaged in doing at the time was among the *circumstances* they were to consider.”<sup>78</sup> This is a different standard altogether than the majority adopted. Yet, as with *Shoffner*, the apparent discrepancy in the justices’ reasoning went unaddressed. While we do not know what happened in *Knutter* on remand, future contributory-negligence cases cited it as a “majority” decision without qualification.<sup>79</sup>

### iii. Rise of the Rationale Rule, 1980–2000

Overall, Wisconsin’s first hundred-plus years of jurisprudence provides key clues, if few decisive answers, about SCOWIS’s approach to irreconcilable division at the high court. Cases like *McNaughton’s Will*, *Ford*, and *Wright* show a longstanding issue-by-issue approach to judicial decision-making that requires a true majority rationale to decide a case. The relative paucity of seriatim opinions suggests that, in all but exceptional cases, the court sought to speak with one voice and avoid confusion through long concurrences that only elaborate on, and don’t suggest an actual disagreement with, the majority opinion. Finally, cases such as *Willow River*, *Shoffner*, and *Knutter* suggest that the justices were, on exceptional occasions, willing to decide a case despite lacking support for a single *ratio decidendi*.<sup>80</sup> (These cases stand in tension with *McNaughton’s Will* and *Ford*, along with—as we discuss below—fundamental norms of Wisconsin judicial practice.)

The problem of fractured opinions started to come into sharper relief in the mid-1980s. In *State v. Dowe*, a criminal defendant moved to force the State to

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77. *Id.* at 759–60 (R. Hansen, J., concurring).

78. *Id.* at 762–63.

79. *Walsh v. Wild Masonry Co.*, 72 Wis. 2d 447, 453, 241 N.W.2d 416 (1976); *Nimmer v. Purtell*, 69 Wis. 2d 21, 31, 230 N.W.2d 258 (1975); *Bourassa v. Gateway Erectors, Inc.*, 54 Wis. 2d 176, 183, 194 N.W.2d 602 (1972).

80. *See also State ex rel. Hickox v. Widule*, 166 Wis. 113, 163 N.W. 648 (1917) (fractured opinion).

disclose the identity of a confidential informant.<sup>81</sup> The trial judge, applying a plurality opinion from an earlier case, found the State's refusal to do so a sufficient basis to dismiss the prosecution.<sup>82</sup> But on appeal SCOWIS clarified that the earlier case—*State v. Outlaw*—did not mandate this result, because the case had featured a four-justice concurrence proposing a different test for requiring the disclosure of an informant's identity.<sup>83</sup>

The *Dowe* court's per curiam opinion went on to assert as follows, in language referenced by virtually every Wisconsin court thereafter to confront a fractured opinion:

It is a general principle of appellate practice that a majority must have agreed on a particular point for it to be considered the opinion of the court. . . . Numerous cases have expressly held that a concurring opinion becomes the opinion of the court when joined in by a majority. . . . In *Outlaw*, the lead opinion represents the majority and is controlling on the issues of the state's burden and the existence of abuse of discretion by that circuit court. However, the concurring opinions represent the majority on the issue of the test to be applied and therefore control on this point.<sup>84</sup>

In 1985, in the criminal case *State v. Gustafson*, the court faced a similar problem as in the *McNaughton's Will* case discussed above, but with higher stakes.<sup>85</sup> The specifics of *Gustafson* are not particularly important. Just know that a person was convicted of a crime and then appealed based on two alleged evidentiary errors.<sup>86</sup> In 1984, SCOWIS reversed the conviction and ordered a new trial.<sup>87</sup> But on a motion for reconsideration in 1985, the court issued a per curiam opinion vacating its earlier decision and affirming *Gustafson's* conviction.<sup>88</sup>

The court's 1984 decision had "failed to agree on one specific ground of error fatal to the . . . conviction."<sup>89</sup> Two justices believed one error merited reversal; two others believed a different error merited reversal; and three voted

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81. *State v. Dowe*, 120 Wis. 2d 192, 193, 352 N.W.2d 660 (1984) (per curiam).

82. *Id.*

83. *Id.* at 194–95 (citing *State v. Outlaw*, 108 Wis. 2d 112, 321 N.W.2d 145 (1982)).

84. *Id.*

85. 121 Wis. 2d 459, 359 N.W.2d 920 (1985) (per curiam).

86. *Id.* at 460.

87. *State v. Gustafson*, 119 Wis. 2d 676, 350 N.W.2d 653 (1984).

88. *Gustafson*, 121 Wis. 2d at 459–60.

89. *Id.*

to uphold the conviction.<sup>90</sup> Citing *McNaughton's Will*, the court reasoned that “a majority must agree on some one specific ground of error fatal to the judgment, or the judgment must be affirmed.”<sup>91</sup> (The court also explicitly distanced itself from the U.S. Supreme Court’s approach to similar types of fractured opinions in criminal cases.<sup>92</sup>)

It is deeply uncomfortable—and arguably at odds with basic notions of due process—for a state supreme court to uphold a conviction where a majority of justices deemed the trial unconstitutional.<sup>93</sup> Justice Shirley Abrahamson, dissenting in *Gustafson*, argued that following *McNaughton's Will* was erroneous because “in a criminal case in which a liberty interest is involved . . . greater care must be taken to safeguard the individual’s rights,” given the possibility of a false conviction.<sup>94</sup> “There is something ‘fundamentally unfair for a court majority to declare, on the one hand, that there was unfairness below, but to refuse, on the other, to do anything about it’” in derogation of its duties to the litigants.<sup>95</sup>

Yet, there is arguably a practical upside to the approach: had SCOWIS ordered a new trial for *Gustafson*, it would have needed to identify what error the judge made in the first trial to ensure that the second trial proceeded without repeating the error. How could it do this when, for each of the two alleged evidentiary errors, five of the seven justices believed that the circuit court had ruled correctly? Although *Gustafson*’s result is arguably unjust, it could at least be implemented in practice. That may be why the U.S. Supreme Court declined *Gustafson*’s request that it review SCOWIS’s affirmance of his conviction.<sup>96</sup>

Taken together, *Dowe* and *Gustafson* reinforced the basic premise of majority rule on Wisconsin’s high court and created the modern foundations of the Rationale Rule. Still, a fully theorized and well-developed approach to fractured decisions was not truly necessary for SCOWIS during this period. Through the 1980s and 1990s, the court continued to decide the vast majority of its cases by a clear majority, almost never fracturing.

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90. *Id.* at 460.

91. *Id.* at 461.

92. *Id.* at 461–62.

93. See *Frank v. Magnum*, 237 U.S. 309, 347 (1915) (Holmes, J., dissenting) (“Whatever disagreement there may be as to the scope of the phrase ‘due process of law,’ there can be no doubt that it embraces the fundamental conception of a fair trial.”).

94. *Gustafson*, 121 Wis. 2d at 465 (Abrahamson, J., dissenting).

95. *Id.* at 466 n.2 (quoting David P. Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A. L. REV. 299 (1984)).

96. *Gustafson v. Wisconsin*, 471 U.S. 1056 (1985) (denying certiorari).

One key test for the doctrine came in a series of late-1990s cases about a state “statute of repose”—a type of law that, similar to a statute of limitation, restricts the time within which an injured person may initiate a lawsuit. In *Estate of Makos v. Wisconsin Masons Health Care Fund*, the court decided that a medical malpractice lawsuit was not foreclosed by Wisconsin’s statute of repose.<sup>97</sup> Three justices found the statute of repose, as applied to the facts of the case, violated the Due Process Clause of the U.S. Constitution and article I, section 9 of the Wisconsin Constitution.<sup>98</sup> Adding to the confusion, a fourth justice concurred with the result that the plaintiff’s lawsuit be allowed to proceed, but he utilized a statutory argument to conclude that the statute of repose didn’t bar the claims in this case, without reaching the constitutional questions.<sup>99</sup>

Where did that leave the court? Confused and debating the meaning of *Makos*. In 1997, the court acknowledged that “none of the [*Makos*] opinions . . . has any precedential value,” but the court continued to argue about *Makos*’s meaning in various cases over the next couple of years.<sup>100</sup> Finally, in 2000, the court clarified *Makos* by overruling it altogether, with a majority holding that the statute of repose did not violate any state or federal constitutional provision.<sup>101</sup> The dissenters were not happy.<sup>102</sup> (When is a dissenter ever happy?) Still, at least this question was settled, with a clear rule that lower courts, lawyers, and prospective plaintiffs could follow.

While the court issued several other fractured opinions during this period, as it occasionally did during the prior 150 or so years, they remained a rarity. Unfortunately, a shift was lurking just around the corner.

In hindsight, given the run of fractured SCOWIS opinions that was to come in the twenty-first century, the 2000 case *Vincent v. Voight* may now be seen as a warning beacon.<sup>103</sup> The constitutionality of Wisconsin’s school-funding regime was litigated repeatedly in the latter half of the twentieth century, with the justices trying and failing to address the question with finality in 1976 and

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97. 211 Wis. 2d 41, 564 N.W.2d 662 (1997).

98. *Id.* at 54.

99. *Id.* at 55 (Bablitch, J., concurring).

100. *Doe v. Archdiocese*, 211 Wis. 2d 312, 334 n.11, 565 N.W.2d 94 (1997); *see also, e.g.*, *Tomczak v. Bailey*, 218 Wis. 2d 245, 276, 279, 281, 285, 578 N.W.2d 166 (1998) (debating the meaning of *Makos*’s non-majority ruling in three concurring opinions and a dissent).

101. *Aicher v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶¶ 32–40, 237 Wis. 2d 99, 613 N.W.2d 849.

102. *Id.* ¶¶ 86–93 (Crooks, J., dissenting).

103. 2000 WI 93, 236 Wis. 2d 588, 614 N.W.2d 388.

1989.<sup>104</sup> (Both opinions show signs of fracturing, with the latter containing a clear fracture in the rationale for rejecting the petitioner's equal protection challenge.<sup>105</sup>) The challenge to the school-funding system at issue in *Vincent* was comparable to prior challenges, as the petitioners claimed this system prohibited school districts from raising revenue fairly and disadvantaged the state's impoverished, high-need districts.<sup>106</sup> The petitioners raised an equal protection claim, and—important here—a claim based on a state constitutional provision requiring Wisconsin school districts to be “as nearly uniform as practicable.”<sup>107</sup>

While a majority in *Vincent* clearly rejected the equal protection challenge, the opinion was a mess when it came to addressing the education-uniformity clause.<sup>108</sup> The lead opinion, written by Justice N. Patrick Crooks, drew support from three other justices for the basic propositions that “Wisconsin students have a fundamental right to an equal opportunity for a sound basic education” under the state constitution, and “[a]n equal opportunity for a sound basic education acknowledges that students and districts are not fungible and takes into account districts with disproportionate numbers of [higher-need] students.”<sup>109</sup> However, those three other justices dissented from the rest of Justice Crooks's opinion upholding the constitutionality of the state financing system.<sup>110</sup> On the flipside, three other justices disagreed with the above formulation about this “fundamental right”—or that it existed at all—but agreed that the funding system was constitutional under their own, distinct interpretation of the state constitution.<sup>111</sup> This is the height of fractured reasoning, since there was not majority support for any rationale either to uphold or strike down the funding system.

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104. *Id.* ¶ 2 n.2.

105. *Buse v. Smith*, 74 Wis. 2d 550, 581, 247 N.W.2d 141 (1976) (R. Hansen, J., concurring) (stating that he would hold the tax at issue was a state tax and not a local tax, as the majority held, but agreeing with the majority that the tax was unconstitutional however framed); *Kukor v. Grover*, 148 Wis. 2d 469, 510, 436 N.W.2d 568 (1989) (Steinmetz, J., concurring) (agreeing that the state funding scheme does not violate the education uniformity clause of the state constitution, but applying a different standard and relying “on different grounds”).

106. *Vincent*, 2000 WI 93, ¶¶ 16–19.

107. *Id.* ¶ 4.

108. *Id.* ¶¶ 79–86, 89.

109. *Id.* ¶ 3.

110. *Id.* ¶ 124.

111. *Compare id.* ¶¶ 125–27 (Bablitch, J., concurring in part and dissenting in part), with *id.* ¶¶ 158–59 (Prosser, J., concurring in part and dissenting in part).

*B. SCOWIS's Fracturing, 2001–Present*

## i. Setting the Stage

Several major changes marked the transition into Wisconsin's current judicial era. First, as noted above, the court used to take on more cases, around 250 per year in the 1950s, then about 100 per year in the 1990s, and now just 50 or so per year.<sup>112</sup> Part of this stems from the creation of the court of appeals in the 1970s, but as an empirical matter the justices have also begun accepting fewer cases each term. Second, in prior eras at SCOWIS, concurring and dissenting opinions appear to have been far rarer than today.<sup>113</sup> Beginning in the 2000s the justices started chiming in more, with 1.66 concurrences or dissents per opinion by the 2015–16 term, compared to just 0.59 per opinion in 1998–99.<sup>114</sup> Third, beginning in the late-1990s, the *length* of the justices' opinions began to balloon, with almost all of the increase coming from increased concurrences and dissents. On average, today's SCOWIS opinions are about twice as long as they were just twenty-five years ago.<sup>115</sup>

We'll consider these lengthy seriatim opinions later. Let's not lose focus on the main problem of this new era: an unprecedented increase in the number of fractured opinions.

Things started out somewhat slowly. As shown by the chart in the Introduction, the justices fractured less than once per year from the end of the 1990s until 2002.<sup>116</sup> However, in 2002, and then again in 2004, the court fractured a then-record four times in each term.<sup>117</sup>

The fractured opinions of the 2000s did not always revolve around hot-button political issues, even if the subjects were often legally significant—exceptions to the doctor-patient privilege, the existence of unique tort claims

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112. Alan Ball, *The Supreme Court's 2020–21 Term: Some Initial Impressions*, SCOWSTATS (July 23, 2021), <https://scowstats.com/2021/07/23/the-supreme-courts-2020-21-term-some-initial-impressions/> [<https://perma.cc/9X6G-D6YR>].

113. Alan Ball, *The Supreme Court's 2015–16 Term: Some Initial Impressions*, SCOWSTATS (Aug. 1, 2016), <https://scowstats.com/2016/08/01/the-2015-16-term-some-more-impressions/> [<https://perma.cc/MGC5-7CJ8>].

114. *Id.*

115. *Id.*

116. Ball, *supra* note 8.

117. *Id.*



under state law, and the confidentiality of pre-sentence investigations.<sup>118</sup> And this period did produce some deeply fractured opinions, including the economic loss doctrine case *Digicorp, Inc. v. Ameritech Corp.*<sup>119</sup> There, SCOWIS—down two justices due to recusals—fractured badly enough to necessitate a paragraph-long explanation of each justice’s position.<sup>120</sup> Still, fractures remained *mostly* a minor recurring feature of the court’s caseload.

In reading some of the cases of this era, it’s hard not to notice a certain edge to the justices’ writings. When they disagreed, they did so loudly and openly. The back-and-forth sparring between Justice Abrahamson and her successor as Chief Justice, Patience Roggensack, showcases this in particular, with the pair duking it out over matters large and small in countless opinions, even in cases *without* fractures.<sup>121</sup> The frequency and extent to which these two justices disagreed was perhaps one of the most important dynamics at the court

118. See, e.g., *Butler v. Advanced Drainage Sys.*, 2006 WI 102, ¶ 37, 294 Wis. 2d 397, 717 N.W.2d 760 (Roggensack, J., concurring) (creating fractured reasoning by concurring in her own “majority” opinion); *Finnegan v. Wis. Patients Comp. Fund*, 2003 WI 98, 263 Wis. 2d 574, 666 N.W.2d 797; *Johnson v. Rogers Mem’l Hosp., Inc.*, 2005 WI 114, 283 Wis. 2d 384, 700 N.W.2d 27; *State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479.

119. 2003 WI 54, 262 Wis. 2d 32, 662 N.W.2d 652.

120. *Id.* ¶ 5 n.2.

121. See, e.g., *Behrendt v. Gulf Underwriters Ins. Co.*, 2009 WI 71, ¶ 44, 318 Wis. 2d 622, 768 N.W.2d 568 (Abrahamson, C.J., concurring) (arguing with Justice Roggensack over Wisconsin negligence law in separate concurrences); *Milwaukee J. Sentinel v. Wis. Dep’t of Admin.*, 2009 WI 79, ¶ 20 n.14, 319 Wis. 2d 439, 768 N.W.2d 700 (including criticism by Justice Roggensack of Chief Justice Abrahamson’s dissent for conflating issues); *State v. Popenhagen*, 2008 WI 55, ¶¶ 165 n.64, 172, 191, 196, 309 Wis. 2d 601, 749 N.W.2d 611 (Roggensack, J., dissenting) (criticizing Abrahamson for “misguided” opinion, “revising history,” and improperly enacting a “sweeping change in the law” without basis or request by the parties in an opinion that is “not well reasoned”); *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, ¶¶ 67, 72, 303 Wis. 2d 34, 734 N.W.2d 827 (Abrahamson, C.J., concurring in part and dissenting in part) (deriding Justice Roggensack’s opinion as “troubling” and saying it “turns the case law on its head”); *DeHart v. Wis. Mut. Ins. Co.*, 2007 WI 91, ¶ 20, 302 Wis. 2d 564, 734 N.W.2d 394 (including criticism by Justice Roggensack of a dissent penned by Chief Justice Abrahamson in a prior case); *id.* ¶ 61 (Abrahamson, C.J., dissenting) (saying Justice Roggensack’s majority opinion “chokes the text of the statute with inapposite case law”); *Cnty. of Dane v. Lab. & Indus. Rev. Comm’n*, 2009 WI 9, ¶ 50, 315 Wis. 2d 293, 759 N.W.2d 571 (criticizing Justice Roggensack’s alleged miscitation of a prior Chief Justice Abrahamson concurrence); *In re Doe*, 2004 WI 149, ¶ 5, 277 Wis. 2d 75, 689 N.W.2d 908 (Abrahamson, C.J., dissenting) (“Maybe something was in the air, or water, but on several occasions in the spring of 2004 this court played the roles of both counsel and court . . .”); *State ex rel. Kalal v. Cir. Ct.*, 2004 WI 58, ¶ 60 n.15, 271 Wis. 2d 633, 681 N.W.2d 110 (Abrahamson, C.J., concurring) (criticizing prior Justice Roggensack concurrence for criticizing her approach to statutory interpretation); *In re Doe*, 2004 WI 65, ¶ 58, 272 Wis. 2d 208, 680 N.W.2d 792 (Abrahamson, C.J., concurring) (“The majority opinion addresses many issues, but comes to few answers that will provide guidance to the litigants . . .”).

throughout much the early-twenty-first century, until Justice Abrahamson's retirement in 2019, followed by Justice Roggensack's in 2023.

