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March 6, 2012

STARE DECISIS AND CONFLICTS BETWEEN THE DIVISIONS OF WASHINGTON STATE COURT OF APPEALS: RESOLVING A PROBLEM AT THE TRIAL COURT LEVEL

Mark DeForrest, Gonzaga University

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Mark DeForrest

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1Associate Professor of Law-Legal Research & Writing, Gonzaga University School of Law. J.D., Gonzaga University School of Law, 1997; B.A., Western Washington University, 1992. Special thanks to Brian Harnetiaux of the Washington State Trial Lawyers Association and Professor David DeWolf of Gonzaga University School of Law for their helpful suggestions regarding some of the structure and wording of this article. Thanks go as well to my research assistant Michael Safstrom for his help with some of the research used in this article. I would also like to thank Professor Patrick Charles and Carolyn Hood, both of the Gonzaga University School of Law library, for their assistance in tracking down some of the historical materials used in this article. Finally, this article is dedicated to my mother, Verna DeForrest, who early on gave me some advice that has come in handy during my career as a lawyer and teacher: “always look in the corners.”
V. Conclusion

I. Introduction

Like many states, Washington has an appellate court structure that includes both a court of final review – the Washington Supreme Court – and lower appellate court – the Washington Court of Appeals. Unlike the federal circuit appellate system, the Washington Court of Appeals is a unitary court. It is structured, under the state constitution and legislative enactments, as a single court of appeals. Like the federal circuits, though, it sits in geographically distinct divisions. In Washington, those panels are located in three divisions, two in western Washington and one in eastern Washington. Decisions from the superior court, with some exceptions, may be appealed to the court of appeals as a matter of right, with final review possible, either as of right or as a matter of discretionary review, by the state supreme court.

One weakness in this system is the lack of direction provided to a trial court when faced with a situation where there is no controlling Washington Supreme Court authority and there is a conflict in the case law among the various divisions of the Washington Court of Appeals? Washington's approach to stare decisis and precedent provides guidance to trial courts when dealing with issues that have been resolved by the state supreme court or where there is either a single court of appeals ruling governing an area of law or a consensus among the divisions of the court of appeals. Unfortunately, there is no clear guidance regarding the proper action a trial court judge should take when faced with making a decision regarding an issue for which there is a conflict between the divisions within the court of appeals on an issue of law. This problem becomes all the more pressing when the conflict is between the appellate division in which the trial court is located and one or both of the other divisions of the Washington Court of Appeals.

Further complicating this problem is the possibility that the conflict arises from a clearly erroneous view of the law by one or more of the appellate divisions. Faced with such conflicting decisions, is the trial court bound to follow the rule handed down by its own appellate division, or should the court engage in an independent evaluation of the legal question, seeking to discern how the conflict is likely to be resolved – for example, by the state supreme court? Adding still more complexity to this problem is the contrast between the state court of appeals and the federal circuit courts. The history and enacting

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3 Washington Const. Art. IV, Sec. 30 (“judicial power is vested in a court of appeals, which shall be established by statute”); Wash. Rev. Code. Sec. 2.06.010 (“[t]here is hereby established a court of appeals as a court of record”). In both the state constitution and in the state statutory code, the Washington Court of Appeals is consistently referred to in the singular. See, e.g., Wash. Rev. Code Sec. 2.04.030; 2.06.030; 2.06.040; 2.08.050; 2.06.062; 2.06.064; 2.06.080; 2.06.085; 2.06.110; 2.06.150; 2.06.160.
4 Wash. Rev. Code. Sec. 2.06.020.
5 Id.
6 Wash. Rev. Code Sec. 2.06.030.
7 Wash. Rev. Code. Sec. 2.04.010; 2.04.020; 2.04.220.
law of the Washington Court of Appeals demonstrates that, unlike at the federal circuit courts, the Washington appellate court has almost uniformly been conceived to be a single court with jurisdiction over the entire state. It may sit in three distinct geographic divisions, but it remains “the court of appeals,” and not “the courts of appeal.”

This article will seek to identify some principles whereby trial courts in Washington may resolve this dilemma. My proposal is that a trial court, when faced with conflicting authority from different divisions of the court of appeals, should follow the rule that the trial judge is convinced would be adopted by the state supreme court when and if the high court should reach the issue. While this solution requires a good deal of prudential discernment on the part of a trial court judge, it has definite advantages over other possible solutions. In order to make better sense of context underlying this proposal, the second section of the article will explore in more detail the nature of the problem posed to trial courts by conflicting decisions from the divisions of the court of appeals. Both a hypothetical situation involving a trial court judge faced with such a conflict and the practical consequences of an appellate system with geographic divisions will be discussed.

The subsequent sections provide a look backward to explain how the Washington appellate system was created and how the unified nature of the court of appeals as well as its geographic structure set the stage for the problem of conflicting decisions within the court. Since the court of appeals is a single court for the entire state, the trial courts are bound by the rulings of each division, regardless of the division in which the trial court is located. Yet, this single court sits in divisions that are co-ordinate to each other, the divisions cannot bind each other to their case law. In order to better understand how this situation operates at the appellate level, this section includes a discussion of a sample conflict of authority between the divisions that was eventually resolved by the state supreme court, as well as brief exploration of the difficulties facing a trial court when dealing with conflicted authorities from the court of appeals. The fourth section identifies and critiques possible resolutions of the problem facing trial courts regarding conflicts within the court of appeals. There are a variety of possible resolutions to this problem, with corresponding differences in the extent to which the constitutional and statutory framework of the court of appeals would require modification in order to implement each different proposed solution. Finally, this article will conclude with an appeal for a prudential resolution of this problem, to provide guidance to the trial courts of this state.

II. The Quandary for a Trial Court Judge

A. The Problem

The Washington Court of Appeals and its method of operation are the products of a lengthy developmental process, and the court’s features incorporate key structural aspects of the history of its creation. With the exception of some early ambiguity on this point, the court has been consistently thought of as a single institution, a court of appeals rather than multiple courts of appeal. Within this single institution, however, regional diversity has been embraced in an effort to make the court more accessible to the people. This regional diversity is embodied in the division structure of the court, with each division responsible for a geographically determined area of the state. Since this
division structure provides for numerous panels to resolve cases, given human nature it is inevitable that the panels will disagree with each other about the formulation of the law or its proper application.

In order to provide a way for conflicts between the divisions to be brought effectively to the attention of the state supreme court, express provision was made in the court rules governing appellate procedure to ensure that the supreme court would have the ability to review cases where there was a conflict of authority within the court of appeals. The supreme court’s role in resolving those disagreements had also been expressly provided for in the appellate court’s original enabling act. The problem, however, is that this system provides no guidance for trial courts when faced with unresolved conflicts in authority from the divisions of the court of appeals. Since the court of appeals is one court with jurisdiction over the entire state, a trial court judge faces a difficult task when deciding issues for which there are conflicting authorities from the court of appeals.

B. A Hypothetical Scenario

In order to make the discussion of the problem more concrete, imagine a trial court judge – Judge Martinez of the superior court for Yakima County – facing this problem. Judge Martinez has a motion before her court dealing with an evidentiary question in a criminal case. After doing some basic research, she finds the applicable rules of evidence and some interpretive case law. After checking the case law to determine whether there are any cases that are more up to date, Judge Martinez makes an interesting discovery. On the particular issue before the court, there is a conflict among the divisions of the court of appeals regarding the admissibility of a particular item of evidence. Divisions 1 and 2 of the court of appeals find the evidence to be inadmissible, but Division 3 – the division within which Yakima County is found – has held that the evidence is admissible. To make matters for Judge Martinez worse, the appellate cases are not distinguishable from

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8 Washington Rule of Appellate Procedure 13.4(b)(2).
9 Session Laws of the State of Washington 1969 c 221 sec. 3; see also Wash. Rev. Code sec. 2.06.030; Washington Rules of Appellate Procedure 4.4.
the case before the trial court,\textsuperscript{10} and each of the cases deals with the same basic legal theory.\textsuperscript{11}

Puzzled at this discrepancy in the appellate law, Judge Martinez digs further. She finds that the state supreme court has neither directly resolved the conflict between the divisions, nor has it even addressed the issue of the admissibility of the type of evidence that is dispute before the trial court. The only applicable authorities that Judge Martinez has are the rules of evidence themselves, plus the divided case law, with Divisions 1 and 2 on one side, and her own appellate division, Division 3, on the other. With that established, Judge Martinez picks up the cases again and begins to re-read them very carefully. What she finds, much to her dismay, is that in crafting its decision on admissibility, Division 3 has overlooked one of the published rules of evidence that govern this area of law. Divisions 1 and 2 correctly identified all of the applicable rules of evidence, which is why those divisions came to a contrary conclusion about admissibility. For reasons unknown, Division 3 simply did not take all the applicable rules of evidence into account when it made its decision. So, what should Judge Martinez do? Should she follow all the applicable rules of evidence as applied by Divisions 1 and 2? Or should she follow the existing precedent from Division 3, the division in which the Yakima trial court is located, even though that precedent is critically, if not fatally, flawed?\textsuperscript{12}

\textsuperscript{10} If a case before a trial court is factually distinguishable from cases already decided by the court of appeals, the prior cases are not be binding authority under the doctrine of \textit{stare decisis}. See Floyd v. Department of Labor & Industries, 269 P.2d 563, 566 (Wash. 1954). In that case the state supreme court stated unambiguously that \textit{stare decisis} “means no more than that the rule laid down in any particular case is applicable \textit{only to the facts in that particular case or to another case involving identical or substantially similar facts}.” Id. (emphasis in the original). For a brief discussion of concerns about the proper application of this aspect of \textit{stare decisis}, see Evan H. Caminker, Why Must Inferior Courts Obey Superior Court Precedents?, 46 Stan. L. Rev. 817, 818 (1994).

\textsuperscript{11} Under Washington law, a prior case is controlling under the doctrine of \textit{stare decisis} only when the prior case discusses the same legal theory as the immediate case before the court. See Berschauer/Philips v. Seattle School Dist. No. 1, 381 P.2d 986 (Wash. 1994) (citing Webster v. Fall, 266 U.S. 507, 511 (1925); Losada v. Golden Gate Disposal Co., 950 F.2d 1395, 1399 (9th Cir. 1991); Anderson v. East Gate Temple Ass’n of Spokane, 64 P.2d 510 (Wash. 1937).

\textsuperscript{12} Lest this hypothetical scenario sound too far-fetched; see In re Higgins, 95 P.3d 330, 333 (Wash. 2004), where the state supreme court resolved a conflict between the divisions regarding the effect of a pending personal restraint petition on the jurisdiction of the state Department of Corrections to hold a rehearing of an infraction against a prison inmate. After noting that “[t]he Court of Appeals has reached different conclusions over these issues,” id. at 332 (citations omitted), the supreme court resolved the split in favor of holding that the Department of Corrections did have jurisdiction to hold the rehearing. Id. at 333. In making its holding, the supreme court specifically noted that the one division which had previously ruled against jurisdiction, Division 3, had “failed to consider” an
C. Practical Consequences Necessitate a Practical Solution

The quandary that Judge Martinez finds herself in is more than merely theoretical. Adding to the difficulty is the additional fact that Judge Martinez is confronted with a conflict regarding case law from the court of appeals division in which her trial court is located. Not only is it likely that her ruling will be appealed, but the appeal could be heard by the very division of the court of appeals whose reliability on this issue she is inclined to question. Yet, Martinez cannot simply ignore the law from the other divisions, or the evidentiary rule overlooked by her appellate division.

The possible catch-22 facing a trial court judge comes into focus by examining the court of appeals decision in *Marley v. Department of Labor and*

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applicable Rule of Appellate Procedure when it formulated its holding. Id. at 333 (discussing In re Leland, 61 P.3d 357 (Wash. Ct. App. 2003)).

13 It is possible, under the Washington Rules of Appellate Procedure for the appeal to be moved outside of the division wherein the trial court is located. Rule of Appellate Procedure 4.4 permits the state supreme court to transfer the appeal either to another division or to the supreme court itself:

The Supreme Court, to promote the orderly administration of justice may, on its own initiative, upon certification by the Court of Appeals, or on motion of a party, transfer a case from the Court of Appeals to the Supreme Court or from one division to another division of the Court of Appeals. The Court of Appeals, on its own initiative or on motion of a party, may transfer a case from one division to another division pursuant to CAR 21(a). A party should not file a motion to transfer until the record has been perfected and all briefs have been filed in the Court of Appeals.

Rule of Appellate Procedure 4.2 allows for direct review of a superior court decision by the state supreme court, one of the grounds for which is "a conflict among decisions of the Court of Appeals[.]" Washington Rule of Appellate Procedure 4.2(a)(3). Rule of Appellate Procedure 4.3 allows for direct review of a decision by a court of limited jurisdiction, although the grounds for such direct review are different than they are for a decision from the superior court:

(a) The case involves a fundamental and urgent issue of statewide importance which requires a prompt and precedential determination;
(b) Delay in obtaining such a determination would cause significant detriment to any party or to the public interest; and
(c) The record of the proceedings in the court of limited jurisdiction adequately presents the issue.
Industries, a Division 1 case. In that case the state appealed an order of summary judgment, arguing in part that the trial court’s decision permitted the plaintiff to evade a time limitation for an appeal. The trial court in Marley had followed a ruling set out in a Division 3 case, Fairley v. Department of Labor and Industries, in making its ruling that the time limitation did not apply to the plaintiff’s cause of action. The first division expressly stated that while it was not obligated to follow the third division’s ruling in formulating its own opinion, the earlier decision by the trial court was obligated to follow Division 3’s ruling: “the trial court was bound by the court’s decision in Fairley.” While Division 1 was free to disagree with Division 3 and formulate a different conclusion to the legal problem, the trial court, facing the situation prior to Division 1’s examination of the issue, did not have that freedom.

