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## “Followed Rates” and Leading State Cases, 1940-2005

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“Citation analysis” has long been employed to study interactions between courts and to assess the influence of individual courts in relation to one another. That methodology, however, has been subject to criticism because the number of times a decision has been cited is an overinclusive indicator of influence. This Essay reports the preliminary results of a project that updates thirty-year-old data concerning the comparative influence of state high courts, while seeking to avoid some of the problems inherent in simple citation analysis studies. Instead of relying on the rate of citation, we utilize data showing cases that have been “followed,” as that term has been used by Shepard’s Citations Service. Our results reveal, consistent with the prior literature, that the California Supreme Court has long been, and continues to be, the most “followed” state supreme court. Our results also show that in recent decades some of the previously highest-ranked state high courts have been eclipsed by other courts such as the Supreme Court of Washington. We explore reasons why decisions of some state high courts are followed more frequently than others and propose further analysis of our data and discussion of our methods.

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## INTRODUCTION

In contemplating the California Supreme Court Historical Society's 2006 panel program, "*California — Laboratory of Legal Innovation*," we reflected on some leading cases that the court has decided.<sup>1</sup> During our continuing exchanges, we began to consider the meaning of legal "innovation," and specifically, how one could assess or measure a court's innovation. We posited that one way of measuring innovation (or at least *influence* — an aspect of innovation) might be to examine the frequency with which the decisions of various state high courts have been adopted or relied upon by state courts of other jurisdictions.

This in turn led us to a body of "citation analysis" literature. Citation analysis has long been employed in related contexts to examine questions, such as the character and type of authorities courts rely upon,<sup>2</sup> in order to

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<sup>1</sup> See Cal. Supreme Court Historical Soc'y, *California — Laboratory of Legal Innovation I* (2006), [http://www.cschs.org/images\\_features/cschs\\_monterey-2006.pdf](http://www.cschs.org/images_features/cschs_monterey-2006.pdf). The Society's program was held at the California State Bar's Annual Meeting on October 7, 2006, in Monterey, California. The topic was conceived by board member Selma Moidel Smith, Esq., who organized the program. The panel was moderated by Elwood Lui, former Associate Justice, California Court of Appeal, and partner, Jones Day. Panelists included California Supreme Court Associate Justice Kathryn Mickle Werdegar; Joseph R. Grodin, former Associate Justice, California Supreme Court, and currently Distinguished Professor Emeritus, UC Hastings College of the Law; Harry N. Scheiber, Riesenfeld Professor of Law & History, and Director, Institute for Legal Research, Boalt Hall School of Law, UC Berkeley; Robert F. Williams, Distinguished Professor of Law, and Associate Director, Center for State Constitutional Studies, Rutgers University School of Law, Camden; and Gerald F. Uelman, Professor (and former Dean), Santa Clara University School of Law.

<sup>2</sup> The first systematic review was conducted by John H. Merryman. John H. Merryman, *The Authority of Authority*, 6 STAN. L. REV. 613, 650-71 (1954) [hereinafter Merryman, *Authority*]; see also Lawrence M. Friedman, Robert A. Kagan, Bliss Cartwright & Stanton Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 774 (1981) [hereinafter Friedman et al.] (analyzing sampled citation data from nearly 6000 cases of 16 state high courts from 1870 to 1970); Charles A. Johnson, *Citations to Authority in Supreme Court Opinions*, 7 J.L. & POL'Y 509, 512 (1985) [hereinafter Johnson, *Citations to Authority*] (identifying and analyzing positive, negative, and neutral citations in selected U.S. Supreme Court decisions, 1946 to 1974); Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121 (1977) [hereinafter Kagan et al., *Business*]; Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978) [hereinafter Kagan et al., *Evolution*]; William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 251-52 (1976) (employing modified citation counts to analyze three samples totaling approximately 1000 federal cases from 1960 and 1974 to 1975); William H. Manz, *The Citation Practices of the New York Court of Appeal: A Millennium*

probe, among other things, the nature and legitimacy of appellate decision making.<sup>3</sup>

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*Update*, 49 BUFF. L. REV. 1273, 1273 n.3 (2001) (collecting numerous prior studies of various courts' citation practices); John H. Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977) [hereinafter Merryman, *Toward a Theory*]. See generally Charles A. Johnson, *Personnel Change and Policy Change on the U.S. Supreme Court*, 62 SOC. SCI. Q. 751, 752-53 (1981) [hereinafter Johnson, *Change*] (employing *Shepard's* positive and negative case treatment classifications to analyze how early Burger Court treated Warren Court precedents from 1961 to 1963 terms).

Citation analysis also has been used to measure relative influence of, for example, legal publications, law school faculties, and individual scholars. For recent studies, see, for example, Symposium, *Dead Poets and Academic Progenitors: The Next Generation of Law School Rankings*, 81 IND. L.J. 1 (2006) (providing 20 articles and essays). For earlier works, see, for example, Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373 (1998); Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 468-70 (2000) (noting, however, that numerous factors other than work's inherent quality may affect citation history); Fred R. Shapiro, *The Most-Cited Law Reviews*, 29 J. LEGAL STUD. 389, 390 n.1 (2000) [hereinafter Shapiro, *Law Reviews*] (listing eight prior citation analysis rankings of law reviews); Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409 (2000) [hereinafter Shapiro, *Legal Scholars*]. See also J.M. Balkin & Sanford Levinson, *How to Win Cites and Influence People*, 71 CHI.-KENT L. REV. 843, 846 (1996) (critiquing citation analysis of law review literature). Shapiro has aptly described his own ranking studies as part "intellectual history and the sociology of legal scholarship" and part "parlor game" for "legal stats freaks." Shapiro, *Legal Scholars*, *supra*, at 409, 411. Prior to these inquiries, citation analysis had been long used in the field of bibliometrics to study scientific scholarship. See, e.g., Virgil L.P. Blake, *Citation Studies — The Missing Background*, 12 CARDOZO L. REV. 1961 (1991) (describing "information science" studies by "statistical bibliographers" dating from 1917).

<sup>3</sup> "According to our legal theory, judges are to decide 'according to the law.' They are not free to decide cases as they please. They are expected to invoke appropriate legal authority for their decisions. . . . Judges are expected to *justify* [in writing] their decisions. . . . [T]he [resulting] opinion and its reasoning show what judges *think* is legitimate argument and legitimate authority, justifying their behavior." Friedman et al., *supra* note 2, at 793-94; accord Johnson, *Citations to Authority*, *supra* note 2, at 510 ("Citations to previous cases are . . . one way [that appellate judges] legitimize their decisions."); Merryman, *Authority*, *supra* note 2, at 616 (noting citations are used to legitimize decisions and to confer legitimacy on source cited). As Professor David J. Walsh noted, "[C]itations potentially open a window to better understanding of judicial decisionmaking, . . . intercourt communication, and the structuring of relations between courts," and may reflect either "some degree of substantive influence on decisionmaking," the justification for decision making, or both. David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 LAW & SOC'Y REV. 337, 338-39 (1997); see also Richard A. Posner, *An Economic Analysis of the Use of Citations in the Law*, 2 AM. L. & ECON. REV. 381, 382-83 (2000) (studying citations "enables rigorous quantitative analysis of elusive but important social phenomena such as reputation,

Of most relevance to our inquiry, we found a few older studies that analyzed comparative influence of courts by measuring how frequently various courts are cited by others.<sup>4</sup> None of these studies, however, specifically addressed the question that interested us — the frequency with which the decisions of various courts have been *adopted or relied upon* by courts of other jurisdictions.

Moreover, as we reviewed those studies, we came to realize that when used to compare the work of courts, citation analysis can be problematic because of the basic overinclusiveness of citations. A later decision might cite a case to express agreement with it; but citations may also express criticism of, or disagreement with, prior cases. Furthermore, many citations are merely neutral — that is, the citation is simply descriptive, or it distinguishes the prior case, or it may be

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influence, . . . *stare decisis* (that is, the basing of judicial decision on previous decisions — precedents) . . . and the productivity of . . . judges [and] courts . . .”). Others who have studied citations as an aspect of intercourt communication have been primarily concerned with sociological aspects of citation practices. See, e.g., Peter Harris, *Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1870-1970*, 19 LAW & SOC’Y REV. 449 (1985) (analyzing sampled citation data from 1870 to 1970).

<sup>4</sup> The citation analysis studies of comparative state high court influence are as follows: Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83, 83 (1983) [hereinafter Caldeira, *Reputation*] (analyzing citation data from 1975); Friedman et al., *supra* note 2, at 804-07; Rodney L. Mott, *Judicial Influence*, 30 AM. POL. SCI. REV. 295, 307-12 (1937) (analyzing citation data from just prior to 1910, and from 1919 to 1921, with approval by U.S. Supreme Court, of various state courts); see also Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 179 (1985) [hereinafter Caldeira, *Transmission*] (analyzing citation data for 1975); cf. Stuart Nagel, *Sociometric Relationships Among American Courts*, 43 SW. SOC. SCI. Q. 136 (1962) (analyzing Shepard’s citation data from 1955 to 1959); Michael E. Solimine, *The Impact of Babcock v. Jackson: An Empirical Note*, 56 ALB. L. REV. 773, 775 (1993) (conducting citation analysis of single leading conflict-of-laws decision).