Toward the end of the decade, significant political change was afoot. The elections of Justices Michael Gableman and Annette Ziegler marked the beginnings of the current era—Gableman's election in particular. During Justice Gableman's tenure on the court, beginning in 2008, the two liberal justices on the court went from joining majority opinions over 80% of the time to about 60% of the time.<sup>122</sup> Excluding unanimous decisions, the shift was even starker, with the liberals going from joining well over half of the court's divided majority opinions to joining barely one-third.<sup>123</sup> Notably, SCOWIS also issued nine fractured opinions in Gableman's first three terms, including four in each of the 2010–11 and 2011–12 terms.<sup>124</sup>

Changes were happening outside the justices' chambers, too. While this Article is not a study of Wisconsin political history, it is vital to understand that 2010's elections helped set the stage for some of the court's most high-profile fractures during the next decade. In the 2010 midterm elections, Democrats across the country faced a massive conservative political wave. It was a nationwide "shellacking" of the Democratic Party, in then-President Barack Obama's words.<sup>125</sup> The effects were dramatic in Wisconsin: Republicans took complete control of the state legislature and governor's office, picked up a formerly Democratic congressional seat, and toppled a leading U.S. Senate Democrat. What's more, 2010 swept into office a wave of ultra-conservative lawmakers dead-set on enacting a highly ideological legislative agenda and locking in their party's legislative gains.<sup>126</sup>

And how did SCOWIS react to the partisan sea change in state government? While the court continued to accept fewer cases, it generally carried on its business as usual. In fact, the justices commendably issued *no* fractured opinions at all in 2012–13, and just one in 2013–14.<sup>127</sup> It would be a mistake to

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122. Alan Ball, *The Butler-Gableman Divide: Wisconsin Supreme Court Elections Matter*, SCOWSTATS (Mar. 20, 2018), <https://scowstats.com/2018/03/20/the-butler-gableman-divide-wisconsin-supreme-court-elections-matter/> [<https://perma.cc/5S5F-6G4B>].

123. *Id.*

124. Ball, *supra* note 8.

125. Liz Halloran, *Obama Humbled by Election 'Shellacking'*, NPR (Nov. 3, 2010, 5:23 PM), <https://www.npr.org/2010/11/02/131046118/obama-humbled-by-election-shellacking> [<https://perma.cc/6DZT-D286>].

126. See generally JASON STEIN & PATRICK MARLEY, MORE THAN THEY BARGAINED FOR: SCOTT WALKER, UNIONS, AND THE FIGHT FOR WISCONSIN (2013).

127. See *State v. Dubdiaz-Osorio*, 2014 WI 87, 357 Wis. 2d 41, 849 N.W.2d 748.

see this as an era of comity at the court, though, especially in light of the continuing, now long-running dispute between Justices Abrahamson and Roggensack, each attacking the other's reasoning in lead and dissenting opinions that leave little impression of a great respect between the two colleagues.<sup>128</sup> This was clear in a 2012 case where—despite all justices agreeing on the result and reasoning—Justice Roggensack issued a separate concurrence simply to rail against perceived policy problems that Justice Abrahamson's lead opinion did not address.<sup>129</sup>

Some might argue these dueling opinions simply represented professional disagreement. But the justices' then-decade-long battle of ideas, combined with the events of the early 2010s, belies this conclusion. This Article would be entirely incomplete without acknowledging that, for the past decade and a half, the Wisconsin Supreme Court has seen unprecedented levels of internal and public acrimony. The examples are numerous and well-documented. Public fights over justices presiding over their campaign donors' cases; an alleged choking of one justice by another; public and private disputes over court process and procedure; the removal of Justice Abrahamson from her "Chief" role by conservatives on the court; the unceremonious shut down of a John Doe investigation into allegations of illegal coordination between Governor Scott Walker's campaign and a third-party expenditure group; and, of course, the transformation of the justices' election campaigns into brutal, multi-million-dollar ad barrages.<sup>130</sup> And more and more. SCOWIS has certainly seen its share

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128. *State v. Spaeth*, 2012 WI 95, ¶ 94, 343 Wis. 2d 220, 819 N.W.2d 769 (Abrahamson, C.J., concurring) (criticizing Justice Roggensack's dissent for going "too far without briefs or a complete factual record" and explicitly stating concurrence was written "to . . . state my concerns with the dissent"); *Jandre v. Wis. Injured Patients & Fams. Comp. Fund*, 2012 WI 39, ¶ 305, 340 Wis. 2d 31, 813 N.W.2d 627 (Roggensack, J., dissenting) (criticizing Chief Justice Abrahamson's lead opinion for "attempt[ing] to clothe itself in precedent, as it takes statements from past cases and juxtaposes them with holdings that the statements and the cases cited do not support").

129. *See Milwaukee J. Sentinel v. City of Milwaukee*, 2012 WI 65, ¶ 1 n.4, 341 Wis. 2d 607, 815 N.W.2d 367. The labeling in this case is particularly odd. The outcome was unanimous, but the court fractured into two opinions. Chief Justice Abrahamson authored the lead opinion; Justice Roggensack's opinion was denominated a concurrence, even though a majority of the justices signed on.

130. *In re Gableman*, 2010 WI 61, ¶¶ 10–12, 325 Wis. 2d 579, 784 N.W.2d 605 (deadlocking 3–3 along ideological lines about whether to accept a panel's recommendation that Justice Gableman had violated judicial ethics rules during his 2008 campaign); *Wis. Jud. Comm'n v. Prosser*, 2012 WI 69, ¶ 2, 341 Wis. 2d 656, 817 N.W.2d 830; Lynn Adelman, *How Big Money Ruined Public Life in Wisconsin*, 66 CLEV. ST. L. REV. 1, 18–25 (2017); Bruce Murphy, *Lady MacBeth of the Supreme Court*, URB. MILWAUKEE (May 7, 2015, 10:56 AM),

of drama since 1848,<sup>131</sup> but it's been hard to miss the toxic fumes emanating from the justices' wing of the state capitol in recent years.<sup>132</sup>

## ii. The Great Fracturing

SCOWIS had undeniably arrived at a partisan break, and this break helped shape the course of the court's wave of fractured decisions. Between the 2010–11 and 2021–22 terms, SCOWIS issued forty-nine fractured decisions, compared to twenty-one in the preceding fourteen years.<sup>133</sup> At the same time, these fractured decisions represented a larger proportion of the justices' docket. In the twelve years after 2010, the court averaged fifty-four cases per term,

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<https://urbanmilwaukee.com/2015/05/07/murphys-law-lady-macbeth-of-the-supreme-court/> [<https://perma.cc/X24P-J39>]; Lincoln Caplan, *The Destruction of the Wisconsin Supreme Court*, NEW YORKER (May 5, 2015), <https://www.newyorker.com/news/news-desk/the-destruction-of-the-wisconsin-supreme-court> [<https://perma.cc/Y8ZC-9XUJ>]; Steven Elbow, *Nasty Debate Over Money in Court Races Shows Supreme Court's Political Divide*, CAP TIMES (Dec. 17, 2009), [https://madison.com/ct/news/local/govt\\_and\\_politics/article\\_5f07adc2-eafe-11de-8686-001cc4c002e0.html](https://madison.com/ct/news/local/govt_and_politics/article_5f07adc2-eafe-11de-8686-001cc4c002e0.html) [<https://perma.cc/SG5E-RTQG>].

131. *See, e.g.*, *Ableman v. Booth*, 62 U.S. 506, 525–26 (1859) (undoing SCOWIS'S attempted nullification of the Fugitive Slave Act, a decision whose mandate SCOWIS never officially entered); WIS. SUP. CT., *supra* note 21, at 9 (describing Justice Abram D. Smith's implication in scandal involving a railroad promoter in 1856); Daniel Suhr, *Accurate & Balanced Reporting on the Wisconsin Supreme Court*, MARQ. UNIV. L. SCH. FAC. BLOG (Dec. 17, 2009), <https://law.marquette.edu/facultyblog/2009/12/accurate-balanced-reporting-on-the-wisconsin-supreme-court/> [<https://perma.cc/7PQ5-TJVF>] (noting that three sitting members of SCOWIS endorsed then-Chief Justice Abrahamson's political opponent during a reelection campaign); Mark Walsh, *Campaign Cash From Voucher Backers at Issue in Wisconsin*, EDUC. WK. (May 24, 2000), <https://www.edweek.org/policy-politics/campaign-cash-from-voucher-backers-at-issue-in-wisconsin/2000/05> [<https://perma.cc/HC6Q-FXJ7>] (describing allegations of Justice Wilcox's campaign illegally collaborating with an independent group's \$200,000 get-out-the-vote drive).

132. The 2023 election of Justice Janet Protasiewicz—which flipped the court's perceived ideological balance for the first time in well over a decade—exacerbated this acrimony to an even greater degree, with Chief Justice Annette Ziegler accusing her colleagues of staging a “coup” over rule changes and the state legislature threatening to impeach Protasiewicz over predictions that she would deny the legislature's motion asking her to recuse herself from a new gerrymandering lawsuit. Jessie Opoien, *'An Unprecedented Coup': Ziegler Fires Back at Court's Liberals, Vows to Post Court Director Job*, MILWAUKEE J. SENTINEL (Aug. 28, 2023, 6:31 PM), <https://www.jsonline.com/story/news/politics/2023/08/28/supreme-court-feud-escalates-with-ziegler-posting-court-directors-job/70703777007/> [<https://perma.cc/U5RX-3ZSR>]; Scott Bauer & David A. Lieb, *GOP Threat to Impeach a Wisconsin Supreme Court Justice is Driven by Fear of Losing Legislative Edge*, ASSOC. PRESS (Sept. 10, 2023, 7:22 AM), <https://apnews.com/article/wisconsin-supreme-court-impeachment-republicans-gerrymandering-legislature-21fc8c3cf99623a379cbf4dd01ed0b8c> [<https://perma.cc/YU89-62WH>].

133. Ball, *supra* note 8. As Skylar Reese Croy notes, this may actually *understate* the extent of the justices' fracturing. *See Croy, supra* note 15, at 13–16.

compared to eighty-one per term in the preceding fourteen years.<sup>134</sup> Thus, the incidence of fractured opinions ballooned from less than 2% in the 1996–2010 period to nearly 8% after 2010.<sup>135</sup> And in both the 2019–20 and 2021–22 terms, it was approximately twice that.<sup>136</sup>

We cannot address every one of the court’s recent fractured opinions. Instead, we believe that laying out some of the most egregious fractures of the current era will be more useful. It’s clear that SCOWIS is fracturing more than in the past, but it’s the substance and effect of these fractures that reveals the problem’s seriousness.

**The *Shifra* Cases.** Between 2013 and 2016, SCOWIS tried and failed three times to decide whether a crime victim should be required to produce privileged medical records for *in camera* review upon request of her abuser’s counsel. (And if not, whether the victim should be allowed to testify as part of the prosecution’s case, even after refusing to produce the records.) The opinions center largely around the court of appeals decision in *State v. Shifra*<sup>137</sup> and, among other things, whether it rested on an incorrect interpretation of *Pennsylvania v. Ritchie*, which applied the Confrontation Clause of the Sixth Amendment to the U.S. Constitution.<sup>138</sup>

In the first case, 2013’s *State v. Johnson*, a five-justice court issued a brief per curiam order upholding *Shifra* (by a 4–1 vote) and allowing (by a 3–2 vote) the victim/privilege holder to testify without producing the records to defendant.<sup>139</sup> However, the court’s brief opinion apparently provided insufficient guidance for the State and for Johnson, both of whom moved for reconsideration.<sup>140</sup> Upon reconsideration, in 2014’s *State v. Johnson*, the court now decided in another per curiam opinion that, notwithstanding votes of 4–1 and 3–2, the original decision was a “deadlock” that left the court of appeals decision in place.<sup>141</sup> In the per curiam opinion’s view, “no three justices reach[ed] agreement to either affirm, reverse, or modify the decision of the court of appeals” along established lines of precedent or consistent legal

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134. Ball, *supra* note 8.

135. *Id.*

136. *Id.*

137. 175 Wis. 2d 600, 499 N.W.2d 719 (Ct. App. 1993).

138. 480 U.S. 39 (1987).

139. *State v. Johnson*, 2013 WI 59, ¶¶ 2–9, 348 Wis. 2d 450, 832 N.W.2d 609.

140. *State v. Johnson*, 2014 WI 16, ¶ 1, 353 Wis. 2d 119, 846 N.W.2d 1 (per curiam).

141. *Id.* ¶¶ 1–5.

reasoning.<sup>142</sup> This drew a fierce dissent from Justice Ann Walsh Bradley (joined by Chief Justice Abrahamson), who believed the court's prior decision had represented a true majority in its mandate.<sup>143</sup> "To the extent the [justices' prior] rationales diverge[d], that simply goes to the precedential value of each justice's rationale. . . . It is not minority vote-pooling."<sup>144</sup>

The saga continued in 2016's *State v. Lynch*, part of a sadly banner year at SCOWIS where the justices issued a then-record eight fractured opinions.<sup>145</sup> Faced with a fractured court, the justices let the lower court's decision stand and again failed to conclusively address the meaning and vitality of *Shiffra*.<sup>146</sup> In this process, the justices' gloves came off. Justice Abrahamson penned a partial dissent that slammed Justice Gableman's lead opinion for (among other things) disagreeing with its own stated mandate, and also claimed the court's labeling of the various opinions was misleading since the various "dissents" represented, in fact, the majority.<sup>147</sup> "We are, in the words of Rod Serling . . . [in] The Twilight Zone."<sup>148</sup> This drew a fiery condemnation from Chief Justice Roggensack, who called Abrahamson's dissent a "defamatory" personal attack that showed "a lack of respect for the . . . serious constitutional and sensitive personal issues" at play.<sup>149</sup> Notably, however, Roggensack did not address the problems created by the fracture and labeling problem, nor did she respond to Abrahamson's accurate comment that "few of the court's decisions this term have been unanimous without any separate writings."<sup>150</sup>

It took seven years for the court to choose a path, finally overruling *Shiffra* in the 2023 case *State v. Johnson* by a vote of 5–2.<sup>151</sup> True to form, the decision features a concurrence, a partial concurrence, and two dissents.<sup>152</sup>

***Coyne v. Walker***. In 2011, the Wisconsin Legislature adopted Act 21, which created additional veto-points for both the governor and a legislative committee within the rulemaking process and made other major changes to

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142. *Id.* ¶¶ 1–2, 7–13.

143. *Id.* ¶¶ 15–16, 23–27 (Bradley, J., concurring in part and dissenting in part).

144. *Id.* ¶ 27.

145. Ball, *supra* note 8.

146. *State v. Lynch*, 2016 WI 66, ¶ 73, 371 Wis. 2d 1, 885 N.W.2d 89.

147. *Id.* ¶¶ 83, 124–27 (Abrahamson, J., concurring in part and dissenting in part).

148. *Id.*

149. *Id.* ¶¶ 76–79 (Roggensack, C.J., concurring).

150. *Id.* ¶ 141 (Abrahamson, J., concurring in part and dissenting in part) (collecting cases).

151. 2023 WI 39, ¶ 1, 407 Wis. 2d 195, 990 N.W.2d 174.

152. *Id.*

state administrative procedure.<sup>153</sup> However, because Wisconsin's Department of Public Instruction is an independent agency led by a separately elected constitutional officer (the Superintendent of Public Instruction), the agency and superintendent challenged the statute as inapplicable to them. The circuit court granted summary judgment in favor of the agency and superintendent, the court of appeals affirmed, and so did SCOWIS.<sup>154</sup>

Except that the *Coyne* court cobbled together a majority for its mandate out of a one-justice lead opinion, a one-justice concurrence, and a separate two-justice concurrence, which relied on different views of an important binding case and also diverged on the general scope of the legislature's authority to control the agency (and the superintendent).<sup>155</sup> Although the opinions overlapped in some of their reasoning and conclusions, there was no majority agreement for the core *ratio decidendi*.

Just one year later, the same lawyers behind the *Coyne* challenge filed an original action to present the same questions again, hoping that a change in the court's composition would yield a different outcome.<sup>156</sup> Those hopes were borne out, when, after some procedural skirmishes,<sup>157</sup> the *Coyne* decision was overruled by a four-justice majority in *Koschkee v. Taylor*, which featured concurring opinions from Justices Rebecca Grassl Bradley and Daniel Kelly that took issue with the majority's general characterizations of Wisconsin administrative law.<sup>158</sup> In dissent, Justice Ann Walsh Bradley argued that the "mandate of *Coyne* was clear despite the fractured nature of the opinions."<sup>159</sup>

***Upending State Government.*** By the end of the decade, the problem was fully out in the open, as exemplified by two cases representing the absolute worst of the court's non-decision-making.

The first case, *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, focused on whether the activities of a company, Tetra Tech, could be taxed

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153. *Coyne v. Walker*, 2016 WI 38, ¶ 23, 368 Wis. 2d 444, 879 N.W.2d 520.

154. *Id.* ¶ 4.

155. *Id.* ¶ 80 (Abrahamson, J., concurring); see also *id.* ¶¶ 121–22 (Prosser, J., concurring).

156. See *Koschkee v. Evers*, 2018 WI 82, ¶ 1, 382 Wis. 2d 666, 913 N.W.2d 878. In the interim, Justice David Prosser had resigned his seat on the court, and Governor Scott Walker had appointed Justice Daniel Kelly to replace him.

157. See *id.* ¶ 3.

158. *Koschkee v. Taylor*, 2019 WI 76, ¶ 8, 387 Wis. 2d 552, 929 N.W.2d 600; *id.* ¶ 42 (R.G. Bradley, J., concurring); *id.* ¶ 58 (Kelly, J., concurring). Justice Abrahamson withdrew from participation in this case.