The appellate court in Marley did not clarify what, precisely or generally, a trial court should do when facing a conflict between the divisions of the court of appeals. The state supreme court accepted review of Marley “to revolve the conflict between the opinions of the Court of Appeals.” Unfortunately, the high court did not address the question of what a trial court should do when faced with conflicting decisions from the divisions of the court of appeals. This lack of clarity sets up the problem faced by a trial court judge when dealing with an unresolved conflict within the court of appeals: a trial court is bound by the divisions of the court of appeals, but those divisions are not themselves required to agree on the formulation of the law. Since the trial court, under Marley, is “bound” to follow such decisions, a judge cannot ignore one division’s approach in trying to decide a case where there is an unresolved split of authority within the court of appeals.

So, what should Judge Martinez do?

III. An Overview of the Washington Court of Appeals

A. Historical Background

At the crux of the problem facing Judge Martinez is the fact that while the court of appeals is structured as a single court, its structure as a court consisting of co-equal and separate divisions can have fragmenting effects on the appellate court’s jurisprudence. Trial courts, as a consequence, occasionally deal with conflicted case law coming from the court of appeals. The development of the idea behind the Washington

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15 Id. at 965.
16 Id. at 962 ("[a]s a preliminary matter, we recognize that the trial court was bound by the [Division 3] court’s decision in Fairley").
17 Id.
18 Id.
20 Id.
Court of Appeals indicates that this tension between unity and diversity within the court has deep roots, both within the history leading up to the creation of the court of appeals and in the state constitutional and statutory enactments that have given the court life. While the court was not formally created until 1968-1969, there is a rich history behind the court of appeals, a history that dates back to the late 1920’s. While there is some ambiguity on this point at the very beginning of the push to create a court of appeals, the record for the most part indicates that the court of appeals prior to its inception was conceived to be a single court with jurisdiction over the entire state. The idea of a unitary court was carried over into the express language of the constitutional and statutory enactments creating the court of appeals sets up a single court. Later in the process, the court was envisaged to have regional divisions that would provide greater accessibility to the appellate court for the people of the state. Once the formal division structure was proposed, however, the divisions were not thought of as separate courts of appeal; the court of appeals was from that point forward thought of as a single court of appeals.

1. Early Moves Towards a Court of Appeals

The first organized push for the creation of a court of appeals for Washington occurred in 1928 with the submission of a report to the governor composed by the Washington Judicial Council. The Second Report of the Judicial Council expressly recommended that the state constitution be amended to provide for “an intermediate appellate court” to relieve the pressure caused by an ever-increasing supreme court docket. The Judicial Council expressed concern that the “volume of litigation” faced by the supreme court was resulting in overwork by the justices on the bench. The rise in the supreme court’s docket was the “natural result,” the report stated, “of an increase in population and the growth of the business, economic and social life of the state[.]”

The report then detailed the council’s efforts to explore remedies to the problem of the supreme court’s expanding docket. Starting in 1927 the council began to consider possible constitutional amendments “to restrict the volume of business” before the high court. After noting that its proposals had provoked spirited discussion and disagreement within the legal community, the report noted that “the discussion and sharp division” within the legal community at that time had undercut the viability of the council’s “proposal to further restrict the right of appeal.” While contending that the idea of restricting the cases to the supreme court had enough benefit to merit ongoing

22 Id. at 11.
23 Id. at 10-11.
24 Id. at 10.
25 Id.
26 Id. at 11.
27 Id.
28 Id.
29 Id.
consideration, after receiving feedback from the legal community, the council instead recommended the creation of a junior appellate court.

The council had sought aid from Alfred J. Schweppe, the dean of the University of Washington Law School. Dean Schweppe prepared an internal study for the council detailing a variety of approaches that were available to solve the problem of the supreme court’s growing case load. Schweppe’s work, which the report described as “painstaking,” was included as an appendix to the council’s report. In both Schweppe’s study and in the main text of the council’s report, five different options were identified that could be carried out to alleviate the docket pressure on the high court. Two of those options involved revision of the types of cases that could come before the high court, and three involved changes in court structure and/or judicial personnel:

1. Creation of additional judges for the Supreme Court and/or the addition of another department thereto.
2. The creation of Supreme Court Commissioners.
3. The establishment of an intermediate appellate court.
4. The restriction of the judicial amount in controversy.
5. Change in the method of appeal without raising the jurisdictional amount.

The Judicial Council then presented a dual recommendation for action. First, as a short-term measure “for immediate relief,” the council stated that judicial personnel working on the court should be increased by the inclusion of four commissioners in order to relieve some of the pressure on the high court. Second, as a long-term solution, the council recommended that the state constitution be revised to create “an intermediate appellate court” for the state. The Judicial Council emphasized that its advice regarding the appellate court was given “after a careful study of intermediate appellate courts the country over,” and after “an extensive correspondence with over one hundred leading lawyers and judges in all of the states of the Union having intermediate appellate

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30 Id.
31 Id.
32 Id. at 11.
33 Id.
34 Id.
35 Id. at 16-25.
36 Id. at 11; see generally id. at 16-25.
37 Id. at 11. Oddly enough, while it listed five options, the report states that “the various proposals which have heretofore been devised for the relief of the higher courts of the various states may be roughly divided into four classes.”
38 Id.
39 Id.
40 Id.
Significantly, in all references in the main text of the Judicial Council’s report, the proposed court of appeals for Washington is referred to in the singular. Along with Dean’s Schweppe’s study and a proposed statute for the creation of the court commissioner positions to assist the supreme court, the Judicial Council also included a “tentative draft” amendment to the state constitution to create an intermediate court. Here, the council’s proposals regarding the unitary nature of the court were less clear. In the title to the draft, the court is referred to in the singular, as “An Intermediate Court.” However, in the second section of the proposed amendment, it refers expressly to “courts of appeal,” – in the plural. The proposed constitutional amendment reads, “The judicial power of the state shall be vested in the supreme court, courts of appeal, superior courts, justices of the peace, and such inferior courts as the legislature may provide.” These courts of appeal would be set up by the legislature on geographic lines, “into appellate districts, in each of which there shall be a court of appeal” consisting of a three judge panel. The rest of the tentative draft consistently refers to the junior appellate level as being made up of multiple courts, rather than a single court. No explanation was provided in the report or the draft constitutional amendment to explain this discrepancy.

One month after the Judicial Council formally published its report promoting the creation of an intermediate appellate court for Washington State, Dean Alfred Schweppe reworked and published his recommendations to the council as a law review article for the February 1929 edition of Washington Law Review. In that article he publically identified the options that he had informed the council were available to relieve the case load that faced the state supreme court. In his work, Schweppe sought to openly identify pathways for reducing the caseload facing the supreme court. He was clear that he was not attempting to persuade the bar, the judiciary, or the state government to adopt any of them. Schweppe instead only sought “to present some possible methods of approaching a solution of the problem.”

Schweppe then expanded his discussion of the jurisdictional and structural mechanisms he had earlier provided to the Judicial Council to relieve the burden borne by

41 Id.  
42 See generally id. at 10-11  
43 Id. at 11; see also id. at 29-31.  
44 Id. at 29.  
45 Id.  
46 Id. (italics in original).  
47 Id.  
48 Id. at 29-31.  
49 See generally 10-11, 29-31.  
50 Alfred J. Schweppe, Possible Methods of Relieving the Supreme Court of the State of Washington, 4 Wash. L. Rev. 1 (1929).  
51 See generally, id.  
52 Id. at 1.  
53 Id.  
54 Id.
Schweppe discussed increasing the number of departments in and justices serving on the supreme court, the creation of an intermediate court of appeals, setting up a system of supreme court commissioners to assist the justices, raising the amount in controversy to qualify for an appeal to the supreme court in civil cases, or eliminating appeals to the state supreme court as a matter of right, substituting a system of purely discretionary review. In mentioning each of these different alternatives, Schweppe was careful to note what changes in the legal framework of the Washington judiciary would be necessary to effectuate each option.

In his discussion of an intermediate court of appeals, Schweppe noted that such an option “has been the plan most widely employed” by other jurisdictions to relieve their high courts from every-increasing workloads. This provided the benefit of allowing a high court to “largely devote its time to important cases.” After setting forth a laundry list of jurisdictions – ranging from England to the American federal judiciary to a cross-sections of states, Schweppe then discussed four different categories of appellate courts, arranged according to the scope of their jurisdictions. Some appellate courts were courts of limited civil and criminal jurisdiction, precluded from hearing certain civil matters involving more than a set amount of damages and criminal matters involving certain types of punishment. Other appellate courts were limited by subject matter jurisdiction. Still other intermediate appellate courts functioned as full courts of review, with no limitations on their jurisdiction, with some mechanism provided to allow appeal to the highest appellate court. Finally, some appellate courts were bifurcated between civil and criminal courts. Regardless of the type of court of intermediate review, according to Schweppe, provision was usually made for discretionary review of the appellate court’s decisions by the state supreme court.

In addition to the proposal to create a court of appeals, Schweppe also detailed a plan to restructure the state supreme court via statute to provide for appellate panels that would function like a court of appeals. Schweppe’s proposal for legislative restructuring of the supreme court would create a system quite similar to one employing both a high court and an intermediate appellate court. Noting that the state constitution allowed the legislature to “increase the number of judges from time to time,” as well as “provide for
separate departments” of the supreme court,67 Schweppe sketched out a plan by which such separate departments could function, in effect, like an intermediate court of appeal, with the full supreme court sitting en banc to review decisions of each department.68 At the time Schweppe wrote his article, there already were two supreme court departments in existence. The addition of more departments could be effectuated by the legislature, adding more hands on the bench to do the work of the court.69

Schweppe identified two main advantages to this approach over the creation of an intermediate court of appeals. First, since the state constitution did not on its face preclude the legislature from setting up multiple departments located elsewhere than the state capital of Olympia, it would be possible to place the departments “in various parts of the state” while keeping the en banc panel in the state capital.70 Second, unlike a plan that formally created an intermediate court of appeals, creating an additional supreme court department would not require “working out a division of jurisdiction between the Supreme Court and intermediate court[.].”71 Each of the supreme court’s departments, Schweppe reasoned, “would have all the jurisdiction of the Supreme Court, subject to review en banc.”72 One of the virtues of such a scheme, in Schweppe’s view, is that it might also prevent conflicts about the law from developing in the jurisprudence coming out of the departments, as each department’s decisions would be decisions by the state supreme court.73 As he put it, “greater weight would probably be given to departmental decisions than is usually given to the decisions of an intermediate court.”74 As a result, this appellate structure would likely keep the law “harmonious.”75

Creating an additional department and adding additional justices to the supreme court would allow the state “to incorporate a number of the advantages of an intermediate court without the special creation of one.”76 The plan had the virtues of simplicity and would allow for the expeditious resolution of appeals.77 And if the departmental organization resulted in too much workload on the court sitting en banc, the legislature might authorize “a permanent court en banc,” allowing a review “before nine men who had not heard the case in department.”78 Effectively, this plan once carried out, would create a de facto intermediate court of appeals without the need to amend the state constitution, simply by having the legislature redefine the structure and function of the

67 Id. at 1; see also Session Laws of the State of Washington 1909 chapter 24 sections 3-4 (allowing for multiple departments within the state supreme court and establishing two departments with en banc review before the entire court).
68 Alfred J. Schweppe, Possible Methods of Relieving the Supreme Court of the State of Washington, 4 Wash. L. Rev. 1, 2 (1929).
69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
74 Id.
75 Id.
76 Id.
77 Id.
78 Id.
state supreme court. Such a task could be accomplished, as the law school dean put it, through, “ordinary legislation.”

After Dean Schweppe’s law review article was published, movement towards a court of appeals languished for the next three decades. By 1960, nine years before the court of appeals was formally created, the problem of the supreme court’s workload had become pressing enough that Washington Supreme Court Associate Justice Robert C. Finley published a law review article based on a talk he gave to the North Carolina Bar Association. In the article, Finley touched on the continuing movement towards the development of an intermediate court of appeals for Washington State. Noting a problem of increasing court dockets across multiple states, Finley observed that the increasing workload for the Washington State Supreme Court was eroding the ability for the court to function in “collectively.” Instead of relying on the wisdom of the court as a whole, “there is a dangerous tendency, almost a necessity,” Finley explained, “to parcel out the cases proportionately to the individual judges, and to accept and approve their judgment and recommended disposition in such cases.” This long-standing concern had resulted in numerous proposals – Finley notes efforts both in the 1929 Judicial Council report and the “by legislative committees” to address the problem – but none of those proposals were carried out. “No serious effort was made to do anything further about the problem” at the time Finley wrote. Yet, despite these longstanding concerns, the Washington legislature was still to find “some practicable solution to the problem.”

In both of their discussions of the problem that faced the Washington appellate court system, Finley and Schweppe identified a common underlying concern: the problem of time. Given the structure of the Washington Supreme Court and the realities of the caseloads coming before that court, the judicial personnel simply did not have the time to optimally deal with the cases they were presented. This lack of time, as Ruth Bader Ginsburg has pointed out, functions as the “one intensely practical constraint” on judges. And while the pressures of time can lead judges towards greater efficiency and focus, if taken too far they can also decrease measured, thoughtful and collaborative interaction by judges, a problem that Justice Finley thought was affecting

79 Id. at 3.
80 Id.
82 Id. at 5-6.
83 Id. at 6.
84 Id.
85 Id.
86 Id. at 6 (1960).
87 Robert C. Finley, Some Observations on the Law and the Nature of the Judicial Process, 25 Wash. L. Rev. 1, 4-7 (1960); Alfred J. Schweppe, Possible Methods of Relieving the Supreme Court of the State of Washington, 4 Wash. L. Rev. 1 (1929).
the Washington high court. As Finley himself put it in 1960 “[t]he point of diminishing returns actually has been reached.”

