

THE INFLUENCE OF JUSTICE STANLEY MOSK'S OPINIONS

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Much has been written concerning Justice Stanley Mosk's contributions to the development of the law in his many opinions.¹ In this brief essay, I will attempt to address something a bit different — the comparative *influence* of his opinions.

At the risk of revealing the results of my inquiry before a proper foundation has been laid for the evidence, let me simply announce that Justice Mosk was by far the leading author of “followed” opinions on a

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¹ See, e.g., *Celebration Session Honoring the Record Service of Justice Stanley Mosk, California Supreme Court (1964-present)*, 21 Cal.4th 1316, 1325-1327 (1999) [hereafter *Honoring the Record*] (remarks of Peter J. Belton, referring to and listing some of Justice Mosk's leading decisions in the areas of civil rights and liberties, free speech and free press, equal protection, privacy, state constitutionalism, environmental law, employee rights, consumer protection, taxation, insurance, contracts, and property). See also Gerald F. Uelmen, *Justice Stanley Mosk*, 62 ALB. L. REV. 1221, 1222-1223 (1999) (listing some of Justice Mosk's leading decisions) Christopher David Ruiz Cameron, *Remembering Justice Mosk*, 31 Sw. U. L. Rev. 5, 8-9 (2001) (same); Gerald F. Uelmen, *Tribute to Justice Stanley Mosk*, 65 ALB. L. REV. 863, 860 (2002) (listing decisions of Justice Mosk that have been included in casebooks).

court already distinguished for being the most followed in the nation. As we shall see, his most influential opinions covered topics ranging from constitutional to practical legal issues. But first, let me turn to the process of my inquiry.

In a prior essay, *“Followed Rates” and Leading State Cases, 1940-2005*,² Ed Jessen and I attempted to measure objectively the relative influence of the various state supreme courts. Our methodology was quite simple: We identified all opinions filed since 1940, by each of the 50 state high courts, that Shepard’s Citations Service has designated as having been “followed”³ in a published opinion by a state court outside the originating jurisdiction, and then noted the number of times this had occurred. The data from all 50 states reflected nearly 24,400 state high court decisions that were followed at least once by out-of-state courts between 1940 and 2005.⁴

As explained in our essay, our data showed that the California Supreme Court has been, and continues to be, the most “followed” state high court in the nation. This proved to be true no matter how we viewed the data: California produced the most cases followed at least once (1,260), three times (160), or five times (45), by the courts of other states. It did so over the 66-year span of the study, and during the most recent 20-year period covered by the study. Somewhat surprisingly, many other

² See Jake Dear & Edward W. Jessen, *“Followed Rates” and Leading State Cases, 1940-2005*, 41 U.C. DAVIS L. REV. 683 (2007) [hereafter *“Followed Rates”*]; see also Jake Dear & Edward W. Jessen, *Measuring the Comparative Influence of State Supreme Courts: Comments on Our “Followed Rates” Essay*, 41 U.C. DAVIS L. REV. 1665 (2008).

³ As explained in our essay, 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” — that is, whether it has been “overruled,” “criticized,” “questioned,” “limited,” “distinguished,” “explained,” “harmonized,” or “followed.” Shepard’s has continuously applied its “followed” designation when “[the citing opinion relies on the case . . . as controlling or persuasive authority.” For example, if an earlier opinion from the Nebraska Supreme Court is cited and treated as persuasive authority in a later opinion by the Ohio Supreme Court, the editors at Shepard’s provide a notation in its published history of the Nebraska decision, showing a legal researcher that it has been “followed” by the Ohio decision. See *Followed Rates*, *supra* note 4, at 690-691.

⁴ See *Followed Rates*, *supra* note 2, at 692-693.

populous states did not rank commensurately with their size in our study — and some less-populated states placed far better than observers relying on that factor alone might have predicted.⁵ Our essay discussed various possible explanations for these results.⁶

Our essay also focused on the California data in isolation, in order to compare the influence of the California Supreme Court during various eras between 1940-2005. To derive a manageable data subset for further analysis, we identified the 160 opinions of the California Supreme Court that had been followed at least three times by state courts of other jurisdictions. These cases, we surmised, were the “most influential” of California’s 1,260 followed decisions. We divided these 160 decisions into six groups, representing the terms of the Chief Justices who served on the court when the opinion was filed: Phil S. Gibson (1940-1964); Roger J. Traynor (1964-1970); Donald R. Wright (1970-1977); Rose Elizabeth Bird (1977-1987); Malcolm M. Lucas (1987-1996); and Ronald M. George (1996-present). We then calculated the annual average number of opinions from each era that generated “three or more follows” by state courts of other jurisdictions.