159. *Id.* ¶ 73 (A.W. Bradley, J., dissenting).

under a law that made “processing” taxable.<sup>160</sup> (The activity in question was the separation of river materials into waste sludge, reusable sand, and water.<sup>161</sup>) An administrative appellate board, a trial court, and the Wisconsin Court of Appeals all agreed that the Department of Revenue’s interpretation of “processing” was correct.<sup>162</sup> SCOWIS also agreed with this interpretation.<sup>163</sup>

Nevertheless, a conservative majority of the court seized on the case as an opportunity to go further and end Wisconsin’s multi-decade practice of giving “great weight” deference to state agencies’ interpretation of the laws they enforce.<sup>164</sup> This was unnecessary, as the court could have upheld the Department of Revenue’s—and lower courts’—interpretation of “processing” without making any broad pronouncement about the various branches of government’s constitutional authority. But what makes the decision more lamentable was the absence of majority reasoning. Two justices held that deferring to agencies’ interpretations violated the doctrine of separation of powers—i.e., it’s the job of judges, not agencies, to declare the law.<sup>165</sup> Three others concurred; in their views, the deference rule was judge-made law that could—and should—be reversed by judges without reliance on constitutional precepts.<sup>166</sup> The lead and concurring opinions contained thematic overlaps, but the lead opinion’s chastising of the concurrences’ refusal to adopt its constitutional analysis leaves no doubt that the ultimate holding—the end of “great weight” deference—rests on fractured reasoning.<sup>167</sup>

So, what is the precedential value of *Tetra Tech*? As Justice Ann Walsh Bradley pointed out in her concurrence, no reason for ditching the existing deference regime drew support from a majority.<sup>168</sup> The only sections of the so-called “majority” opinion that drew at least four votes were those setting out the facts, reviewing the court’s current deference standard, and tracing its history in case law.<sup>169</sup> Yet, the court arranged its opinions in a way that camouflages the absence of a majority *ratio decendi*. Most of the reasoning, and all of the extensive constitutional discussion, was endorsed by only two or

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160. 2018 WI 75, ¶ 1, 382 Wis. 2d 496, 914 N.W.2d 21 (lead opinion without majority support).

161. *Id.*

162. *Id.* ¶¶ 6–7.

163. *Id.*

164. *Id.* ¶¶ 3, 80–81 (lead opinion without majority support).

165. *Id.* ¶¶ 50–53, 84 (lead opinion without majority support).

166. *Id.* ¶ 135 (Ziegler, J., concurring); *id.* ¶ 162 (Gableman, J., concurring).

167. *Id.* ¶¶ 3 n.4, 87–90 (lead opinion without majority support).

168. *Id.* ¶ 109 n.1 (A.W. Bradley, J., concurring).

169. *Id.*



three justices. This interweaving of fifty paragraphs with majority support amongst fifty-eight paragraphs that lack majority support has created confusion for lower courts and others trying to decipher the law. Indeed, the vast majority of lower courts to apply *Tetra Tech* have erroneously cited paragraphs that lack majority support as part of the holding.<sup>170</sup>

Still, the highest-profile fracture was yet to come. An unusual feature of Wisconsin's constitution has given governors the power to strike out virtually anything—phrases, words, even entire paragraphs—from an appropriations bill if the governor chooses. In prior cases, SCOWIS blessed the practice of partially vetoing phrases, digits, letters, and even word fragments.<sup>171</sup> Quirky as it may be, this was an established part of Wisconsin's constitutional scheme for nearly a century. The only limit was that any veto had to leave a “complete, entire, and workable law” in its place (although the voters prohibited letter-level editing—so-called “Vanna White vetoes”—via state constitutional amendment in 1990).<sup>172</sup>

In 2019, newly elected Governor Tony Evers issued four partial vetoes to the 2019 Biennial Budget Act.<sup>173</sup> These were undeniably aggressive vetoes, that—as multiple governors had done before—altered the nature of the provisions affected, in some cases creating entirely new programs altogether from the modified provisions. Three taxpayers challenged Governor Evers's vetoes as impermissible exercises of power.<sup>174</sup>

The court struck down three of the four vetoes, via a per curiam opinion that acknowledged “[n]o rationale [for striking down the vetoes] has the support

170. See, e.g., *Wis. Dep't of Workforce Dev. v. Lab. & Indus. Rev. Comm'n*, 2022 WI App 49, ¶ 18 n.2, 404 Wis. 2d 509, 979 N.W.2d 808 (citing *Tetra Tech*, 2018 WI 75, ¶ 79); *Meteor Timber, LLC v. Wis. Div. of Hearings & Appeals*, 2022 WI App 5, ¶ 25, 400 Wis. 2d 451, 969 N.W.2d 746 (citing *Tetra Tech*, 2018 WI 75, ¶¶ 10–16, 32, 83–84); *Vega v. Lab. & Indus. Rev. Comm'n*, 2022 WI App 21, ¶ 25, 402 Wis. 2d 233, 975 N.W.2d 249 (citing *Tetra Tech*, 2018 WI 75, ¶ 84).

171. See, e.g., *State ex rel. Finnegan v. Dammann*, 220 Wis. 143, 264 N.W. 622 (1936); *State ex rel. Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988); *Risser v. Klauser*, 207 Wis. 2d 176, 558 N.W.2d 108 (1997).

172. *Thompson*, 144 Wis. 2d at 437; Richard A. Champagne, Staci Duros & Madeline Kasper, *The Wisconsin Governor's Partial Veto After Bartlett v. Evers*, 5 WIS. LEG. REFERENCE BUR.: READING CONST. 1, 13–14 (July 2020), [https://docs.legis.wisconsin.gov/misc/lrb/reading\\_the\\_constitution/governors\\_partial\\_veto\\_5\\_3.pdf](https://docs.legis.wisconsin.gov/misc/lrb/reading_the_constitution/governors_partial_veto_5_3.pdf) [<https://perma.cc/P228-JHRV>].

173. Champagne, Duros & Kasper, *supra* note 172, at 15.

174. *Bartlett v. Evers*, 2020 WI 68, ¶ 12, 393 Wis. 2d 172, 945 N.W.2d 685 (Roggensack, C.J., concurring in part and dissenting in part).

of a majority.”<sup>175</sup> Chief Justice Roggensack said two of the vetoes were unconstitutional because they “result[] in topics and subject matters that were not found in the enrolled bill,” proposing a new germaneness requirement on the governor’s partial-veto power.<sup>176</sup> Justices Kelly and Rebecca Grassl Bradley found all four vetoes were unconstitutional violations of the state constitution’s “origination clause, amendment clause, and legislative passage clause,” focusing on the lawmaking process itself and *hinting* at a germaneness requirement without adopting it.<sup>177</sup> Justices Brian Hagedorn and Ziegler deemed three of the vetoes unconstitutional, generally accepting the concept of a germaneness requirement while disagreeing with Justice Kelly’s view of which pieces of a bill could be vetoed, and also proposing an entirely different test for a veto’s constitutionality.<sup>178</sup> The remaining two justices would have upheld all four vetoes based on existing precedent.<sup>179</sup>

Now ask, what is the test for the constitutionality of partial vetoes after *Bartlett*? A Wisconsin Legislative Reference Bureau analysis starts with the right conclusion: “*Bartlett* . . . potentially reconfigures the entire field of partial veto jurisprudence,” but, “unlike most judicial decisions that fundamentally alter law, there is no rationale for the decision that has . . . majority” support.<sup>180</sup> It notes that the opinions of Chief Justice Roggensack, Justice Kelly, and Justice Hagedorn have commonalities and tend to view policy proposals as cohesive “ideas” that cannot be modified via partial veto into an entirely new program, but also that each opinion proposes entirely different limits on gubernatorial power.<sup>181</sup> “Thus, . . . Roggensack affords . . . a degree of creativity in using the partial veto as long as the subject or topic is not altered . . . ; Hagedorn allows the governor only to negate policies or parts of policies . . . ; and . . . Kelly limits the governor to removing from a bill only entire ideas and not their constituent parts.”<sup>182</sup>

***Tavern League of Wisconsin, Inc. v. Palm.*** The COVID-19 pandemic led to a series of contentious, high-stakes cases before SCOWIS. At the outset of the pandemic, on April 16, 2020, Department of Health Services Secretary-

175. *Id.* ¶ 4 (per curiam).

176. *Id.* ¶ 5 (per curiam); *id.* ¶ 62 (Roggensack, C.J., concurring in part and dissenting in part).

177. *Id.* ¶ 7 (per curiam); *id.* ¶ 207 (Kelly, J., concurring in part and dissenting in part).

178. *Id.* ¶ 8 (per curiam); *id.* ¶¶ 262–63 (Hagedorn, J., concurring) (proposing his own approach to partial vetoes while distinguishing colleagues’ proposals).

179. *Id.* ¶¶ 110, 115–16 (A.W. Bradley, J., concurring in part and dissenting in part).

180. Champagne, Duros & Kasper, *supra* note 172, at 1.

181. *Id.* at 19.

182. *Id.* at 20.

designee Andrea Palm issued an emergency “Safer at Home Order” that restricted travel, business operations, public and private gatherings, school operations, and more.<sup>183</sup> The Order was issued without following emergency rulemaking procedures set out in state law. The Wisconsin Legislature sued, alleging the Order needed to go through that rulemaking procedure and that, regardless, the Order far exceeded the scope of what state law allows. SCOWIS accepted the case as an original action.<sup>184</sup>

Less than one month after the Order’s issuance, the court held 4–3 that the issuance of the Order without going through emergency rulemaking procedures violated the constitutional separation of powers.<sup>185</sup> The decision did contain a minor fracture regarding its mandate, with Chief Justice Roggensack going against the majority to state that she “would” stay the effect of the court’s ruling for ten days, but overall there was no major fracture in this decision.<sup>186</sup> What’s important is that Justice Hagedorn issued an impassioned dissent in the case, wholly disagreeing with the majority’s reasoning and accusing it of going well beyond the issues briefed—“[w]e are not here to do freewheeling constitutional theory.”<sup>187</sup>

Several months later, as the pandemic continued to rage, the Secretary-designee issued a similar (if narrower) order restricting public gatherings. Once again, the court held 4–3 in *Tavern League, Inc. v. Palm* that the order was improperly issued without going through rulemaking procedures.<sup>188</sup> In the interim, the court’s makeup had shifted by one, with Justice Jill Karofsky replacing Justice Kelly.<sup>189</sup> However, this time, Justice Hagedorn joined the majority in a wholly inscrutable manner. His concurrence explicitly cited and incorporated his dissent in *Wisconsin Legislature* and also explicitly declined to join the lead opinion’s reasoning.<sup>190</sup> Yet, citing *stare decisis* and the fact that the court had just declared the Secretary-designee’s first Order unconstitutional, he concurred in the mandate.<sup>191</sup> (This is despite the fact that,

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183. WIS. DEP’T OF HEALTH SERVS., EMERGENCY ORDER 28: SAFER AT HOME ORDER (2020).

184. Wis. Legislature v. Palm, 2020 WI 42, ¶ 10, 391 Wis. 2d 497, 942 N.W.2d 900.

185. *Id.* ¶ 58.

186. *Id.* ¶ 65 (Roggensack, C.J., concurring).

187. *Id.* ¶¶ 165–70 (Hagedorn, J., dissenting).

188. 2021 WI 33, ¶ 2, 396 Wis. 2d 434, 957 N.W.2d 261.

189. *Id.*

190. *Id.* ¶¶ 36, 38.

191. *Id.* ¶¶ 35–38 (Hagedorn, J., concurring).

in *Tavern League*, the court was being called to address a critical statutory question not discussed in *Wisconsin Legislature* at all.<sup>192</sup>)

This is fractured reasoning, given that SCOWIS does not recognize the concept of dicta. Justice Hagedorn's precedent-based rationale for concurring is irreconcilable with his open and ongoing rejection of *Wisconsin Legislature's* reasoning.

**2021–22, the Court's Worst Year.** We will conclude by noting that *Tavern League* was, in the greater scheme of things, a drop in the bucket during an otherwise dismal year for SCOWIS, where the court fractured a record nine times out of fifty-two cases.<sup>193</sup> There are many potential causes of this ignominious distinction. The 2021–22 term saw the court address a cavalcade of contentious, high-profile political litigation over gerrymandering and ballot drop boxes that arguably led to two fractures.<sup>194</sup> Meanwhile, the court was often split 3–3 along ideological lines, with the somewhat more malleable Justice Hagedorn often stepping in to cast the deciding vote in a manner that created a fracture.<sup>195</sup> Perhaps not helping matters, Justice Rebecca Grassl Bradley routinely chastised Justice Hagedorn for failing to fall into lockstep with the other conservative justices in every case.<sup>196</sup>

While there are nine cases to choose from in this dreary term, we'll limit ourselves to discussing one, as by now there should be no room to quibble about the reality of this fracturing trend. The 2021–22 term saw a novel attempt by the court's conservative justices to work around their painfully obvious fracturing problem in *County of Dane v. Public Service Commission of Wisconsin*. There, the court ruled that a trial court judge should have quashed a third-party subpoena.<sup>197</sup> However, once again Justice Hagedorn went his own way, writing in a concurrence that the lead opinion had ruled on an earlier order

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192. *Id.* ¶ 41 (A.W. Bradley, J., dissenting) (“Stare decisis simply does not apply. The *Palm* decision, on which the mandate of this court hinges, did not decide the question now before us and did not even attempt to interpret § 252.02(3). With no analysis, there is no decision for us to follow.”).

193. Ball, *supra* note 8.

194. *See, e.g.*, *Johnson v. Wis. Elections Comm'n*, 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469; *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519.

195. *See Tavern League*, 2021 WI 33, ¶¶ 35–37; *see also* *State v. Nimmer*, 2022 WI 47, ¶ 74, 402 Wis. 2d 416, 975 N.W.2d 598 (Hagedorn, J., concurring); *State v. C.G.*, 2022 WI 60, ¶ 95 n.2, 403 Wis. 2d 229, 976 N.W.2d 318 (Hagedorn, J., concurring); *Becker v. Dane Cnty.*, 2022 WI 63, ¶ 46, 403 Wis. 2d 424, 977 N.W.2d 390 (Hagedorn, J., concurring).

196. *See, e.g.*, *Teigen*, 2022 WI 64, ¶¶ 32, 34–35; *C.G.*, 2022 WI 60, ¶¶ 6 n.9, 36 n.14; *Becker*, 2022 WI 63, ¶¶ 89, 106–10 (R.G. Bradley, J., dissenting).

197. *Cnty. of Dane v. Pub. Serv. Comm'n of Wis.*, 2022 WI 61, ¶¶ 4, 403 Wis. 2d 306, 976 N.W.2d 790.

in the case that had not itself been appealed, instead of the order denying the motion to quash the subpoena.<sup>198</sup> Justice Hagedorn joined the lead opinion as to a single paragraph broadly stating the holding of the case, without signing onto a single word of the supporting reasoning—never addressing how he could agree with a decision that did not even address, in his view, the correct order from the lower court.<sup>199</sup>

### C. *Compounding Factors: Labeling and Seriatim Opinions*

As we've now exhaustively set forth, SCOWIS has a serious fractured-opinions problem that has grown worse in both volume and substance. A century ago, it would've been unthinkable for the court not to form a clear jurisprudential majority outside of extremely rare cases. Today, it happens multiple times per term, on issues core to the state's functioning, and despite the court taking on many fewer cases each term.

The problem of these fractured opinions has been compounded by two related factors. The first is simply one of labeling. For whatever reason, the court's Internal Operating Procedures require opinions to be referred to as a "lead opinion" when the document circulated as the majority doesn't *actually* garner a majority of votes on every major point of law.<sup>200</sup> Indeed, as noted above, sometimes that opinion does not even have support from a plurality of the justices.<sup>201</sup> Moreover, the court does not even apply this confusing nomenclature consistently, leading to disputes about—and confusion flowing from—proper characterization of some opinions.<sup>202</sup> As Justice Ann Walsh Bradley has repeatedly pointed out, "[t]he potential confusion that arises from mislabeling a lead opinion is exacerbated because the precedential effect . . . of a lead opinion is uncertain."<sup>203</sup> Marquette Law School Dean Joseph Kearney has echoed that this has made it "unexpectedly difficult to tell whether something is an opinion of the court."<sup>204</sup>

The other issue is a different story and may not be easy to fix given prevailing tensions at the court. One side effect of the court's inability to form

198. *Id.* ¶ 87 (Hagedorn, J., concurring).

199. *Id.* ¶ 86 n.1 (Hagedorn, J., concurring).

200. WIS. SUP. CT. INTERNAL OPERATING PROC. III(G)(4).

201. *See supra* note 5.

202. *See, e.g.*, *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 109 n.1, 382 Wis. 2d 496, 914 N.W.2d 21 (A.W. Bradley, J., concurring).

203. *Koss Corp. v. Park Bank*, 2019 WI 7, ¶ 76 n.1, 385 Wis. 2d 261, 922 N.W.2d 20 (A.W. Bradley, J., concurring).

204. Kearney, *supra* note 14, at 49.

a majority has been a dramatic increase in the length of its opinions, with the justices attempting to counter, qualify, and shape the meaning of so-called “lead” opinions through mind-numbingly long concurrences and dissents. As noted briefly above, this practice is known as issuing opinions seriatim.

In recent decades, even SCOTUS has drifted toward this practice. Chief Justice Roberts observed back in 2007:

During Marshall’s thirty years as chief, ‘there weren’t a lot of concurring opinions. There weren’t a lot of dissents. And nowadays, you take a look at some of our opinions and you wonder if we’re reverting back to the English model, where everybody has to have their say. It’s more being concerned with the jurisprudence of the individual rather than working toward a jurisprudence of the Court.’<sup>205</sup>

Not much has changed at SCOTUS since, and Wisconsin’s own high court clearly didn’t react to Chief Justice Roberts’s message.

To be fair, many see no issue with this practice. If a justice believes the law is a certain way, don’t they have a duty to say so?<sup>206</sup> Even by penning a dissent or concurrence? In theory, sure. But in practice, Wisconsin’s justices have begun to draft massively long opinions that are not only a burden to lawyers and lower courts, but also have made interpreting their increasingly fractured opinions all the more difficult, with SCOWIS-watcher Dr. Ball identifying Justice Rebecca Grassl Bradley as the most long-winded justice on the current court.<sup>207</sup>

Wisconsin is a regional outlier on this issue. As of the mid-2010s, Wisconsin’s average opinion lengths (53 pages on average!) far exceeded those of its four neighbors (Minnesota (20), Iowa (29), Illinois (23), and Michigan (31)).<sup>208</sup> And the length of concurrences and dissents certainly contributed, with Wisconsin’s 19.5 pages substantially outpacing its neighbors (Minnesota (3.5),

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205. Rosen, *supra* note 57.

206. Indeed, to some, the expression of these disagreements on the particulars of a legal dispute via concurring opinion might be seen as the judiciary’s healthy, visible commitment to intellectual pluralism in a democracy. See Cass R. Sunstein, *Incompletely Theorized Agreements Commentary*, 108 HARV. L. REV. 1733, 1735–36, 1746 n.35 (1994).