2. The 1966-1967 Proposals

The pressures on the Washington appellate system did not lessen during the 1960’s, and as the decade wore on, momentum grew to amend the state constitution to create an intermediate court of appeals. In both the judiciary and in the legislature, the wheels began grinding fine, as proposals were made and critiqued regarding the structure and functions that the court of appeals should assume. Taken as a whole, these proposals have two primary characteristics: first, that the court of appeals should assist in reducing the workload faced by the supreme court; and second, the court of appeals was consistently thought of as a single court. Even as the idea arose to structure the court in geographic divisions in order to better facilitate the court’s work, the court of appeals was still thought of as a unified court.

In early November 1966 the justices of the Washington Supreme Court met with a joint committee of the Superior Court Judges’ Association and the Washington Bar Association to discuss the restructuring of the Washington State appellate system. This meeting, held on November 3, was memorialized in an undated and unsigned memorandum available in the Washington State law library. According to the memorandum, the meeting grew out of an earlier set of recommendations of both the judges’ association and the bar calling for an amendment to the state constitution that would create a court of appeals. According to the memorandum, a “small minority” within the judges’ conference and state bar proposed an alternative, that the state supreme court be restructured into “panels of three with as many panels as necessary to keep abreast of filings.” The purpose of the November 3 meeting was to discuss this alternative proposal’s advantages and then allow the justices of the supreme court an opportunity to evaluate the proposal.

The memorandum provides an overview of the problem of judicial backlog that was then facing the state supreme court, as well as the efforts that had been made to deal with the problem short of a structural reworking of the state appellate system. With the growth that Washington had at that point experienced since statehood – an increase in population from 75,000 to over 3,000,000 according to the memorandum – an

90 Id.
92 Id.
93 Id. at 1.
94 Id.
95 Id.
96 Id. at 2-3.
97 Id. at 2.
increasing amount of appellate work in a system with a “virtually unrestricted” right to appeal had long stressed the supreme court. The number of cases being presented for appellate review began to exceed the capacity of the Court in the 1950’s. A backlog of undecided cases increased each year as the number of cases being filed steadily mounted,” as the memorandum reports. As this backlog continued into the early 1960’s, “both bench and bar” became increasingly concerned, particularly when adding in projections at that time regarding likely state population growth. This dual demographic problem “was portrayed in frighteningly emergent terms,” and the memorandum speculates that if unsolved these pressures would lead, by 1985, to a delay of “four or five years” from the filing of an appeal with the supreme court to argument.

The November 3 memorandum then summarizes the steps that had been taken or proposed to deal with the appellate case overflow. First, it notes that in 1963 the Washington legislature enacted a law permitting the supreme court, acting by majority vote, to appoint either sitting or retired judges as pro tem members of the supreme court in order to increase the court’s personnel. The memorandum characterizes this approach as “enormously helpful,” but ultimately futile. The addition of more judicial personal had “not been capable of stemming the growth of the backlog.”

Second, the memorandum reveals that the supreme court itself considered adopting Dean Schweppe’s proposal to create a system of discretionary review for appeal to the high court. This would have moved the court away from a system of appeal as a matter of right into a system where an appeal would be based a grant of certiorari. The memorandum notes that “[a]fter considerable study,” the members of the court decided that even if such a shift was constitutionally possible, it was bad public policy. “[B]oth the Bar and public desired, perhaps demanded, the right of one review disposed of with the discipline involved in a reasoned opinion.”

Third, the memorandum details how the court had moved to a system whereby cases “having little or no precedential value” were resolved with per curiam-style decisions. As the memorandum states:

Forms for such dispositions were developed. Forty cases pre-selected as best amenable to such disposition were added to the normal calendar for the

98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
103 Id. at 2-3.
104 Id. at 2.
105 Id. at 2-3.
106 Id at 3.
107 Id.
108 Id.
109 Id.
110 Id.
111 Id.
January 1965 Session. Sixteen of the forty were actually disposed of by a per curiam opinion. However the members of the Court were not satisfied with the procedure, and were not of the opinion that sufficient [advantage] was gained to warrant a continuation.

Finally, the memorandum concludes with a separate section providing an evaluation of the alternate proposal to create multiple supreme court panels of three to deal with the case backlog. 112 This section, according to a heading contained with the memorandum, provides the views of the justices of the supreme court themselves. 113 According to the memorandum, the members of the court opposed the panel suggestion to enlarge the supreme court for a number of reasons. 114 One recurring reason was the conviction that simply adding additional personnel to the court was not going to resolve what was a fundamentally structural problem. 115 Another objection arose out of a concern that such a proposal would undermine the unity of the supreme court’s case law. 116 An increase in the number of panels and justices could negatively impact the consistency and coherence of the law. 117 As the memorandum states the justices’ views:

While consistency can never be an accomplished fact, it must be a goal, and one particularly of a court of final review. The panel system would inevitably tend to dilute the means of obtaining consistency if through more members more opinions were filed, or, if all the members were not responsible for the consistency and harmony of decisions being announced by a panel. 118

The justices rejected the idea of using en banc review to achieve harmony among the panels on contested issues as a fit mechanism to achieve that end. 119 Although not providing specifics, the memorandum asserts that the number of judges that would by necessity constitute such a panel — “even with a court of fifteen members” 120 — “would present tremendous difficulties.” 121 En banc panels of “less than the full membership” of the court would also pose problems, with such panels resulting in “factions, divergent law, and confusion.” 122 In such an atmosphere, the justices postulated, there would be moves for rehearings and rehearings of the rehearings, leading to the loss of judicial economy that the system was supposed to create. 123 As the memorandum puts it, “[t]he

112 Id. at 4-5.
113 Id. at 4.
114 Id. at 4-5.
115 Id.
116 Id. at 4.
117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
122 Id.
123 Id.
time involved in rehearing would be greatly increased and could become completely disruptive.”124

The state supreme court justices then set out a case for the creation of a separate court of appeals. Noting that the panel proposal was in fact an effort to create the same kind of structure as a court of appeals,125 the court noted that “a multi-judge court” was the best way to achieve not only efficient resolution of cases but also the “[s]ound development of the law in important cases.”126 While the supreme court panel approach would provide review by multiple judges, it was not institutionally efficient enough to function well.127 As the memorandum observes, the supreme court at that time was functioning with twelve effective members, once the pro tem judges were added into the mix.128 For the panel approach to be feasible, the court would have to “immediately” ramp up to fifteen members.129 If a court of appeals was created, the structural efficiencies that could be realized alleviate some of the concerns regarding institutional fragmentation within the judiciary; for example, the memorandum specifically noted that a court of appeals might permit a reduction in the number of justices on the high court. “The membership of the Supreme Court could be reduced to nine, and possibly seven.”130

In concluding their argument for a court of appeals, the memorandum addresses the question of the physical location of the court of appeals.131 The justices observed that “[i]f decentralization of physical location is undesirable,” the intermediate appellate court could simply be headquartered in the state capital, Olympia.132 If the court of appeals was located there, “the logistical task” of setting up the court “does not present a much greater problem than support for a panel Supreme Court[].”133

In the memorandum, the supreme court justices contemplate that the court of appeals would be a single court. Aside from consistently referring to the court of appeals in the singular, the justices noted that the court itself could have a single base of operations in the state capital. While leaving the door open to the possibility of the appellate court’s “decentralization,” the supreme court’s recommendation did not equate to fragmentation. The court of appeals, if adopted, was to be a single court.

The November 3 memorandum was not the only report made leading up to the creation of the Washington State Court of Appeals. At least two other reports were composed advocating for the creation of an additional appellate court for the state. One of these other reports was the Consensus Statement by the Citizens’ Conference on Washington Courts.134 Dated November 12, 1966, this report is on file with the

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124 Id.
125 Id.
126 Id. at 5.
127 Id.
128 Id.
129 Id.
130 Id.
131 Id.
132 Id.
133 Id.
Washington State archive. The statement provides little background information on the work of the citizens’ conference, but does provide a list of articles recommending various structural reforms to the state judicial system.135 In Article III of the report, the conference called for the creation of a single court of appeals with multiple divisions across the state:

There is an immediate need for the creation of a court of appeals (subsidiary to the Supreme Court), the decisions of which should be final in most cases. Three judge divisions of this court should sit in such locations as the convenience of the citizenry shall require.136

That brief paragraph is the first mention in the available record describing the basic structure that the court of appeals would eventually. The court of appeals was referred to in the singular (“a court of appeals,” “this court”);137 while the conference also expressly recommended that the court sit in divisions in multiple places throughout the state.138 The appellate structure with multiple locations where the court would sit was created not for the purpose of fragmenting the court’s unity, but for the stated purpose of facilitating “the convenience of the citizenry.”139 The exact locations where the court should sit were left undecided in the conference’s recommendation, but the basic contours of what would become the structure of the Washington State Court of Appeals was sketched out.140 And critically, in that sketch, the court of appeals was thought of as unified court.

In January 29, 1967 another unsigned report, entitled A Need For a Court of Appeals, was produced.141 This report, like the other two, is available through the Washington State law library. Unlike the other two reports, however, this report does not identify its author or issuing body.142 There are two notions in handwriting on the archived copy: “SJR 6” and “HJR 13”143 – references to what may reasonably be assumed to be Senate Joint Resolution 6 and House Joint Resolution 13, the resolutions by which the state legislature would propose the formal amendment of the state constitution to provide for a court of appeals. A Need For a Court of Appeals sets

\[\text{Id. at 1.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{A Need for a Court of Appeals, January 29, 1967. Obtained through the Washington State Archive. Copy available with the author.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{House Joint Resolution No. 13, 40th Regular Session, January 16, 1967.}\]
out a fully developed rationale and structure for what would become the Washington Court of Appeals.

The report details in greater specificity the problem posed by the ever-increasing caseload faced by the state supreme court.146 Since an unsuccessful litigant had a “virtually unqualified” right of appeal, the state supreme court was in the position of being unable to deny jurisdiction.147 A large increase since statehood in the number of superior courts and superior court judges in the state meant that an increasing number of cases were moving through the judicial system.148 The state supreme court itself had increased from its original five to nine members, with the increase in membership occurring in 1909.149

The January 29 report then discusses in detail the increases in the supreme court’s caseload from 1961 to 1966, an overview that showed a steady rise from 485 cases filed in 1961 to 680 cases filed in 1966, an increase of 195 cases.150 After extrapolating from a demographic study of likely population increases commissioned by the state, the report postulates that the increase in appeals would continue.151 Demographic data indicated that the number of appeals filed per year until 1985 would range “between 1200 and 1500.”152 The efforts taken to try to reduce these demographic pressures on the supreme court had been unsuccessful.153 The use of pro tem judges to reduce workload had not dealt with the backlog of cases being produced by the increasing amount of litigation.154 In 1966, the supreme court had 81 cases pending resolution at the end of the year – cases that the court was unable to resolve for lack of time.155 This caused problems with delay, problems that were only anticipated to get worse.156 The case backlog was noted to have a “cumulative” effect, adding to the ongoing work with which the supreme court had to wrestle.157 The problem had reached the point where there was “urgency for remedial action,”158 particularly in light of the report’s conclusion that the state constitution would need to be amended in order to create a court of appeals, an amendment process that would itself be complex and time-consuming.159

The January 29 report’s concerns were not limited only to the issue of delay in case resolution. The report also voiced a concern over the quality of appellate decision-making in a system that was under significant time pressures.160 Echoing the concerns

146 A Need for a Court of Appeals, January 29, 1967 at 1-4.
147 Id. at 1.
148 Id. at 2.
149 Id.
150 Id. at 2-3.
151 Id. at 2.
152 Id. at 3.
153 Id. at 3-5.
154 Id. at 3.
155 Id.
156 Id. at 3-4.
157 Id.
158 Id. at 4.
159 Id.
160 Id. at 4-5.
identified earlier in Associate Justice Finley’s law review article, the report stated that “[t]here is in the appellate field, as in any work, a significant relationship because volume of business and quality of business done.” The glut of cases piling up waiting to be decided would at some point “inevitably result in dilution of the craftsmanship and excellence of the law being pronounced.” In the report’s view, concern about the timely resolution of cases in dispute was combined with a concern for precision and accuracy in formulating the law, both sets of concerns leading to the conclusion that the then-existing appellate judicial system was in need of change.

The solution proposed by the January 29 report was to create a court of appeals. Noting a wide range of support within the legal community for such a court, the report referenced a proposed amendment to the state constitution that would create a court of appeals, along with a proposed set of illustrative court rules. These materials, drafted by a joint committee of the state Judicial Council and the state bar association, were appended to the January 29 report.

While the January 29 report called for the creation of a court of appeals, the court envisaged by the report was expressly not “an intermediate step in the appellate process.” The report directly states that “[a]ll cases would be appealed as now to the Supreme Court.” Instead of being a true intermediate court of appeals, the court of appeals contemplated by the January 29 report was to be a court that would receive cases on transfer from the state supreme court, cases that the high court viewed as being of less significance. Death penalty cases would remain with the supreme court, as would all cases “having substantial legal significance for the development of the law[.]” In the cases that the court of appeals received on transfer, the decision of the appellate court would be final “in most cases,” with an allowance for “a right to petition the Supreme Court for certiorari.” In order to protect the supreme court from being overwhelmed by certiorari petitions, the report anticipated that review would be rarely granted, “generally only to obtain uniformity between division [sic] of the Court of Appeals.” This last point in the report reveals three important things about the then-solidifying concepts to provide structure for the court of appeals: 1) it would be a single court of appeals made up of divisions; 2) that there would likely be conflicts between those divisions on the legal points; and 3) uniformity was a key value that would be preserved through the role of the supreme court as a final decider sitting over the court of appeals.

