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Cardozo's Use of Authority: An Empirical Study

William H. Manz

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*William H. Manz**

TABLE OF CONTENTS

Introduction	32
I. Methodology	34
II. Citations to Opinions	35
A. Sources of Case Citations	35
B. Age of Citations	38
III. Secondary Sources	38
A. Legal Treatises	38
B. Legal Periodicals	41
C. The Restatement	43
D. Legal Encyclopedias and Annotations	44
E. Legislative Materials	45
F. Other Secondary Sources	45
IV. Philosophy, Style, and Citation Practice	46
V. Reputation and the Use of Authority	52
VI. Citation and Ideology	55
Conclusion	57
Appendix I - Tables	59
New York Court of Appeals	59
Appendix II - Tables	78
United States Supreme Court	78

ABSTRACT

This statistical analysis of use of citation by Justice Benjamin Cardozo, 1870-1938, shows that Cardozo cited far more authority in his opinions than did his colleagues on the New York Court of Appeals. In particular, he cited to far more U.S. Supreme Court cases, British decisions, legal treatises and law review articles. On the Supreme Court, Cardozo's citation practices resembled those of the other justices with major reputations, Brandeis, Stone and Hughes, more than those of the remainder of the Court.

Cardozo's heavy use of authority reflects his intellect, scholarly background and characteristic method of deciding cases. He wrote opinions which were no longer than average. But Cardozo covered more issues, addressed more legal implications, and included frequent historical references. The result was an above-average number of citations. Cardozo's far heavier use of authority than the other New York judges and Supreme Court justices of

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lesser renown lends support for the theory that the greatest judges are heavy citers.

INTRODUCTION

Since the legitimacy of American appellate opinions rests on the authorities they cite, virtually all contain such references. Although judges writing opinions draw on the same body of source material, studies that examine individual patterns show differences in citation practice.¹ Unfortunately, surveys done thus far on individual judges have usually provided statistics for only one or two sample years.² Because case assignments can influence citation practice,³ the authority used by a judge may vary each year, and results obtained from one or two sample periods may not be representative of an entire career.⁴

Thus, the question remains: why and to what extent do the citation practices of individual judges actually differ? Are differences idiosyncratic, the product of the cases assigned, or do they reflect the beliefs and intellectual background of the individual judge? Does the authority utilized

1. See John H. Merryman, *The Authority of Authority—What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 656-62 tbls. 3-9 (1954) [hereinafter Merryman I]; 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, 415-22 (1977) [hereinafter Merryman II]; Richard A. Mann, *The North Carolina Supreme Court 1977: A Statistical Analysis*, 15 WAKE FOREST L. REV. 39 (1979); William H. Manz, *The Citation Practices of the New York Court of Appeals, 1850-1993*, 43 BUFF. L. REV. 121, 146-48, apps. at 164-79 (1995).

For studies surveying entire courts, but without information on individuals, see generally Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773 (1981); James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990*, 86 L. LIB. J. 129 (1994); Mary Bobinski, Comment, *Citation Sources and the New York Court of Appeals*, 34 BUFF. L. REV. 965 (1985); John Scurlock, *Scholarship and the Courts*, 32 UMKC L. REV. 228 (1964); Wes R. Daniels, "Far Beyond the Law Reports": *Secondary Source Citations in United States Supreme Court Opinions October Terms 1900, 1940 and 1978*, 76 L. LIB. J. 1 (1983).

The findings of these studies may be summarized as follows:

1. Courts cite most often to their own more recent opinions;
2. Use of Supreme Court and other federal decisions has increased while use of British cases has virtually disappeared;
3. Treatises and, more recently, law review articles are favored by a wide margin over the Restatement, legal encyclopedias, and A.L.R. annotations;
4. There is a long-term trend toward longer opinions containing more citations.

2. Exceptions are Chester A. Newland, *Legal Periodicals and the United States Supreme Court*, 7 KAN. L. REV. 477, 479, tbl. 2 (1959) (legal periodical citations for 28 justices from 1924 to 1956); William L. Turner, Comment, *Legal Periodicals: Their Use in Kansas*, 7 KAN. L. REV. 490 (1959) (Kansas state judges during the 1950's); Charles A. Johnson, *Citations to Authority in Supreme Court Opinions*, 7 L. AND POL'Y 509, 518 (1985) (citation data taken from a random sampling of opinions from 1946 to 1974).