207. Ball, *supra* note 8.

208. Alan Ball, *Comparing the Supreme Courts of Wisconsin and its Four Neighbors*, SCOWSTATS (Nov. 8, 2016), <https://scowstats.com/2016/11/08/comparing-the-supreme-courts-of-wisconsin-and-its-four-neighbors/> [<https://perma.cc/C265-LYQY>]. However, the Illinois Supreme Court opinions are not double-spaced, while Wisconsin’s are, and this may account for much of the difference there. *Id.*

Iowa (5.5), Illinois (3.6), and Michigan (8.5)).<sup>209</sup> No one has complained yet that the supreme courts of these four other states are giving litigants short shrift by not writing longer decisions. Nor is there any indication that Wisconsin is producing better or clearer case law because its justices write more.

Some of the justices have occasionally tired of this practice and politely asked their colleagues to knock it off. In one case, Justice Ziegler derided the bunch of concurring opinions as a “collection of . . . law review articles” with little practical value.<sup>210</sup> In a disciplinary proceeding from the 2010s, Justice Abrahamson similarly took a lead opinion to task: “The lead opinion is overly lengthy, and gratuitously addresses too many issues that have not been fully briefed or carefully studied. The issues are difficult and of the utmost importance to attorneys and disciplinary proceedings. The issues need more consideration.”<sup>211</sup> Abrahamson had a point.<sup>212</sup> Overseeing disciplinary proceedings is one of SCOWIS’s core functions, and attorneys rely on these proceedings to understand what they can and cannot do while practicing law in Wisconsin. Long opinions that address numerous complex issues in a scattershot manner risk setting traps for attorneys who later try to follow them in good faith.

There may be different explanations for this phenomenon. The court’s reduced docket in recent terms<sup>213</sup> may have inadvertently contributed to the justices and their clerks crafting more and longer separate opinions.

Some justices may also feel they have more reason than ever to write novella-length opinions. The kind explanation? With the court more divided and ideological than ever, these lengthy writings simply reflect the justices jockeying to be heard and laying down markers for a future court willing to

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209. *Id.* Also note that Wisconsin’s majority opinions were regionally larger than ordinary for the period. *Id.*

210. *State v. Lynch*, 2016 WI 66, ¶ 231, 371 Wis. 2d 1, 885 N.W.2d 89 (Ziegler, J., dissenting).

211. *In re John Kenyatta Riley*, 2016 WI 70, ¶ 97, 371 Wis. 2d 311, 882 N.W.2d 820 (Abrahamson, J., concurring).

212. To be fair, Justice Abrahamson herself was hardly shy about sharing her views or spilling serious ink, authoring more than 800 concurrences and dissents in her four-plus decades on the court. Alan Ball, *Justice Abrahamson by the Numbers*, SCOWSTATS (Oct. 2, 2018), <https://scowstats.com/2018/10/02/justice-abrahamson-by-the-numbers/> [https://perma.cc/UP6V-6J5V].

213. Alan Ball, *Some Thoughts on the Supreme Court’s 2016–17 Docket*, SCOWSTATS (Feb. 9, 2017), <https://scowstats.com/2017/02/09/some-thoughts-on-the-supreme-courts-2016-17-docket/> [https://perma.cc/M582-2KHB]; Alan Ball, *The 2020–21 Term: Some More Impressions*, SCOWSTATS (July 30, 2021), <https://scowstats.com/2021/07/30/the-2020-21-term-some-more-impressions/> [https://perma.cc/ZMD5-LK29].

coalesce around their reasoning. This is, after all, the traditional reason for penning concurrences and dissents. For example, in 2009 Justice Ziegler authored a concurrence in the case *State v. Tody* that would've held a juror is not inherently biased, and thus automatically excusable from jury duty, simply because her son is the judge in the case.<sup>214</sup> Chief Justice Abrahamson roundly criticized the decision at the time.<sup>215</sup> Three years later, in *State v. Sellhausen*, Abrahamson partially blessed Ziegler's *Tody* concurrence, which became the law for a certain subset of cases.<sup>216</sup>

The unkind explanation? The *realpolitik* one. Perhaps some justices sense there's a bigger crowd to play for these days and recognize that headline-grabbing rhetoric can raise their public profile.<sup>217</sup>

Whatever the reason, the justices have undeniably increased the length of their written output in recent years. That has made the court's work frustratingly harder for lawyers and judges to parse. No matter the cause or precise effect of this practice, unless the justices mutually agree to put down their proverbial pens more frequently, it's unlikely to stop.

#### *D. How Does Wisconsin's Approach Differ from the Federal Approach?*

Wisconsin is far from alone in having disagreements at its high court, and it's worth pausing to look at how SCOTUS has approached the problem of fractured opinions. At least thirteen state supreme courts follow the approach SCOTUS tried to establish in the 1977 case *Marks v. United States*,<sup>218</sup> while a majority of states—though often referencing *Marks*—have not clearly chosen a path.<sup>219</sup> Discussing the *Marks* rule will more clearly distinguish SCOTUS's approach from SCOWIS's and also show why the solution to SCOWIS's fractiousness does *not* lie in adopting SCOTUS's approach.

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214. 2009 WI 31, ¶¶ 59–69, 316 Wis. 2d 689, 764 N.W.2d 737 (Ziegler, J., concurring).

215. *Id.* ¶ 6 (majority opinion).

216. 2012 WI 5, ¶¶ 45–46, 338 Wis. 2d 286, 809 N.W.2d 14 (Abrahamson, C.J., concurring).

217. *See, e.g., Doe 4 v. Madison Metro. Sch. Dist.*, Nos. 2022AP2042, 2023AP305 & 2023AP306, unpublished order, at 66 (Wis. June 14, 2023) (R.G. Bradley, J., dissenting) (calling on justices in majority to resign); *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 72, 391 Wis. 2d 497, 942 N.W.2d 900 (R.G. Bradley, J., concurring) (citing and discussing *Korematsu v. United States*, 323 U.S. 214 (1944), in a case about COVID-19-related mandates); *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 22, 403 Wis. 2d 607, 976 N.W.2d 519 (lead opinion without majority support) (comparing sham elections in Iraq, North Korea, Cuba, and Syria to Wisconsin's elections).

218. 430 U.S. 188 (1977).

219. Maxwell Stearns, *Modelling Narrowest Grounds*, 89 G. WASH. L. REV. 461 app. at 551 (2021).



Though *Marks* was not SCOTUS's first word on the subject—that came a few years earlier in the capital punishment case *Gregg v. Georgia*<sup>220</sup>—it has been its most enduring word. In *Marks*, the defendants were convicted of transporting obscene materials.<sup>221</sup> Their appeal centered on a then-gaping division in the Court's First Amendment jurisprudence: the Justices had adopted various approaches to obscenity prosecutions in the 1950s and 1960s, including through a fractured 1966 decision in *Memoirs v. Massachusetts*.<sup>222</sup> While the defendants had been trafficking their obscene materials, *Memoirs*'s plurality decision was the most recent “statement” of law. Then, just after the defendants stopped publication, the Court shifted course and applied a more prosecution-friendly standard for obscene materials in the case *Miller v. California*.<sup>223</sup> As you can imagine, the defendants wanted the more lenient standard applied to them.

Richard Re recounts in his article, *Beyond the Marks Rule*:

In *Marks* the Court ruled in favor the defendants on the theory that the *Memoirs* plurality set the governing law until *Miller*. The Court began by stating the precedential rule that the *Gregg* plurality had asserted just the year before. . . . *Marks* then reviewed the opinions set out in *Memoirs*. A three-Justice plurality had adopted a multipart test offering First Amendment protection unless the expression [was] ‘utterly without redeeming social value.’ Two Justices had concluded that obscenity prosecutions were essentially impermissible. [O]ne Justice had advanced a stringent test for obscenity prosecutions, allowing them only for ‘hardcore pornography.’ After summarizing these *Memoirs* opinions, the Court concluded: ‘The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards.’ . . . In a footnote, *Marks* also alluded to its earlier practice summarily based on what ‘at least five members’ of the *Memoirs* Court would do, judging from the various tests espoused in that case.<sup>224</sup>

Thus, the Court held that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority], the

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220. 428 U.S. 153 (1976); *id.* at 169 n.15 (plurality opinion of Stewart, Powell, and Stevens, JJ.).

221. *Marks*, 430 U.S. at 189.

222. *Roth v. United States*, 354 U.S. 476 (1957); *Memoirs v. Mass.*, 383 U.S. 413 (1966).

223. 413 U.S. 15, 24–25 (1973).

224. Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1943, 1949–50 (2019).

holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”<sup>225</sup>

An example may clarify how this works in practice. Although SCOWIS eschews the *Marks* approach to its own fractured decisions, it applies the *Marks* rule when interpreting fractured SCOTUS cases.<sup>226</sup> Take *Lounge Management v. Town of Trenton*, a First Amendment case about the constitutionality of a local anti-public nudity ordinance.<sup>227</sup> Wisconsin’s justices had to identify the holding of the First Amendment case *Barnes v. Glen Theatre, Inc.*, which likewise involved nude dancing and featured a fractured majority (a three-Justice plurality, with concurrences by Justices David Souter and Antonin Scalia).<sup>228</sup> The *Barnes* plurality believed that “a state’s interest in promoting morality was a legitimate reason to suppress First Amendment rights,” while Souter concluded that a state’s interest was more limited to the “secondary effects” of adult entertainment (e.g., “increased criminal activity and prostitution”).<sup>229</sup> The justices chose to adopt the Wisconsin Court of Appeals’s reasoning, which in another case found Souter’s opinion to be the “narrowest” since the three-justice plurality would have “implicitly” agreed with his views that “governmental efforts to control harmful secondary effects [of] adult entertainment can serve as a basis for restricting” First Amendment-protected activities.<sup>230</sup>

That seems to resolve the problem, doesn’t it? If SCOTUS splits on the reasoning behind a key holding, the “holding” of the case is identified “when one opinion is a logical subset of other, broader opinions” and can “represent a common denominator of the Court’s reasoning.”<sup>231</sup>

It’s not that simple in practice. In Ryan C. Williams’s account, courts have taken three approaches to *Marks*, applying them inconsistently. One approach looks for “implicit consensus” between a plurality and a concurrence (or concurrences)—the D.C. Circuit’s “logical subset” that SCOWIS has used to

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225. *Marks*, 430 U.S. at 193 (internal quotations and citations omitted).

226. *State v. Deadwiller*, 2013 WI 75, ¶¶ 54–55, 350 Wis. 2d 138, 834 N.W.2d 362 (Abrahamson, C.J., concurring) (stating that “[t]his court has followed *Marks* in applying plurality opinions of the United States Supreme Court,” and collecting cases).

227. 219 Wis. 2d 13, 580 N.W.2d 156 (1998).

228. *Id.* ¶¶ 11–13 (discussing *Barnes v. Glen Theatre*, 501 U.S. 560 (1991)).

229. *Fond du Lac Cnty. v. Mentzel*, 195 Wis. 2d 313, 324, 536 N.W.2d 160 (1995).

230. *Lounge Mgmt.*, 219 Wis. 2d at 22 (citing *Mentzel*, 195 Wis. 2d 313).

231. *Deadwiller*, 2013 WI 75, ¶ 56 (Abrahamson, C.J., concurring) (quoting *King v. Palmer*, 920 F.2d 771, 781 (D.C. Cir. 1991) (en banc)).

analyze fractured SCOTUS decisions.<sup>232</sup> Another, the “fifth vote” approach, says that the justice who “concurred on the narrowest grounds necessary to secure a majority” controls.<sup>233</sup> The final approach, an “issue-by-issue” approach, “looks for specific propositions that have actually been explicitly or implicitly assented to by a majority of justices”—a controversial approach because it requires assessing the views of dissenters.<sup>234</sup> (This last approach is most similar to how Wisconsin deals with its own fractured opinions, on an issue-by-issue basis.) As Williams notes, none of these approaches has gained a foothold as the dominant way of applying *Marks*.<sup>235</sup>

Really, the problem of fractured reasoning is far more difficult than *Marks* would suggest, as critics on and off the bench have noted over the years. Generating “considerable confusion,” “fragmented Supreme Court decisions have continued to bedevil both state and federal courts.”<sup>236</sup> This reality has caused—in part—splits among the federal circuits that SCOTUS has declined to fix or to address by clarifying the meaning of *Marks*, and far more than one scholar has criticized it.<sup>237</sup> It has been called “wrong, root and stem,”<sup>238</sup> “cryptic,”<sup>239</sup> “confused,”<sup>240</sup> and “unsound.”<sup>241</sup> Even the Supreme Court itself has said that *Marks* is “more easily stated than applied” and recognizes that *Marks* has “baffled and divided the lower courts.”<sup>242</sup>

These are not just the complaints of haughty law professors and lazy judges unwilling to read fractured opinions closely—*Marks* has serious problems. One commentator asked in 2017:

[D]oes *Marks* require lower courts to search for a single ‘narrowest’ opinion issued in the precedent-setting case and accord that opinion full stare decisis effect? Many lower court judges believe that it does—even where the putatively ‘narrowest’ opinion reflects the reasoning of only one of the

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232. Williams, *supra* note 4, at 806.

233. *Id.*

234. *Id.* at 817–18.

235. *Id.* at 806–07, 822.

236. Re, *supra* note 224, at 1944.

237. *Id.* at 1945.

238. *Id.*

239. Williams, *supra* note 4, at 798–99.

240. Bennett, Friedman, Martin & Smelcer, *supra* note 57, at 847.

241. Mark Alan Thurman, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 428 (1992).

242. *Nichols v. United States*, 511 U.S. 738, 745–46 (1994).

Court's nine members. But others disagree, finding it inappropriate to accord binding effect to portions of a putatively 'narrowest' opinion in which a majority of Justices did not explicitly or implicitly acquiesce. Even if lower court judges could agree on an answer to this first question, there would remain a further unanswered question regarding what criteria of 'narrowness' they should use to identify the 'narrowest grounds' of decision in the precedent case. Yet another unanswered question involves what role, if any, dissenting opinions should play in the *Marks* analysis.<sup>243</sup>

The courts have echoed these concerns, albeit in the more restrained language of judicial opinions.<sup>244</sup> The Supreme Court itself has even expressed frustration, throwing up its own hands in the affirmative action case *Grutter v. Bollinger* to say "[i]t does not seem useful to pursue the *Marks* inquiry to the utmost logical possibility when [the Court's fractured decision in a prior affirmative action case] has so obviously baffled and divided the lower courts that have considered it."<sup>245</sup>

Reviewing courts' efforts to apply *Marks* also demonstrates its normative deficiencies, namely how it privileges narrow outsider views on a high court. Recall *Lounge Management*, where SCOWIS (relying on a lower court's reasoning) adopted Justice Souter's solo concurrence in a First Amendment case, despite the fact that only three other Justices on the Court even arguably agreed with any of its reasoning.<sup>246</sup> *Marks* compounded the problem. It forced the Wisconsin justices into accepting a view that represented what four (at most) federal justices would've theoretically agreed to as a logical extension of their actual opinions in the case.<sup>247</sup>

Not that the issue-by-issue approach doesn't have its own flaws. Critiques of federal courts applying an issue-by-issue approach to *Marks* note a certain illogic to counting votes in a dissent as part of the Court's judgment.<sup>248</sup> Further,

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243. Williams, *supra* note 4, at 799 (collecting various sources).

244. See, e.g., *United States v. Davis*, 825 F.3d 1014, 1021 (9th Cir. 2016) (en banc) ("Our cases interpreting *Marks* have not been a model of clarity.").

245. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

246. *Lounge Mgmt. v. Town of Trenton*, 219 Wis. 2d 13, 21–22, 580 N.W.2d 156 (1998).

247. *Id.* at 22 (citing *Fond du Lac Cnty. v. Mentzel*, 195 Wis. 2d 313, 324, 536 N.W.2d 160 (1995)).

248. Jonathan H. Adler, *Reckoning with Rapanos: Revisiting "Waters of the United States" and the Limits of Federal Wetland Regulation*, 14 MO. ENV'T. L. & POL'Y REV. 1, 14 (2006); Williams, *supra* note 4, at 819 (discussing how "[t]aking dissenters' views into account . . . conflicts with the

as we saw earlier in *Gustafson*, in criminal cases an issue-by-issue approach can sometimes lead to unjust outcomes, allowing a conviction to stand even when a high-court majority agrees *something* about the trial was constitutionally deficient.<sup>249</sup> The issue-by-issue approach also presents practical difficulties, requiring even further squinting at, and overlaying of, justices' opinions down to the paragraph (or even sentence) level to construct a majority rationale the court itself chose not to present that way.<sup>250</sup>

Some even argue that the issue-based approach simply may not provide any precedential guidance in certain cases.<sup>251</sup> By way of example, consider a hypothetical appeal in a civil case. The question on appeal is whether a federal court has subject matter jurisdiction over a dispute under Article III of the U.S. Constitution. The U.S. Supreme Court—which in this hypothetical has adopted Wisconsin's issue-based approach rather than *Marks*—rules 6–3 that jurisdiction is lacking. But three Justices base their ruling on a lack of a concrete injury to the plaintiff, while three others rely on the political-question doctrine, and each opinion disavows the other's reasoning. In this case, even though six Justices would agree that a federal court is not empowered to hear the dispute, there would not be an ounce of overlap in their reasoning, providing no guidance moving forward. And arguably, the correct result would be to hold that there is jurisdiction because two configurations of six Justices (three dissenters added to each of two sets of three in the so-called “majority”) do not agree that a lack of concrete injury or the political-question doctrine bars a court from hearing the case.

Hypotheticals aside, what's important about *Marks* for our purposes is that it is largely distinct from Wisconsin's approach.<sup>252</sup> We know this both based on

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longstanding view that only statements in judicial opinions that are in some way ‘necessary’ to the judgment in the precedent case are entitled to precedential effect,” and “by definition,” dissents are “not necessary to the judgment”).

249. *State v. Gustafson*, 121 Wis. 2d 459, 459–60, 359 N.W.2d 920 (1985).

250. *See, e.g., Sanders v. State*, 2023 WI 60, ¶ 33, 408 Wis. 2d 370, 992 N.W.2d 126 (criticizing, through the lead opinion, a concurring opinion for not “join[ing] any part of our opinion—not even those portions with which he agrees”); *id.* ¶¶ 49–50 (Hagedorn, J., concurring) (finding “agree[ment] with the lead opinion’s statutory analysis” but declining to sign onto it for “reach[ing] beyond the issues raised by the parties”); *see also, e.g., In re A.G.*, 2023 WI 61, 408 Wis. 2d 413, 992 N.W.2d 75 (involving a case where one justice recused and court agrees on mandate 4–2 but divides on reasoning 2–2–2 among lead opinion, concurrence, and dissent).