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161 Id. at 4.
162 Id. at 4-5.
163 Id. at 5.
164 Id.
165 Id.
166 Id.
167 Id.
168 Id.
169 Id.
170 Id. at 5-6.
171 Id. at 6.
In addition to its main text, the January 29 report also included the text of a proposed constitutional amendment and proposed appellate court rules. These proposed texts conform to the general structural plan detailed in the report. The suggested court rules for the court of appeals go further in detailing just how the proposed divisions of the court of appeals were conceived at that time. While the location of the headquarters of each division is left unspecified, the rough geographic outline of each division is indicated. Division 1 was to include only a single county: King; Division 2 was to include all of eastern Washington; and Division 3 was to include all of western Washington, absent King County. Regardless of the boundaries proposed for the divisions, the proposed sets of court rules always refer to the court of appeals itself in the singular – for example, “the court of appeals,” not “the courts of appeal.” Unlike the constitutional amendment proposed by the Judicial Council in 1929, A Need For a Court of Appeals proposal for the state court of appeals had no ambiguity about the unitary nature of the court. While sitting in three divisions, the court was itself singular. That key structural concept would be carried over directly into the constitutional and statutory enactments that would establish the Washington Court of Appeals.

B. Structure and Function of the Court of Appeals

1. State Constitutional Amendment

After the January 29 report, proposals began to move through the legislature. An amendment to the state constitution was proposed and passed on November 5, 1968, authorizing the legislature create a court of appeals. The amendment, which still stands, reads as follows:

SECTION 30 COURT OF APPEALS. (1) Authorization. In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute. (2) Jurisdiction. The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute. (3) Review of Superior Court. Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute. (4) Judges. The number, manner of election, compensation, terms of office, removal and retirement of judges of the court of

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172 Id. at A-1, Redraft of Proposed Amendment to Article IV of the Constitution of the State of Washington Providing for a Court of Appeals Per Ackley Suggestion of 10-3-66. No identification of Ackley is make in the appendix. The text in the appendix is dated “11-1-66.”
173 Id. at A-2, Suggested Rules Peculiar to the Business of the Supreme Court for a Court of Appeals; Id. at A-4, Suggested Rules on Appeal for a Court of Appeals.
174 Id. at A-2.
175 Id.
176 Id.
177 Id. at A-2-A-4.
appeals shall be as provided by statute. (5) Administration and Procedure. The administration and procedures of the court of appeals shall be as provided by rules issued by the supreme court. (6) Conflicts. The provisions of this section shall supersede any conflicting provisions in prior sections of this article.

The constitutional language mentions nothing about divisions, instead mentioning only “a” singular court of appeals. The work of the court of appeals and its procedure was left to the legislature and the courts to craft, via an enabling act and requisite court rules. With the constitutional authority now clearly provided for it to act, the legislature began its work crafting the statute that would effect the establishment of the court.

2. Statutory Enactment

The final bill produced by the Washington legislature to set up the court of appeals was enacted by the state Senate in April and the state House of Representatives in May of 1969. Engrossed House Bill No. 183\(^\text{178}\) adopted much of the basic pattern found in the January 29, 1967 report A Need For a Court of Appeals. The unitary nature of the court of appeals was maintained, with all references to the court itself appearing in the singular.\(^\text{179}\) The court was set up as “a court of record,”\(^\text{180}\) and the tri-divisional structure proposed in the 1966 Consensus Statement by the Citizens’ Conference on Washington Courts and the January 29, 1967 report was adopted.\(^\text{181}\) However, the structure of the divisions was altered significantly from that proposed in the January 29, 1967 report. The court’s three divisions were given specified seats, Division 1’s in Seattle, Division 2’s in Tacoma,\(^\text{182}\) and Division 3’s in Spokane.\(^\text{183}\) At one point, the Senate Judiciary Committee had proposed that all three divisions sit in Seattle,\(^\text{184}\) but that proposal was rejected in favor of having a regional headquarters for each division.\(^\text{185}\) The divisional boundaries were set geographically, with the most densely populated north Puget Sound area made up Division 1, the Olympic Peninsula and southwestern Washington made up Division 2, and Division 3 covered all of Washington east of the Cascade crest.\(^\text{186}\) While each division had an official seat, other cities were specified as being locations where the court could hold sessions by rule: Seattle, Everett, Bellingham, Tacoma,

\(^{179}\) See generally, id.
\(^{180}\) Id. at Sec. 1.
\(^{181}\) Id. at Sec. 2.
\(^{182}\) In an early version of House Bill 183, Olympia was designated as the seat for Division 2, but Tacoma was chosen to be the seat in the enacted version of the bill. House Bill No. 183 (January 21, 1969), pg. 1.
\(^{183}\) Engrossed House Bill No. 183: Court of Appeals, reprinted in Washington Laws, ch. 221, 1st Ex. Sess. 1969, Sec. 2.
\(^{184}\) Senate Amendments to Engrossed House Bill No. 183 by Judiciary Committee, pg. 1.
\(^{185}\) Engrossed House Bill No. 183, ch. 221, sec. 2 (1969).
\(^{186}\) Id.
Vancouver, Spokane, Yakima, Richland and Walla Walla.\textsuperscript{187} Despite the divisional structure, the underlying unity of the court of appeals is evident by a provision that judges of one division were specifically authorizes judges to “sit in other divisions” if “directed by written order of the chief justice” of the supreme court.\textsuperscript{188} The unity of the court of appeals reinforced by the a provision allowing the transfer of cases between divisions, subject again to a written order by the chief justice.\textsuperscript{189}

As in the 1967 statutory plan, Engrossed Bill 183 placed significant limitations on the appellate court’s exclusive jurisdiction.\textsuperscript{190} These limitations provide significant opportunities for the state supreme court to exercise direct review over decisions from trial courts. As a result, the court of appeals was created not as a true intermediate court, but rather as a junior appellate court exercising limited appellate jurisdiction.\textsuperscript{191} The bill specified in detail the nature of those cases where the supreme court could assert direct jurisdiction:

(a) cases of quo warranto, prohibition, injunction or mandamus directed to state officials;
(b) criminal cases where the death penalty has been decreed;
(c) cases where the validity of all or any portion of a statute, ordinance, tax, impost, assessment or toll is drawn into question on the grounds of repugnancy to the Constitution of the United States or of the state of Washington, or to a statute or treaty of the United States, and the superior court has held against its validity;
(d) cases involving fundamental and urgent issues of broad public import requiring prompt and ultimate determination;
(e) cases involving substantive issues on which there is a direct conflict among prevailing decisions of panels of the [supreme] court or between decisions of the supreme court;
all of which shall be appealed directly to the supreme court.\textsuperscript{192}

In addition, the right to appeal to the state supreme court was guaranteed “when the court [of appeals] reverses a judgment or order of the superior court by less than a unanimous decision.”\textsuperscript{193} For “all other cases,” the legislature set up a system of discretionary review by the supreme court via “the filing of a petition for review.”\textsuperscript{194}

With those provisions in place, Engrossed House Bill No. 183 was passed first by the Senate on April 25, 1969, then by the House of Representatives on May 2, followed by the signature of the governor on May 8.\textsuperscript{195} The bill was filed with the secretary of

\textsuperscript{187} Id. at Sec. 4.
\textsuperscript{188} Id. at Sec. 4.
\textsuperscript{189} Id. at Sec. 3.
\textsuperscript{190} Id. at Sec. 3.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} While agreeing with the bulk of the bill, the governor did veto one portion of Engrossed House Bill No. 183 pertaining to the funding of the court of appeals.
state’s office on May 12. Over forty years after it was first proposed, Washington State had its court of appeals.

The current statutory scheme governing the Washington Court of Appeals is found in the Revised Code of Washington, title 2. According to RCW, the court of appeals functions as a court of record with the same restricted appellate jurisdiction present in the original statutory enactment establishing the court, although the legislature has granted the court of appeals jurisdiction over the review of final administrative agency decisions certified by the superior court. Even though changes have been made to the statutes governing the court of appeals over the years, none of those changes has altered the court’s fundamental structure. It is still a single court of record, sitting in three consistently defined geographic divisions, with essentially the same limited appellate jurisdiction. Judges from one division may sit on panels in another division, with permission from the chief justice of the supreme court, and cases may also be transferred between divisions, likewise with the permission of the chief justice. Since its inception it has been, as far as its broad nature and powers are concerned, a stable institution within the state judiciary.

While the statutory scheme that sets up the court creates three geographic divisions, those three geographic divisions are sub-sets of one single court, not separate courts themselves. The geographic divisions do not, as a consequence, have the same autonomous status that the circuit courts of appeal have in federal system. While the current structure and operation of the court is the product of a lengthy process of development, its essential nature as a single court of appeals has been one of the court’s consistent characteristics.

C. Conflicting Authority Arising From Different Divisions of the Court of Appeals

1. Stare Decisis and the Court of Appeals

Section 12 of the bill included a one million dollar appropriation for the court, to which the governor objected. Because of a conflict between that appropriation and the legislature’s own budgetary conference committee, the governor vetoed the appropriation section. Engrossed House Bill No. 183, ch. 221, Note (1969), pg. 1658.

196 Wash. Rev. Code Sec. 2.06.030.
197 Wash. Rev. Code Sec. 2.06.010.
198 Wash. Rev. Code Sec. 2.06.020.
199 Wash. Rev. Code Sec. 2.06.030.
200 Wash. Rev. Code Sec. 2.06.040.
201 Id.; see also Rule of Appellate Procedure 4.4, which permits the state supreme court to “transfer a case from the Court of Appeals to the Supreme Court or from one division to another divisions of the Court of Appeals.” Rule 4.4 also allows for the court of appeals itself to transfer a case “from one division to another.”
One aspect of the appellate court’s operation involves occasional disagreements between the divisions of the court regarding the formulation of legal rules.\(^{202}\) Given the unitary nature of the court of appeals and Washington’s general approach to \textit{stare decisis}, these conflicts between the divisions of a single court can present a challenge to the trial court judge who has to deal with legal rules that are the subject of those conflicts. \textit{Stare decisis}, the principle that courts should follow the previous decisions when dealing with substantially identical issues,\(^{203}\) is a prudential consideration that has a long history in the common law legal system.\(^{204}\) \textit{Stare decisis} serves a number of well-identified values in the American legal system. As Fred W. Catlett observes, it fosters “stability and certainty in the law, convenience, and uniformity of treatment of all litigants.”\(^{205}\) The stability in law provided by the doctrine of \textit{stare decisis} allows for predictability regarding a court’s likely rulings, allowing for people to understand what is likely to be required of them in the daily “affairs of life,” and for lawyers to make “dependable advice” to their clients.\(^{206}\) In addition, \textit{stare decisis} provides for institutional stability by reinforcing “[c]onfidence in the honesty and integrity of the courts and in their


\(^{204}\) See Fred W. Catlett, The Development of the Doctrine of Stare Decisis and the Extent to Which it Should Be Applied, 21 Wash. L. Rev. 158 (1946). As Catlett writes, “The exact time when the doctrine first appeared or was definitely accepted in English Law is of small practical importance. It appeared early.” Id. at 159. As he summarizes the doctrine’s historical roots, “The doctrine of stare decisis, which means ‘to stand by decisions and not to disturb settled matters,’ is of ancient lineage. Some writers find evidences of it in Bracton and in the Year Books, although one very careful scholar, who has gone through the Year Books for the special purpose of determine to what extent the doctrine of stare decisis was recognized in that early period, concludes that it cannot be said that the doctrine was firmly established then. Other writers have been of the opinion that the essence of the doctrine can be found in the Roman Civil Law and even in the Code of Justinian.” Id. at 158-59.

\(^{205}\) Id. at 159. Michael P. Van Alstine writes that \textit{stare decisis} serves as a brake on rapid legal change, serving “as a built-in stabilizing mechanism. By centralizing authority in higher courts, and by constraining even their situational discretion, the doctrine both enhances legal certainty and minimizes the velocity of change. A derivative consequence is that it functions to decrease the aggregate costs that flow from legal transactions.” Michael P. Van Alstine, The Costs of Legal Change, 49 UCLA L. Rev. 789, 862 (2002).

impartiality[].” Instead of applying their own “personal views” or “personal desires,” judges are bound by the law previously announced by the court. As such, one of the key values undergirding stare decisis is to reduce, as much as possible, arbitrary or prejudiced decision-making by judges.

Closely linked to the idea of stare decisis is the notion of precedent, namely that courts should follow their own decisions and the decisions of higher courts when deciding a case. Going back to William Blackstone, the value of precedent rests in its evidentiary quality – the precedent is not law itself, rather it is evidence of the law. As Charles J. Reid, Jr. explains, this evidentiary function is “crucial” for understanding the nature of case law: “if judicial decisions were evidence of law, they were necessarily subject to the rules of evidence: they might therefore be subject to further evaluation, scrutiny, consideration, and deliberation to ascertain their fidelity to fundamental legal principles and also the higher law.” While judges are restricted from allowing their own personal views to guide their rulings, Blackstone’s approach does not render prior case law untouchable. As Reid notes, “judges, even while they consulted precedent, were simultaneous obligated” to use reason when deciding legal issues.