Citation analysis studies of comparative influence within federal courts include the following: Montgomery N. Kosma, *Measuring the Influence of Supreme Court Justices*, 27 J. LEGAL STUD. 333, 333 (1998) (employing citation counts to assess influence of 99 high court justices); William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeal Judges*, 27 J. LEGAL STUD. 271, 271 (1998) [hereinafter Landes et al.] (employing citation counts to assess influence of individual federal appellate circuits and judges); see also RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 74-91 (1990) (conducting citation analysis of state and federal decisions of Justice Benjamin Cardozo); Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L.J. 511, 534-40 (1994) (conducting citation analysis of decisions of Judge Learned Hand). But see Blake, *supra* note 2, at 1965-67 (questioning methodology actually employed by Posner); Keith Ann Stiverson & Lynn Wishart, *Citation Studies — Measuring Rods of Judicial Reputation?*, 12 CARDOZO L. REV. 1969, 1971-74 (1991) (same).

one of many in a “string citation” without any special acknowledgment of the merits or value of the cited case. Some citations refer to collateral matters unrelated to the case’s main holding. And some citations are no more than judicial noise.

A few early studies acknowledged, but discounted, these and related problems by suggesting that truly negative citations (criticisms or disagreements) are relatively uncommon.<sup>5</sup> That assertion may be correct, but it does not address the underlying overinclusiveness issue. As others have observed,<sup>6</sup> and as our own practical experience amply confirms, the real problem is that even if relatively few citations are of the strictly negative sort, most citations are not classifiable as positive reflections — only a subset of all citations are of the clearly positive variety, and most are neutral.<sup>7</sup>

Some more recent citation studies, mindful of such limitations, simply acknowledge these and associated problems while simultaneously employing citation analysis as the only relatively objective game in town. In this vein, for example, one prominent study recognized that “[c]itations are at best a crude and rough proxy

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<sup>5</sup> Harris, *supra* note 3, at 461 n.11; *accord* Caldeira, *Reputation*, *supra* note 4, at 88 (asserting there is no need to “differentiate between positive and negative citations”); *see also* Landes et al., *supra* note 4, at 273 (questioning need to differentiate “between favorable, critical, or distinguishing citations,” and declining to do so); Mott, *supra* note 4, at 309 (noting samples used in study “include citations with disapproval, citations in dissenting opinions, and citations for illustrative purposes”). Some of these studies and others, in turn, rely uncritically upon citation analysis results reported in Nagel, *supra* note 4. But in our view, Nagel’s conclusions are suspect, in part because of his highly overinclusive definition of what constitutes a positive or approving citation. In essence, Nagel assumed that all citations not expressly coded by *Shepard’s Citations Service* as negative are, in fact, positive. *See* Nagel, *supra* note 4, at 137 (“All citations of an approving nature are indicated in *Shepard’s Citations* by a letter f (followed) . . . or by the absence of any letter alongside the citation.” (emphasis added)).

<sup>6</sup> *See infra* note 11.

<sup>7</sup> Professors Landes and Posner have acknowledged the general problem posed by failing to account for negative citations but have suggested that the failure does not amount to much: “When speaking of influence rather than quality, one has no call to denigrate critical citations. Scholars rarely bother to criticize work that they do not think is or is likely to become influential. They ignore it.” William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385, 390 (1993). But even if this observation justifies failure to distinguish between positive and negative citations in *the study of scholastic influence*, it seems questionable with respect to studies focused on the comparative influence of courts. Unlike scholars, courts often are not free simply to ignore authority that is, for example, expressly relied upon in a party’s brief, but which the court finds unpersuasive. Instead, a court often will cite that authority and in the process criticize or at least distinguish it. *See, e.g.*, *Californians for an Open Primary v. McPherson*, 134 P.3d. 299, 343-49 (Cal. 2006) (examining Oregon decision and explaining why it would not be followed).

for measuring influence” of courts — then went on to use citations to do exactly that.<sup>8</sup>

Although we found a few recent comparative influence studies of the U.S. federal courts (and also of the Canadian and Australian courts), we were unable to locate any study published in the past two decades addressing the comparative influence of state high courts. Cognizant of the problems described above, and yet hoping to constructively build upon the prior methodologies, we set about to see if we could collect the relevant state court data that would provide a more reliable indicator of state high court influence. That led to the research we describe below.

## I. “FOLLOWED” CASES, 1940-2005: A PRELIMINARY REPORT

### A. Method

In response to the overinclusiveness problems mentioned above, one early proponent of citation analysis, Professor Charles A. Johnson, cautioned researchers not to “indiscriminately count citations” but instead to attempt to focus upon the narrow subset of citations that reflect positively on the prior cited case.<sup>9</sup> Subsequently, some researchers have attempted, and others presently are attempting, to do so by employing increasingly sophisticated methods.<sup>10</sup> Our own

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<sup>8</sup> See Landes et al., *supra* note 4, at 271-76 (listing numerous caveats); see also Friedman et al., *supra* note 2, at 804 (noting many citations are of “string” variety, presented without discussion or elaboration); Posner, *supra* note 3, at 387-90 (listing numerous caveats). Despite such acknowledgements and a few efforts to guard against overinclusiveness, it seems inevitable that problems identified above have reduced the analytical reliability of many citation analysis studies.

<sup>9</sup> Charles A. Johnson, *Follow-Up Citations in the U.S. Supreme Court*, 39 W. POL. Q. 538, 543 (1986) (questioning whether “positive as well as negative . . . citations should be treated alike in studying . . . communications among courts”); *id.* at 546 (“[I]f the nature of citations is ignored, theoretical interpretations of ‘citation counts’ may ultimately misrepresent . . . communications among courts.”). As previously observed, the author of the study reported in Johnson, *Change*, *supra* note 2, followed his own advice by focusing on the positive and negative treatment codings of cases in *Shepard’s Citations Service*. See discussion *supra* note 2.

<sup>10</sup> See Henry R. Glick, *Judicial Innovation and Policy Re-Invention: State Supreme Courts and the Right to Die*, 45 W. POL. Q. 71, 76 (1992) (employing enhanced form of citation analysis); Walsh, *supra* note 3, at 342 (attempting to distinguish between “strong” and other citations); see also James H. Fowler, Timothy R. Johnson, James F. Spriggs II, Sangick Jeon & Paul J. Wahlbeck, *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court 3* (2006) (unpublished manuscript, on file with UC Davis Law Review), available at

relatively simple approach continues in this same vein.

For more than 100 years, *Shepard's Citations Service* has analyzed every published decision filed by every appellate court in every state to determine its subsequent "treatment" — whether it has been "overruled," "criticized," "questioned," "limited," "distinguished," "explained," "harmonized," or "followed."<sup>11</sup> Through its staff of professional attorney editors, *Shepard's* has continuously applied its "followed" designation when "[t]he citing opinion relies on the case . . . as controlling or persuasive authority."<sup>12</sup> For example, if an

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[http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID906827\\_code636020.pdf?abstractid=906827&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID906827_code636020.pdf?abstractid=906827&mirid=1) [hereinafter Fowler et al.] (describing "network analysis" of all U.S. Supreme Court decisions since 1791); Wayne McIntosh et al., *Using Information Technology to Examine the Communication of Precedent: Initial Findings and Lessons from the CITE-IT Project 10-15* (Mar. 17, 2005) (unpublished manuscript, on file with UC Davis Law Review), available at <http://www.bsos.umd.edu/gvpt/kcousins/ACAD.htm> (follow "Using Information Technology to Examine the Communication of Precedent: Initial Findings and Lessons from the CITE-IT Project" hyperlink); cf. Landes & Posner, *supra* note 2, at 251 (specifying some of most suspect types of citations were excluded from data sample in that study).