251. Williams, *supra* note 4, at 816, 819.

252. *But see United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011) (applying approach of “look[ing] to the votes of dissenting Justices if they, combined with votes from plurality or concurring

the actual application of the Rationale Rule in practice and based on some SCOWIS justices' occasional suggestion that the court consider following *Marks*.<sup>253</sup>

### III. ARGUMENT

SCOWIS has endorsed what we've referred to as the Rationale Rule, holding that a "majority of the participating judges must have agreed on a particular point" of law for precedent to form.<sup>254</sup> When the court was issuing a fractured decision every several years or so, perhaps there was less of a need to clearly define what this means, theorize its underpinnings, and consider how it should apply or be modified. Circumstances have changed. The court is now issuing massive, fractured opinions as a matter of course, in ways that threaten to undermine certainty and stability in the law, to say nothing of the operations of state government. A discussion about how these opinions should be treated is long overdue.

The arguments advanced here may be uncomfortable ones. People are rightfully reticent about leveling criticism against appellate judges, out of respect and professional self-interest, but also out of the belief that appellate

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opinions, establish a majority view on the relevant issue"); *see also*, e.g., *United Real Est. Co. v. Hudson*, 178 F.3d 649, 659, 674 (3d Cir. 1999) (counting dissenters' votes to find majority in Supreme Court case *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)). This is similar to the Wisconsin Supreme Court's fractured decision in *Teigen* last year. Though *Teigen* dealt with the legality of absentee-ballot-return assistance, the court first had to address two threshold issues of justiciability. On neither issue did a majority of the court agree on any rationale for justiciability. *See* *Teigen v. Wis. Elections Comm'n*, 2022 WI 64, ¶ 167, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring) (rejecting lead opinion's standing analysis as "unpersuasive" and noting the lead opinion's approach "does not garner the support of four members of this court"). *Compare id.* ¶¶ 39, 43 (lead opinion discussion of sovereign immunity), *with id.* ¶ 169 (Hagedorn, J., concurring) (different sovereign-immunity analysis), *and id.* ¶ 210 n.4 (A.W. Bradley, J., dissenting) (same). Because the court granted bypass, *id.* ¶ 3 (lead opinion without majority support), and was unable to resolve these threshold questions, it should have dismissed the bypass as improvidently granted and remanded the case to the court of appeals for resolution.

253. *See*, e.g., *State v. Elam*, 195 Wis. 2d 683, 685–86, 538 N.W.2d 249 (1995) (discussing case *State v. Speer*, 176 Wis. 2d 1101, 501 N.W.2d 429 (1993)) (calling the rule a "general principle of appellate practice" without analysis and citing *Dowe*, in a case where the court was equally divided). Concurring in a 2013 case, Chief Justice Abrahamson claimed in passing that her colleagues followed *Marks* "in applying plurality decisions of *this court*." *State v. Deadwiller*, 2013 WI 75, ¶ 55, 350 Wis. 2d 138, 834 N.W.2d 362 (Abrahamson, C.J., concurring) (emphasis added). However, her only support for this claim were two decisions analyzing fractured SCOTUS decisions—not Wisconsin precedent—and Justice Crooks's concurrence in *Tomczak v. Bailey*, 218 Wis. 2d 245, 281, 578 N.W.2d 166 (1998), where he asked the court to consider adopting *Marks*. These were thin reeds to hang this claim on.

254. *Elam*, 195 Wis. 2d at 685.

courts *must* maintain their legitimacy. These concerns shouldn't be dismissed lightly. If Wisconsinites stop believing that SCOWIS speaks with authority, that its rulings carry the force of law, and that it has the final say on matters big and small (save those federal-law questions taken up by SCOTUS), it's hard to imagine the court being treated as anything but a nominal decision-maker.

On the other hand, it is worth taking a moment to remember why this matters. SCOWIS's precedent-formation problem is now obvious. So are its effects on the state, which will only grow worse as the years pass and questions continue to arise about these majority-less cases' meaning and validity. Dissenting in the second of SCOWIS's two fractured COVID regulations cases, Justice Ann Walsh Bradley rightfully noted that the court's earlier COVID decision "did not decide anything with regard to [one of the statutes at issue]. Where there is no analysis at all, what precedent was created for us to follow?"<sup>255</sup> If SCOWIS is malfunctioning in plain sight even one-twentieth of the time—and in the 2021–22 term, fractures occurred in more than one-sixth of the cases the court decided—it is in everyone's interest for someone to say so.

Who bears the brunt of this shaky state of affairs? Wisconsin's lower courts certainly do, as they are the ones most frequently called to apply these cases and make decisions based on them. Again, this is the big problem when high courts can't agree on both their decisions *and* the reasons for them: future courts can't be clear on the standard to apply in similar cases and are relegated to making educated guesses. (And although we may not have reason to be particularly sympathetic to the justices, this is a problem they, too, must deal with, as one can observe from their occasional disagreements about whether prior decisions found true majority support or not.<sup>256</sup>)

State government also arguably has suffered under this system. In our system of separated powers, the executive and legislative branches need a judicial branch that will clearly enunciate the law when called to. It also goes without saying that most citizens want their government to be competent (at minimum) and to abide by the limits on using its immense power. Officials struggle to do this when courts cannot reliably say what those limits are. Per

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255. *Tavern League v. Palm*, 2021 WI 33, ¶ 67, 396 Wis. 2d 434, 957 N.W.2d 261 (A.W. Bradley, J., concurring).

256. *See, e.g., Johnson v. Wis. Elections Comm'n*, 2022 WI 14, ¶ 66 n.1, 400 Wis. 2d 626, 971 N.W.2d 402 (Ziegler, C.J., dissenting); *Tavern League*, 2021 WI 33, ¶ 67 (A.W. Bradley, J., concurring); *Aicher v. Wis. Patients Comp'n Fund*, 2000 WI 98, ¶¶ 86–93, 237 Wis. 2d 99, 613 N.W.2d 849 (Crooks, J., dissenting).

*Tetra Tech*, can an agency apply its substantive expertise with confidence that its judgment will be upheld down the road, or given any deference at all? Per *Bartlett*, can the governor attempt to leverage his constitutional line-item-veto power on budget matters, without knowing what vetoes will be sustained by the courts? Per *Tavern League*, must state agencies obtain a legislative hall pass before responding to rapidly developing public-health emergencies?

These concerns apply to the state legislature with full force. For example, it is a basic principle of statutory interpretation that legislatures are presumed to know the legal backdrop of the laws they pass.<sup>257</sup> This principle is difficult to square with an environment like the one Wisconsin faces, where the legislature cannot truly claim to understand the state of multiple areas of law. By the same token, the canon of legislative acquiescence—i.e., a legislature that makes no effort to reverse a court decision by enacting contrary law has tacitly agreed to the correctness of that decision—suffers under this regime as well.<sup>258</sup> If no one can honestly discern the state of the law, how can the legislature be expected to build upon tenuous, shifting sands?

Finally, the people of Wisconsin stand to lose most under current conditions. Put aside the actual and potential consequences of these decisions for a moment and focus on the decision-makers. Each of these seven statewide elected justices was each voted into a ten-year term in office to oversee a \$100 million court system whose decisions impact every person, business, and official in the state. The fact that they are regularly failing to fulfill their primary duty as judges—to clearly articulate the law—is problematic at best. It's especially bad in those cases like *Bartlett*, where the court appeared to issue a legally unmatchable compendium of concurring opinions that wrought a massive change to a core governmental power.<sup>259</sup> Citizens will continue to lose if SCOWIS continues on its path of publishing confusing, majority-less decisions.

This is an untenable state of affairs, and it may take significant self-regulation by SCOWIS to fix it, including by refining and reconsidering its approach to the Rationale Rule. Existing case law, judicial practice, and foundational legal norms in Wisconsin illuminate the path toward doing so. We argue that the court should heed these lights, readjust its approach to the Rationale Rule, and ultimately, if it cannot start to form more clear majorities on *both* the outcome and *ratio decidendi* in a case, decline to alter the *status*

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257. *Czapinski v. St. Francis Hosp., Inc.*, 2000 WI 80, ¶ 22, 236 Wis. 2d 316, 613 N.W.2d 120.

258. *Miller v. Storey*, 2017 WI 99, ¶ 51, 378 Wis. 2d 358, 903 N.W.2d 759 (collecting cases).

259. *See Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685.



*quo ante* at all. Consistent with its own precedent and historical practices, when SCOWIS cannot truly decide, it should decline to affirmatively act.

*A. The Rationale Rule and Wisconsin's Judicial Norms*

What do we know about the Rationale Rule? First, the outcome of a case—what a litigant or lower court is being ordered to do—must draw the support of a majority of justices. Second, for a decision to represent binding precedent for future courts and litigants, a majority of justices must agree on *both* the mandate *and* the various “point[s] of law” underlying that reasoning. Third, the Rationale Rule is not the same as the *Marks* narrowest-grounds approach followed by SCOTUS. SCOWIS has never endorsed this approach, choosing instead to look issue-by-issue for overlapping points of agreement between the justices’ opinions when they split from each other.<sup>260</sup> Fourth, SCOWIS sometimes sidesteps its own Rationale Rule and decides a case on the merits, even though a majority of the court agrees with a mandate, but diverges on the supporting reasoning. (Below, we argue that the court should stop doing this in most cases.) Fifth, both the *Makos-Aicher* saga and the *Coyne-Koschkee* sequence demonstrate that fractured opinions provide only persuasive authority for Wisconsin’s lower courts and can be overruled by a future SCOWIS able to form a true majority.

That is it. The rest is theoretically “up for grabs.” And there is plenty left to be defined in this wholly undertheorized area of law. Within an individual opinion, what constitutes a “point” of law on which a majority of justices must agree? What actually constitutes “agree[ment]” on a point of law? How should the Rationale Rule apply in original actions, where there is no lower-court opinion or possibility for remand? What should happen when no majority of justices agrees on all points of law necessary to a decision?

To address these questions appropriately, one must step back and consider the basis for Wisconsin’s approach to fractured opinions within the context of its specific system of judicial decision-making. While SCOWIS has never explicitly outlined the theoretical justifications for the Rationale Rule, the foundations of Wisconsin’s approach to the common law clearly support its use. They also, as we argue below, help situate potential solutions within a stable and useful normative framework. These norms include, though are not necessarily limited to, the notions of precedent, majoritarianism, judicial restraint, and apolitical decision-making.

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260. Again, only a minority of federal courts take an issue-by-issue approach to *Marks*. Williams, *supra* note 4, at 818.

**Precedent.** Talking about the meaning of a fractured opinion must start with the concept of precedent itself. By the time of Blackstone’s *Commentaries*, which in the eighteenth century spoke of “the rule of precedent as one of general obligation,” the concept of generally adhering to prior court decisions was well established.<sup>261</sup> But to compromise with the inevitable fallibility of judges and need for the law to develop soundly, Blackstone offered a compromise: “where the former determination is most evidently contrary to reason; much more if it be contrary to divine law” or “the established custom of the realm,” old cases *could* be overruled.<sup>262</sup> America’s Founders variously endorsed both approaches. In Federalist No. 78, Alexander Hamilton referenced “strict rules and precedents” as the ideal for the judiciary, to ensure an “inflexible and uniform adherence to the rights of the Constitution.”<sup>263</sup> James Madison saw precedent as a more open-ended process of case development with various policy-based exceptions.<sup>264</sup>

Wisconsin’s own jurisprudential history also embodies both views. On the one hand, SCOWIS “follows the doctrine of stare decisis scrupulously” to promote the “rule of law.”<sup>265</sup> In addition, “[t]he court of appeals may not overrule, modify, or withdraw language from a prior supreme court or court of appeals opinion—even if the court of appeals believes that the prior precedent is erroneous.”<sup>266</sup> Only SCOWIS may do this, in order to uphold and preserve “principles of predictability, certainty, and finality relied upon by litigants, attorneys, and courts alike.”<sup>267</sup>

On the other hand, the court has also said that prior precedent is not to be a “straightjacket” requiring the justices to adhere to all past cases always, forever.<sup>268</sup> “Compelling” justifications may require overruling past

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261. Thomas Healy, *Stare Decisis as Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001); see also 1 WILLIAM BLACKSTONE, COMMENTARIES \*68–69 (“[I]t is an established rule to abide by former precedents where the same points come again in litigation.”).

262. BLACKSTONE, *supra* note 261, at \*69–70.

263. THE FEDERALIST NO. 78, AT 469 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

264. Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 664–66 (1999).

265. *Engelhardt v. City of New Berlin*, 2019 WI 2, ¶ 24, 385 Wis. 2d 86, 921 N.W.2d 714.

266. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶ 54, 324 Wis. 2d 325, 782 N.W.2d 682.

267. *Id.* (citing and discussing *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997)).

268. *Johnson Controls, Inc. v. Employers Ins. of Wausau*, 2003 WI 108, ¶ 100, 264 Wis. 2d 60, 665 N.W.2d 257.

precedent.<sup>269</sup> In practice, stare decisis is a core guideline that does not *inexorably* lock the justices in but *should generally* bind them. Thus, SCOWIS has developed a nonexclusive five-factor analysis for deciding whether to overrule a prior precedent. Though it has not always scrupulously followed this test—including in the *Bartlett* case discussed above and others from the court’s last several terms—this basic approach to stare decisis has not been overruled.<sup>270</sup>

One might argue that this formulation is naïve as a matter of *realpolitik*, given SCOWIS’s recent brazenness in jettisoning decades-old precedent because (i) it can (e.g., *Tetra Tech*), or (ii) it has newly determined the precedent was just “objectively wrong” at all times past and present.<sup>271</sup> We need not resolve this tension here, because it does not change the fact that stare decisis is still followed broadly—every time the justices build arguments out of faithful interpretations of prior case law, that is stare decisis. Whether some justices on the court have done harm to the concept in recent years does not mean that it has lost all meaning nor that it is no longer a cornerstone of Wisconsin’s common law. By all appearances, the justices largely accept the concept as critical and invoke it as such. It thus remains a relevant value (among several) in assessing the scope and proper application of the Rationale Rule.

**Judicial Restraint.** Related to the concept of precedent is the norm of judicial restraint. It is inherent in the idea that judges should generally adhere to prior precedents, overruling them only in extraordinary circumstances. It is as much a doctrine enabling predictability and consistency in the law as it is a doctrine meant to limit the options and actions of the justices.

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269. *State v. Luedtke*, 2015 WI 42, ¶40, 362 Wis. 2d 1, 863 N.W.2d 592 (quoting *Bartholomew v. Wis. Patients Comp. Fund*, 2006 WI 91, ¶33, 293 Wis. 2d 38, 717 N.W.2d 216).

270. *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685; *see also* *Koschkee v. Taylor*, 2019 WI 76, ¶¶65–67, 387 Wis. 2d 552, 929 N.W.2d 600 (A.W. Bradley, J., dissenting) (noting how, in a case overruling the fractured decision in *Coyne v. Walker*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520, the majority opinion declined to address stare decisis not only due to the fractured nature of *Coyne*, but because, simply “stare decisis does not require us to retain constitutional interpretations that were objectively wrong when made . . . because such interpretations are unsound in principle”).

271. *Friends of Frame Park v. City of Waukesha*, 2022 WI 57, ¶42, 403 Wis. 2d 1, 976 N.W.2d 265; *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 2018 WI 75, ¶135, 382 Wis. 2d 496, 914 N.W.2d 21 (Ziegler, J., concurring); *see also* Daniel R. Suhr & Kevin LeRoy, *The Past and The Present: Stare Decisis in Wisconsin Law*, 102 MARQ. L. REV. 839, 858 (2019) (collecting cases to show that each of the justices sometimes find “themselves in the awkward juxtaposition of holding that the court must respect stare decisis and defer to precedent, except when they think the court should overrule a prior case and not follow precedent—all based solely on their own weighing of the relevant factors and considerations”).

SCOWIS regularly invokes judicial restraint in a variety of contexts: standing, mootness, administrative exhaustion, and constitutional avoidance, to name a few.<sup>272</sup> We see the concept of judicial restraint come up in other places, too.<sup>273</sup> For example, it is hornbook law that SCOWIS does not issue advisory opinions: “Courts will not declare rights *until they have become fixed* under an existing state of facts.”<sup>274</sup> The premise that SCOWIS will not render advisory opinions has been uncontroversial in Wisconsin legal history. Any number of cases over the past century have supported the proposition that “[i]n the absence of constitutional provisions *so requiring*, courts will not render merely advisory opinions, even though such opinions be requested by coordinate branches of . . . government.”<sup>275</sup> This is fundamentally a doctrine of restraint, limiting justices’ ability to shape the law before a dispute about the law actually becomes ripe.

Also consider the court’s treatment of dicta. The existence of dicta—stray statements in an opinion without supporting analysis or binding legal effect—

272. *Tetra Tech*, 2018 WI 75, ¶ 138 (Ziegler, J., concurring); *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 168, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting) (explaining that the court’s proper role is not “to do freewheeling constitutional theory” or “to decide every interesting legal question” but to “precise[ly]” and “carefully focus[.]” on “the narrow . . . question[.]” before it); *cf. Marathon Cnty. v. D.K.*, 2020 WI 8, ¶ 19, 390 Wis. 2d 50, 937 N.W.2d 901 (discussing mootness as a “doctrine of judicial restraint”); *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶ 25, 294 Wis. 2d 274, 717 N.W.2d 781 (discussing judicial restraint in the context of statutory interpretation); *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶ 8, 242 Wis. 2d 94, 624 N.W.2d 150 (describing judicial restraint in the context of the requirement of administrative exhaustion); 16 C.J.S. *Constitutional Law* § 212 (2015) (“A longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.”); John Paul Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 183 (1982) (“The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.”).

273. *See Wis. Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 72, 373 Wis. 2d 543, 892 N.W.2d 233 (A.W. Bradley, J., dissenting) (understanding statutory interpretation as a form of judicial restraint).

274. *Voight v. Walters*, 262 Wis. 356, 359, 55 N.W.2d 399 (1952) (quoting *Skowron v. Skowron*, 259 Wis. 17, 19, 47 N.W.2d 326 (1951)).