3. For a study detailing how citations differ depending on subject, see generally Bobinski, *supra* note 1; see also Johnson, *supra* note 2, at 517, tbl. 3.

4. See, e.g., Merryman II, *supra* note 1, at 415 tbl.18 (Chief Judge Traynor was the heaviest citer in 1950, averaging 30 cases per opinion, but in 1970, he was fifth with only 15); Manz, *supra* note 1 at 140 (Judge Dye was the top citer in 1950 with 13.5 citations per case. In 1960 he was seventh and last with only 5.2).

by a light citer differ in any way from that of a heavy citer? Do the citation practices of a judge of great reputation differ considerably from those of her less famous colleagues, and if so why? Will a liberal jurist use more or less authority than a conservative?

This article offers some answers to these questions by surveying the use of authority in all the opinions of Benjamin N. Cardozo and his contemporaries on the New York Court of Appeals and the United States Supreme Court. Study of these cases makes it possible to compare a judge of major reputation⁵ with competent, but by now largely forgotten, state judges.⁶ It also permits Cardozo to be compared with others on the famous New Deal Era Court of the "Nine Old Men." Three are regarded as great, Brandeis, Hughes and Stone, and three labeled as failures, Butler, McReynolds and Van Devanter.⁷ Reputation aside, Cardozo's work is a good choice for study for another reason. Because Cardozo did most of his own research, his citation practices were largely unaffected by the influence of law clerks.⁸ The fact

5. For an article whose very title exemplifies Cardozo's status, see Bernard Weissman, *Cardozo: "All-Time Greatest" American Judge*, 19 CUMB. L. REV. 1 (1988). Cardozo is included on virtually every listing of top jurists. See, e.g., John T. Noonan Jr., *Education, Intelligence & Character in Judges*, 71 MINN. L. REV. 1119 (1987) (Cardozo included along with Raleigh, Coke, Marshall, Holmes and Brandeis as one of the greats of Anglo-American legal history); James E. Hambleton, *The All-Time All Star All Era Supreme Court*, 69 A.B.A. J. 463, 464 (1983); Bernard Schwartz, *The Judicial Ten: America's Greatest Judges*, 1979 SO. ILL. L.J. 405 (Cardozo sixth on a chronological list); ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 30 n.2 (1938) (Cardozo tenth on a chronological list); ALBERT P. BLAUSTEIN & ROY M. MERSKY, *THE FIRST ONE HUNDRED JUSTICES, STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES* 37 (1978) (Cardozo listed as one of the 12 great justices). One list which omits Cardozo is found in George R. Currie, *A Judicial All-Star Nine*, 1964 WIS. L. REV. 3. For an in-depth study of Cardozo's perceived place in American law, see RICHARD A. POSNER, *CARDOZO—A STUDY IN REPUTATION* (1990).

6. During the Cardozo era, the New York Court of Appeals was highly regarded and was the state high court most cited in the opinions of other jurisdictions. Friedman et al., *supra* note 1, at 805. For a history of the court during this period, see FRANCIS BERGAN, *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932*, 248-71, 292-342 (1985). Cardozo's preeminence is demonstrated by the four and one-half pages the author dedicates to describing his career. *Id.* at 244-52. Few of the other judges warranted more than a paragraph.

Five judges who served with Cardozo, Frederick E. Crane, Frank H. Hiscock, Irving Lehman, Cuthbert Pound, and Samuel Seabury, rated inclusion in the *Dictionary of American Biography*. Nine others, Willard Bartlett, William H. Cuddeback, Frederick Collin, Abram I. Elkus, Henry T. Kellogg, Nathan L. Miller, John F. O'Brien, and William E. Werner, are named in the less exclusive *National Cyclopaedia of American Biography*.