<sup>11</sup> See generally James F. Spriggs II & Thomas G. Hansford, *Measuring Legal Change: The Reliability and Validity of Shepard's Citations*, 53 POL. RES. Q. 327, 329-32 (2000) (describing mechanics of *Shepard's* citations and quoting extensively from *Shepard's* 1993 "in-house, unpublished training manual"). With regard to the vast majority of citations listed in *Shepard's*, no coding information is provided by *Shepard's*. Moreover, only a comparatively small subset of the citations that earn a code are designated by *Shepard's* as followed. Studies reporting *Shepard's* treatment of the U.S. Supreme Court's self-citations provide some empirical support for these observations. See Johnson, *supra* note 9, at 542-43, 546; Johnson, *Change*, *supra* note 2, at 755-56 (observing that of citations analyzed in two samples, less than 20% in one, and less than 11% in other, were "substantive" citations — coded by *Shepard's* as "followed," "limited," "harmonized," "distinguished," "criticized," "questioned," etc.); accord Johnson, *Citations to Authority*, *supra* note 2, at 512, 513 (noting most citations in sampled decisions were found to be neither positive nor negative, but neutral); Spriggs & Hansford, *supra*, at 333 n.9 (finding citations coded by *Shepard's* to be distributed as follows: approximately 4.6% were given clearly negative code — "overruled," "questioned," "criticized," or "limited"; approximately 31% were coded as "distinguished"; 1.3% were coded as "harmonized"; approximately 25% were coded as "explained"; and approximately 38% were coded as "followed"). Of course, regarding these U.S. Supreme Court self-citation samples, it is likely that many if not most follows were influenced by stare decisis principles. See *infra* note 16 and accompanying text (distinguishing between compulsory and voluntary follows of state high court decisions).

<sup>12</sup> We understand that *Shepard's* provides its attorney editors with a manual of detailed guidelines and examples concerning each of its codes, including the followed code. According to the *Shepard's* manual, the label "followed" is to be applied only when "the citing opinion contains language that goes beyond a 'mere going-along' with the cited case." Spriggs & Hansford, *supra* note 11, at 330. The authors also report that despite slight alterations by *Shepard's* in its coding rules during the period of their study (1946 to 1995), "reliability of the data is quite stable over time." *Id.* at 335.



opinion of the Ohio Supreme Court cites and treats as persuasive authority an earlier opinion from the Nebraska Supreme Court, the editors at *Shepard's* provide a notation in its published history of the Nebraska decision showing a legal researcher that the earlier Nebraska opinion has been followed by the Ohio decision. As observed by Professor Johnson, *Shepard's* classification system is “widely used in the legal community to evaluate the status of existing precedents” and, “with appropriate qualifications,” *Shepard's* “constitutes a relevant data source that ought to be used in studying judicial behavior.”<sup>13</sup> Subsequent empirical analysis has confirmed the general propriety of employing *Shepard's* for these purposes,<sup>14</sup> but of course, caveats apply to the use of *Shepard's* followed data.<sup>15</sup>

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<sup>13</sup> Johnson, *Change*, *supra* note 2, at 753 & n.4; see also Friedman et al., *supra* note 2, at 775 (counting case citations from *Shepard's*); Johnson, *supra* note 9, at 538, 546; Kagan et al., *supra* note 2, at 963 (counting case citations from *Shepard's*); Landes et al., *supra* note 4, at 276-77 (employing *Shepard's* as data source for citation analysis of federal appellate decisions); Nagel, *supra* note 4, at 137 (employing *Shepard's* as data source and noting its “high reputation for accuracy”). But see Donald R. Songer, *Case Selection in Judicial Impact Research*, 41 W. POL. Q. 569, 569-70 (1988) (confirming accuracy of *Shepard's* data but questioning whether it should be used for “impact analysis” without also considering other possibly relevant decisions not identified by *Shepard's*). For more recent studies employing *Shepard's* as a data source, see Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 540-41 (2002) (employing and augmenting *Shepard's* positive and negative treatment codes in order to analyze compliance by lower courts with U.S. Supreme Court's overrulings of precedent); Fowler et al., *supra* note 10, at 7 (describing automated “Shepardizing” of every U.S. Supreme Court case filed since 1792); James F. Spriggs II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1097, 1100 (2001) (employing *Shepard's* positive and negative treatment codes in analyzing nearly 6000 U.S. Supreme Court decisions from 1946 to 1995).

<sup>14</sup> Spriggs & Hansford, *supra* note 11, at 332-39 (concluding that, properly employed, “*Shepard's* can provide a valuable data source for developing . . . the treatment of precedent”).

<sup>15</sup> First, although *Shepard's* editors endeavor to apply the various treatment codes uniformly, some degree of editorial judgment must be involved in determining whether, for example, a decision treats another as persuasive authority and adopts or relies upon its reasoning. Accordingly, it is likely that some decisions inside and outside *Shepard's* followed data might have been coded differently. See *id.* at 335-36 (replicating *Shepard's* coding of 602 U.S. Supreme Court decisions and reporting “substantial agreement” — approximately 82% — with *Shepard's* coding of “follows”). Indeed, in our review and spot-checking of the following and related cases listed by *Shepard's*, we have found decisions that we might have coded differently: some might have been coded as follows but were not, and some were coded as follows but were less obviously such. And yet, as Professor Johnson has observed, “[t]his is . . . a problem faced by any researcher who chooses to rely on a secondary data source, whether it is the *Congressional Quarterly*, the *Book of States*, or *Shepard's Citations*.”

Our court's library contacted LexisNexis, the current provider of *Shepard's Citations Service*, and asked if LexisNexis might be willing to undertake a novel and somewhat extensive research assignment: (1) identify all opinions since 1940, for each of the fifty state high courts that *Shepard's* has designated as having been followed in a published opinion by a state court outside the originating jurisdiction;<sup>16</sup> (2) note

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Clearly, one must assume the professional competence of the volume's editors to base empirical research on any of these sources." Johnson, *Change*, *supra* note 2, at 753 n.4; see also Landes et al., *supra* note 4, at 276 n.15 (asserting *Shepard's* miscodings are rare and "unlikely to affect our estimations of influence"). In any event, for our purposes, any coding problem applies equally to the full range of the 50-state data and thus would not seem to favor or disfavor any particular jurisdiction. See Posner, *supra* note 3, at 390 ("[I]f errors in data are randomly distributed with respect to the variable of interest . . . they are unlikely to invalidate the conclusions of the study.").

Second, as Johnson observes, "[a]ssuming the data in *Shepard's* are reliable, . . . it is not a substitute for examination of the cases," and he notes that decisions "usually concern several principles and the citation of a case may bear upon a single principle or on several principles in the original case. *Shepard's* does not, unfortunately, give any indication of whether the later treatments of the case involved procedural or substantive questions nor whether the issue in the later court was only tangentially related to the original . . . decision . . . . Certainly, more sensitive measures . . . might be devised in some future research." Johnson, *Citations to Authority*, *supra* note 2, at 753 n.4. This remains true today, and as previously observed, more sensitive measures are being developed. *Supra* note 10. And yet, we believe that focusing upon cases coded by *Shepard's* as having been followed significantly minimizes the problems of overinclusiveness identified above, which are implicated in unrefined citation analysis studies.

Finally, as highlighted in the text below, followed data may in some respects under represent the real-life influence of certain cases. Although this should be kept in mind, it does not undermine the usefulness of such data for the purpose employed here — discerning and confirming trends.

<sup>16</sup> We excluded follows by all courts within the originating jurisdiction because stare decisis and related principles generally compel adherence to settled or higher authority, and hence follows by courts within the originating jurisdiction are not reliable indicators of persuasiveness or influence of the followed decision. For related reasons, we excluded follows by federal courts. Unlike state courts, which generally are free to decide for themselves whether to follow decisions of other states, when federal courts entertain diversity jurisdiction and rule on matters of state law, federal courts are *compelled* to follow controlling state decisions. In other circumstances, federal courts are not bound by state decisions, or there is no controlling state decision. In those instances, federal courts are free to follow state court decisions to the extent they are found persuasive. Because it is impossible, as a practical matter, to determine which of the two bases, compulsory or voluntary, applies when a federal decision follows a state decision, we excluded all federal opinions from the study. Of course, state courts are sometimes compelled to follow the law of other states — such as when applying a contractual choice-of-law provision — but our review and spot-checking of the "following" cases suggest that compulsory follows by state courts are few and thus unlikely to be statistically significant. In any event, such compulsory

the number of times each case has been followed; and (3) provide the raw data for our analysis.<sup>17</sup>

LexisNexis did so. It collected data from all fifty states, which we subsequently cleansed to remove a few duplicate citations. The material reveals nearly 24,400 state high court decisions that were followed at least once, and most only once, by out-of-state courts during the sixty-six years under review.<sup>18</sup> We present some preliminary results in four bar graphs below.

Before doing so, however, we emphasize that the raw number of *Shepard's* follows generated by a case often represents only the tip of the iceberg in terms of any particular decision's real-life influence. For example, in the area of business law, a state high court opinion may quickly affect business practices in the home state and nationwide, so that the underlying issue is unlikely to arise in a similar context in another state. Decisions of this sort may have far-reaching impact but result in few measurable follows.<sup>19</sup> Accordingly, it is important to stress that the number or rate of followed cases is not a definitive measure of the impact of a particular court's cases, but instead is a *device* useful in discerning and confirming trends.

As explained below, the graphs reveal that the California Supreme Court has been, and continues to be, the most "followed" state high court in the nation. This result is consistent with prior citation analysis studies utilizing data from thirty to thirty-five years ago. The graphs also show the positions of the other forty-nine states, some of which differ significantly from the results of prior studies.