A concern for stability renders judges hesitant to deviate from established case law, but the doctrine of stare decisis “is not always rigidly applied.” If a court is

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207 Id.

208 Id. For a discussion of precedent and the rule of law, see generally Daniel A. Farber, The Rule of Law and the Law of Precedents, 90 Minn. L. Rev. 1173 (2006).

209 The notion of precedent in the American system is, as one writer has noted, “simply the recognition that judicial decisions have the force of law and must be respected, not only by the litigants in particular cases, but also by the government, the public, lawyers and (in most cases) the courts themselves.” Mortimer N.S. Sellers, The Doctrine of Precedent in the United States of America, 54 Am. J. of Comparative Law 67, 68 (2006).


211 Charles J. Reid, Jr., Judicial Precedent in the Late Eighteenth and Early Nineteenth centuries: A Commentary on Chancellor Kent’s Commentaries, 5 Ave Maria L. Rev. 47, 52 (2007); Fred W. Catlett, The Development of the Doctrine of State Decisis and the Extent to Which It Should Be Applied, 21 Wash. L. Rev. 158, 162 (1946) (noting that if the view of court decisions as evidence of the law is true, then cases “may be weighed like any other evidence.”).

212 Charles J. Reid, Jr., Judicial Precedent in the Late Eighteenth and Early Nineteenth centuries: A Commentary on Chancellor Kent’s Commentaries, 5 Ave Maria L. Rev. 47, 52 (2007).


convinced that a strict application of the doctrine “would promote an injustice or perpetuate unsound legal rules,” a court may decide not to follow the doctrine.\(^{215}\) As the United States Supreme Court has stated:

\[\text{[S]}\text{tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.}\(^{216}\]

The Washington Supreme Court discussed \textit{stare decisis} at length in the case of \textit{In re Stranger Creek and Tributaries in Stevens Co.}\(^{217}\) pointing out the importance of \textit{stare decisis} in maintaining stability and consistency within the judicial decision-making process.\(^{218}\) The court made plain, however, “that stability should not be confused with perpetuity.”\(^{219}\) When reason requires a judicially announced rule to change, the courts “must have” the capacity to change it.\(^{220}\) A correct understanding of \textit{stare decisis} incorporates this necessary capacity for reform,\(^{221}\) cabined by a restrained approach by the court. This restrained approach, the court announced, “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.”\(^{222}\)

As a general rule, the function of overruling a prior precedent is reserved for the court that make the earlier decision, or a higher court.\(^{223}\) Lower courts, given the hierarchical nature of the judiciary in the common law system, cannot overrule or bind the decisions of higher courts.\(^{224}\) A lower court that does not follow the precedent of a higher court invites appeal of its decision.\(^{225}\) The recognition that lower courts are bound by the decisions of higher courts is not to say that lower courts simply parrot those decisions. Trial courts in particular have a critical function in applying precedent to the

\[^{215}\text{Id.}\]
\[^{217}\text{In re Stranger Creek and Tributaries in Stevens Co., 466 P.2d 508, 511 (Wash. 1970).}\]
\[^{218}\text{Id.}\]
\[^{219}\text{Id.}\]
\[^{220}\text{Id.}\]
\[^{221}\text{Id.}\]
\[^{222}\text{Id. For an example of a case where a party failed to establish that a precedent was incorrect and harmful, see Key Design, Inc. v. Moser, 983 P.2d 653, 657-658 (Wash. 1999).}\]
\[^{223}\text{State v. Gore, 681 P.2d 227, 231 (Wash. 1984) (“once this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court”).}\]
\[^{224}\text{Id.; Bunch v. King County Department of Youth Services, 116 P.3d 381, 390 (Wash. 2005) (expressly stating that a court of appeals decision “is not binding on us”).}\]
individual cases that constantly appear before them. As Washington Court of Appeals Judge Dennis J. Sweeney notes in an article published by the Washington Law Review, it is when legal principles are given shape in the trial courts that such principles “become part of the fabric of our legal culture. Only when a trial judge […] treats them as law and applies them as law in the process of deciding a case will they become “law.”” Finding that “when legal principles are given shape in the trial courts that such principles “become part of the fabric of our legal culture. Only when a trial judge […] treats them as law and applies them as law in the process of deciding a case will they become “law.”” 226 Each decision by a trial court that resolves a dispute before it, “becomes,” as Sweeney puts it, “part of the fabric of ‘the law.’” 227

As in any American appellate system, the doctrine of stare decisis is a key concept in the operation of Washington’s appellate structure. The Washington court system has a developed notion of vertical stare decisis regarding the binding nature of state supreme court decisions on the court of appeals, as well as an approach to the authority of the decisions of the each division of the court of appeals. Decisions of the state supreme court are binding on all lower Washington courts, whether trial courts or the appellate court sitting in its divisions. 228 Decisions of a division of the court of appeals are binding on all state trial courts, but not on the other divisions of the court of appeals. 229 Hence, the a trial court located in Division 1 is bound by case law from Division 2, but a panel of Division 1 of the court of appeals is not similarly bound by case law decided by Division 2. 230 This structure births conflicts between the divisions of the single court of appeals, with trial courts often left to deal with those conflicted authorities as best they can. 231

227 Id. This is not to say that each judicial decision is equally important as evidence of the law or in making the law. See Thomas A. Smith, The Web of Law, 44 San Diego L. Rev. 309, 341 (2007).
228 State v. Gore, 681 P.2d 227, 231 (Wash. 1984) (“[i]n failing to follow directly controlling authority of this court, the Court of Appeals erred”).
229 State v. Hochhalter, 128 P.3d 104 (Wash. Ct. App. 2006); see also Brian Harnetaux and George Ahrend, Tegman and Denial of Review in Rollins, and Recent Filings, Trial News (Washington State Association for Justice, Dec. 2009) 1, 8 (describing in brief the basic lines of authority from the court of appeals to the superior court in Washington); Washington Rule of Appellate Practice 13.4(b)(2) (recognizing that conflicts exist within court of appeals jurisprudence). Bond and Kunsch suggest that in order to minimize the number of cases that bind it, the supreme court “should only exercise its discretionary review when the law is unclear or contradictory,” situations where “disagreements among appellate jurists is likely.” James E. Bond and Kelly Kunsch, A State Supreme Court in Transition, 25 Seattle U. L. Rev. 545, 550 (2002).
231 How big of a problem this poses is difficult to measure, as Kelly Kunsch explains in an article for the Washington State Bar News, Stare Decisis: Everything You Never Realized You Need to Know, 52 Wash. St. B. News 31, 33 (1998) [“b]ecause trial court opinions are not published, one cannot know what precedential value those courts typically accord appellate court decisions from other divisions.”].
Theoretically, the court of appeals is capable of resolving conflicts within itself. While the divisions are not bound by each other’s decisions, those decisions are persuasive authority and a division which initially adopts a rule that is later rejected by one or both of its sister divisions could, theoretically, be persuaded to abandon its initial approach in recognition of the outcome favored by its coordinate divisions. The self-correcting capacity of the court of appeals is complicated, however, by the relationship of the divisions to each other as coordinate branches of the same court. One the one hand, there is authority from the court of appeals that holds that in the absence of a supreme court decision on an issue, “an existing Court of Appeals decision is that law that must be followed on the issue.”\textsuperscript{232} And such an approach makes sense given the fact that the court of appeals is a single court. Yet, there is also authority from the court of appeals that states quite clearly that the divisions are not bound to each other’s decisions.\textsuperscript{233} Because the divisions are co-ordinate to each other and as a result cannot bind each other, there is no institutional locus of unity within the court of appeals to compel the resolution of a conflict between the divisions.

2. A Resolved Conflict Between the Divisions

The interaction between the divisions in regard to conflicting case law, and the supreme court’s resolution of that conflict can be seen in \textit{McClarty v. Totem Electric}.\textsuperscript{234} In that case, Division 2 addressed a disability claim by a plaintiff who brought an employment discrimination lawsuit against his previous employer.\textsuperscript{235} In evaluating whether the employer had engaged in disparate treatment of the plaintiff, the court looked to a standard previously developed by the Division 3 of the court of appeals to determine whether disparate treatment had occurred.\textsuperscript{236} The plaintiff in \textit{McClarty} argued against the use of Division 3’s standard, contending, as Division 2 noted, that in so far as another division of the court had developed the standard, Division 2 was not bound to follow it.\textsuperscript{237} The plaintiff also argued that the decision from Division 3 was not persuasive.\textsuperscript{238}

In a footnote in its opinion, the \textit{McClarty} court noted that while a case from another division “is not binding on this Court,” the decision could still be persuasive so

\textsuperscript{235} Id. at 910.
\textsuperscript{236} Id. at 910 n. 8.
\textsuperscript{237} Id.
long as “its reasoning is sound.” Significantly, the McClarty court did not find the Division 3 case to be persuasive, because the Division 3’s standard, in the McClarty court’s view, would have undermined the state statute prohibiting discrimination. For that reason, even though the Division 3 case was already on the books and the state supreme court had not yet decided the specific issue before the court of appeals, Division 2 chose not to follow the case from its sister division. The court ruled in favor of the plaintiff.

The Washington Supreme Court took the case up on appeal. The court accepted review in part to address “the issue regarding the definition of disability in disparate treatment claims.” After providing a detailed overview of the background law regarding Washington’s prohibition on discrimination in employment, the supreme court held that the previously used definitions of “disability” provided by the courts and by state administrative regulation were either too restrictive or too broad. The court decided to resolve the ambiguity over the relevant definition of disability by adopting the definition used in the federal Americans with Disabilities Act. This effectively resolved the conflict between the divisions and provided Washington courts throughout the state with a clear standard to use when deciding cases involving disability claims. While the issue of the correct definition of “disability” under Washington law was later revisited by the legislature, the conflict between the divisions on that point was ended by the state supreme court’s decision in McClarty.

IV. Four Possible Solutions to the Problem

239 Id.
240 Id. at 910-911.
242 Id. at 847 (quoting its own order granting review, Wash. State Supreme Court Order, McClarty v. Totem Elec., 99 P.3d 895 (2004)).
243 Id. at 848-849.
244 Id. at 850.
245 Id. at 851.
246 The state legislature responded to the supreme court’s decision in McClarty by amending the relevant Washington statute to broaden the definition of disability. See Session Laws of the State of Washington, 2007 c 317 sec. 1 (“[t]he legislature finds that the supreme court, in its opinion in McClarty v. Totem Electric, 157 Wn.2d 214, 137 P.3d 844 (2006), failed to recognize that the law against discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with Disabilities act of 1990, and that the law against discrimination has provided such protections for many years prior to passage of the federal act”); Wash. Rev. Code sec. 49.60.040; see also Hale v. Wellpinit School District No 49, 198 P.3d 1021, 1028 (2009). The state supreme court noted in Hale that the interaction between the supreme court and the legislature regarding the definition of “disability” under Washington law “should serve as a model of how two separate and independent branches of government can work together in harmony and in the spirit of reciprocal deference to the other’s important role and function in the art of governing.” Id. at 1028-1029.
One of the judges I clerked for after law school once explained to me that the key task of a trial court judge boils down to making decisions about cases before the court. Decisions of a particular sort, but decisions all the same. Judge Martinez needs to make a decision regarding the evidentiary motion that has been put before the trial court. Under state law, she must render a decision as part of her duty as a judge. That being the case, she has to find some way to resolve the conflict between the divisions that she is faced with. At the end of the day, she has to find an answer; she must make a decision. There are four possible resolutions of the dilemma that faces Judge Martinez. Each of these resolutions has advantages and pitfalls that will be identified and discussed; none is perfect. Only one of these paths would enable Judge Martinez to make a decision now that would be fully cognizant of all the applicable evidentiary rules that apply to the issue before the trial court.

A. **Adopt the Federal Model**

1. **Overview**

The simplest way to resolve the problem caused by contrary authorities from the court of appeals would be to adopt the approach used in the federal appellate system. In the federal system, each circuit court of appeals is distinct and separate.\(^{247}\) While decisions from other circuits are persuasive, they are not binding

\(^{247}\) Genarali v D’Amico, 766 F.2d 485, 489 (11th Cir. 1985) (“authority from one circuit of the United States Court of Appeals is not binding on another circuit”); see e.g., Washington Energy Co. v. U.S., 94 F.3d 1557 (Fed. Cir. 1996) (“Congress has created multiple and co-equal intermediate federal appellate courts, each with an equal power and duty to decide the cases properly brought before it”); Brinskele v. U.S., 88 Fed.Cl. 334 (Fed. Cl. 2009); In re Korean Air Lines Disaster, 829 F.2d 1171, 1176 (D.C. Cir. 1987), aff’d, 490 U.S. 122 (1989) (“each [federal court] has an obligation to engaged independently in reasoned analysis”); Sweet v. Commissioner of Internal Revenue, 102 F.2d 103 (1st Cir. 1939); Menowitz v. Brown, 9919 F.2d 36 (2d Cir. 1993); In re Grossman’s, Inc., 607 F.3d 114 (3d Cir. 2010) (“[n]otwithstanding what appears to be universal disapproval, we decided cases before us on our own examination of the issue, not on the views of other jurisdictions”); Rosmer v. Pfizer Inc., 263 F.3d 110, 118 (4th Cir. 2001); Peters v. Ashcroft, 383 F.3d 302 (5th Cir. 2004); Ashki v. I.N.S., 233 F.3d 302 (6th Cir. 2004) (“[a]lthough we are not bound by the holdings of our sister circuits, we find their reasoning persuasive”); Atchison, Topeka and Santa Fe Ry. Co. v. Pena, 44 F.3d 437 (7th Cir. 1994) (“while we carefully consider the opinions of our sister circuits, we certainly do not defer to them”); United State v. Auginash, 266 F.3d 781, 784 (8th Cir. 2001); Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005); Estate of McMorris v. C.I.R., 243 F.3d 1254 (10th Cir. 2001); Bonner v. City of Prichard, Ala., 661 F.2d 1206 (11th Cir. 1981) (“[u]nder the established federal legal system the decisions of one circuit are not binding on the decisions of other circuits”); see also Admiral Fincancial Corp. v. U.S., 378 F.3d 1336 (Fed. Cir. 2004) (“we according great weight
within a given circuit, even if that circuit has not ruled on a question of law that is addressed by decisions from the other circuits. On federal issues, the circuit itself is bound only by its own case law and the case law from the United States Supreme Court. Even if a trial court within the circuit is convinced that its appellate court decided a case wrongly, it is bound to follow that circuit court opinion so long as the federal Supreme Court has not addressed the issue. This approach has been characterized as a “geographical approach” to stare decisis.