7. The Blaustein-Mersky study ranks Louis D. Brandeis, Benjamin N. Cardozo, Charles E. Hughes and Harlan F. Stone as great, George Sutherland as near great, Owen J. Roberts as average, and Pierce Butler, James C. McReynolds and Willis Van Devanter as failures. BLAUSTEIN & MERSKY, *supra* note 5, at 37-40. These rankings have been criticized as a product of the liberal bias of those responding to the authors' survey. See generally Robert W. Langran, *Why Are Some Supreme Court Justices Rated as "Failures"?*, 1985 Y.B. SUP. CT. HIST. SOC'Y 8. For a full discussion of the reasons for the poor reputation of three of the Four Horsemen (e.g., Van Devanter - low productivity; McReynolds - prejudiced and disagreeable; Butler - generally undistinguished), see G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION—PROFILES OF LEADING AMERICAN JUDGES* 178-99 (1976).

8. Cardozo's law secretary on the New York Supreme Court during January and February 1914, Charles E. Hughes, Jr., told of receiving case references from the jurist and discovering upon further research they were all he needed. GEORGE S. HELLMAN, *BENJAMIN N. CARDOZO—AMERICAN JUDGE* 58 (1940). On the Court of Appeals, Cardozo's lone clerk

that he sat on a state court which assigned cases by rotation also eliminated the influence of specialization on his citation practice.⁹

I. METHODOLOGY

Statistical data for this article was taken from all the majority, concurring and dissenting opinions published in *New York Reports* and *United States Reports* for the years of Cardozo's service. Per curium and memoranda opinions, joint concurrences and dissents, and Supreme Court decrees were omitted. Separate opinions were included with concurrences.

Primary sources analyzed include judicial opinions and administrative decisions. All other material is classified as secondary. Because citations to constitutions, statutes and regulations are often required by the subject matter of the case and are not truly discretionary, these authorities were not included in the statistical analysis.¹⁰

In the secondary source grouping, the treatise category includes practice books, law dictionaries, maxims, digests and studies of legal history. The legal periodicals category includes both law reviews and bar journals. The *Restatements* constitute a separate category. Legislative materials covers citations to House or Senate reports and hearings, the *Congressional Record*, and constitutional convention documents. The miscellaneous category consists largely of attorney general opinions, non-legal books, periodical articles, and non-legislative reports.

Citations to particular authorities were counted only the first time they appeared in an opinion. Most of the data was gathered by manual count. To correct for oversights, the results were checked, where possible, by LEXIS or Westlaw searches. Page counts were taken from *New York Reports* and *United States Reports*.¹¹ Statistics on how often opinions were subsequently

occasionally added a case or statute citation. His main duties were typing and running errands. Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 992 (1993). Similarly, Cardozo's United States Supreme Court clerks were occasionally asked to add a few cites to what was essentially a finished opinion. Joseph L. Rauh et al., *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 CARDOZO L. REV. 5, 6 (1979).

9. An example of specialization on the Supreme Court during the period when Chief Justice Hughes assigned the cases can be found in the work of Justice Van Devanter. Six of Van Devanter's 24 opinions between 1932 and 1937 dealt with American Indian issues. A discussion of the rotation system of case assignment during the Cardozo period can be found in Frank H. Hiscock, *The Court of Appeals of New York: Some Features of its Organization and Work*, 14 CORNELL L.Q. 131, 138 (1929). For a discussion of the advantages and disadvantages of the rotation system, see POSNER, *supra* note 5, at 145-47.

10. Merryman I, *supra* note 1, at 652 n.131.

11. No effort has been made to standardize the page counts. *New York Reports* pages from 1914-1932 typically have 37 lines with approximately 50 characters per line for a total of 1850 characters per page. *United States Reports* usually have 36 lines with an average of 47 characters producing 1692 characters per page. Supreme Court footnotes average 60 characters per line.

cited were derived from *Shepard's New York Supplement Citations*¹² and *Shepard's United States Citations*.¹³

II. CITATIONS TO OPINIONS

A. Sources of Case Citations

Table I-1 shows that Cardozo dominated his fellow members of the New York Court of Appeals in terms of total number of cases cited. This imbalance resulted from the fact that Cardozo wrote the most opinions and cited far more opinions per case.¹⁴ As Table I-11 indicates, he was the most prolific judge from 1914-1921, in 1923, and again from 1928-1931.¹⁵ He cited the most cases per majority opinion in every year but 1919,¹⁶ averaging 13.87 case cites per opinion.¹⁷ The remainder of the court averaged only 7.15, with only a few judges significantly above or below the average.¹⁸ Cardozo's citation rates for concurring and dissenting opinions led by similarly large margins.