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follows are not likely to benefit any particular jurisdiction over other jurisdictions whose laws also are incorporated into contracts.

<sup>17</sup> The data contain additional information not analyzed here, including, with respect to each followed decision, the case name together with official and unofficial citation(s), and the total numbers of case, law review, treatise, and *Restatement* citations.

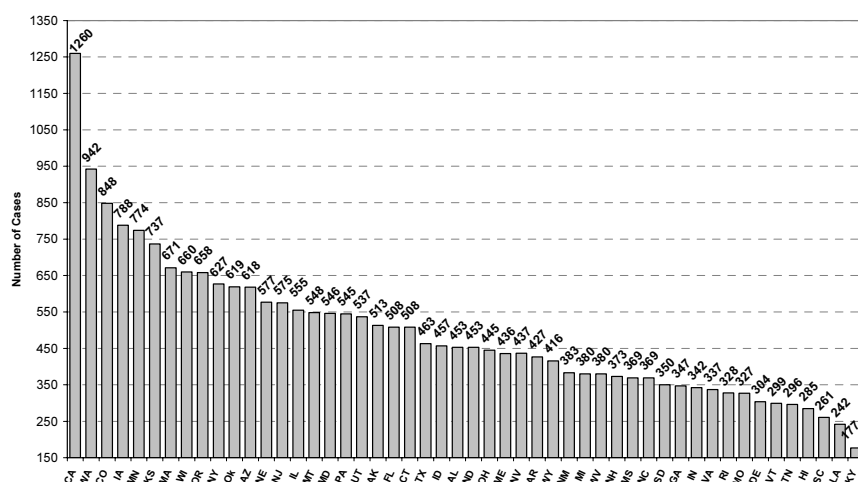
<sup>18</sup> Notes concerning the data: First, the data are current as of April 2006. As one would expect, few very recent high court cases had been followed by out-of-state decisions. Accordingly, we limited our analysis of followed cases to those filed between 1940 and December 2005. See generally *infra* Part I.C (discussing long gestation period for some leading cases). Second, as suggested above, and consistent with the methodology employed, the data include following decisions published by the various states' high courts and intermediate appellate courts, and in some instances, by the comparatively few published trial court opinions. Friedman et al., *supra* note 2, at 775 n.4. Third, because Texas and Oklahoma each have two high courts — one for civil matters and the other for criminal matters — for each state the data combine the decisions of the two courts.

<sup>19</sup> Cf. Landes & Posner, *supra* note 2, at 251 (discussing "superprecedent" that may avoid subsequent citation by preventing suits or inducing settlement without litigation).

### B. The Preliminary Interstate Data

Graph 1 shows for all fifty states the number of high court decisions that have been followed at least once by an out-of-state court since 1940. As a general matter, most state high courts during this period produced roughly comparable numbers of full written opinions each year.<sup>20</sup> California is the leader with 1,260 followed decisions. Washington and Colorado are next with 942 and 848 decisions, respectively.<sup>21</sup> The median for all fifty state high courts is 453 decisions followed at least once.

**Graph 1.** Number of state high court decisions that have been followed at least once by an out-of-state court, by state, 1940-2005.



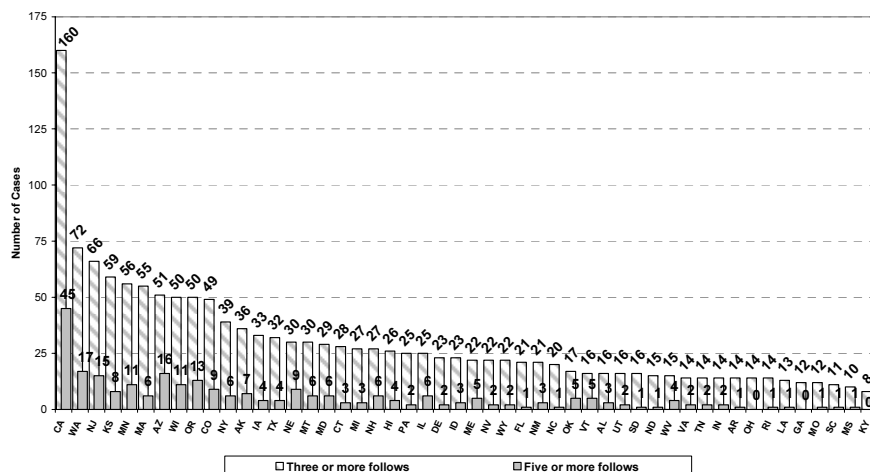
<sup>20</sup> For statistics from 1978 to 2004, see Nat'l Ctr. for State Courts, [www.ncsconline.org](http://www.ncsconline.org) [hereinafter NCSC] (follow "Research" hyperlink; then "Court Statistics" hyperlink; then follow "Past Reports 1975-2004" hyperlink under "State Court Caseload Statistics" heading). See also Kagan et al., *Business*, *supra* note 2, at 128-32 (reporting 1870 to 1970 data); *infra* note 25. Firm comparative publication figures are elusive, in part because of differing publication practices (that is, full published opinions only versus a mix of full opinions and brief "memorandum" decisions and/or orders) and differences in data-reporting protocols both within and between jurisdictions since 1940. In addition, state high court publication rates have differed somewhat, again both within and between jurisdictions since 1940, depending upon factors such as the presence or growth of an intermediate court of appeal, and the existence or scope of a high court's review discretion. See Kagan et al., *Business*, *supra* note 2, at 128-32. See generally THOMAS B. MARVELL, NAT'L CENTER FOR STATE COURTS, APPELLATE COURT CASELOADS: HISTORICAL TRENDS WITH CASELOAD STATISTICS APPENDED (1983) (reporting nineteenth century through early 1980s data).

<sup>21</sup> Iowa is fourth with 788 cases followed at least once; Minnesota and Kansas are fifth and sixth with 774 and 737 decisions, respectively.

A decision voluntarily followed one time by a single state court of another jurisdiction is of interest. But, as recognized in a related study, a decision voluntarily followed *multiple* times by state courts of other jurisdictions provides a more telling measure of any given decision's impact.<sup>22</sup> Graph 2 depicts that information.

Graph 2 shows for all fifty states the number of state high court decisions that have been followed *three or more times* by out-of-state courts. California is again the leader with 160 decisions followed at least three times. In this graph, Washington is again second and New Jersey is third, with seventy-two and sixty-six decisions, respectively.<sup>23</sup> The median for all fifty states is approximately twenty-three decisions followed at least three times.

**Graph 2.** Number of state high court decisions that have been followed at least three times by out-of-state courts, by state, 1940-2005.



Graph 2 also depicts, as a subcategory of each state's high court cases, the number of decisions that have been followed *five or more times* by out-of-state courts. California leads with forty-five such decisions. Washington and Arizona are second and third with seventeen and sixteen cases, respectively.<sup>24</sup> The median for all fifty

<sup>22</sup> Friedman et al., *supra* note 2, at 805, 807 n.75 (reporting comparative numbers of cases cited at least 3, 8, and 14 times).

<sup>23</sup> Kansas is fourth with 59 cases followed at least three times; Minnesota and Massachusetts are a close fifth and sixth with 56 and 55 decisions, respectively.

<sup>24</sup> New Jersey is fourth with 15 cases followed at least five times; Minnesota and Wisconsin are tied for fifth, each with 11 decisions.



Finally, Graph 3 also shows, as a subcategory, the number of decisions followed at least five times by out-of-state courts during the most recent twenty years. The order again is California, Washington, and Arizona with sixteen, thirteen and eleven decisions, respectively.<sup>27</sup> The median for all fifty states is approximately two.

The results set forth in these first three graphs are, in one significant respect, consistent with the decades-old literature mentioned earlier, which regularly placed California at the top of all influence rankings.<sup>28</sup> But our results differ significantly from the prior studies with respect to the next tier of rankings. Earlier studies based on citation data ending thirty to thirty-five years ago showed the second and third jurisdictions as New York and New Jersey, and the fourth and fifth states as either Pennsylvania and Massachusetts, or Illinois and Texas.<sup>29</sup> In our more recent data based on followed cases, Washington has become the dominant second-ranked court, with Arizona, New Jersey, and Kansas in the next positions.<sup>30</sup>

### C. The Preliminary Intrastate Data: California

By contrast with the intercourt (or horizontal) comparisons set forth above, we also undertook an intra-California (or vertical) look at the sixty-six-year data. We focused on the annual average number of California Supreme Court decisions among cases generated during the terms of the six most recent California Chief Justices that have resulted in at least three follows by out-of-state courts. In other words, we determined the total numbers of “three-or-more” (and “five-or-more”) opinions filed during the period in which each Chief Justice led the court, then divided that total by the number of years in that term.<sup>31</sup> Before describing the data, however, we will first address problems inherent in any attempt to measure performance over different time periods.