In attempting these comparisons, we readily acknowledged that “comparisons of courts over different eras [may] be problematic.”⁷ But with that and related caveats, we reported that the Lucas era, closely followed by the Wright era, came out on top.⁸

⁵ This aspect of our study received some media attention and generated spirited debate in a few legal blogs — especially in Texas, where the results were not uniformly embraced. By the way, Justice Mosk was born in San Antonio, Texas, but as he explained in an oral history, “I was precocious and left there at age three and grew up in a small town in Rockford, Illinois.” *Conversations with Justice Mosk*, 3 CAL. SUPREME CT. HIST. SOC’Y YBK. (1996-97), 175.

⁶ See “*Followed Rates*,” *supra* note 2, at 703-707.

⁷ See “*Followed Rates*,” *supra* note 2, at 698. Among the problems we noted is the relatively long “gestation period” often seen before “follows” begin to occur. For example, as we explained, our review of a sampling of the out-of-state cases that have followed the “top 45” California decisions (those that have been followed five times or more) revealed that more than 62 percent of the out-of-state follows occurred at least 25 years after the filing of these most followed California decisions. See “*Followed Rates*,” *supra* note 2, at 697-701.

⁸ The Traynor and Bird eras followed significantly behind, at third and fourth places; the George era, which is ongoing (and for which the data is incomplete — see

Prior to publication of our study, I shared this information with former Associate Justice Joseph R. Grodin.⁹ He commented wryly that, although interesting, he found the whole undertaking to be rather like baseball statistics.

Fair enough.¹⁰ On the other hand, as those of us who worked with Justice Mosk as externs, annual law clerks, or staff attorneys quickly learned, he was a great fan of baseball.¹¹ He played in high school, had hoped to do so professionally, and, although additional interests and abilities took him in a different direction, he still toyed with the idea of becoming Commissioner of Major League Baseball.¹² And so with the spirit of baseball statistics in mind, I'll now turn to Justice Mosk's record.

Focusing again solely on the same 160 "most influential" decisions of the California Supreme Court mentioned above (that is, those that have generated three or more "follows" by courts of other states), the data disclose the following:

These 160 opinions were written by 33 different justices. Five of the justices — Roger J. Traynor, Matthew O. Tobriner, Stanley Mosk, Raymond L. Sullivan, and Malcolm M. Lucas — produced nearly half (78) of these decisions; the remaining 82 opinions were divided among 27 other justices. Of these five "giants of the court," Justice Mosk has a commanding lead, with 27 decisions followed at least three times. (For comparison, the others are: Tobriner, 16; Lucas, 14; Traynor, 12; and Sullivan, 9.¹³)

discussion *supra* note 9), placed next; the Gibson era trailed. See "Followed Rates," *supra* note 2, at 702.

⁹ See Joseph R. Grodin, *Professor of Law and Supreme Court Justice*, 3 CAL. LEGAL HIST. 1 (2008) (oral history).

¹⁰ Other practitioners of the discipline have candidly observed that, however cloaked in earnest and scholarly garb, some "citation studies" share characteristics of a "parlor game" for "legal stats freaks." See Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUDIES 409, 409 & 411 (2000). Witness, for example, the proliferation of articles and blogs employing "citation analysis" to rank, among other things, law professors and law schools. See, e.g., Symposium, *Dead Poets and Academic Progenitors: The Next Generation of Law School Rankings*, 81 IND. L. J. 1-401 (2006) (twenty articles and essays).

¹¹ And of tennis, which he played until his very late years.

¹² *Honoring the Record*, *supra* note 1, at 1323 (remarks of Peter J. Belton).

¹³ The next group of justices, authoring 7 to 6 "most influential" decisions each, are: Edward A. Panelli, Marvin R. Baxter, Ronald M. George, and Kathryn M.

Justice Mosk's most-followed decisions share a single philosophical basis — the enhancement of individual liberties and protections. His 1978 opinion in *People v. Wheeler* ruled that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the state constitutional right to trial by a jury drawn from a cross-section of the community, and has been followed 10 times.¹⁴ A close second is his holding that the Fourth Amendment applies to routine inventory searches undertaken after an automobile accident (followed 8 times).¹⁵ His third most-followed decision adopted the doctrine of informed consent, requiring that physicians disclose to their patients the treatments available and the risks inherent in each (followed 6 times).¹⁶ Among his other much-followed decisions are those establishing a right to privacy in one's bank statements, limiting cruel or unusual punishments, and establishing the remedy of market-share tort liability.¹⁷

Werdegar. The latter three of these justices are, of course, still producing opinions, and this circumstance, along with the relatively long “gestation period” required to generate “follows” (see *supra* note 9), suggests that a similar future statistical analysis may need to include these and other names.

¹⁴ 22 Cal.3d 258 (1978).

¹⁵ *Mozzetti v. Superior Court*, 4 Cal.3d 699 (1971).

¹⁶ *Cobbs v. Grant*, 8 Cal.3d 229 (1972).