Applying this structure to Washington State’s appellate system would result in each division being separate and autonomous from each other not only at the appellate level (a system which already is in place), but at the trial court level as well. Instead of the structure referenced in Marley v. Department of Labor and Industries

to the decision o sister circuits when the same or similar issues come before us, and we ‘do not create conflicts among the circuits without strong cause’”) (quoting Wash. Energy Co. v. United States, 94 F.3d 1557, 1561 (Fed. Cir. 1996).

Hart v. Massanari, 266 F.3d 1155, 1173 (9th Cir. 2001). As the Ninth Circuit Court of Appeals put it in that decision:

The courts of appeals, and even the lower courts of other circuits, may decline to follow the rule we announce – and often do. This ability to develop different interpretations of the law among the circuits is considered a strength of our system. It allows experimentation with different approaches to the same legal problem so that when the Supreme Court eventually reviews the issue it has the benefit of “percolation” within the lower courts.


Hart, 266 F.3d at 1171 (“[a] decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modified it...[t]he same is true as to circuit authority, although it usually covers a much smaller geographic area”).

Id. at 1175 (9th Cir. 2001), cited in Chad Flanders, Toward a Theory of Persuasive Authority, 62 Okla. L. Rev. 55, 59 n. 14 & 15 (2009). As Flanders quotes Hart, “[a] district court bound by circuit authority, for example, has no choice but to follow it, even if convinced that such authority was wrongly decided.” Id. at n. 15. See also Montgomery County Maryland v Metromedia Fiber Network, Inc., 326 B.R. 483 (2005) (“[a] federal bankruptcy court, like a federal district court, is bound to apply federal laws as they have been interpreted by the Court of Appeals in the circuit where it sits”).

where trial courts are bound by decisions from other divisions, the trial courts would be bound only by the case law issuing from their own division or from the state supreme court. Under this approach, Judge Martinez would follow the authority from Division 3 unless and until that authority is reversed either by Division 3 itself or the state supreme court.

The federal model has a number of distinct advantages. First, it is institutionally clean, providing a clear bright line around the binding case law that a trial court judge would be required to apply. Second, it would require minimal alteration of the existing court rules to implement. Third, decisions from a different division of the court of appeals would remain persuasive authority, meaning that trial court judges could still look at case law from the other divisions, particularly when dealing with an issue that had not been resolved by their respective division. Fourth, the divisions would have the opportunity to correct their own decisions in light of what other divisions of the court of appeals were ruling on a given issue without putting the burden of directly conflicting with one’s own division on the trial court.

Along with these advantages, though, come significant detriments. Two of these detriments have already been identified by Kelly Kunsch in an article for the Washington State Bar News. As Kunsch points out, the first problem in adopting the federal structure to Washington State regards the enabling act for the Washington Court of Appeals. The federal statute that creates the circuit courts specifically creates each circuit’s appellate court as a distinct court of appeals: “There shall be in each circuit a court of appeals.” As Kunch observes, “[t]he implication is that under the federal statutes, each circuit court of appeals is a separate entity. Washington’s statute, by contrast, specifically refers to the court of appeals in the singular, and the divisions themselves are referred to as belonging to “the court” of appeals. To Kunsch, “[t]he plain language indicates that under the state statutes, the Court of Appeals is considered a single entity. As such, the only geographical limitation on precedential value of a Court of Appeals decision would be the boundaries of the state itself.” Kunsch also argues that custom and usages supports the structural unity of the Washington Court of Appeals, with “research tools and citation forms” demonstrating that the appellate court should be viewed in the singular rather than the plural:

The Washington Digest does not indicate which division decided an opinion while the Federal Practice Digest (and its predecessors) do indicate the circuit. And while a citation of a federal court of appeals case requires

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255 Wash. Rev. Code sec. 2.06.010.
Kunsch’s basic point is supported by the historical and constitutional background to the creation of the court of appeals detailed earlier in this article. That background shows that the court of appeals was consistently conceived of as a single court of appeals, and that it was constitutionally structured in such a way as well. As a result, it is difficult to conceive how the federal model could be embraced under the existing constitutional and statutory regime governing the court of appeals.

Of course, there is an established remedy to such constitutional and statutory objections: amend the state constitution to create multiple geographically distinct courts of appeal for the state, and revise the enabling act for the state appellate system accordingly. \(^{258}\) This would be somewhat time-consuming and would require that Washington’s process for amending its constitution be followed, but it can be accomplished if there is sufficient political will. The question then arises: would creating such a structure be a good idea? For a number of reasons, it would likely not be.

One critique of the federal court of appeals system is that it reduces the uniformity of the law. As one of the circuit courts of appeal has put it, while conflicts between the circuits are a reality, “federal law [unlike state law] is supposed to be unitary.” \(^{259}\) As Mary Garvey Algero observes, the number of conflicts between federal circuit decisions has risen sharply since 1950. \(^{260}\) As a result, the U.S. Supreme Court has progressively lost the ability “to adequately harmonize federal law” through the resolution “all intercircuit conflicts.” \(^{261}\) The ever-growing body of divergent circuit court decisions results in “a system in which litigants are treated differently by courts purporting to apply the same federal laws.” \(^{262}\) Such a system results not only in theoretical problems involving the nature of the law, it can create a host of other problems, as Algero notes, quoting the Commission on Revision of the Federal Court Appellate System:

> The absence of a definitive decision, equally binding on all citizens wherever they may be, exacts a price whether or not a conflict ultimately develops. That price may be years of uncertainty and repetitive litigation, sometimes

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\(^{257}\) Id. at 33-34.

\(^{258}\) One model of such a system can be found the original proposed constitutional amendment from the 1929 Judicial Council report, which in its text set up separate regional “courts of appeal” rather than a single court of appeal. Second Report of the Judicial Council, Appendix D at 29-31 (1929).

\(^{259}\) Menowitz v. Brown, 991 F.2d 36 (2d Cir. 1993).


\(^{261}\) Id. at 623.

\(^{262}\) Id.
resulting from the unwillingness of a government agency to acquiesce in an unfavorable decision, sometimes from the desire of citizens to take advantage of the absence of a nationally-binding authoritative precedent.\footnote{Id. at 623-64, quoting the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 207.}

Former Illinois Supreme Court justice Walter Schaefer has speculated that the existence of conflicts within an intermediate court system could actually “stimulate” the development of splits between different appellate panels or courts.\footnote{Walter V. Schaefer, Forward: State Decisis and “The Law of the Circuit,” 28 DePaul L. Rev. 565, 566 (1978-1979).} In addition, the embrace interdivision or intercircuit conflict within an appellate system could affect the willingness of judges to address conflicts directly.\footnote{Id.} As Schaefer writes, such conflicts may operate to blunt the sensitivity of an appellate judge to the damage that is done to the rights of litigants, as well as to the fabric of the law itself, by conflicting decisions. He may rationalize his refusal to follow the decision of a court of coordinate authority by mentally passing on to the top court the responsibility for resolving those conflicts.\footnote{Id.}

An even more troubling problem that Schaefer identifies regards the basic fairness involved in a system where the law’s basic contours shifts based on the accident of geography.\footnote{Id. at 568.} Schaefer contends that such an approach implicates significant constitutional protections:

A court can violate equal protection and other constitutional rights by its opinions, just as a legislative body can violate constitutional rights by its statutes. When a court deliberately refuses to follow the earlier ruling of a court of coordinate authority, it creates an unconstitutional discrimination. What is involved in the “law of the circuit” is akin to what was involved in \textit{Erie v. Tompkins}. In that case a rule, promulgated by judges, was held unconstitutional because it subjected citizens to different rules of law depending solely upon the court in which the action was brought. The ‘law of the circuit’ operates in the same way: it subjects the citizens to different rules of law depending solely upon the court in which the action is brought.\footnote{Id.}

Within the context of the Washington State Court of Appeals, uniformity is made all the more urgent in light of the nature of state government itself. As Kunsch

\begin{footnotesize}
\begin{enumerate}
\item Id. at 623-64, quoting the Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, 67 F.R.D. 195, 207.
\item Id.
\item Id.
\item Id. at 568.
\item Id. 568
\end{enumerate}
\end{footnotesize}
notes, the state is a unitary form of government, while the counties, where she notes the state trial courts are located, “are more entities of administrative convenience.” 269 A policy of autonomy among the different divisions of the state court of appeals would undermine such an approach, and could lead to further problems such as forum shopping. 270

Kunsch’s observation regarding forum shopping should not be minimized. The odious practice is a distinct possibility under the existing appellate system in Washington. Washington’s venue statute allows for cases against the state to be brought in a number of venues, including Thurston county, regardless of the county where the case originates. 271 The statute allows a litigant against a state in a dispute arising, for example, in Grant county within Division 3 to file suit against the state in a trial court located in Thurston county, within Division 2. In suit involving multiple private defendants, Washington law permits suit to be filed in “any county […] where some one of the defendants resides at the time of the commencement of the action.” 272 If each of the defendants lived in a different division, then it would be possible for a plaintiff to bring suit in the division with the law most favorable to the claim. If the defendant is a corporation, the possibilities for forum shopping

270 Id.; see also Eric Stein, Uniformity and Diversity in a Divided-Power system: the United States’ Experience, 61 Wash. L. Rev. 1081, 1087-1088 (1986) (discussing the problem of forum shopping in the federal court system in light of conflicts between the circuit courts of appeal).
271 Wash. Rev. Code sec. 4.92.010. The statute reads in relevant part:

Any person or corporation having any claim against the state of Washington shall have a right of action against the state in the superior court.

The venue for such actions shall be as follows:

(1) The county of the residence or principal place of business of one or more of the plaintiffs;

(2) The county where the cause of action arose;

(3) The county in which the real property that is the subject of the action is situated;

(4) The county where the action may be properly commenced by reason of the joinder of an additional defendant; or

(5) Thurston county.

increase. In a claim against a corporation, Washington permits suit against a corporation to be filed, “at the option of the plaintiff” in a variety of locales: “(a) [i]n the county where the tort was committed; (b) in the county where the work was performed for said corporation; (c) in the county where the agreement entered into with the corporation was made; or (d) in the county where the corporation has its residence.”273 As a result, a corporation located in Seattle that does business in Spokane could find itself subject to suit in either Division 1 or Division 3. An appeal from the trial court would not be to the division where the cause of action arose, but rather in the division where the trial court is located.274 Embracing the federal model to create strong autonomy between the divisions would likely exacerbate the potential for forum shopping, not resolve it.

2. New York’s Approach

While the pure federal model poses problems for Washington State, New York follows a modified approach that combines the autonomy of different geographic appellate panels with an emphasis on the interconnectedness of the court of appeals as a single court.275 In New York, trial courts are generally bound to follow the decisions of the appellate department in which the trial court is located.276 The appellate departments themselves are not bound to follow each other’s rulings, rather a ruling from one department is only persuasive authority in the other departments.277 It should come as no surprise then that the New York appellate departments disagree with each other regarding the formulation and application of the law.278 In the event of such a conflict a trial court is bound to

274 See Rule of Appellate Procedure 4.1. That rule mandates that “a party must seek review” of a trial court decision in the division in which that trial court is located. Rule 4.4 does permit the supreme court to transfer cases between divisions of the court of appeals, but the rule is ensures that such transfer may be done only if it “promote[s] the orderly administration of justice.”
follow the case law from the department in which it is located. Since New York has a single court of appeals sitting in multiple departments, if there is no authority from the trial court’s appellate department, the trial court is bound by the case law from the other appellate departments in the state. If the trial court’s appellate division has not issued an applicable decision and the appellate decisions from the other departments conflict, the trial court is then permitted to craft its own opinion under the applicable law.

The New York system has significant advantages over the pure federal approach, particularly in light of Washington State’s constitutional and statutory provisions governing the court of appeals. Like Washington, New York has a single court of appeals system; both states are in this way unlike the federal system, which creates separate circuit appellate courts. New York recognizes that the consequence of this unified court structure is that decisions by the court of appeals are valid throughout the state, a position substantively identical to that recognized by the Washington Court of Appeals in *Marley v. Department of Labor and Industries*.

New York recognizes the difficulty that trial court judges are faced with when presented with conflicting authority, permitting the trial court to evaluate conflicting opinions of the court of appeals so long as those opinions do not issue from the trial court’s own department. At the same time, by emphasizing the duty of a trial court to follow the decisions of its own appellate department, New York provides clarity to the institutional hierarchy of its court system and relieves the trial court of the responsibility to freshly analyze disputed legal principles when faced with a conflict between its own department and the other departments of the court of appeals.