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<sup>27</sup> New Jersey is fourth with nine cases followed at least five times and New York is fifth, with seven decisions.

<sup>28</sup> See Caldeira, *Reputation*, *supra* note 4, at 86, 89, 99; Caldeira, *Transmission*, *supra* note 4, at 186-88, 190; Friedman et al., *supra* note 2, at 804-07; see also Kagan et al., *supra* note 2, at 993.

<sup>29</sup> Caldeira, *Reputation*, *supra* note 4, at 88-89; Friedman et al., *supra* note 2, at 805-06.

<sup>30</sup> By comparison, in Caldeira’s prior rankings, Washington was eighth and Arizona was nineteenth. Caldeira, *Reputation*, *supra* note 4, at 89.

<sup>31</sup> The average number of opinions filed per year during these Chief Justice terms generally tracked the opinion output of other state high courts in the same time periods and has recently averaged approximately 105 written decisions each year in California. See *supra* notes 20, 25.

1. "Depreciation," "Half-Life," and Other Issues Related to Comparison Over Time

Just as it can be problematic to compare baseball players of different eras, so too can comparisons of courts over different eras be problematic. Thus, we should note a few special caveats. Professor and Judge Richard A. Posner has suggested that "[j]udicial decisions, as precedents for the guidance of future cases, tend to depreciate as law changes, or as the principles announced in a decision become repeated in later decisions that are then cited instead."<sup>32</sup> Similarly, it has been suggested that in some contexts decisions may have a "citation half-life" of approximately seven years, meaning that most citations to a case occur within about a decade of the decision's filing.<sup>33</sup> These factors, assuming they are equally applicable to the subset of citations that constitute out-of-state follows, might operate to the detriment of older cases and to the benefit of more recent cases in our California-only period-based comparison.<sup>34</sup>

Our preliminary analysis of the California data, however, discloses neither a low half-life nor a rapid rate of depreciation. Instead, our preliminary review of the 315 out-of-state cases that have followed the "top forty-five" California decisions (those that have been followed five times or more) reveals that many of the California decisions have undergone a very substantial gestation period before garnering multiple follows by out-of-state cases. This phenomenon is most pronounced in the pre-1970 decisions. Of the fourteen most-followed decisions in the thirty years after 1940, barely ten percent of the cumulative follows occurred within the first ten years of the filing of those decisions, and less than twenty-one percent of the follows occurred within the first fifteen years of the filing of those decisions. More than sixty-two percent of the out-of-state follows occurred *at*

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<sup>32</sup> Posner, *supra* note 4, at 535; *see also* Friedman et al., *supra* note 2, at 807; Landes et al., *supra* note 4, at 280 ("A decision rendered 25 years ago will be less influential today than one decided a few years ago because passage of time and changing circumstances will tend to make the earlier decision less applicable to current disputes."); Landes & Posner, *supra* note 2; Merryman, *Toward a Theory*, *supra* note 2, at 398.

<sup>33</sup> Merryman, *Toward a Theory*, *supra* note 2, at 394-98 (analyzing California high court's "self-citations" and citations of California intermediate appellate decisions); *see also* Friedman et al., *supra* note 2, at 807 (finding from sample of 1960 to 1970 decisions that 40% of out-of-state cites were to opinions less than 10 years old); Landes & Posner, *supra* note 2.

<sup>34</sup> Related considerations have led Posner to question whether "it is feasible, at least in the current state of the art, to use citation counts to compare judges other than with their [contemporary] colleagues." Posner, *supra* note 4, at 535.



least twenty-five years after the filing of the fourteen most followed California decisions.<sup>35</sup>

This may call into question whether concepts such as a relatively short half-life or a high depreciation rate for citations might apply somewhat differently to the subset of citations that constitute out-of-state follows.<sup>36</sup> Indeed, experience suggests reasons for this apparent phenomenon. In some circumstances — for example, when a court is poised to extend a doctrine or recognize a new one — an opinion author may search for and rely upon *older* cases in order to demonstrate that venerable authority of long standing grounds the present holding. In such circumstances, mature cases are more likely to be cited and followed than are comparatively newer ones.<sup>37</sup>

Another consideration, however, suggests caution with respect to any comparison of eras, especially periods before and after the mid-1960s. As a general matter, the total number of published state court decisions nationally has increased substantially since that time,<sup>38</sup> with the result that previously decided state high court decisions had comparatively fewer opportunities to be followed early in their "careers," while subsequently filed state high court decisions have had comparatively greater opportunities to be followed early in their

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<sup>35</sup> A similar but less pronounced trend is revealed by the 18 most followed California cases filed from 1970 to 1989. Less than 30% of the follows occurred within the first 10 years of the filing of those 18 cases; and 50% of the follows to date occurred more than 15 years after the filing of those cases. Similar comparisons of the 15 most followed cases since 1990 cannot be undertaken at this time because most of those cases are less than or barely a decade old. *See also infra* note 39.

<sup>36</sup> Cf. Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975, 984 (1981) (documenting historically slow rate of "diffusion" of judicial innovations in tort doctrine, and focusing on two reasons: "courts' dependence on litigants for action" and "judicial passivity and restraint").

<sup>37</sup> Similarly, research has suggested that some categories of cases may attract older citations. *See* Friedman et al., *supra* note 2, at 807 n.77 (observing in sample of 1870 to 1970 decisions studied, cases "involving estate law, corporate law, contracts, real estate, and crimes against property" tended to cite older out-of-state decisions compared with other categories of cases, which tended to cite more recent out-of-state cases).

<sup>38</sup> *See also* ERWIN SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING 58 (1990) (noting "dramatic increase in the number of reported decisions in the decade following 1960"). *See generally* MARVELL, *supra* note 20, at 6 (noting "rapid rise" in published appellate court opinions of various states "beginning in the late 1960s"); *id.* at 7 (noting that nationwide appellate filings increased at rate of "doubling about every eight years"); *id.* tbl.1, 2, 5, 6 & 7; NCSC, *supra* note 20 (providing statistics for years 1978 to 2004).

careers.<sup>39</sup> From this it might be questioned whether follows generated by state high court decisions filed prior to the mid-1960s were more difficult to earn than follows generated by state high court decisions filed since and whether an appropriate valuation adjustment is warranted as between the time periods set forth *infra* in Graph 4.<sup>40</sup>

Still other factors, however, may militate against any adjustment, or may moderate any adjustment. The years prior to the 1960s typically saw somewhat higher annual production of written decisions by the California Supreme Court compared with the court's annual output of full written opinions in the most recent decades.<sup>41</sup> Moreover, during the past thirty years the court's growing death penalty docket has, as a practical matter, further reduced the modern court's annual inventory of decisions likely to be followed by out-of-state decisions.<sup>42</sup> Additionally, restrictions imposed by the people through the initiative power have in some respects narrowed the category of cases that might generate follows by other states' courts.<sup>43</sup> This variation in

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<sup>39</sup> We see evidence of this in the California data. Our review of the 315 out-of-state cases that have followed the "top 45" California decisions filed since 1940 reveals substantial differences over time in the raw number of follows generated in the first decade after filing of a case. As noted above, of the 14 most followed cases in the 30 years since 1940, approximately 10% of the cumulative follows occurred within the first decade of the filing of those cases (and only about 20% of the follows occurred within the first 15 years of the filing of those cases). By contrast, for the 18 most followed California cases decided between 1970 and 1989, nearly 30% of the follows occurred within the first decade of the filing of those cases. Concerning the most recent period (since 1990), of course the vast majority of the 15 most followed cases are less than or barely a decade old, but again we see a substantial increase over the prior raw number of follows generated within a decade of filing. The picture painted above appears consistent with the observation that "[t]he growing volume of litigation has reduced the time that an appellate court must wait for a chance to act," — and possibly follow another court's decision. Canon & Baum, *supra* note 36, at 985.

<sup>40</sup> In our preliminary analysis and presentation of the data described in Graphs 1 through 3 we have not needed to consider or account for questions of half-life, depreciation, or differential over time in opportunities to be followed because our focus has been on comparative *intercourt* follow rates among the 50 jurisdictions for common periods of time.

<sup>41</sup> Kagan et al., *Business*, *supra* note 2, at 129; see also Merryman, *Toward a Theory*, *supra* note 2, at 383 tbl.1.

<sup>42</sup> During the past three decades, the court has faced dramatically increased numbers of capital appeals and related habeas corpus filings, all of which come to the court without review by the lower courts, and which the court must resolve without the benefit of a lower court opinion. Death penalty opinions constitute approximately one-fifth of the court's annual opinion output but do not produce anything close to a corresponding share of out-of-state follows.