275. *City of Milwaukee v. Milwaukee Cnty.*, 256 Wis. 580, 585, 42 N.W.2d 276 (1950) (quoting *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 22–24, 264 N.W. 627 (1936)); *see also State ex rel. Collison v. Milwaukee Bd. Rev.*, 2021 WI 48, ¶ 46, 397 Wis. 2d 246, 960 N.W.2d 1 (“We will . . . not depart from our general practice that this court will not offer an advisory opinion or make a pronouncement based on hypothetical facts.”); *State v. Grandberry*, 2018 WI 29, ¶ 31 n.20, 380 Wis. 2d 541, 910 N.W.2d 214; *Am. Med. Servs. v. Mut. Fed. Sav. & Loan Ass’n*, 52 Wis. 198, 203, 188 N.W.2d 529 (1971).

was formally disavowed by a unanimous SCOWIS over a decade ago.<sup>276</sup> Indeed, the court held without qualification that “to uphold the principles of predictability, certainty, and finality, the court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum.”<sup>277</sup> The refusal to make statements that do not firmly and squarely address an issue placed before the court, based on logic and reason, is closely related to the concept of judicial restraint, showing a judicial commitment to self-control and choosing one’s words carefully.

Much as with stare decisis, we must address political reality. Members of the conservative majority that dominated the court for more than a decade, until quite recently, were often accused by their colleagues of abandoning judicial restraint in order to race toward decisions on the merits, especially in the context of original actions. The 2010s fractured cases contain plenty of examples—*Tetra Tech* and *Palm* come to mind.<sup>278</sup> It’s also fair to point out, as Dr. Ball has, that conservative justices were once the loudest defenders of judicial restraint when in the minority, but more recently liberal justices have occupied that role.<sup>279</sup> A reasonable observer might argue that this exposes judicial restraint as a fig leaf for judges in the minority to accuse the majority of doing something they don’t like. High talk, low substance.

Here, the circle can be sufficiently squared for our purposes. There is no dispute that judicial restraint *is* a Wisconsin jurisprudential value, as shown by the massive volume of prudential doctrines that invoke it directly and indirectly. It is also true that judicial restraint is often a circumstantial judgment, and a determined majority may feel empowered to run roughshod over the concept to achieve a specific result. However, the latter point does not deprive the concept of judicial restraint of all substance. A recalcitrant justice’s refusal to adjudicate

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276. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶ 57–58, 324 Wis. 2d 325, 782 N.W.2d 682.

277. *Id.* ¶ 58. Note that some justices on the current court appear open to formally reviving (or clarifying) dicta’s status, per a concurrence by Justice Hagedorn in a case where he also wrote a majority opinion discussing a lame-duck conservative majority’s views on originalism at length. *See Wis. Just. Initiative, Inc. v. Wis. Elections Comm’n*, 2023 WI 38, ¶¶ 147–50, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring with Dallet, J.) (denying that SCOWIS adopted a categorical rule against dicta in *Zarder* and arguing that dicta remains a viable concept in Wisconsin jurisprudence).

278. *Wis. Legislature v. Palm*, 2020 WI 42, ¶¶ 132, 148, 154, 156–161, 391 Wis. 2d 497, 942 N.W.2d 900 (Dallet, J., dissenting); *Tetra Tech EC, Inc. v. Wis. Dep’t of Revenue*, 2018 WI 75, ¶¶ 111–20, 382 Wis. 2d 496, 914 N.W.2d 21 (A.W. Bradley, J., concurring in the judgment); *see also James v. Heinrich*, 2021 WI 58, ¶ 87, 397 Wis. 2d 516, 960 N.W.2d 350 (Dallet, J., dissenting).

279. Alan Ball, *Is Stare Decisis Dead?*, SCOWSTATS, (Mar. 28, 2017), <http://www.scowstats.com/2017/03/28/is-stare-decisis-dead/> [<https://perma.cc/CBS9-CTHG>].

as an honest broker is an argument that they are ignoring an important principle in bad faith, not an argument that the principle is itself without value. At most, it means that judicial restraint may be a somewhat weaker judicial value in practice that, standing alone, is not enough to justify an approach to the Rationale Rule. Luckily, there are others.

**Majoritarianism.** High courts are not often thought of as majoritarian political institutions, at least as “majoritarian” is usually understood. Quite the opposite. The term smacks of the politics of popularity, and understandably, some justices would rather set their robes ablaze than openly decide cases based on what they think the public prefers.

Yet, since the start of Wisconsin’s history, the state constitution has commanded that the court comprise an odd number of justices, an unmistakable gesture towards the concept of majority rule.<sup>280</sup> Indeed, the justices have—Rationale Rule-implicating cases aside—followed a rule that a majority vote of justices is generally required for the court to decide a case.<sup>281</sup> The uniform treatment of tied votes as requiring affirmance of a lower court opinion also supports the notion of SCOWIS as a fundamentally majoritarian institution. As does the manner in which the justices confer to discuss draft opinions or make changes to the court’s Internal Operating Procedures: by majority vote.<sup>282</sup>

Further, consider the addition of the intermediate court of appeals in the 1970s. By changing the structure of Wisconsin’s third branch the people clearly signaled comfort with the premise that a majority of an intermediate appellate court could and *should* trump a tied vote at the high court. Even if a majority of SCOWIS cannot rule in a given case, we the people decided that it is ultimately better for some majority on an intermediate appellate court to rule instead. The justices have endorsed this view:

The entire organizational scheme of our court system, as designated constitutionally in 1977–78, provides that the court of appeals has law-making power that transcends merely doing justice in the individual case. . . . Since 1978, a body of law,

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280. This may have even been true before the state formally began electing judges. WIS. SUP. CT., *supra* note 21, at vii (noting that in 1848 five circuit court judges convened annually in Madison as a “Supreme Court”).

281. *See, e.g.,* Pepsi-Cola Metro. Bottling Co. v. Emps. Ins. Co. of Wausau, 2023 WI 42, ¶ 1, 407 Wis. 2d 384, 990 N.W.2d 267 (per curiam) (affirming court of appeals after two justices recused because “[n]o three justices reach agreement to either affirm, reverse, or affirm in part and reverse in part”).

282. WIS. SUP. CT. INTERNAL OPERATING PROC. Introduction; WIS. SUP. CT. INTERNAL OPERATING PROC. III.

which lawyers and trial courts are obliged to follow and which this court treats as precedent, stems from published decisions and opinions of the court of appeals.<sup>283</sup>

Remember also the *Gustafson* case, which helped kick off the last thirty-five-plus years of fractured-opinions jurisprudence:

[A] rule that would allow individual justices to pool their minority votes and award a new trial, in the face of the court's determination that there was no prejudicial error, would have the effect of elevating the individual justices to a position above the court. This evidences a misunderstanding of the concept of a collegial appellate court. The power to render decisions rests with this court, not in the individual justices.<sup>284</sup>

Although the court was speaking to *Gustafson's* particular situation of awarding a new criminal trial, this reasoning further supports majority rule as a core tenet of Wisconsin's constitutional order. Put otherwise, "the Court" is one entity, not "the Body of Several Individual Justices," and its decisions and reasoning are supposed to be issued based on the views of a cohesive majority.<sup>285</sup> (Even SCOTUS, whatever the limits of *Marks*, has certainly hewn to this belief. Although nothing in the federal Constitution explicitly requires majority rule at the Supreme Court, it has been the rule since the beginning.<sup>286</sup>) The constellation of these constitutional commands, judicial structures, and deep-seated institutional practices demonstrates that SCOWIS is an institution shaped and governed by majoritarianism.

***Apolitical Decision-making.*** It scarcely needs to be said that SCOWIS's justices present themselves as fair dealers doing their best to interpret and apply law, rather than to advance short-term political goals. Return again for a moment to the reason Wisconsin elects its judges. The framers of Wisconsin's constitution believed that appointing justices would create a judiciary lacking independence. Whereas—in the Jacksonian tradition of the time—elected

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283. *Vollmer v. Luety*, 156 Wis. 2d 1, 15 n.4, 456 N.W.2d 797 (1990).

284. *State v. Gustafson*, 121 Wis. 2d 459, 463, 359 N.W.2d 920 (1985) (emphasis added).

285. *Cf. Schwister v. Shoenecker*, 2002 WI 132, ¶ 8, 258 Wis. 2d 1, 654 N.W.2d 852 (discussing how when the court has to interpret its own rules, its "goal" is to "ascertain and give effect to the intent of the court in adopting the rule"). This further shows how SCOWIS tends to conceive of itself as a single body, as opposed to a confederation of individual justices.

286. AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 360 (2012) (noting that SCOTUS has "routinely followed the majority rule principle without even appearing to give the matter much thought" from "its first day to the present day").

judges would recognize the people as the underlying source of judicial power and lean into impartial decision-making focused on producing honest results, rather than satisfying the preferences of an aligned political party.<sup>287</sup>

Whether one believes the justices are truly apolitical is irrelevant to this discussion.<sup>288</sup> As a matter of core, state-constitutional norms, Wisconsinites expect their justices to make decisions based on their views of the law. The justices themselves have clearly sought to identify themselves as “apolitical and neutral arbiters of the law.”<sup>289</sup> We sometimes see this in the justices’ invocations of the political-question doctrine to (rightly or wrongly) avoid treading on the more explicitly politicized turf of the executive and legislative branches.<sup>290</sup> We also see this in the rules the justices have set for all judges in the state, in Wisconsin Supreme Court Rule 60. Wisconsin has long placed limits (albeit modest ones) on judges’ speech that aren’t observed by other branches of state government.<sup>291</sup> Judges are required to resign prior to becoming a candidate for any non-judicial office.<sup>292</sup> Candidates for judicial office are even forbidden—if only nominally—from “appeal[ing] to partisanship” in their campaigns.<sup>293</sup> These constraints provide textual evidence of a deep commitment to the foundational ideal of a nonpartisan judiciary.

287. R. Lawrence Hachey, *Jacksonian Democracy and the Wisconsin Constitution*, 62 MARQ. L. REV. 485, 517–19, 525 (1979).

288. *But see* David Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266–68 (2008) (noting that “[n]o other advanced democracy elects any sizable portion of its judiciary,” and generally discussing and documenting the fact that, while judicial elections used to be “low-key” affairs, in the modern era “[c]ontributions have skyrocketed; interest groups, political parties, and mass media advertising play an increasingly prominent role; incumbents are facing stiffer competition; salience is at an all-time high,” plus “[c]ampaign rhetoric has . . . become more substantive in content and negative in tone,” and “the distinctive rules, norms, and politics of judicial elections have begun to disappear”); *see also* Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection*, 56 WM. & MARY L. REV. 3 (2014); *cf.* Adelman, *supra* note 130, at 17–26.

289. *Johnson v. Wis. Elections Comm’n*, 2021 WI 87, ¶ 72, 399 Wis. 2d 623, 967 N.W.2d 469; *James v. Heinrich*, 2021 WI 58, ¶ 23 n.12, 397 Wis. 2d 516, 960 N.W.2d 350 (quoting ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 61 (2012)); *Helgeland v. Wis. Muns.*, 2008 WI 9, ¶ 17, 307 Wis. 2d 1, 745 N.W. 2d 1 (Abrahamson, C.J.) (quoting Chief Justice Roberts in stating that “a judge’s job is like an umpire’s . . . to make calls according to the rules, not according to the voices of a partisan crowd”); *McCarthy v. Elections Bd.*, 166 Wis. 2d 481, 495, 480 N.W.2d 241 (1992) (Ceci, J., dissenting) (“This court should not appropriate to itself the functions of a political supercommittee.”).

290. *Johnson*, 2021 WI 87, ¶ 40.

291. Wis. Sup. Ct. R. 60.04(4)(f) (requiring recusal while a “judge or candidate for judicial office” based on certain types of “public statement”).

292. *Id.* 60.06.

293. *Id.* 60.06(2)(a).



*B. Theorizing the Rationale Rule and Charting a Path Forward*

Having distinguished the federal approach to fractured decisions and identified key judicial norms that drive Wisconsin's approach to the common law, we can now discuss how the Rationale Rule fits within that broader scheme. Further, we can try to propose a way out of the recurring impasses that have defined the past decade-plus at SCOWIS.

The core of the Rationale Rule is that a "majority of the participating judges must have agreed on a particular point" of law for precedent to form.<sup>294</sup> So, to properly theorize the Rationale Rule and divine a solution, we will first identify what should be considered a "point" of law, and what it should mean for the justices to "agree" on that point. Finally, we will argue that, for the justices to remain faithful to the Rationale Rule and these fundamental judicial norms, they must change how they approach resolving fractured opinions. That is, in the future, where the justices are unable to form Rationale Rule-proof majorities, in all but exceedingly rare circumstances they should decline to affirmatively act through their decision-making.

i. What is a "Point" of Law?

Let's start with the most basic question, what is a "point" of law requiring majority agreement among the justices?

There are ultimately two ways to view this. A "point" of law could refer to the core legal decision in a case—in *Tetra Tech*, for example, that holding that courts may not afford any deference to administrative agencies' interpretations of the statutes they enforce.<sup>295</sup> On the other hand, a point of law could be both a fundamental legal holding and *ratio decidendi* of a case—those various pieces of rational scaffolding that support and explain the holding. It would include (i) any applicable standards or rules the court applies in the case and (ii) the application or interpretation of any constitutional provisions, statutes, or regulations that form a critical link in the decision-making chain.

As discussed throughout this piece, SCOWIS has steered itself towards the latter approach, with lower-court judges—in the face of a fractured opinion—pulling out various pieces of the justices' opinions on an issue-by-issue basis. This is certainly how SCOWIS itself has addressed the issue in discussing its

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294. *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995).

295. *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 106, 382 Wis. 2d 496, 914 N.W.2d 21.

own fractured decisions.<sup>296</sup> (“A concurrence which receives the support of a majority of participating judges on a particular issue becomes the opinion of the court on *that issue*.”<sup>297</sup>) Remember also early cases like *McNaughton’s Will*, *Ford*, and *Sperry*, where concurring justices’ opinions were able to shape the outcome of the case by cabining their agreement with the “majority” opinion to specific sub-issues that still allowed for a cognizable result (and affirmative mandate) in the case.

The Wisconsin Court of Appeals has also apparently taken this approach to heart and dealt with fractured opinions under the view that a “point” of law can include a standard or rule adopted or applied by a majority of SCOWIS and not explicitly rejected by a concurrence.<sup>298</sup> For example, in *State v. Lane*, a case about a defendant who revoked his consent to a blood sample *after* giving police his blood, the court of appeals cobbled together several points of law from a one-justice lead opinion and a three-justice concurrence to determine the relevant Fourth Amendment standard.<sup>299</sup> *State v. Hogan* was more complex, as the court of appeals tried to discern a rule from one of SCOWIS’s 2010s fractured opinions by looking for “areas of agreement among” three opinions.<sup>300</sup> In that case, the court of appeals was forced to chop the justices’ opinions into many paragraph-specific pieces and cobble together a couple dozen paragraphs’ worth of consensus out of them.<sup>301</sup> The court of appeals has even used an issue-by-issue analysis for the opposite purpose of identifying a

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296. *Vivid, Inc. v. Fielder*, 219 Wis. 2d 764, 797 n.1, 580 N.W.2d 644 (1998) (A.W. Bradley, J., concurring); *State v. Dowe*, 120 Wis. 2d 192, 194, 352 N.W.2d 660 (1984) (per curiam); *In re McNaughton’s Will*, 138 Wis. 179, 191, 118 N.W. 997 (1908).

297. *Vivid, Inc.*, 219 Wis. 2d at 797 n.1 (A.W. Bradley, J., concurring) (emphasis added); *see also Dowe*, 120 Wis. 2d at 194; *McNaughton’s Will*, 138 Wis. at 191.

298. *State v. Lane*, 2019 WI App 65, ¶¶ 7–11, 389 Wis. 2d 378, 936 N.W.2d 424 (unpublished); *see also Lang v. Lions Club of Cudahy Wis., Inc.*, 2018 WI App 69, ¶ 22 n.6, 384 Wis. 2d 520, 920 N.W.2d 329 (discussing how, in an earlier SCOWIS case, a majority formed because a concurrence “d[id] not include language disavowing the rationale” of the majority), *rev’d on other grounds*, 2020 WI 25, 390 Wis. 2d 627, 939 N.W.2d 582.

299. 2019 WI App 65, ¶¶ 7–11.

300. 2021 WI App 24, ¶ 18 n.5, 397 Wis. 2d 171, 959 N.W.2d 658 (discussing *Seifert v. Balink*, 2017 WI 2, 372 Wis. 2d 525, 888 N.W.2d 816).

301. *Id.* ¶ 18 n.5 (relying on agreement among *Seifert*’s lead opinion and separate concurrences by Justices Ziegler and Gableman).

point that SCOWIS has *not* said or addressed in an opinion—such as in *Schwab v. Schwab*.<sup>302</sup>

State jurisprudential norms also suggest that a “point” encompasses the logical bases underlying a decision. Wisconsin’s common law is not just a series of outcomes, but rather, a nearly two-century-long tapestry of legal reasoning developed through precedent as different issues and arguments are adjudicated. SCOWIS does not simply issue mandates: it explains its actions through reasoned opinions that cite to and build upon prior case law and principles. This is not just because justices enjoy writing, though you would hope they do. They integrate today’s decisions with the past for the benefit of future courts and litigants to understand *why* a case was decided a given way, so that, when a new case with different facts and the same applicable law arises down the road, they will have authoritative and majority-backed guidance on how to approach it.

So, to summarize: a “point” of law may include both the result of a given case and any of these components forming a necessary link in the chain of reasoning to reach that result:

- The use or interpretation of a specific constitutional provision, statute, procedural rule, or comparable written source of law;
- The application of an underlying judicial rule or legal principle, such as waiver, *stare decisis*, or the political-question doctrine; and
- Any other legal rule, test, or standard applied or adopted in order to reach the conclusion in a case.

## ii. What Constitutes “Agreement”?

Having identified what a “point” of law is, the next issue is what it means for the justices to “agree” on that point. Just as foundational Wisconsin legal norms provide that a “point” is not limited to the result of a case but encompasses supporting legal principles—the *why* behind the mandate—the concept of agreement under the Rationale Rule must also respect these principles. Thus, to create binding precedent under the Rationale Rule, we must

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302. 2020 WI App 40, ¶ 16 n.4, 392 Wis. 2d 660, 946 N.W.2d 241, *rev’d on other grounds*, 2021 WI 67, 397 Wis. 2d 820, 961 N.W.2d 56. In reversing the court of appeals in *Schwab*, SCOWIS did not criticize the methodology that the lower court applied to interpreting a prior lead opinion; it simply found majority support for the point of law that had not previously garnered enough support to become a holding.

ask what happens when a majority of SCOWIS does not agree on (i) the result of the case or (ii) the key legal tenets underlying it.