Opinion length is definitely not a factor in Cardozo's higher citation rate. As Judge Posner has observed, Cardozo wrote more compact opinions than his colleagues, avoiding extensive discussion of individual cases.¹⁹ Thus,

12. 1989 ed. and the 1991, 1993 and 1995 supplements.

13. 1994 ed.

14. Cardozo's status as the most prolific judge and the heaviest citer supports Merryman's finding that the most productive judges wrote the most heavily documented opinions. Merryman II, *supra* note 1, at 419. Cardozo also exemplifies this relationship on the Supreme Court, as does Hughes. In comparison, McReynolds, by far the lightest citer, wrote the fewest opinions of all of the justices except Van Devanter, who is famous for his lack of productivity.

15. Crane wrote more opinions than Cardozo in 1922, 1925 and 1926. He tied Cardozo in 1927, as did Pound in 1924.

16. That year Cardozo was narrowly outcited by Judge Collin. Collin's high cite totals were a result of his fondness for out-of-state opinions. See Table I-5 *infra*, at 63.

17. This is true regardless of the subject of the opinion. Table I-10 indicates that Cardozo had the highest citation rate for negligence, contracts, criminal, and tax opinions. Of judges who wrote at least one hundred opinions, he was the least likely to include no authority. The totals are as follows:

Crane	47	Hogan	32	McLaughlin	17	Bartlett	10
Andrews	40	Lehman	28	Pound	12	O'Brien	8
Hiscock	32	Kellogg	20	Collin	11	Cardozo	7

The case citation mean for the sixteen state supreme courts studied by Professor Friedman and his colleagues for the same approximate time period is 9.6. Friedman et al., *supra* note 1, at 802, tbl. 8.

Cardozo appears to have been a heavier citer than any previous New York Court of Appeals judge. His annual citation averages were not equalled or exceeded until the last twenty years, when longer opinions and the frequent use of footnotes drove up citation totals. Manz, *supra* note 1, app. at 177-79.

18. The case citation rates of most of the other judges were so similar they appear to confirm that, at least for average judges, variation in citation was caused more by the types of cases assigned than by personal taste. An argument for case type as the determining factor in citation rates is presented in William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. OF L. & ECON. 249, 259 (1976).

19. POSNER, *supra* note 5, at 135.

the average Cardozo opinion is actually slightly shorter than those of the remainder of the court.²⁰ This characteristic resulted in a citation rate per page double that of the other judges.

Consistent with the general pattern for high state courts, Cardozo cited most frequently to in-state opinions. As a heavy citer, he also used more cases from all types of sources. Compared with the other judges on the court, his citation rate to United States Supreme Court cases is particularly high. Cardozo cited these cases 3.5 times as often as the rest of the court, and included such authorities in virtually half his opinions.²¹

Cardozo admired the style of English jurists and their ability to bring everyday experience into their opinions.²² Unlike his fellows, he made regular and significant use of British cases.²³ These authorities appear in almost one-third of his opinions, cited at a rate approximately four times greater than in the opinions of his colleagues on the court.

When Cardozo moved to the United States Supreme Court in 1932, he joined a body with a significantly different docket than the Court of Appeals. Compared with Commerce Clause or federal tax cases, those involving common law issues made up only a small part of the Court's business.²⁴ Stylistically, Supreme Court opinions included footnotes, were generally longer, and contained far more citations than those of the New York court.²⁵

Accordingly, Cardozo's opinions now lengthened and his rate of case citation almost doubled, but he no longer dominated his colleagues. As Table

20. See Table, I-2. In contrast, the sixty Cardozo opinions used in Posner's sample were slightly longer than average. POSNER, *supra* note 5, at 135.

21. Merryman regards a high citation rate to Supreme Court and in-state high court cases by heavy citers as evidence they are not packing their opinions with inferior, superfluous authorities. Merryman II, *supra* note 1, at 422.

22. BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 18-21 (1931). Cardozo's own purported propensity to write in an English style was a target of criticism. See generally Anon Y. Mous, *The Speech of Judges: A Dissenting Opinion*, 29 VA. L. REV. 625 (1943).

23. British cases had long been in decline in the United States. The multi-state study reports that foreign cases appeared in 15.3% of state supreme court opinions between 1870 and 1900. Friedman et al., *supra* note 1, at 799. For 1900 to 1935, this dropped to only 5.4%. *Id.* British decisions comprised 25% of the Court of Appeals' case citations in 1850. Manz, *supra* note 1, at 132. By 1940, without Cardozo to boost the totals, only 19 of 1028 majority opinion case citations were from the British Isles. *Id.* at 173.

24. For example, in 1932, the year Cardozo joined the Court, only six cases involved common law issues, compared to 51 for tax. Felix Frankfurter and Henry M. Hart, Jr., *Business of the Supreme Court at October Term, 1934*, 49 HARV. L. REV. 68, 88-89, tbl. IX (1935) (includes statistics for 1930-1934). For subject matter statistics for 1935-1939, see Henry M. Hart, Jr., *Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 HARV. L. REV. 579, 602-03, tbl. IX (1940). For a study of state court dockets, see Robert A. Kagan et al., *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 133-35, tbl. 1 (1977).

25. Part of the differences in opinion lengths and cite counts result from the Supreme Court's frequent use of footnotes, which New York Court of Appeals judges including Cardozo did not then use. The inflationary effect of footnotes on citation rates can be seen on the current Court of Appeals where Judge Joseph Bellacosa, who alone avoids footnotes, averages fewer cites per opinion than those judges who use them regularly. Manz, *supra* note 1, app. at 178-79. Present Supreme Court Justice Stephen Breyer also does not use them. *In Justice Breyer's Opinion, a Footnote Has No Place*, N.Y. TIMES, July 28, 1995, at B18.

II-1 indicates, he was second to Brandeis in average case cites per opinion and modestly ahead of Stone and Hughes. All three of these justices cited to Supreme Court opinions at a higher rate than Cardozo. His experience as a state high court judge is reflected in his more frequent use of state cases, particularly those from New York.²⁶ In a carryover from his New York citation practice, Cardozo referred to British decisions far more often than did the other justices.²⁷

Cardozo was also more likely to bolster the authority of his case citations by identifying the author of an opinion. Certain of his choices reflect his special esteem for particular jurists. Cardozo cited two men praised in his extra-judicial writings, Justice Holmes²⁸ and the English judge, Lord Mansfield,²⁹ more often than did all the decisions of his colleagues combined.³⁰

26. Cardozo's law clerk, Ambrose Doskow, stated that the justice's "nostalgia surfaced whenever he could cite a New York case in an opinion." Rauh, et al., *supra* note 8, at 16. Use of New York cases by the Court between 1932 and 1937 were as follows:

	Total N.Y. Cites	N.Y. Pct. of State Cites	N.Y. Pct. of All Cites
Brandeis	38	15.6	1.6
Butler	22	8.2	1.2
<i>Cardozo</i>	254	30.5	8.2
Hughes	53	19.7	1.8
McReynolds	8	15.0	1.4
Roberts	23	10.0	1.3
Stone	59	17.2	.2
Sutherland	31	10.8	1.8
VanDevanter	6	13.0	1.6

27. One of Cardozo's Supreme Court foreign case citations was to a Canadian court. In *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301, 310 (1935), he quoted *Johnston v. Miller*, 31 Gel. & Russ. 83 (N.S. 1898), on the issue of the need for equitable circumstances if restitution is to occur. His only other cite to a non-British foreign opinion is in *Ostrowe v. Lee*, 175 N.E. 505 (N.Y. 1931), a defamation case. Here, he used a New Zealand decision, *Angelini v. Antico*, 31 N.Z.L.R. 841 (1912), as an example of the view that it is slander, not libel, to have a stenographer read back notes containing defamatory material.

28. See generally, Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682 (1931); see also CARDOZO, *supra* note 22, at 16-17; Benjamin N. Cardozo, *Our Lady of the Common Law*, 13 ST. JOHN'S L. REV. 231, 236 (1939) [hereinafter Cardozo I]; BENJAMIN N. CARDOZO THE GROWTH OF THE LAW 97 (1924) [hereinafter CARDOZO II].