<sup>43</sup> See CAL. CONST. art. I, § 28(d) (incorporating changes adopted in June 1982 by Proposition 8); *In re Lance W.*, 694 P.2d 744, 747 (Cal. 1985) (concluding

generated “legal capital”<sup>44</sup> between eras might be seen as benefiting the older periods, whose cases also have been on the shelves and in cyberspace databanks longer and hence have had more time to accumulate follows.<sup>45</sup> A related point is, even assuming the historically long gestation period for follows is shrinking somewhat,<sup>46</sup> most of the cases decided since the mid-1990s are too young to have generated many follows and to have made the top forty-five list. Their productive follow-generating years lie in the future.

Certainly, it would be useful to further investigate problems posed in any attempt to compare follow rates from different eras. For now, we flag the issue and note below, as appropriate, circumstances in which this factor might possibly alter the preliminary results.

## 2. Analysis of the California Data

Graph 4 shows that the term of Chief Justice Malcolm M. Lucas (February 1987 to April 1996) has the highest average of followed decisions. To date, forty-six Supreme Court decisions during that term have been followed at least three times, and the court produced on average five such opinions per year. Closely following the Lucas court era is the term of Chief Justice Donald R. Wright (April 1970 to February 1977). To date, thirty-three Supreme Court decisions during that term have been followed at least three times, and the court produced on average almost five such opinions each year. As suggested above, however, because the Wright era cases had comparatively fewer opportunities to be followed early in their careers than the Lucas era cases, it is possible that the Wright era figures are somewhat undervalued in relation to the more recent Lucas era figures.

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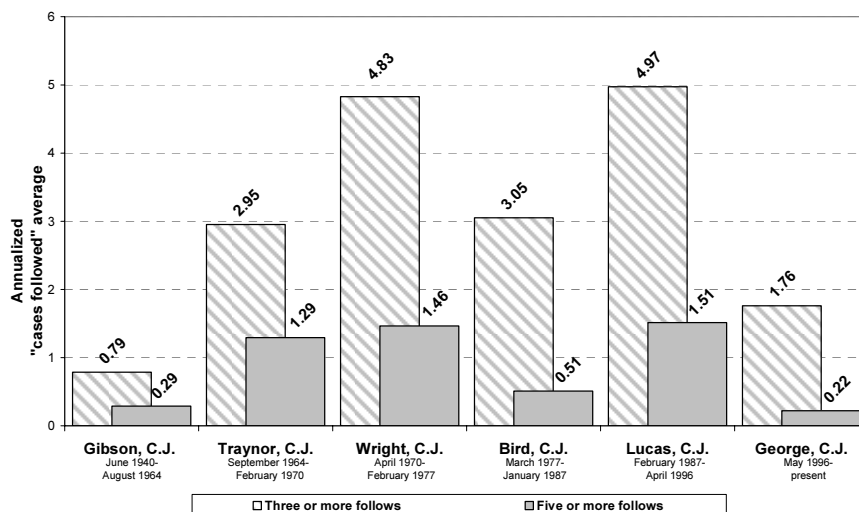
Proposition 8 bars state courts from enforcing state-law-based exclusionary rules different from those required under Federal Constitution). As a result of this voter initiative, the modern court is precluded from generating followed cases such as *People v. Brisendine*, 531 P.2d 1099, 1112 (Cal. 1975) (recognizing independent and more exacting standards under California Constitution’s search and seizure clause, and excluding evidence that would be admissible under federal law).

<sup>44</sup> See Landes & Posner, *supra* note 2, at 262.

<sup>45</sup> See Friedman et al., *supra* note 2, at 807 (“Overall, there are *more* citations in our sample [of 1870 to 1970 decisions] to *older* cases, simply because an 1890 case has had many more opportunities to be cited than a 1965 case.” (emphasis added)); Landes et al., *supra* note 4, at 280.

<sup>46</sup> See *supra* notes 35, 36, 39 and accompanying text.

**Graph 4.** Annual average number of California Supreme Court decisions that have been followed at least three times by out-of-state courts, by terms of California Chief Justices, 1940-2005.



The court under Chief Justice Rose Elizabeth Bird (March 1977 to January 1987) produced thirty such decisions for an annual production of slightly more than three. The court under Chief Justice Roger J. Traynor (September 1964 to February 1970) produced sixteen such decisions for an annual production of just under three. Again, however, because the Traynor era cases had comparatively fewer opportunities to be followed early in their careers than the Bird era cases, it is possible that the Traynor era figures are somewhat undervalued in relation to the more recent Bird era figures.<sup>47</sup> The figures for the court under Chief Justice Ronald M. George are, of course, quite preliminary. As noted earlier, there often is a gestation period of many years before a given decision is followed multiple times,<sup>48</sup> but indications are that the

<sup>47</sup> Even assuming that the Traynor era figures are somewhat undervalued in comparison with the Bird era figures, as also shown in Graph 4, when measuring decisions followed at least five times or more, the earlier Traynor court outperformed the more recent Bird court by more than double, producing 1.29 such decisions a year, compared with .51 for the Bird era.

<sup>48</sup> The most recent California case producing at least three follows was filed in March 2002. See *San Remo Hotel v. City of S.F.*, 41 P.3d 87 (Cal. 2002). The most recent California case producing at least five follows was filed in April 1996. See *In re Marriage of Burgess*, 913 P.2d 473 (Cal. 1996).

current court is on track with the California Supreme Court’s historic rates.

By contrast, the long tenure of Chief Justice Phil S. Gibson (June 1940 to August 1964), despite being a period during which the court first developed a reputation for leading and innovative rulings, produced nineteen decisions that have been followed at least three times, for an annual rate of only .79 per year. But once again, as suggested above, the Gibson era figures, which represent the earliest cases in this intra-California look at the data, may be somewhat undervalued in relation to the later periods because of the comparatively fewer opportunities to be followed early in their careers than cases from all other eras.

## II. PRELIMINARY ANALYSIS OF THE DATA

What accounts for the role of the California Supreme Court, and, as shown above, the Washington Supreme Court, and other state high courts, in producing more followed decisions than other state jurisdictions? We offer some possibilities.

### A. *Depth of Inventory, and a Focused Review Selection System*

A populous jurisdiction with dynamic and diverse social, cultural, and economic conditions is most likely to produce a wealth of litigation capable of yielding leading decisions.<sup>49</sup> If the highest appellate court of such a state possesses and carefully exercises review discretion in order to grant hearings in significant cases that may have broad impact, that court may well produce opinions that other jurisdictions will follow.<sup>50</sup>

California’s highest court certainly has a large and rich inventory of cases from which to select — the court considers approximately 5400 petitions for review and 3000 requests for original writs annually<sup>51</sup> —

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<sup>49</sup> See Lawrence Baum, *Courts and Policy Innovation*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 413, 425 (John Gates & Charles Johnson eds., 1991); Caldeira, *Reputation*, *supra* note 4, at 95-100, 105; Caldeira, *Transmission*, *supra* note 4, at 185-86; Friedman et al., *supra* note 2, at 806; Harris, *supra* note 3, at 454-55; Mott, *supra* note 4, at 313; see also Canon & Baum, *supra* note 36, at 980 (asserting states with higher populations have more “innovative” courts); Solimine, *supra* note 4, at 784.

<sup>50</sup> Friedman et al., *supra* note 2, at 806; Harris, *supra* note 3, at 461; Kagan et al., *supra* note 2, at 991, 993 n.73.

<sup>51</sup> JUDICIAL COUNCIL OF CAL., *supra* note 25, at 9. Typically, the court exercises its discretion to grant review and issue an opinion in only about 85 to 95 cases per year. *Id.* at 9. The court also hears and renders extensive opinions on approximately 23

but at least two other related factors also may be at work in producing significant opinions.

First, in most instances, matters come to the California Supreme Court on a petition for review from a written decision of the state's intermediate court of appeal,<sup>52</sup> whose three-justice panels operate under a rather unusual state constitutional provision requiring that all decisions be "in writing with reasons stated."<sup>53</sup> The resulting intermediate appellate decisions are of generally high quality and serve to focus the issues for the high court's consideration.

Second, the California Supreme Court employs professional legal central staffs (civil and criminal) whose primary task is to analyze petitions for review of intermediate appellate court decisions and make recommendations to the court.<sup>54</sup> The resulting internal memoranda frequently survey and note trends in appellate decisions, which assists the court in carefully selecting the most appropriate vehicle for the review of particular issues.<sup>55</sup>

### B. Style and "Culture" of High Court Opinions

There are, at the extremes, two contrasting ways to write an opinion that resolves a thorny or novel legal issue: a concise approach that contains only minimal analysis before announcing a conclusion, or a more extensive, explanatory, and analytical style.

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capital cases each year, which come to the court automatically. *Id.* at 4.

<sup>52</sup> California has six appellate districts and 105 Court of Appeal justices. *See id.* at 18 tbl.1.

<sup>53</sup> CAL. CONST. art. VI, § 14 (applying same requirement to California's Supreme Court). Washington imposes essentially the same requirement on its intermediate appellate court by statute. *See* WASH. REV. CODE § 2.06.040 (2007). By contrast, the highest and intermediate appellate courts of many other states have discretion to summarily dispose of their cases by memorandum decision or brief orders with the result that the number and percentage of fully explicated appellate decisions can be comparatively small in many other states.