Point (i) is simple—the justices must agree on *what* they are directing a lower court, agency, executive-branch official, or private litigant to do. SCOWIS has not had much difficulty with this, aside from rare cases like *Shoffner* where the court’s mandate seemingly contained contradictory guidance about what jury instruction to use on remand.<sup>303</sup> In SCOWIS’s many fractured decisions in the past decade-plus, it can at least be said that when the court cannot get a majority of justices to agree on the result in a case, it will generally not issue an affirmative mandate.<sup>304</sup>

Point (ii)—the *why* of a decision—is undoubtedly the hard question, particularly given the tendency of fractured opinions to arise in complex, politically charged cases. Finding agreement on reasoning in these cases is not always easy. So, how can we structure a Rationale Rule that respects these difficulties, provides the court with a minimum amount of judicial flexibility, and still curtails the problems that have plagued it in recent years? We don’t necessarily want a Rationale Rule that demands each concurring justice explicitly sign off on every last word in a majority opinion or be prohibited from speaking their own mind. On the other hand, the status quo is not acceptable either, where a justice can blatantly disagree with the lead opinion’s reasoning, offer their own ideas, and create a mandate resting on disparate reasoning. Surely a middle ground exists.

The most faithful implementation of the Rationale Rule recognizes the formation of binding precedent only where a concurring justice agrees with the *why* of a case, as demonstrated by running the lead opinion and concurrence through two interpretative “filters.” The first is essentially a legal smell test: does the concurrence clearly rely on different reasoning than the lead opinion to reach the same conclusion? A concurrence that does this fails the Rationale Rule. Using this formulation, an easy Rationale Rule case will be those like *Tavern League* and *Makos*, since the concurring justices’ opinions agreed only on the core holdings while explicitly diverging on the underlying reasoning. (*Tetra Tech* also fits in this category.)

Still, this “smell test” is not going to be enough in many fractured cases. Consider SCOWIS’s first of three recent redistricting decisions, *Johnson v.*

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303. *State v. Shoffner*, 31 Wis. 2d 412, 434, 143 N.W.2d 458 (1966).

304. *See, e.g., State v. Lynch*, 2016 WI 66, 66 n.1, 371 Wis. 2d 1, 885 N.W.2d 89; *State v. Hambly*, 2008 WI 10, ¶¶ 4–6, 307 Wis. 2d 98, 745 N.W.2d 48. *But see* Wis. Legislature v. Palm, 2020 WI 42, ¶ 65, 391 Wis. 2d 497, 942 N.W.2d 900 (Roggensack, J., concurring).

*Wisconsin Elections Commission*.<sup>305</sup> There, anticipating that the legislature and the governor would fail to enact new maps for state legislative and congressional districts following the 2020 Census, the court accepted original jurisdiction to impose maps and break the anticipated impasse.<sup>306</sup> In its first decision, the court addressed four preliminary questions about how it would adjudicate competing proposed maps. A lead opinion by three justices held that the court should apply a “least change” standard to the state’s existing maps—i.e., make only the limited changes necessary to account for population shifts, the Voting Rights Act, and state constitutional limits on mapmaking.<sup>307</sup> However, while Justice Hagedorn concurred with the least change concept, he explicitly disagreed that the court could not consider other factors in how to draw a new map, such as protecting communities of interest and “other traditional redistricting criteria.”<sup>308</sup>

What does this mean for the court and the future application of this case? A surface read of Justice Hagedorn’s concurrence suggests his general agreement with the court’s analysis. But a closer read shows that he rejected key pieces of the court’s decision: the criteria for how the new map should be drawn *and* the reasoning for not considering other redistricting criteria.<sup>309</sup> (The importance of this was starkly illustrated in follow-up decisions adopting specific maps.<sup>310</sup>)

Thus, the second filter to assess whether the lead and concurring opinions agree on the *why* of a case should require a more detailed look at whether the justices’ reasoning lines up. This requires the point-by-point analysis of the justices’ opinions, including their use or interpretation of various constitutional and statutory provisions, along with any tests or rules of law they rely on to come to their ultimate decision. It is a more difficult task than the smell test, but it is an essential step under Wisconsin’s issue-based approach to precedent formation. If the justices do not agree on each necessary component of the “why” in a given case, that decision lacks precedential value.

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305. 2021 WI 87, 399 Wis. 2d 623, 967 N.W.2d 469.

306. *Id.* ¶ 18.

307. *Id.* ¶ 81.

308. *Id.* ¶ 83 (Hagedorn, J., concurring).

309. *Id.*

310. See *Johnson v. Wis. Elections Comm’n*, 2022 WI 14, 400 Wis. 2d 626, 971 N.W.2d 402, *rev’d in part sub nom.* *Wis. Legislature v. Wis. Elections Comm’n*, 142 S. Ct. 1245 (2022), *stay denied in part sub nom.* *Grothman v. Wis. Elections Comm’n*, 142 S. Ct. 1410 (mem.) (2022), *modifying on remand*, *Johnson v. Wis. Elections Comm’n*, 2022 WI 19, ¶¶ 1–3, 401 Wis. 2d 198, 972 N.W.2d 559.

Let's consider some hypotheticals to help explain this approach to agreement. Consider a few variations on a case where four justices want to vote in favor of holding a state statute unconstitutional, as applied to a specific fact pattern:

- Say three justices strike down the law for three reasons, A, B, and C, each of which is an independent ground to find the statute to be unconstitutional. If the fourth justice agrees with reason A alone, the opinion would become binding precedent as to reason A, but not reasons B or C.
- Now, say that reasons A, B, and C are not independent factors. Perhaps A is a threshold question of justiciability; B is the interpretation of the relevant statute being challenged; and C is a multi-factor test to determine whether the statute is unconstitutional. If the fourth justice agrees with A and B, but then (for whatever reason) applies an entirely different test for constitutionality, D, under the Rationale Rule no precedent should form as to point C or point D. While, under SCOWIS's current practice, it appears the statute will still be held to be unconstitutional as applied, we discuss below why the court should refuse to bless facial challenges to laws under this form of divided reasoning.
- Perhaps the outcome of the case is even more complex: two justices hold the law to be unconstitutional as-applied for interdependent reasons A, B, and C, just as in the second example. A third justice, as above, agrees with A and B, and then applies a different test for the statute's constitutionality, D. Now, however, the fourth justice agrees with only A, and then writes a concurrence holding the statute unconstitutional for an entirely different reason, E. Under the Rationale Rule, no binding precedent has formed except as to point A. As we further argue below, the court should decline to issue its own mandate at all, and simply uphold the court of appeals, or otherwise maintain the *status quo ante*.

This understanding of the Rationale Rule is in line with SCOWIS's prior case law and is most faithful to the concept of majority rule. As discussed above, majority rule is an "essential" concept in Wisconsin's common-law

system, as it is throughout the American legal system more broadly.<sup>311</sup> Only majorities may decide the ultimate outcomes of cases, and SCOWIS has previously endeavored to apply this to the reasoning behind a decision, including the applicable legal standards going forward.<sup>312</sup>

The absurd consequences of the alternative illustrate why our proposed understanding of the Rationale Rule is correct. If “agreement” on a point of law merely refers to agreement on the case’s ultimate conclusion, then there is no limit on how many ways SCOWIS can split. Four justices could cobble together a mandate and issue four opinions based on divergent reasoning, rules, or constitutional provisions. How could lower courts and litigants be expected to effectively reconcile these opinions in future cases?<sup>313</sup> They would be left to choose, buffet-style, the opinion they most identify with, creating a risk of drastically divergent outcomes based on the practices and preferences of individual lower-court judges and almost guaranteeing future splits of opinion among the lower courts. Requiring agreement to encompass a given holding *and* its supporting reasoning avoids this problem, building certainty and stability in the law.

### iii. Options Going Forward

This Article now turns to a final question about cases implicating the Rationale Rule: what can be done about SCOWIS’s growing inability to form cohesive majorities?

A convenient solution would be for the court to simply decide to become ideologically monolithic. Skylar Reese Croy’s 2021 article correctly identified the rise in fractured opinions at SCOWIS, though without this Article’s in-

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311. AMAR, *supra* note 286, at 356–61 (collecting sources); Bennett, Friedman, Martin & Smelcer, *supra* note 57, at 839 (“It is an essential feature of common law collegial courts, including nearly every court in the United States, that a decision by majority vote is binding.”).

312. *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995) (discussing *State v. Dowe*, 120 Wis. 2d 192, 194–95, 352 N.W.2d 660 (1984)).

313. Two SCOWIS cases suggests one rare situation where this might be acceptable. *Ives v. Coopertools, Div. of Cooper Indus., Inc.*, 208 Wis. 2d 55, 57, 559 N.W.2d 571 (1997) (per curiam) (reversing appellate decision in six-justice decision where two groups of three justices diverged on reasoning behind decision, but all six squarely agreed on the outcome: “The published opinion of the Court of Appeals here should not stand when we unanimously agree that it does not state the law of Wisconsin”); *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 37 n.1, 262 Wis. 2d 720, 665 N.W.2d 155 (A.W. Bradley, J., concurring) (forming no precedent in habeas case due to “evenly divided [court] on the issue of remedy,” but also, Justice Bradley noting that “the court is unanimous in the conclusion that release is not a proper remedy at this time”).

depth look at the issue's history or analysis of its theoretical implications.<sup>314</sup> Though Croy suggests several options for dealing with the problem, he clearly gestures at the idea that the court's more ideologically rigid members should simply fall in line as part of an impregnable conservative bloc.<sup>315</sup> Broadly casting liberal judges as a clan of outcome-oriented would-be policymakers—based on fairly dubious citations aimed at building more coherent law that supports conservative ideological goals<sup>316</sup>—Croy asks conservative justices on SCOWIS to show “judicial humility” and just try to compromise with each other more.<sup>317</sup> He even suggests the justices could simply adopt their colleagues' views despite personally rejecting them in order to create more lasting law, just like Justice Wiley Rutledge in *Screws v. United States*.<sup>318</sup>

While Croy's article correctly identifies this problem and rightfully chastises the justices for their increasing tendency toward seriatim opinions, his prescriptions have a decidedly partisan bent—and often miss the point. The justices should not *have* to temper their views just to “say what the law is.” As long as the people of Wisconsin continue to elect our justices, some will be more ideologically flexible than others. The court should not skirt its duty by simply pretending it has a true majority where none has formed. Even if it were to take up fewer contentious issues, bring back the concept of dicta a little more than a decade after its abolition, or just show more “humility,” it would not obviate SCOWIS's need to clarify the consequences of these disagreements and self-police its dysfunction.

Still, we agree with Croy's implicit concession that there do not appear to be many extra-judicial options to rectify the situation. Ultimately, if four justices want to take on an issue and make a jurisprudential mess of it, in all likelihood there is little that the governor or the legislature can do to stop them. However, we have several suggestions that may help to bring clarity and stability back to Wisconsin's common law, and hopefully move the justices past their impasse. One of these suggestions is to simply explain the Rationale

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314. Croy, *supra* note 15, at 13–16.

315. *Id.* at 34.

316. *Id.* at 4, 33–34 (calling occasional refusals by liberal justices to compromise “psychological and not jurisprudential,” quoting an opinion piece from *The Hill* that suggests liberal U.S. Supreme Court Justices are “closed minded,” and citing other materials showing that liberal justices agree more with each other, all to support the conclusion that liberals “compromise” in a way conservatives cannot).

317. *Id.* at 21, 41, 46.

318. *Id.* at 42–43 (citing *Screws v. United States*, 325 U.S. 91, 113–34 (1945) (Rutledge, J., concurring)).



Rule; three involve internal or legislative reforms; one would ask Wisconsin's voters to take action within their constitutional role as justice-selectors; and the primary suggestion would entail an extraordinary (and perhaps unheard of) exercise in judicial self-regulation.

*a. Explain the Rationale Rule*

SCOWIS has never explained the theoretical or norms-based foundations of the Rationale Rule in an opinion. It should endeavor to do so at the next available opportunity. As shown above, the practices of (i) requiring majority support for a mandate and (ii) limiting the precedential effect of a split *ratio decidendi* have deep roots in Wisconsin's constitutional structure and norms. They also have support in case law. By providing a clear map for how lower courts, litigants, and others should approach fractured decisions, SCOWIS will help us all understand what these cases stand for and how they should (or should not) guide public practice.

*b. Make Several Updates to Internal Operating Procedures*

Revising the court's Internal Operating Procedures will be critical to improving the clarity of SCOWIS's fractured opinions. Indeed, it may be possible to make amendments that cut down on the number of fractures altogether.

One necessary change is a simple labelling issue. The court's Internal Operating Procedures require opinions to be referred to as a "lead opinion" when the document circulated as the draft majority doesn't garner a majority of votes on every major point of law.<sup>319</sup> Labelling a non-precedential minority opinion as the "lead" opinion is unnecessarily confusing. The court could easily fix this problem by modifying its Internal Operating Procedures to identify as the court's primary opinion the one whose reasoning draws the support of the largest number of justices *and* contains a majority-supported outcome. It could also stop referring to these opinions as "lead" opinions and use the more broadly recognized term "plurality."

The court need not stop there in improving the hygiene of its work product. SCOWIS could adopt an Internal Operating Procedure that requires the publication of a clear statement of the binding majority opinion—that is, every legal proposition and supportive reasoning in an opinion that draws a true majority of votes. That would substantially ease the burden on practitioners,

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319. WIS. SUP. CT. INTERNAL OPERATING PROC. III(G)(4).

courts, and the public in understanding what lasting holdings arise from a given case. It would also allow for greater ease in determining where a concurrence or dissent does *not* align with the majority view but represents a fracture in the justices' reasoning.<sup>320</sup>

These changes to the court's Internal Operating Procedures could be made even more impactful by modifying or abolishing the practice of assigning opinions by lot.<sup>321</sup> Under its current procedures, SCOWIS takes an initial vote on a case following oral arguments and then randomly assigns the task of writing the decision to a justice in the tentative majority.<sup>322</sup> This process is ripe for generating fractures, notwithstanding the caveat that "[w]here possible, a case is assigned only to a justice who has voted with the majority and agrees with a majority on the legal rationale for the decision."<sup>323</sup> (How can this really be enforced, if the opinions are assigned randomly?) Rather than risk wasting the justices' time (and their clerks') by leaving open the possibility that an outlier justice will write an opinion no one else will sign onto, SCOWIS should instead initially assign opinions only to a justice whose vote and reasoning appears to match the majority's (or at least the plurality's). If a fracture still occurs, the court may then need to re-assign the task to whichever justice can cobble together the most votes.

Finally, and perhaps controversially, the court could consider increasing the threshold for accepting cases for review at all. At present, a petition for review requires the affirmative vote of three members of the court.<sup>324</sup> This requirement is rooted in a noble purpose of "accomodat[ing] the general public policy that appellate review is desirable."<sup>325</sup> However, this public policy stands in tension with the judicial value of majoritarianism and allows any three justices to grant cases for review before a majority of the court is prepared to render a binding opinion. In theory, raising this threshold from three votes to four would prevent this from happening in a certain number of cases. So long as the court of appeals is given a chance to weigh in on a case—that is, the case is not heard as an

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320. Moving the majority opinion writer's own non-conforming views to a concurrence could also aid this effort, though it would still not resolve the court's problem with issuing more and longer opinions. *See, e.g., Wis. Just. Initiative v. Wis. Elections Comm'n*, 2023 WI 38, ¶¶ 147–50, 407 Wis. 2d 87, 990 N.W.2d 122 (Hagedorn, J., concurring) (presenting with Justice Dallet, in separate writing, the two justices' views of dicta).

321. WIS. SUP. CT. INTERNAL OPERATING PROC. III(F).

322. *Id.*

323. *Id.*

324. *Id.* III(B).

325. *Id.*

original action or on a petition for bypass—the public policy in support of appellate review would still be respected.<sup>326</sup>

*c. Limit Concurrences*

Seriatim opinions were long ago cast aside at SCOTUS by Chief Justice Marshall.<sup>327</sup> And until more recently, SCOWIS, with rare exceptions, attempted to convey the majority view in one voice. Unfortunately, as documented above, the court's rise in fractured opinions has coincided with an increase in the length of its opinions overall, as the justices attempt to counter, qualify, and shape the meaning of so-called “lead” opinions through lengthy concurrences.<sup>328</sup>

If SCOWIS wants to improve the clarity and reduce the length of its opinions, it might place internal limits on these concurring opinions. SCOWIS could adopt an Internal Operating Procedure along these lines. It could prohibit concurring opinions from being included as part a published decision where the opinion is being used to do something other than distinguish one justice's view from a majority or lead opinion—such as to opine on potential policy proposals, simply criticize a dissent, or offer “freewheeling constitutional theory.”<sup>329</sup> This may not eliminate all of the court's seriatim opinions, but it will help around the edges where the justices could be tempted to publish a writing that does not affect the result of a case.<sup>330</sup>

Another option would be to limit concurrences to a 1,000-word maximum. This approach would be a blunt but effective instrument to reduce concurrence lengths. It would also be subject to the criticism that it stifles the ability of a popularly elected justice to state their views where relevant to deciding the case at hand. Another potential drawback of a word-count limit is that it could inhibit justices from shifting more of their views into concurring opinions, rather than

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326. Wis. Stat. § 809.60 (2021-22); Wis. Stat. § 809.70 (2021-22).

327. Rotunda, *supra* note 27.

328. See Ball, *supra* note 8; Ball, *supra* note 208.

329. *Bartlett v. Evers*, 2020 WI 68, ¶¶ 244–45, 393 Wis. 2d 172, 945 N.W.2d 685 (Hagedorn, J., concurring). This phenomenon is not necessarily limited to fractured opinions. See, e.g., *Wis. Prop. Taxpayers, Inc. v. Town of Buchanan*, 2023 WI 58, ¶ 33, 408 Wis. 2d 287, 992 N.W.2d 100 (R.G. Bradley, J., concurring) (authoring a concurrence in a case in which she wrote the unanimous majority opinion).

330. Again, SCOWIS's justices are not the only appellate judges who struggle to reconcile their individual views with their duty to form majorities. Some judges, including some renowned jurists, have done so by issuing opinions *dubitante*. These are separate writings by a judge who joins the majority opinion in full but then writes separately to express uncertainty about a premise of that opinion. See Jason J. Czarneski, *The Dubitante Opinion*, 39 AKRON L. REV. 1 (2006).

confusingly integrate them into part-majority, part-lead opinions despite the lack of majority support for those views. As frustrating as these lengthy concurrences might be, it is possible that they may be a necessarily evil, so long as other significant reforms are implemented that improve the clarity of the opinions (and their precedential value) as a whole.