29. Cardozo I, *supra* note 28, at 236. Here, Cardozo notes that after a mob of anti-papist rioters destroyed Mansfield's house, their leader chose to be tried before him because of his reputation for impartiality.

30. A LEXIS search indicated that 16 of Cardozo's Court of Appeals opinions identified an opinion as that of Holmes, compared to 24 for rest of the court. Cardozo's lead in such references on the Supreme Court was six to four. He attributed cases to Mansfield nine times, six in New York cases and three in Supreme Court decisions. This compares to six by other Court of Appeals judges and one by Justice Stone.

B. Age of Case Citations

One theory of case citation holds that a light citer will only cite more recent cases, while a heavier user of authority will include new and old cases.³¹

This proposition is well supported by Cardozo's New York opinions, which cite to Court of Appeals greater than sixty years old more frequently than do the opinions of any of his colleagues on the court.³² No distinct patterns can be discerned regarding the age of cases cited by other judges. For example, two of the heavier citers, Collin and Chase, refer to older opinions at a lower rate than does the below-average citer, John F. O'Brien.

The results are equally equivocal on the Supreme Court. Justice Hughes, a heavy citer, makes the most use of older Supreme Court opinions. Cardozo and Brandeis have a lower citation rate for these decisions than do the lighter citers: Butler, Sutherland and Van Devanter.

It does appear that judges who use the least case authority do in fact rely primarily on more recent decisions. The two lightest citers on the Court of Appeals, Bartlett and Hogan, have the lowest rate of citation to older cases. The same is true of James McReynolds and Owen Roberts on the U.S. Supreme Court. Not only do they cite the fewest opinions overall, but also the least older decisions.

III. SECONDARY SOURCES

A. Legal Treatises

In the same way that certain aspects of Cardozo's background and interests influenced his choice of cases, these factors also affected his use of citation to secondary materials. Cardozo has been described as the "ultimate scholar judge."³³ This is evidenced by his extra-judicial writings, which reveal a familiarity with the writings of numerous legal scholars. He admired their work, specifically commending the efforts of such men as James Kent, Joseph Story, John Wigmore and Samuel Williston.³⁴ This attitude toward scholarship is reflected in a citation rate to legal treatises far higher than that of any of his contemporaries. Cardozo cited treatises three times as frequently as his

31. Landes & Posner, *supra* note 18, at 259.

32. By virtue of citing the most English cases, Cardozo's opinions also contained the most references to decisions from the old English nominative reporters. The oldest of these, from *Dyer's King's Bench Reports*, was *Tyrrel's Case*, 73 Eng. Rep. 336 (1557), cited in *In re Mayor of New York*, 158 N.E. 24, 25 (N.Y. 1927), involved a long unpaid indemnity claimed by the American Express Co. The citation appeared as part of an historical analogy between New York law and the old English Statute of Uses.

33. William H. Rehnquist, *Remarks on the Process of Judging*, 49 WASH. & LEE L. REV. 263, 264 (1992).

34. CARDOZO II, *supra* note 28, at 10-11. Williston's contracts treatise is described as a "treasury of learning." *Id.* at 15.

New York colleagues and almost twice as often as other U.S. Supreme Court justices. Table I-7 indicates that more than forty percent of Cardozo's Court of Appeals opinions contained at least one cite to a treatise, far above the average.³⁵ Although, as Table II-7 indicates, this average dropped to just over 25 percent on the Supreme Court, this figure was still above the mean for the rest of the Court. Cardozo cited most often to the leading treatises of his era, Wigmore's and Williston's.³⁶ In addition to the standard subject treatises, he made use of venerable favorites such as Blackstone and Kent, and even some of the old abridgements and digests. Cardozo also occasionally included some of the same major works of jurisprudence that he referred to in his books *The Nature of the Judicial Process* and *The Growth of the Law*. The most cited work of this type is Holmes' *The Common Law*, referred to in seven New York opinions.³⁷ A title like Rudolf von Jhering's

35. Cardozo's high rate of treatise citations, coupled with heavy case citations, mirrors with Merryman's findings for the California Supreme Court. There, the heaviest citers of primary authority were also the most frequent users of secondary sources. Merryman II, *supra* note 1, at 422. On the Supreme Court, the four heaviest citers of opinions, Brandeis, Cardozo, Hughes and Stone, also had the highest citation rates for non-case materials.