<sup>54</sup> *See* Kagan et al., *supra* note 2, at 982.

<sup>55</sup> In some ways, the results for Washington defy the state's demographics, given its smaller population base and correspondingly smaller court system, as compared to California and many other states. We found, however, that Washington employs appellate practices that produce a focused review selection process. Moreover, Washington requires by statute that intermediate appellate dispositions be made by written opinions with reasons stated, and Washington's Supreme Court, similar to California's, utilizes a professional central staff of attorneys to carefully scrutinize petitions for review of underlying intermediate appellate opinions. *See supra* note 53 and accompanying text.

As a general matter, California Supreme Court decisions (and those of some other states’ high courts) decided in the past sixty-six years tend to fall in the latter camp.<sup>56</sup> In California, a number of factors contribute in this regard. As a general matter, the appellate bar — private, institutional, and governmental — produces sophisticated briefing that helps to shape and focus issues. Public interest and specialized firms, local bar associations, and professors at many of the state’s numerous law schools contribute expertise and often provide helpful input as *amicus curiae*. In addition, since the 1940s the California Supreme Court’s internal culture has supported independent research beyond the briefing. That tradition continues today in most chambers and among most of the court’s professional attorneys who work directly for each justice by drafting calendar memoranda and opinions. The resulting court opinions often survey the field and analyze issues in depth, thus making them more likely to be viewed by a court of another jurisdiction as persuasive authority.<sup>57</sup>

### C. Regionalism and Borrowed Sources

Some have suggested that states grouped in one of legal publisher West’s seven regional reporters (Atlantic, Northeastern, Northwestern, Pacific, Southern, Southeastern, and Southwestern) traditionally have had easier physical access to each other’s cases, and have been more likely to cite and follow them for related reasons.<sup>58</sup> Perhaps this may have been a significant factor decades ago, but we doubt that in the computer age this point accounts for much.<sup>59</sup>

A somewhat more likely explanation for perceived regional trends may relate to borrowed sources. That is, many states have over time adopted similar constitutional or statutory provisions. Pursuant to traditional rules of interpretation, courts will, in appropriate circumstances, follow persuasive judicial constructions of provisions whose language or phrasing is similar to those construed in decisions of jurisdictions with similar provisions.<sup>60</sup> Although this possible

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<sup>56</sup> See Kagan et al., *supra* note 2, at 991-93.

<sup>57</sup> See Caldeira, *Reputation*, *supra* note 4, at 100.

<sup>58</sup> See Caldeira, *Transmission*, *supra* note 4, at 181-82, 190; Harris, *supra* note 3, at 452-53, 465-66, 470-71; *cf.* Nagel, *supra* note 4, at 139 & n.13 (using scissors, cardboard, and plumb lines to explain regional analysis). *But see* Baum, *supra* note 49, at 424 (discounting influence of regionalism in context of common law tort innovations).

<sup>59</sup> See Landes et al., *supra* note 4, at 275-76.

<sup>60</sup> Two recent California decisions illustrate the point. *See, e.g.*, *Estate of Saueressig v. Goff*, 136 P.3d 201, 205 (Cal. 2006) (following other states’

explanation for the comparative follow rates of various state high courts warrants further examination, from our review of the “top 160” California cases decided since 1940, it does not appear that this phenomenon accounts for a significant percentage of that state’s followed cases.<sup>61</sup> Indeed, as observed in Part II.E, the “most followed” California cases are essentially common law decisions, not involving extensive statutory interpretation.

*D. Other Possibly Relevant Factors: Reputation, Professionalism, and “Legal Capital”*

A number of additional factors have been discussed in the literature, and some bear further study. First, it is frequently suggested that certain cases are more likely to be followed because of perceptions concerning the reputation or prestige of a decision’s author or court. For example, one study asserts that “[a] judge wishing to buttress his conclusions in the eyes of others . . . might hope that by invoking a prestigious judge’s name he could impart to his position some of the credibility associated with that name.”<sup>62</sup> The same might be said of invoking the identity of certain courts.

The literature also discusses a somewhat related concept, “judicial professionalism,” defined as reasonable remuneration for judicial

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interpretation of probate code provision); Californians for an Open Primary v. McPherson, 134 P.3d 299, 319-27 (Cal. 2006) (following majority rule holdings of decisions from numerous states that share similar “separate vote” constitutional provision). A seemingly related point suggested in the literature concerns legislative “innovativeness,” which, it is postulated, may in turn cause a court to produce first-impression decisions that may be relevant in other jurisdictions that subsequently adopt similar legislative innovations. See Harris, *supra* note 3, at 453-54, 466. A similar point might be made with respect to voter initiatives.

<sup>61</sup> By comparison, New Jersey’s most followed decision, and two of Washington’s three most followed decisions, concerned statutory schemes common to many, if not most, other jurisdictions. See *infra* note 87 and accompanying text.

<sup>62</sup> David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals*, 28 J. LEGAL STUD. 371, 376 (1999); see POSNER, *supra* note 4, at 74-9; see also Caldeira, *Transmission*, *supra* note 4, at 186-87; Freidman et al., *supra* note 2, at 806; Landes et al., *supra* note 4, at 272 (viewing certain judges as representing “a ‘brand name’ or ‘trademark’ that signifies quality”); Merryman, *Toward a Theory*, *supra* note 2, at 403; Walsh, *supra* note 3, at 347-48, 352-53. Regarding attempts to measure and rank the reputation or prestige of individual judges, see Mita Bhattacharya & Russell Smyth, *The Determinants of Judicial Prestige and Influence: Some Empirical Evidence From the High Court of Australia*, 30 J. LEGAL STUD. 223, 226 (2001) (calculating “prestige” by counting references made in out-of-circuit decisions to individual circuit judges by name); Klein & Morrisroe *supra*, at 379-80 (utilizing similar method to measure “prestige”).



officers, modernized selection and organization processes, and some level of insulation from partisan politics.<sup>63</sup> It has been suggested that “professional supreme courts ‘may produce decisions that are more widely applicable over states and time, because they can afford to let abstract rules rather than political concerns decide cases.’”<sup>64</sup>

Other factors discussed in the literature strike us as less likely to be major influences on comparative follow rates of state high courts. For example, some have pointed to each jurisdiction’s stock of “legal capital” — the comparative number of decisions produced in the past and hence available to be cited or followed.<sup>65</sup> That may be an important consideration when undertaking a vertical comparison of relative influence of different eras within courts, or when undertaking a horizontal comparison of courts or judges that have widely disparate annual publication rates.<sup>66</sup> But with respect to our interstate horizontal data, we suspect that the existence of a large inventory of decided cases per se is not as significant as the existence of a possibly smaller inventory of decisions that have been carefully selected from a large, robust, and diverse pool of litigation.<sup>67</sup>

#### E. Examples of “Most Followed” California Cases

Of course, numbers alone do not tell the full story, and so we will briefly review some of the prominent California “followed” cases. Many of the most followed California decisions address difficult issues of broad application — novel questions likely to arise in other jurisdictions.

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<sup>63</sup> Caldeira, *Reputation*, *supra* note 4, at 98; Harris, *supra* note 3, at 454, 466-67; *see also* Caldeira, *Reputation*, *supra* note 4, at 101 (asserting most “innovative and prestigious state supreme courts” are those that have “handed down numerous progressive decisions” characterized by “political liberalism” and “judicial activism”).

<sup>64</sup> Caldeira, *Reputation*, *supra* note 4, at 98 (quoting earlier unpublished study by Professor Harris).

<sup>65</sup> *Id.* at 103; Harris, *supra* note 3, at 452-53; *see also* Landes & Posner, *supra* note 2; Merryman, *Toward a Theory*, *supra* note 2, at 403 (discussing “‘case-in-point’ factor”).

<sup>66</sup> As, for example, is the situation with respect to the federal appellate courts. *See* Landes et al., *supra* note 4, at 278-80.

<sup>67</sup> Another factor discussed in the literature is so-called social ecology — regional similarities in urbanization, industrialization, and population size, which might make courts more prone to cite courts from similar jurisdictions. Ultimately, however, both Caldeira and Harris suggest this is not a significant factor. Caldeira, *Transmission*, *supra* note 4, at 187-88, 190-92; Harris, *supra* note 3, at 451, 454-55, 467, 478-79. Still, Harris does find the seemingly related concept of “cultural regionalism” to be a strong factor in his study of decisions from 1870 to 1970. *See id.* at 451, 455-58, 467, 476-77.