¹⁷ Of the 27 cases in which Justice Mosk's opinion was followed 3 or more times by courts of other states, the following are 9 additional examples: *In re Marriage of Burgess*, 13 Cal.4th 25 (1996) (holding that a divorced parent who has joint legal custody of minor children, and who seeks to relocate with those children, bears no burden of establishing that the move is “necessary”; a trial court adequately satisfies the statutory policy in favor of “frequent and continuing contact” by ordering liberal visitation with the noncustodial parent if the custodial parent relocates — followed 5 times); *People v. McDonald*, 37 Cal.3d 351 (1984) (holding that the trial court erred in excluding the testimony of a psychologist, who was a qualified expert witness, regarding psychological factors that generally affect the accuracy of eyewitness identifications — followed 5 times); *Burrows v. Superior Court*, 13 Cal.3d 238 (1974) (holding that bank depositors have a constitutionally protected right of privacy in their bank statements — followed 5 times); *In re Lynch*, 8 Cal.3d 410 (1972) (holding that the penalty for a crime can be so disproportionate to the offense that it violates the cruel or unusual punishments clause of the California Constitution — followed 5 times); *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916 (1980) (upholding a cause of action for the negligent infliction of serious emotional distress — followed 3 times); *Sindell v. Abbot Laboratories*, 26 Cal.3d 588 (1980) (holding that a person unable to identify the particular manufacturer of the drug that injured him or her

But statistics can be looked at from various angles — and as we all know, how data is viewed is apt to affect the results and conclusions drawn. For example, not factored into the previous calculation is the effect of Justice Mosk’s more than 37 years on the Supreme Court bench — the longest term in the court’s history.¹⁸ Thus it may not be surprising that Mosk generated a high number of the court’s “most influential” decisions. Accordingly, one might want to probe how often Mosk, compared to the other four luminaries of the 1940-2005 period, produced “most influential” decisions.

To do so, I calculated the average number of the 160 “most influential” decisions generated during each year (and fraction thereof) of each justice’s service on the court. The results are: Lucas: 14 opinions/12 years (1.16 per year); Sullivan: 9/10 (0.9 per year); Tobriner: 16/19.5 (0.8 per year); Mosk: 27/37.5 (0.7 per year); and Traynor: 12/29.5 (0.4 per year).

Another approach to measuring influence might be to count the raw number of “follows” by other states’ courts, generated by the California Supreme Court’s 160 “most influential” decisions. Looking at the data in this manner, the results are similar to the “per year” findings: Lucas, 69 “follows”/12 years (5.8 per year); Tobriner, 109/19.5 (5.6 per year); Sullivan, 33/10 (3.3 per year); Mosk, 107/37.5 (2.9 per year); and Traynor, 61/29.5 (2.1 per year).

may jointly sue all the manufacturers of that drug on the theory of “enterprise liability” — followed 3 times); *In re Marriage of Carney*, 24 Cal.3d 725 (1979) (holding that disabled persons cannot be deprived of the custody of their children on the basis of stereotypes about their fitness as parents — followed 3 times); *People v. Brisendine*, 13 Cal.3d 528 (1975) (establishing that state courts considering claims of illegal search and seizure under the state Constitution are not bound by interpretation of the analogous provision of the federal Constitution; the state constitutional provision requires a more exacting inquiry — followed 3 times); *Pike v. Frank G. Hough Co.*, 2 Cal.3d 465 (1970) (holding that a manufacturer has a duty to install safety devices to protect against even an obvious danger; the obviousness of peril, although relevant to the manufacturer’s defenses, does not preclude liability for negligent design — followed 3 times).

¹⁸ For this, one of Justice Mosk’s former staff attorneys, Peter J. Belton, christened Mosk “the Cal Ripkin of the California Supreme Court.” *Honoring the Record*, *supra* note 1, at 1323 (referring to Cal Ripkin, Jr., an All Star and Hall of Fame shortstop and third baseman for the Baltimore Orioles who played a record 2,632 straight games over a course of 17 seasons — a feat unlikely to be followed).

There are, of course, yet other ways of considering the question. For example, we might approximate each justice's lifetime "batting average" by calculating the ratio of "total lifetime follows" (hits) to "total lifetime majority opinions" (at bats) for the *entire* California database of 1,260 "followed" cases — and when I have time and inclination, I may do that.¹⁹ But for now, based on this preliminary look at the data, it seems safe to say that, considering the esteemed competition — and the other very notable justices of the California Supreme Court who are not even listed in this elite group of five — Justice Stanley Mosk stands among the most influential of justices to have served on the California Supreme Court.

I end by picturing him emerging from the dugout, tipping his cap to us, and pointing proudly at the scoreboard. ★

¹⁹ Thus far, we have identified the authors of only the "top 160" of the 1,260 California cases; we have yet to identify the authors of the remaining 1,100 California cases — and until we do that, we cannot calculate each justice's total "lifetime follows." On a similar point: We have shared our overall data with scholars in numerous other states, and gladly will do likewise with anyone who is interested to undertake this or any similar additional analysis of the California data.