36. The most frequently cited treatises by the New York Court of Appeals between 1914 and 1932, and the Supreme Court between 1932 and 1937 were as follows:

<i>N.Y. Court of Appeals</i>	<i>Cardozo</i>	<i>Others</i>	<i>Total</i>
Williston on Contracts	46	68	104
Wigmore on Evidence	25	49	74
Williston on Sales	17	20	37
Blackstone's Commentaries	10	15	25
Dillon on Mun. Corp.	2	22	24
Pomeroy's Equity Juris.	6	18	24
Kent's Commentaries	8	13	21
Mechem on Agency	11	10	21
Pollock on Torts	12	9	21
Holdsworth, Hist. Eng. Law	15	4	19
Anson on Contracts	10	8	18
<i>United States Supreme Court</i>			
Story on the Constitution	3	18	21
Blackstone's Commentaries	0	14	14
Wigmore on Evidence	9	4	13
Benedict on Admiralty	0	10	10
Pomeroy's Equity Juris.	3	6	9
Williston on Contracts	6	3	9
Cooley on Const. Law	0	8	8
Hyde on International Law	2	5	7
Moore on International Law	1	6	7
Thayer on Evidence	4	3	7
Holdsworth, Hist. Eng. Law	3	3	6

37. *De Cicco v. Schweizer*, 117 N.E. 807, 810 (N.Y. 1917) (promise to marry was consideration); *Messersmith v. American Fidelity Co.* 133 N.E. 432, 433 (N.Y. 1921) (insurance); *Burns v. McCormick*, 135 N.E. 273, 274 (N.Y. 1922) (oral contract to convey real property); *McGovern v. City of New York*, 138 N.E. 26, 31 (N.Y. 1923) (validity of construction contract); *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173, 174 (N.Y. 1927) (contract/consideration); *Guaranty Trust Co. v. New York & Queens County Ry. Co.*, 170 N.E. 887, 890 (N.Y. 1930) (mortgage held by successor corporation); *McCoy v. American Express Co.*, 171 N.E. 749, 751 (N.Y. 1930) (conversion). The only other New York judge to mention

Struggle for Law might even appear in a routine opinion like *Morningstar v. Lafayette Hotel Co.*³⁸ Cited only fifteen times since it was written, this case concerned a plaintiff who, tired of hotel food, had asked the chef to prepare some spareribs he had bought.³⁹ His repeated refusal to pay one dollar for this service led to his ejection from the hotel dining room.⁴⁰ In endorsing the plaintiff's right to bring a wrongful ejection action over this minor affair, Cardozo cited von Jhering as authority for the proposition that an individual "owes the duty to himself and to society never to permit a legal right to be wantonly infringed."⁴¹

In his treatise on evidence, Professor Wigmore complained that judges fail to demonstrate knowledge of legal history.⁴² This was certainly not the case with Cardozo. Since he believed that "[n]othing can take the place of vigorous and accurate and profound study of the law as already developed by the wisdom of the past,"⁴³ his opinions frequently made some allusion to the history of the law. Accordingly, his opinions, including some of his most famous, *Palsgraf v. Long Island R.R.*,⁴⁴ *Loucks v. Standard Oil*,⁴⁵ and *Palko v. Connecticut*,⁴⁶ often contained citations to works of legal history. Cardozo was by far the heaviest user of these titles, citing to them

Holmes was Pound in *Goldstein v. Pullman Co.*, 116 N.E. 376-78 (N.Y. 1917) (negligence/lost luggage).

38. 105 N.E. 656 (N.Y. 1914).

39. *Id.*

40. *Id.*

41. *Id.* at 657. For other cites to works of jurisprudence, see, e.g., *Melenky v. Melen*, 134 N.E. 822, 823 (N.Y. 1922) (citing WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS*); *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*, 170 N.E. 479, 482 (N.Y. 1930) (citing JOSEF KOHLER, *PHILOSOPHY OF LAW* and RAYMOND SALEILLES, *DE LA JURIDIQUE PURE*.)