3. **Solutions That Create More Problems**

“[a]lthough due deference should be accorded the doctrine of stare decisis in order to promote consistency and stability in the decisional law, we should not blindly follow an earlier ruling [that] has been demonstrated to be unsound simply out of respect for that doctrine”.


Despite its virtues, the New York approach still retains the fundamental weakness of the federal model: it potentially binds a trial court to following appellate authority that is clearly erroneous. To go back to Judge Martinez’s situation for a moment, the federal model and the New York approach both would be of assistance to her if she is called upon to decide a case where the conflict in authority involves divisions of the Washington Court of Appeals outside of her own. If the conflict was only between Division 1 and Division 2, then under either the federal or New York approaches, she would have the ability to critique the conflicting decisions and evaluate which one was more legally proper. Under the federal approach, since neither of the divisions outside her own would be binding, each precedent would be persuasive only. Under New York’s approach, while the case law from the divisions would be binding in the absence of a conflict, since there is such a conflict, Judge Martinez would be free to determine what the most correct legal outcome would be. So far, so good.

But what happens under both the federal and New York models if Judge Martinez’s own division is part of the conflict, and to make matters worse, has clearly make a mistake about the applicable law governing the point at issue? That is the situation that Judge Martinez faces. And in such a circumstance, both the federal and New York approaches would mandate that she follow the rule adopted by her division, even though it appears to be incomplete to the point of being incorrect.

The disadvantages posed by applying either the federal or New York models to the Washington State Court of Appeals are sufficiently problematic to disqualify them from consideration. First, while providing the benefits of institutional simplicity and bright line rules, the adoption of the federal circuit model would require significant constitutional and statutory revision. And second, while adoption of the federal or New York models would resolve the kind of problem currently faced by our hypothetical judge, Judge Martinez, it would do so only at the expense of creating other problems. Critically, the trial court would still be placed in a situation where it was required to apply precedent from its division that overlooked the totality of the legal rules applicable to the case before the trial court.

Adopting either the federal or New York models would solve an existing problem only at the expense of creating addition difficulties. Forum shopping would have to be addressed by amending the relevant statutes or court rules. But even if that were done, other problems, identified by Algero and Schaefer, are more intransigent. There is no question that the institutional simplicity offered by the federal model is attractive, but simplicity for its own sake is not necessarily a virtue, particularly when dealing with something as complex as an appellate judicial system. Trade-offs are inevitable in any attempt to reform an established system, but to be attractive a proposed reform should not make an existing system worse.

B. Create An Additional Court of Appeals Tier for the Entire State

Another possible resolution to the problem of splits between the divisions would be to create a true intermediate court of appeals for Washington State, a court that would stand over the divisions of the existing court of appeals and under
the state supreme court. A similar court has been proposed multiple times at the federal level, to stand between the existing federal circuits and the U.S. Supreme Court. In Washington State, such an intermediate court of appeals could be headquartered in Olympia, and might function much like an en banc panel for the court of appeals, allowing for an additional review of a case before it went to the state supreme court.

Interestingly enough, the early proposals for a court of appeals in Washington did not contemplate the current divisional structure of the court. Instead those proposals envisaged the court of appeals functioning in a single location. Those early proposals also structured the court of appeals as a true intermediate court. Such a system differs from the one currently in place, in which the state supreme court retains a significant amount of original jurisdiction to hear appeals, as well as the ability to intervene in the court of appeals’ docket to transfer cases between divisions and even to and from the state supreme court. Creating another tier of appellate court within the state appellate system would be a way to recapture some of the initial vision behind the push for a court of appeals in Washington State.

A truly intermediate court of appeals could be structured to take some of the pressure off of the supreme court’s docket while at the same time permitting for more extensive review of cases beyond the review provided by the divisions of the existing appellate court. If the new court of appeals was constituted as a court of error with a right of review, rather than a court of discretionary review, that would enable more cases to be reviewed. As a result, more conflicts between the divisions could be addressed without adding to the burden of the supreme court’s case load. While supreme court review would remain necessary in certain critical areas – death penalty appeals, for example – the intermediate court of appeals would be able to shoulder a good deal of the heavy lifting when it came to reviewing decisions of the divisions of the court of appeals.

Several of the practical problems previously discussed when evaluating the federal model also apply here. Significant constitutional and statutory revision would be necessary in order to implement such a system. The current Washington State constitutional provision only authorizes a single court of appeals. Creating a separate, truly intermediate court of appeals would require constitutional amendment. Such a requirement might be avoided if the additional tier was simply incorporated into the existing statutory scheme regarding the court of appeals as another division, but it is difficult to see how such a co-ordinate division would be able to bind the other divisions to its decisions resolving inter-division conflicts. This problem in turn might be addressed by modifying the tier to constitute an en banc panel, where the judges of all the divisions would sit together to resolve cases that involved divisional conflicts about the law. Such a plan would mimic the appellate structure used by state supreme court prior to the creation of the current

283 For an overview of three different proposals to create an additional tier of appellate court in the federal system, see Mary Garvey Algero, A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions, 70 Tenn. L. Rev. 605, 624-629 (2003)
The existence of the current court of appeals is a testament to the inherent limitations of such an en banc approach. Adding an additional layer of appellate court between the divisions of the current court of appeals and the supreme court is likely to entail a considerable amount of institutional development as well. At a time of shrinking budgets, does the state really want to create an additional court? Could already scarce money for the judicial system be better spent within the existing court structure to ensure the better administration of justice? The reality of finite judicial resources surely needs to be taken into consideration. Judges need to be selected, trained and paid. Support personnel must be hired, trained and paid. Additional buildings would be needed, or if existing courthouses were used, additional maintenance on those existing facilities would be required. Archives need to be kept. And all that adds up to a significant expense. The state may simply not have the funds at this time to engage on an ambitious restructuring of the appellate court system.

Finally, there is a prudential problem with the use of an additional tier in the court of appeals to resolve a conflict in authority: it still would not help a trial court judge faced with a conflict among the divisions when that conflict had yet to be brought before a higher court. To look at the problem faced by Judge Martinez, a trial court judge faced with an unresolved conflict between divisions would be no better off under a system with an additional tier of court than she is now. Until the higher court of appeals resolved the conflict, the judge would still be faced with a conundrum: somehow reconcile the divergent opinions of the divisions of the court of appeals, follow those divisions that disagree with her division, or follow her division – even if it appears that her division has made a mistake. Unfortunately for Judge Martinez, the addition of another tier to the Washington appellate system would not be a solution to her dilemma.

C. The First to the Post Controls

A third possible resolution to the problem posed by conflicts between the divisions of the Washington Court of Appeals is what this article will refer to as a “first to the post” solution. The first to the post concept would have the first decision by one of the divisions function as binding precedent for the other divisions of the court of appeals. As described by Taylor Mattis and Kenneth G. Yalowitz, this approach, which they called the “absolute binding model,” sets up “a system in which all divisions of the appellate court are bound by the decisions of the coordinate branches of the court, as well as by their own prior decisions.”

Kelly Kunsch proposes a similar system, advocating “horizontal stare decisis” where the decisions of the divisions are binding on each other, "absent a finding of

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incorrectness and harmfulness.” Kunsch argues that such an approach would reinforce the values of “uniformity and predictability.”

There is little question that a first to the post approach would further such values, and would have the additional benefit of providing a clearer and more focused approach to stare decisis between the divisions than the system that exists currently. Presuming that each of the divisions did not find too much “incorrectness and harmfulness” in the decisions of the other divisions, the number of division splits that would face trial court judges, like our hypothetical Judge Martinez, would be reduced. In addition, this system has some similarity to current practice, as recognized by Marley v. Department of Labor and Industries, that trial courts throughout the state are bound by a division opinion on a novel point of law regardless of which division issues the ruling. The first to the post approach would simply expand the precedential quality of such a division opinion to bind the other divisions as well.

While the advantages to a first to the post system are attractive, there are a number of problems with such a system as well. There is an inherent difficulty in seeking to bind co-ordinate branches of the same court to decisions of a different branch. If the divisions truly are co-ordinate, how can a decision by one division serve as mandatory authority for another division? As Kunsch herself observes, “convincing the courts to limit their own discretion would be a difficult task.” The current case law from the court of appeals indicates that the divisions view themselves as co-ordinate to each other, and thus the decisions of one division cannot bind another division. So long as that co-ordinate structure remains in place, one division binding, as opposed to persuading, another will remain problematic. Significant institutional restructuring of the court of appeals would likely be necessary to effectuate a solution to that problem.

Even if the roadblock of the coordinate nature of the courts is overcome by restructuring the relationship between the divisions, what happens if the division that is first to the post is wrong? Kunsch acknowledges this possibility and makes some effort to account for it by noting that if a decision from one of the divisions was found to be incorrect and harmful it would not be binding on the other divisions. While Kunsch should be applauded for acknowledging the problem faced by an erroneous decision by a division, her solution would not resolve the fundamental problem posed to trial courts by unresolved conflicts between the divisions of the court of appeals. A serious conflict between the divisions results precisely because the divisions are convinced that a ruling of another co-ordinate

286 Id.
289 Id.
division is incorrect. The divisions are not creating splits for the sake of creating splits, they are creating splits because they have honest and well-reasoned disagreements about the nature of the law and its proper application. There may be, lurking out in the Washington Appellate Reports, incidents of conflicts between the divisions that are trivial and harmless, but the conflicts that are most vexing – the conflicts that present both lawyers and judges, like Judge Martinez, with hard decisions – are those that would not go away under Kunsch’s system. Under Kunsch’s approach, Judge Martinez is still going to be faced with a dilemma.

One solution to this problem would be to adopt a pure first to the post solution: the earliest decision by one of the divisions functions to establish binding precedent on the other divisions, come rain or come shine. Even if it was established that the division establishing the precedent was likely erroneous, that decision would stand unless reversed by either the division that made the ruling or the state supreme court. Would such a system be beneficial? It certainly would make the job of judges and advocates easier, removing the complexities posed by splits between the divisions. It would eliminate the possibilities of forum shopping in an attempt to find favorable law in a specific division. It might even increase judicial efficiency. But these benefits would come at a terrible price. The very real possibility remains that the first division to decide an issue might be wrong. Under a first to the post system of stare decisis, unless the supreme court took review, that error would remain unchallenged within the judiciary, becoming binding authority throughout the state on the other divisions and on the trial courts. It would only be through action by the supreme court that the error could be judicially corrected. The political branches might intervene to try to craft a solution, either through statute or state constitutional amendment, but within the judiciary itself, the responsibility of correcting the legal error throughout the state would rest entirely with the supreme court. A supreme court that is likely overworked to begin with.

Another problem with the pure first to the post approach involves the lack of regional diversity it would foster within the state’s jurisprudence. While too much autonomy between divisions has negative effects, too much uniformity could as well. The geographic regions within the state are not all alike. Divisions 1 and 2 are located west of the Cascade range and include large urban areas, with an economy based largely on technology, forestry, fishing and manufacturing. Division 3 is

located east of the Cascades, with smaller urban areas and an economy that is dominated by agriculture and service industries. When dealing with judicial decision-making, it is not necessarily a bad thing to have a system in which the differences between the divisions can be reflected in the court’s case law. Such an approach should be limited to ensure that laws meant to be uniform throughout the state are in fact uniform throughout the divisions. But within that parameter, diversity between the divisions may have the positive effect of texturing the decisions of the court of appeals to the lived realities of the populations and economies of different parts of the state.

Finally, another negative consequence of completely eliminating differences between the divisions regards the information-signaling function that conflicts within the court of appeals can serve for the state supreme court. The existence of splits between the divisions serve a positive function by alerting the high court to areas of law that are unsettled or otherwise in need of review. The divisions’ critique and criticism of each other’s decisions can provide vital doctrinal analysis that can assist the supreme court in evaluating the competing legal schemas developed by the divisions.291

D. Anticipating the Resolution of the Conflict

The final approach to resolve the problem presented to trial court judges by conflicting decisions from the divisions of the court of appeals requires the trial court judge to take all of the conflicting decisions into account to resolve the conflict in the manner which the trial court believes that the state supreme court would, if the issue was brought to the supreme court for review. In short, the trial court would place itself in the position of the supreme court in deciding the issue. Trial courts would examine the decisions of the divisions when a material conflict is present, determining which division’s case law comports most closely to both: 1) the existing structure of the law as evidenced in the relevant constitutional, statutory, regulatory and/or case decisions of the court of appeals and the supreme court; and 2) the supreme court’s likely resolution of the divisional split in light of that existing legal structure.292


292 Anticipating the state supreme court’s likely determination of a legal question is already a component of the federal approach to resolving ambiguous questions of state law. See Filtercorp, Inc. v. Gateway Venture Partners III, L.P., 163 F.3d 570, 578 (9th Cir. 1998) (quoting Dimidowich v. Bell & Howell, 803 F.2d 1473, 1482 (9th Cir. 1986) modified on denial of reh’g, 810 F.2d 1517 (9th Cir. 1987) (“[w]here the state’s highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it”)); Commissioner of Internal Revenue v. Bosch, 388 U.S. 429, 466 (1967) (“while the degrees of ‘lower state courts’ should be ‘attributed some weight…the decision [is] not controlling...where the highest court of the state has not spoken on the point.”); see also West v.
In this approach, trial courts would not be authorized to breach the hierarchy between appellate courts and trial courts. The trial courts would not be given free reign to invent new law in order to find against an opinion of the court of appeals with which the trial court disagrees. Rather trial court judges would be charged with first reconciling, as much as possible, the conflicting decisions of the court of appeals. When such reconciliation is not possible, the trial court should seek to apply what is likely the appropriate legal answer rather than uncritically following an erroneous decision by its own division.