The earliest case of note in the California data, the 1942 decision in *Bernhard v. Bank of America*,<sup>68</sup> concerning collateral estoppel, was followed six times by courts in other states. The most recent case also followed six times is the 1999 decision in *Temple Community Hospital v. Superior Court*,<sup>69</sup> which declined to recognize a new proposed common law tort of intentional third-party spoliation of evidence. In between those dates we find, from 1968, *Dillon v. Legg*,<sup>70</sup> which allowed limited bystander recovery for negligent infliction of emotional distress for close relatives of the direct victim. *Dillon* has been followed twenty times, more than any other opinion from any other state jurisdiction since 1940. Most recently, *Dillon* was followed in a New Jersey decision filed in January 2006, toward the end of the time period covered by our data.<sup>71</sup>

Close behind *Dillon* comes the 1976 decision in *Tarasoff v. Regents of the University of California*,<sup>72</sup> the landmark case regarding the duty of a mental health professional to protect others against reasonably foreseeable serious danger posed by a patient. This decision has been followed by seventeen out-of-state decisions and, like *Dillon*, is still relied upon and followed today, most recently by two 2004 decisions.<sup>73</sup>

Many of the most followed California decisions involve tort liability. In addition to *Dillon* and *Tarasoff*, other landmark opinions include the 1988 decision in *Foley v. Interactive Data Corp.*,<sup>74</sup> concerning employment termination in violation of public policy, followed fifteen times; the 1965 decision in *Seely v. White Motor Co.*,<sup>75</sup> holding that strict liability does not extend to recovery for purely economic loss, followed ten times; the 1978 decision in *Barker v. Lull Engineering Co.*,<sup>76</sup> concerning product design defect liability, followed nine times; the 1977 decision in *Ray v. Alad Corp.*,<sup>77</sup> concerning successor-

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<sup>68</sup> 122 P.2d 892, 896 (Cal. 1942).

<sup>69</sup> 976 P.2d 223, 225 (Cal. 1999).

<sup>70</sup> 441 P.2d 912, 915 (Cal. 1968).

<sup>71</sup> *Mansour v. Leviton Mfg. Co., Inc.*, 890 A.2d 336, 340-41 (N.J. Sup. Ct. 2006).

<sup>72</sup> 551 P.2d 334, 339 (Cal. 1976).

<sup>73</sup> *Univ. of Md. E. Shore v. Rhaney*, 858 A.2d 497, 504 (Md. Ct. Spec. App. 2004), *aff'd*, *Rhaney v. Univ. of Md. E. Shore*, 880 A.2d 357 (Md. 2005); *Doe v. Marion*, 605 S.E.2d 556, 560-561 (S.C. Ct. App. 2004), *aff'd*, 645 S.E.2d 245 (2007 S.C. LEXIS 198).

<sup>74</sup> 765 P.2d 373, 374 (Cal. 1988).

<sup>75</sup> 403 P.2d 145, 158 (Cal. 1965).

<sup>76</sup> 573 P.2d 443, 457-58 (Cal. 1978).

<sup>77</sup> 560 P.2d 3, 8 (Cal. 1977).

corporation liability, followed thirteen times; the 1968 decision in *Rowland v. Christian*,<sup>78</sup> concerning premises liability and duty of care, followed six times; and the 1961 decision in *Lucas v. Hamm*,<sup>79</sup> allowing beneficiaries of wills to pursue a professional negligence action despite lack of privity, also followed six times.

Other notable most-followed civil decisions involve the interpretation of insurance coverage, such as the 1966 case of *Gray v. Zurich Insurance Co.*,<sup>80</sup> concerning a liability insurer’s duty to defend, followed six times; the 1973 decision in *Gruenberg v. Aetna Insurance Co.*,<sup>81</sup> first recognizing the tort of insurance bad faith, also followed six times; and the 1995 decision in *Waller v. Truck Insurance Exchange, Inc.*,<sup>82</sup> finding no duty to defend allegations of incidental emotional distress damages caused by the insured’s noncovered economic or business torts, followed five times.

The most followed decisions involving criminal law or procedure include the 1978 case of *People v. Wheeler*,<sup>83</sup> prohibiting use of peremptory challenges to exclude prospective jurors on the basis of race. *Wheeler* has been followed ten times, and also was followed in substantial part by the U.S. Supreme Court in 1986.<sup>84</sup> *In re Alvernaz*,<sup>85</sup> a 1992 decision concerning ineffective assistance of counsel in the guilty plea context, has been followed seven times. *People v. Leahy*,<sup>86</sup> a 1994 case, imposed limitations on the use of a certain type of field sobriety test and has been followed five times.<sup>87</sup>

<sup>78</sup> 443 P.2d 561, 562 (Cal. 1968).

<sup>79</sup> 364 P.2d 685, 687-88 (Cal. 1961).

<sup>80</sup> 419 P.2d 168, 169 (Cal. 1966).

<sup>81</sup> 510 P.2d 1032, 1038 (Cal. 1973).

<sup>82</sup> 900 P.2d 619, 630 (Cal. 1995).

<sup>83</sup> 583 P.2d 748, 768 (Cal. 1978).

<sup>84</sup> *Batson v. Kentucky*, 476 U.S. 79, 82 (1986).

<sup>85</sup> 830 P.2d 747, 749 (Cal. 1992).

<sup>86</sup> 882 P.2d 321, 323 (Cal. 1994).

<sup>87</sup> For comparison, leading the five non-California decisions most followed by other jurisdictions is an opinion by the Arizona Supreme Court regarding driving under the influence. That opinion was followed 19 times, which marked the first high court to uphold the validity of a widely used field sobriety test. *State v. Superior Court*, 718 P.2d 171, 176 (Ariz. 1986). Two decisions involve the constitutionality of state sex-offender registration statutes that are common in many jurisdictions: *Doe v. Poritz*, 662 A.2d 367, 373 (N.J. 1995) (followed 17 times), concerned the constitutionality of “Megan’s Law,” the landmark New Jersey sex-offender registration statute, and *State v. Ward*, 869 P.2d 1062, 1077 (Wash. 1995) (followed 16 times), rejected similar constitutional challenges to that state’s similar statute. *Boynton Cab v. Neubeck*, 296 N.W. 636, 639 (Wis. 1941) (followed 17 times), was an employment matter containing a thorough analysis of the definition of employee “misconduct.”

## CONCLUSION

Citation analysis offers an opportunity to probe, among other things, the process of appellate decision making, and to measure the comparative influence of various courts. But simply counting citations, without identifying the relatively small subset of truly positive citations, produces questionable results. Focusing instead on cases coded by *Shepard's* as followed offers an objective, fairly simple, and effective method of analysis.

Our preliminary results show that over the course of several decades, the California Supreme Court has been the most followed state high court, and that trend continues. At the same time, some other states, most notably Washington, appear to have gained sway while yet other traditionally influential jurisdictions have become less so.

A full review of the complete data that we have collected would be interesting and beneficial. It may be constructive to compare follows data with raw citation counts, in order to determine whether and to what extent our approach produces results different from traditional citation-count analysis. Similarly, it may be useful to analyze the rates at which a court's decisions are "distinguished," as indicated by that *Shepard's* code. This may provide a complementary measurement of influence, and we would not be surprised to see a correlation with the general rate of follows. In addition, we would like to see a more focused analysis of trends over decades and within other states, and whether the types of cases that have been followed differ significantly from one state to another. Likewise, it would be useful to further explore questions suggested above concerning comparisons across

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Finally, *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (followed 15 times), outlines a test for establishing demand futility as a prerequisite for maintaining a shareholder's derivative action.

As noted above, the Supreme Court of Washington has produced a high number of followed decisions, disproportionate to its population. Of the six Washington cases followed six or more times, three are criminal matters: *State v. Ward*, 869 P.2d 1062, 1077 (Wash. 1995); *State v. Barefield*, 756 P.2d 731, 734 (Wash. 1988) (construing Interstate Agreement on Detainers as applied to sentencing, followed seven times); *State v. Cauthron*, 846 P.2d 502, 516 (Wash. 1993) (concerning population-frequency statistical evidence required for admissibility of DNA evidence, followed six times). The three remaining notable Washington decisions concern general civil issues: *Queen City Farms v. Cent. National Ins.*, 882 P.2d 703, 717 (Wash. 1994) (construing insurance contract's pollution exclusion, followed eight times); *Berschauer/Phillips Construction Co. v. Seattle Sch. District*, 881 P.2d 986, 989-90 (Wash. 1994) (concerning nonrecovery of certain damages under economic loss rule, followed six times); *Pappas v. Holloway*, 787 P.2d 30, 33 (Wash. 1990) (concerning attorney-client privilege in attorney malpractice actions, followed six times).

different time periods (and related questions concerning depreciation of precedent, and the effect of computer databases on the use of precedent), and to conduct further inter- and intrastate comparisons of follows generated in different eras. Finally, it would be informative to investigate more systematically the various factors that may contribute to follows, including the “borrowed sources” phenomenon mentioned above. We hope that such inquiries and studies will be undertaken in the near future, using our data or similar data, and our method or similar, more sophisticated methods.