*d. Stop Issuing Mandates Based on Minority Reasoning*

Unfortunately, these suggestions simply nibble around the edges of the fracturing problem. The real solution requires an extraordinary exercise of self-regulation. Although, the solution would be far more in tune with Wisconsin's fundamental constitutional norms than what is currently happening at SCOWIS.

Wisconsin's justices should have to "say what the law is" or decline to do so—that is, go beyond issuing fractured opinions without binding precedential value. The best way to do this would be for the justices to restrict their own ability to issue remedial mandates to a far smaller share of cases that lack majority reasoning. This would include only cases where: (i) the court *unanimously* agrees on a mandate but diverges on the reasoning and (ii) cases where the fracture is limited to a discrete issue that can logically be insulated from the rest of the opinion.<sup>331</sup> Otherwise, nowhere else. Fractured opinions should be treated more like tied votes, where the lower court's decision and reasoning are upheld by default. In original actions, the doctrinal *status quo ante* would be maintained as is.<sup>332</sup>

Doing so would be more democratic than the current approach, where, per SCOWIS's approach to numerous cases in the 2010s, the court can issue mandates based on fractured reasoning to decide outcomes but not to create new law. Or even worse, as *Tetra Tech* and *Bartlett* certainly demonstrate, blow up entire areas of state constitutional law without true majority support. Wisconsin's commitment to judicial majoritarianism counsels strongly against SCOWIS perpetuating the current trend.

This is especially true on constitutional questions. The power of Wisconsin's justices to interpret and impose their view of the law on the public

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331. *Ives v. Coopertools, Div. of Cooper Indus., Inc.*, 208 Wis. 2d 55, 58, 559 N.W.2d 571 (1997) (per curiam) (splitting 3–3 on reasoning but is unanimous in its mandate); *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 37 n.1, 262 Wis. 2d 720, 665 N.W.2d 155 (splitting 3–3 on appropriate remedy but unanimous that release, the primary remedy sought in this habeas case, would not be appropriate).

332. As a technical matter, the result would be that the SCOWIS's decision to exercise original jurisdiction would be vacated as improvidently granted. This would leave the petitioner with the option to file its action in a circuit court, as if the petition for original action had been denied.

is a great one, and filling the gaps left in constitutional language—which by design are meant to be less precise, and harder to change, than the statutes or the administrative code—is one of the court’s primary duties. Indeed, this may be SCOWIS’s most important function, given the inevitable downstream effects of deciding what a given constitutional provision means.<sup>333</sup> Allowing a hodge-podge of minority views to dominate constitutional law and determine the baseline rules for how state government functions represents an abdication of this core judicial duty. It should not be rewarded by allowing disparate minorities to pool together in service of a short-term goal in a single case.

This approach would also do more justice to the concept of *stare decisis*. Early in Wisconsin history, SCOWIS declared that “[s]*tare decisis* is the motto of courts of justice.”<sup>334</sup> *Stare decisis* is both a way of approaching past cases within a common-law tradition and a goal in and of itself. Properly respecting *stare decisis*, then, requires a high court to constrain itself when it cannot commit to issuing an opinion where a majority coheres in *both* the result *and* the reasoning. This is barely different from the current practice, where cases like the fractured *Makos* and *Coyne* were each overruled a mere three years after being issued.<sup>335</sup> (Although in the case overruling *Coyne*, the justices hinted at other reasons for its decision.<sup>336</sup>) While SCOWIS’s justices have generally grown comfortable issuing decisions in a given case where they fracture in their reasoning but form a majority in their result, the concept of precedent counsels a more muted role where the court cannot find true agreement.

This approach would also recognize the fundamental reality that opinions signed onto by anything less than a majority of the justices substantively lack value, and—as Justice Antonin Scalia once wrote—“rarely . . . ha[ve] the effect

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333. AMAR, *supra* note 286286, at 208 (discussing how SCOTUS doctrine meant to “fill in the gaps, translating the constitution’s broad dictates into law that works in court”); *In re Isiah B.*, 176 Wis. 2d 639, 650, 500 N.W.2d 637, 641 (1993) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 407, 415 (1819)) (reminding that “we must never forget, that it is a *constitution* we are expounding,” “a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs”).

334. *Abelman v. Booth*, 11 Wis. 498, 522 (1859).

335. *Aicher v. Wis. Patients Comp’n Fund*, 2000 WI 98, ¶ 40, 237 Wis. 2d 99, 613 N.W.2d 849 (holding that *Makos* has no precedential value); *Koschkee v. Evers*, 2018 WI 82, ¶ 8, 382 Wis. 2d 666, 913 N.W.2d 878 (holding that the requirement of agencies to receive gubernatorial approval prior to both drafting rules and submitting to the legislature is constitutional thus overruling *Coyne*).

336. *Koschkee v. Taylor*, 2019 WI 76, ¶¶ 65–67, 387 Wis. 2d 552, 929 N.W.2d 600 (A.W. Bradley, J., dissenting).

of shaping the future law.”<sup>337</sup> Justice Rebecca Grassl Bradley noted as much, concurring in a case where she took issue with Justice Ziegler’s citation to her *own* concurring opinions as authority for certain points of law.<sup>338</sup> In Justice Grassl Bradley’s view, “creating majority opinions supported by one justice’s separate writings instead of valid precedent” is not a proper way to create law.<sup>339</sup> Justice Grassl Bradley’s point that citing concurrences instead of majority opinions “raises concerns over the soundness and scholarship of th[e] opinion” fits the foundational premise of majority rule in the common law.<sup>340</sup>

It also supports imposing limits on what the justices should be allowed to do when they don’t agree on the reasoning behind a decision. Though these opinions can be helpful in clarifying the boundaries of a majority opinion, we must acknowledge that they can be used to “play[] to the ‘home crowd,’” at times are only so many “law review articles,” and should have no value as precedent or forming a Rationale Rule majority.<sup>341</sup> While the justices have sometimes followed this approach—such as in the fractured *Lynch* case, where a massively divided court let the court of appeals’s decision stand—they should start doing so in virtually all fractured cases.<sup>342</sup>

Finally, basic notions of judicial restraint support this approach. Restraint is an important concept in the law, a form of true judicial humility that recognizes the importance of avoiding, among other things, addressing difficult constitutional questions unless necessary to decide a case. The justices’ self-regulation to prevent fractured opinions from dictating parties’ rights and the cloudy state of Wisconsin law would be a laudable act of judicial restraint in the face of a consistently divided court.

A critic might question why, if all these principles are so important, the law should allow for any exceptions to majority rule at all? We believe there are two such fairly narrow exceptions, and reviewing them shows how they fit within the framework discussed above:

- *Unanimous Mandates*: The Authors have identified two fractured decisions where a six-justice SCOWIS

337. Meg Penrose, *Goodbye to Concurring Opinions*, 15 DUKE J. CONST. L. & PUB. POL’Y 25, 38–41 (2020).

338. *In re Jones*, 2018 WI 44, ¶¶ 39–40, 381 Wis. 2d 284, 911 N.W.2d 97 (R.G. Bradley, J., concurring).

339. *Id.* (R.G. Bradley, J., concurring).

340. *Id.* ¶ 43 (R.G. Bradley, J., concurring).

341. Penrose, *supra* note 337, at 41; *State v. Lynch*, 2016 WI 66, ¶ 231, 371 Wis. 2d 1, 885 N.W.2d 89 (Ziegler, J., dissenting).

342. *Lynch*, 2016 WI 66, n.1.

(following a recusal) issued a unanimous mandate, but deadlocked 3–3 on the reasoning supporting it.<sup>343</sup> In each case, the court issued a decision while hinting that the case’s precedential value was limited. This was proper. Letting SCOWIS “take the wheel” where the justices unanimously agree on a result is faithful to the norm of judicial majoritarianism. Even if the law as a whole would benefit from a clear rationale, the rarity of this configuration (the justices divide evenly on a decision’s reasoning after one justice recuses) makes it proper for SCOWIS to act in these cases. Not to mention, there is a gut-level absurdity to denying SCOWIS its traditional constitutional role where all of the justices agree on how to resolve the case, even if they use different reasons to reach the same destination.

- *Fracturing on Discrete, Logically Separable Issues*: This refers to a case like *State v. Hambly*, where the court unanimously held that a defendant effectively invoked his Fifth Amendment right to counsel, did not waive it, and was improperly interrogated thereafter.<sup>344</sup> However, the court split 3–3 (one justice had recused) on whether to set a timeframe in which a defendant in custody must invoke his *Miranda* rights.<sup>345</sup> In this case, it would have been both unjust and unnecessary to keep the defendant in prison and maintain the status quo, since the court unanimously believed his interrogation was illegal. But it would also be unnecessary because the core decision about the interrogation’s legality could be logically separated from the justices’ consideration of a temporal limit on invoking Fifth Amendment rights. That is, the court could decide whether the interrogation was legal in this specific instance, without creating a firm rule about the Fifth Amendment’s invocation to apply across all cases.

A critic might also point out that the justices’ past practice has been to allow mandates to issue without a true Rationale Rule-proof majority. At times, SCOWIS has allowed a fractured result to dictate the outcome in a given case

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343. *Ives v. Coopertools, Div. of Cooper Indus., Inc.*, 208 Wis. 2d 55, 58, 559 N.W.2d 571 (1997) (per curiam); *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 37, 262 Wis. 2d 720, 665 N.W.2d 155.

344. 2008 WI 10, ¶¶ 3–6, 307 Wis. 2d 98, 745 N.W.2d 48.

345. *Id.*

(e.g., *Makos*, *Voight*) but in recent years it has allowed fractured reasoning to upend entire areas of law (e.g., *Tetra Tech*, *Bartlett*). Of course, we have stressed throughout this Article that the latter cases represent a problem, not exemplary jurisprudence consistent with state judicial norms. And remember, SCOWIS has not consistently followed this approach anyway, both in cases like *Gustafson* and *McNaughton's Will*, where allowing the false majority to control would have produced absurd results, but also in cases like *Lynch*, where various propositions simply failed to obtain a majority of votes.

Further, even if this was the established practice, our proposed change would certainly satisfy most factors courts look at in deciding whether to overrule precedent. “[D]evelopments in the law have undermined the rationale” for allowing an increasingly fractured court to chart a course for the state based on minority reasoning; “newly ascertained facts” have shown that this fracturing is a recurring problem the justices have not been able to abate for nearly two decades; and of course, this fractious fracturing “has become detrimental to coherence and consistency in the law.”<sup>346</sup> Not to mention, this practice is “unsound” in light of the numerous, clearly established, and deeply embedded norms of Wisconsin’s common-law system. Even if some see this as consistent practice at SCOWIS, it has no place in the current world.

To those who would happily rest on *Marbury*’s laurels and demand that SCOWIS issue its opinions, fractures and norms be damned, consider Justice Marshall’s famous quote in full: “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>347</sup> Anyone who interprets this quote as demanding that a *high* court decide the law, even where it cannot truly do so, is not reading closely. The “judicial department” of the United States—and of Wisconsin—includes lower courts.<sup>348</sup> No one would think the “judicial department” of a state is abandoning its duty when a lower court decides a case and the high court declines to accept discretionary review. What’s more, SCOWIS can improve the odds that it will be able to “say what the law is” in every case by choosing not to accept cases where initial deliberations over the petition for review suggest the case is bound to produce a fracture, by declining petitions for original actions and judicial bypass so that the issues are refined

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346. *State v. Johnson*, 2023 WI 39, ¶ 118, 407 Wis. 2d 195, 990 N.W.2d 174 (citing *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, ¶ 68, 389 Wis. 2d 669, 937 N.W.2d 37).

347. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

348. *See Doe 4 v. Madison Metro. Sch. Dist.*, Nos. 2022AP2042, 2023AP305 & 2023AP306, unpublished order, at 66 (Wis. June 14, 2023) (Hagedorn, J., concurring) (agreeing with denial of bypass petition and responding to dissent by saying that “while *Marbury* reminds us it is most assuredly our duty to say what the law is, *Marbury* does not mean it is our duty alone to . . . or to do so first”).



through litigation below, by refraining from addressing issues or offering solutions not raised by the parties, and by adopting our proposed approach to fractured opinions. Where this prescreening fails, SCOWIS should dismiss as improvidently granted those cases where it is unable to form a majority and that fit neither of the two narrow exceptions identified earlier.

*e. Amend Chapter 809*

Though we have largely focused our suggestions on actions the judiciary could take, we will briefly address the prospect of legislative solutions.

In theory, the Wisconsin State Legislature could promulgate the Rationale Rule in statute, codifying the case law we have discussed in this Article. The natural home for such a law would be Chapter 809 of the Wisconsin Statutes, which provides the rules for appellate court procedures, with SCOWIS's procedural rules located in Wisconsin Statutes sections 809.60–.86.<sup>349</sup> Since these laws include requirements for the timing of appeals, the format of court filings, and the standards by which the high court is to decide whether or not to take a case (with distinct requirements for different types of cases),<sup>350</sup> couldn't the legislature set limits on the supreme court's decision-making in the event of a fracture?

We do not endeavor to propose legislation at this time. Of course, attempting a legislative reform approach would face significant challenges, including what would likely be a limited appetite for reform in Wisconsin's current gerrymandered state legislature. The incentives for inaction are clear: conservative legislators may not mind opinions with fractured *reasoning*, so long as the court's *results* continue to align broadly with conservative policy goals. Beyond this, any effort to reign in judicial action by legislation would be of uncertain efficacy and would highlight untested separation-of-powers questions.<sup>351</sup> Even so, in this troubling moment in SCOWIS's history, it serves no good purpose to leave any option unmentioned.

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349. Wis. Stat. §§ 809.60–86 (2021–22).

350. *Id.* § 809.62(6) (providing that review may be granted “upon such conditions as [the court] considers appropriate”); *id.* § 809.70 (2021–22) (setting the standard for exercising original jurisdiction); *id.* § 809.71 (2021–22) (outlining supervisory writ procedure).

351. Legislative action may not definitively resolve the issue. Consider the attorney ghost-writing rule. In 2014, SCOWIS used its rulemaking authority under Wis. Stat. § 751.12 to adopt a policy allowing pro se litigants to use pleadings drafted by an attorney without disclosing the attorney's name to the court. In 2018, the legislature passed a bill amending the rule so that the litigant *did* have to disclose the attorney's name, even though the attorney was not making an appearance in the case.

*f. Let the Voters Decide*

The prospect of SCOWIS self-regulating as we have proposed is not likely to be an easy sell to the justices themselves. One or more justices could simply agree to become more ideologically flexible and sign onto whatever their colleagues author, despite disagreeing with that writing to some extent.<sup>352</sup> We doubt this will occur, but there is another way that does not require such a craven about-face, and does not even require SCOWIS at all.

For better or for worse, Wisconsin has chosen to elect its justices. This provides Wisconsinites—and importantly, the state’s legal professionals—an important opportunity to practice a form of popular constitutionalism toward those justices who have sown confusion and let the public down in cases like *Tetra Tech*, *Bartlett*, and *Tavern League*. Lawyers and government officials alike should speak out about these issues and, should SCOWIS not take steps to self-regulate, encourage the voters to hold them accountable at the ballot box. By the same token, candidates who have a demonstrated ability to compromise should be encouraged to step up and to attempt to join the court themselves.

#### IV. CONCLUSION

Politics may ultimately get in the way of lasting reform and solutions to this fractured-opinion problem at SCOWIS. With the court closely split along ideological lines at the time of this writing, with tens of millions of dollars being spent on elections to shape the court, and with few of the justices rarely willing to openly criticize these fractured seriatim opinions, it seems hard to imagine that the court will eagerly adhere to our proposed approach to the Rationale Rule or adopt any of our proposed reforms. In *realpolitik* terms, so long as ignoring the Rationale Rule can occasionally produce good results for any given block of justices, there will always be a temptation to ignore it.

Even so, whatever one’s political, ideological, or practical persuasions may be, nobody should be pleased by the current state of affairs at the Wisconsin Supreme Court. The people of Wisconsin elect justices to decide cases. The justices’ increasing inability to do so is not only disappointing but also

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In 2020, the court exercised its rulemaking authority again to restore its 2014 rule. To date, no one has sought to litigate the boundaries of authority between the court and the legislature in promulgating procedural rules for the judiciary. See Joe Forward, *Supreme Court Restores Attorney Ghostwriting Rule for Pro Se Litigants*, STATE BAR WIS. (May 6, 2020), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=12&Issue=8&ArticleID=27730> [<https://perma.cc/7T9S-9KAC>].

352. See Czarnecki, *supra* note 330.

damaging to SCOWIS as an institution and to Wisconsin law. Far worse is for the court to continue imposing mandates on the public where it cannot come up with a coherent explanation for why it is doing so. For over a decade, defendants had to decide whether to gamble with taking cases to trial under a cloud of uncertainty about the law applicable to expert witnesses and whether they may access relevant information about their accuser. Legislative districts—a core mediator of popular sovereignty—have been set without a clear sense of the standards being used to draw them. And, in the most egregious cases, SCOWIS has caused substantial confusion about the law in areas vital to the daily functioning of state government.

The solution to this confusion lies in SCOWIS showing itself some tough love. In cases where the court has fractured, it should endeavor to accept comparable cases as soon as possible to clarify the state of the law. To deal with its decade-long run of fractured opinions, it should identify the precedential limits of these decisions on the record, clearly stating that they form no precedent at all. To discourage this kind of harmful judicial navel-gazing (or perhaps, *gavel-gazing*), the court should agree to self-regulation by either upholding the court of appeals or otherwise maintaining the *status quo ante* where it cannot form a true Rationale Rule majority.<sup>353</sup>

If the justices can do this, they may be able to bring greater clarity and stability to the law, avoid the pitfalls of *Marks*, and set out a straightforward practice for approaching the court's fractured opinions. Perhaps the justices will even be inclined—in the face of a steeper jurisprudential penalty—towards true compromise rather than vote pooling out of convenience. Regardless of the benefits of fixing this state of affairs, it is long past the point where the justices have needed to act.

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353. Along with an increase in fractured opinions, recent years have also seen increases in original actions and the use of judicial bypass, which accelerate a case's reaching SCOWIS. See Colin Thomas Roth, *Wisconsin Supreme Court Jurisdiction: Original Actions*, 95 WIS. LAW. 28 (2022). If, as we advocate, the court declined to decide cases without a Rationale Rule majority, in bypass cases the matter would be remanded to the court of appeals. See *supra*, note 252 (discussing in the context of *Teigen*). In original actions, the petition would be dismissed as improvidently granted, but the case could later be filed in circuit court. See *supra* note 332.