California follows a similar approach. Between districts of the California Court of Appeals, the decisions of one district, while persuasive, are not binding against another appellate district. While California trial courts are bound by the decisions of the intermediate appellate court regardless of the district of the court.

American Tel. & Tel. Co., 311 U.S. 223, 238 (1940). In that decision, the Supreme Court found:

Where an intermediate appellate state court rests is considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

Id. As a result, “under some conditions, federal authority may not be bound even by an intermediate state appellate court ruling.” Commissioner of Internal Revenue v. Bosch, 388 U.S. 429, 466 (1967). This does not mean that federal courts get to rework state law to make it something other than what it is. Montana v. Wyoming, - - - U.S. --, --, 131 S.Ct. 1765, n. 5 (2011). The federal determination of state law “is merely a federal court’s description of state law,” id., arrived at by examination of all the available data to discern “what the state law and apply it[.]” Id. (quoting West v. American Tel. & Tel. Co., 311 U.S. 223, 236 (1940). Once a state court of final review has decided a legal issue under state law, the federal Supreme Court must follow that state court’s ruling “as to the meaning and application” of the law.

Groppi v. Wisconsin, 400 U.S. 454, 514 (1971) (Blackmun, J., concurring). But see McSherry v. Block, 880 F.2d 1049, 1052-1053 n. 2 (9th Cir. 1989) (finding that the federal circuit court of appeals “may not summarily disregard” a state appellate court decision even if unpublished, but noting that its decision would be the same under the test set out by the Supreme Court in West v. American Telephone and Telegraph). McSherry need not be read to contract West. The U.S. Supreme Court has not stated that state intermediate appellate court decisions should be ignored; rather the U.S. Supreme Court’s decision in West indicates that federal courts should look at “the available data” regarding state law. West v. American Tel. & Tel. Co, 311 U.S. at 236. State court of appeals decisions would fall under the category of such data, but would not necessarily be dispositive.

293 Enrico’s, Inc., v. Rice, 730 F.2d 1250, 1255 (9th Cir. 1984) (describing the relationship between the “coordinate” districts within the California Court of Appeals); Hart v. Massanari, 266 F.3d 1055, 1175 n. 30 (9th Cir. 2001).
that issues the decision. If a conflict arises in the jurisprudence of the appellate court’s districts, “any trial court may choose the decision it finds most persuasive.” Trial courts are not empowered to simply create rules out of thin air, but when faced with a division of authority from the appellate court, trial courts are allowed to exercise prudential judgment in evaluating which of the authorities are most legally correct.

There are numerous advantages to this kind of approach at the trial court level. Given the existing Washington appellate court structure, this approach preserves the structure of the divisions without requiring a reworking of the constitutional or statutory organization of the court. It would also preserve the ability of the divisions to disagree with each other regarding proper legal standards that are applicable in given legal cases. By requiring trial court judges not to overlook express errors in court of appeals decisions, this approach avoids validating defective legal analysis by a division of the court of appeals. It does not alter the co-ordinate structure of the divisions of the court of appeals since the divisions are not required to follow each other in the formulation of the law. This provides both for reasoned splits and their attendant benefits to continue at the level of the appellate division while at the same time allowing for weaknesses in the divisions’ reasoning to be identified both by trial courts (and the appellate divisions) having to wrestle with conflicted case law. Such an approach might have the added benefit of encouraging more detailed explanation of the reasoning underlying appellate decisions that create or maintain splits of authority.

With this approach, a trial court would be protected from having to substitute its views for those of the court of appeals or the supreme court. A trial court judge would decide a case in light of the applicable law as it likely would be applied by the supreme court. This permits a trial court to meaningfully address a conflict among divisions of the court of appeals while providing proper restraint in a trial court’s operation in respect to the opinions of both the appellate court and the supreme court. It also incorporates the proper institutional deference between the court of appeals and the supreme court as opposed to the trial court. A trial court does not have independent authority to ignore the decisions of the court of appeals. The trial court is restrained from disregarding an existing court of appeals decision simply because the trial court judge would be inclined to rule in a different way.

Given the existing Washington rules regarding stare decisis, a trial court would be required to follow existing court of appeals case law in the absence of a conflict. If such a conflict was present, under this proposal, a trial court would not be free to simply imagine what the law might be or should be. Instead, the trial court would be required to place itself in the role of the supreme court in discerning

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294 People v. Hunter, 133 Cal.App.4th 371, 382, 34 Cal.Rptr.3d 818 (1st Dist. 2005); People v Bullock, 26 Cal. App.4th 985, 990, 31 Cal.Rptr.2d 850 (5th Dist. 1994); Dep’t of Consumer Affairs v. Superior Court, 71 Cal.App.3d 97, 98, 139 Cal.Rptr. 120 (1st Dist. 1977).
which appropriate legal framework to use to resolve the dispute. The trial court is not allowed to go off into the ether, but must stay grounded on the existing law in order to come to an answer – not the answer that the trial court judge might think is best in theory, but the best answer that the trial court judge can reasonably conclude that the state supreme court is likely to adopt. The trial court does not substitute its own judgment about what the law should be; instead, it respects the appellate function of saying what the law is.

A trial court judge operating under a plan such as this would need to exercise a good deal of prudential judgment in making a decision to disagree with his or her division. A trial judge who finds herself making a ruling that runs contrary to the established case law in her division will likely find that the case appealed to the very division whose ruling she has declined to follow. Such a practical reality provides incentives to a trial judge to not only be very cautious in disagreeing with her division but also to provide a solid foundation for any decision to deviate from the division’s existing approach. Such prudential incentives would likely serve to curtail any excessive activist approaches by trial court judges while insuring that deviations from established division precedent will be sufficiently reasoned that a solid record will be presented if an appeal is launched, a record that would help to bring the inconsistencies inherent in a material conflict between the divisions to light at the appellate level.

It might be objected that this proposal asks too much of individual trial court judges. In the practical hustle and bustle of a trial court, the intricacies and subtleties of the legal points underlying a conflict between the divisions can often be misunderstood, and to expose trial courts to the risk of determining how a conflict should be resolved would place a heavy burden on judges at the trial level. This argument overlooks that trial court judges in the state of Washington are trained attorneys who deal with questions of law as a common part of their work on the bench. The intricacies and subtleties of the law are already part of their stock in trade.

Additionally, there often is not a great deal of either intricacy or subtlety in the legal issues involved in the splits between the divisions. Take, for example, the division split that serves that the basis of this article’s hypothetical involving Judge Martinez. Judge Martinez has to decide a case where the precedent from her division fails to incorporate dispositive provisions from the rules of evidence. She has before her cases from the other divisions that clearly indicate the proper framework for legal analysis of the issues before the court. At its core, the problem that Judge Martinez is faced with is simple: the division of the court of appeals in which her court is geographically located overlooked an applicable legal rule when setting its precedent. It would not take a pantheon of great jurists to figure out where the problem lies in such a case. Cicero, Joseph Story, the first Justice Harlan or Bryon White need not be resurrected from the dead.

Another concern about permitting a trial court to anticipate how a conflict is likely to be resolved is that such an approach would lead to a dilution of the authority of precedent from the court of appeals. At one extreme, such dilution could lead to the decisions of the court of appeals having no precedential value at all,
either in fact or theory. A less vociferous version of this argument would assert that by allowing a trial court to choose between conflicting court of appeals decisions, the judicial hierarchy would be turned upside down. A lower court would essentially be sitting in judgment on a higher court, something that violates the general approach to *stare decisis* and precedent that informs the work of the judiciary in the United States. As discussed earlier in this article, it is part of that general approach that lower courts do not overrule decisions from higher courts. This stands as the most formidable objection to the idea that trial courts should have the ability to anticipate how the supreme court would resolve the conflict between the divisions of the court of appeals.

Yet, as formidable as this objection is, two points serve to undermine it. First, given the nature of the Washington Court of Appeals, this kind of evaluation is inevitable when a trial court is faced with conflicting authorities. The authority of the decisions of the court of appeals, regardless of division, extends to all the trial courts in the state. Unless the federal or New York models are adopted, that will not change. And as previously discussed, the likelihood of either the federal or New York models being adopted are modest. As a consequence, under the current system in Washington, trial courts are already put in the position of evaluating the competing claims of conflicting authority from the court of appeals. The only thing up in the air is the basis will be used for that evaluation. This is simply another problem that trial courts are faced with, just as they are faced with countless other problems that affect the course of justice within the judicial system.

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296 E.g., Oklahoma’s court of appeals rulings only constitute citable precedent upon an order of publication by a majority of the state supreme court justices. Oklahoma Statutes Sec. 20-30.5 sets out that state’s approach to severely curtailing the precedential authority of the decisions of its court of appeals:

The Court of Civil Appeals shall effect disposition of cases assigned to it by a written opinion prepared in such form as the Supreme Court prescribes. No opinion of the Court of Civil Appeals shall be binding or cited as precedent unless it shall have been approved by the majority of the justices of the Supreme Court for publication in the official reporter. The Supreme Court shall direct which opinion or decision, if any, of the Court of Civil Appeals shall be published in the unofficial reporter. Opinions of the Court of Civil Appeals which apply settled precedent and do not settle new questions of law shall not be released for publication in the official reporter.

As a result, the Oklahoma court of appeals “plays no role in the overall development of the jurisdiction’s law.” Andrew T. Solomon, A Simple Prescription for Texas’ Aling Court System: Stronger Stare Decisis, 37 St. Mary’s L.J. 417426 (2005-2006). For a critique of denying precedential authority to decisions by a court of appeals, see Taylor Mattis and Kenneth G. Yalowitz, Stare Decisis Among [Sic] the Appellate Court of Illinois, 28 DePaul L. Rev. 571, 596-297 (1978-1979). Hence, the decisions of the Oklahoma court of appeals are normally not binding on the trial courts in that state.
Second, the objection misunderstands the nature of the trial court’s evaluation of the conflicting decisions of the court of appeals. Under the proposal, trial courts will anticipate how the supreme court would likely resolve the conflict between the divisions if and when the conflict comes before the supreme court. The trial court is not substituting its own judgment for that of the court of appeals, nor is it trying to decide the case in light of what it thinks the law ought to be. Instead, the trial court is working toward the best resolution of the conflict in light of what the entirety of the higher courts in the state have done – both the court of appeals and the state supreme court. Instead of fragmenting the appellate jurisdiction of the state, the trial court would seek to integrate and make sense of the whole body of law – constitutional provisions, statutes, regulations and case law – that the courts are called upon to uphold and apply. In such a situation, if the court of appeals decisions present an irreconcilable conflict, the trial court’s best course of action is to predict what the Washington Supreme Court is likely to do.

V. Conclusion

The problem facing Washington trial judges by conflicts between the divisions of the court of appeals is one that needs to be addressed. The problem is created by the structure of the court of appeals system itself, where the court is a unitary body that sits in three geographically delineated divisions. While the state constitution and the enabling statute for the court of appeals makes plain that it is a single court, the court’s own jurisprudence also makes plain that since the divisions are co-ordinate bodies within the court, one division cannot bind another by its rulings. At the same time, trial courts in Washington State are placed in the difficult situation of being bound by division rulings made by any of the divisions. When faced with a conflict between the divisions, this puts the trial court judge in a difficult position, to say the least. This situation becomes all the more problematic when the conflict involves a what appears to be an erroneous decision by the trial court’s own division within the court of appeals.

Justice Louis Brandeis once commented that when dealing with questions of precedent,

Stare decisis is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than that it be settled right. This is commonly true, even where the error is a matter of serious concern provided correction can be had by legislation.

The fact that a trial court judge may believe that a decision by the court of appeals may be wrong is not sufficient reason for that judge to diverge from the appellate precedent. However, when faced with a split among the divisions of the court of appeals, a trial court judge’s will need to make a prudential decision about which of those decisions to follow. That prudential decision should not be based on a trial court judge’s own subjective view of the law or proper policy, but instead should reflect reasoned judgment about how the case would properly be resolved under existing law by the court of final review.

While there are additional options that could be utilized to assist a trial court faced with such a situation, those additional options come with considerable difficulties,
difficulties which outweigh their practical advantages. Restructuring the Washington appellate system to resemble the federal system would require a wholesale revision of both the state constitutional provision authorizing the court of appeals, as well as reworking the statutory enabling act and court rules for the court of appeals. Establishing an additional tier of appellate court would also require considerable constitutional and statutory amendment, with no practical benefit to resolving the problem faced by trial courts. Creating a first to the post system while beneficial would impair the ability of the court of appeals to correct identify problematic areas within its own jurisprudence and offer a self-corrective analysis of those areas through critique and disagreement between the divisions.

Barring a significant institutional restructuring to the Washington Court of Appeals, the best resolution of the problem is to create a means by which trial court judges are given guidance and structure regarding the necessary work they have to do in resolving material conflicts between the divisions of the court of appeals. This would involve some clarification, and in some instances reform, in the way the trial courts relate to the court of appeals. Such incremental reform is part of the ongoing process of ensuring a more smoothly operating court of appeals in Washington. John Henry Newman once wrote, “[t]o live is to change, and to be perfect is to have changed often.” The history of the Washington Court of Appeals demonstrates that its creation was not the product of a single moment, but rather the result of an accumulated and varied effort over the course of decades. Its creation did not usher in an institution preserved forever in amber, but rather a dynamic and vital component of the Washington judicial system, a component that has been revised and deepened both by the legislature and by the lived practice of the judicial system. In regard to the conundrum faced by state trial courts, there is no substitute for trial court judges applying prudential reasoning to discern the most correct understanding of the law governing a case before the bench. Judge Martinez should act with such prudential reasoning to decide the case.