42. JOHN HENRY WIGMORE, 1 *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN THE TRIALS AT COMMON LAW* 242 (3rd ed. 1940). He also objected to a lack of familiarity with works of jurisprudence. *Id.* at 243.

43. CARDOZO II, *supra* note 28, at 60.

44. 162 N.E. 99, 101 (N.Y. 1928) (citing HOLDSWORTH, *HISTORY OF ENGLISH LAW* and John H. Wigmore, *Responsibility for Tortious Acts*, in 3 *ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* 520.

45. 120 N.E. 198, 199 (N.Y. 1918) (citing HENRY MAINE, *ANCIENT LAW* and FREDERICK POLLOCK & FREDERICK MAITLAND, 1 *HISTORY OF ENGLISH LAW*).

46. 302 U.S. 319, 326 (1937) (citing MAX RADIN, *ANGLO-AMERICAN LEGAL HISTORY*).

more than all of his Court of Appeals and Supreme Court colleagues combined.⁴⁷

B. Legal Periodicals

Cardozo's admiration of the work of scholars extended particularly to their work in law reviews.⁴⁸ Unlike previous Court of Appeals judges, who rarely cited to legal periodicals, he quickly began to make use of this resource.⁴⁹ Even when judges who also cited reviews joined the court, Cardozo still topped the citation totals. As Table I-6 shows, Cardozo's citations to law reviews were more frequent than those of all the other judges combined, 99 to 83. His citation rate of .18 law reviews per opinion is six times that of the rest of the court.

Justices of the U.S. Supreme Court, like those of the New York Court of Appeals, did not often use legal periodicals as authority prior to 1932. It was not until Cardozo joined Stone and Brandeis in Washington that reviews began to be cited with any regularity.⁵⁰ Compared to those two judges, Cardozo was second to Brandeis in frequency of citation and Stone ranked third. The rest of the Court's citation totals were quite low. Even Justice Hughes, who wrote in support of the law reviews, made only light use of them in his opinions.⁵¹ References to the reviews appeared only twice in the

47. Citations to works of legal history were as follows:

<i>New York Ct. of Appeals</i>		<i>United States Supreme Ct.</i>	
Cardozo	38	Cardozo	9
Pound	4	Stone	4
Seabury	4	Brandeis	1
Andrews	3	Hughes	1
Kellogg	2	All Others	0
Bartlett	1		
Collin	1		
Crane	1		
Crouch	1		
All Others	0		

48. CARDOZO II, *supra* note 28, at 12-15.

49. A few stray citations to legal periodicals appeared in Court of Appeals opinions before Cardozo joined the court, two as early as 1880. Manz, *supra* note 1, at 139.

50. Newland, *supra* note 2, at 480, tbl. 3.

51. Charles Evans Hughes, *Foreword*, 50 YALE L.J. 737 (1941). Six of Hughes' nine cites come in *Sorrells v. United States*, 287 U.S. 435, 445 n.4 (1932). Here he listed six unsigned casenotes on entrapment. Note, *Entrapment By Government Officials*, 28 COL. L. REV. 1067 (1928); Note, *Entrapment As a Defense to Criminal Prosecution*, 44 HARV. L. REV. 109 (1931); Note, *Entrapment As Defense in Prosecution for Prohibition Violation*, 41 YALE L.J. 1249 (1932); Note, *When Entrapment is a Bar to Conviction*, 10 VA. L. REV. 316 (1924); Comment, *Criminal Law—Defenses—Entrapment*, 2 SO. CAL. L. REV. 283 (1929); Note, *Criminal Law—Entrapment—Public Policy*, 9 TEX. L. REV. 276 (1930).

opinions of McReynolds, once in those of Sutherland, and not at all in those of Butler and Van Devanter.⁵²

Cardozo used law reviews in various contexts. *Ultramares Corp. v. Touche*⁵³ includes three cites illustrating scholarly interest in the subject of inroads on privity.⁵⁴ *DeCicco v. Schweitzer*⁵⁵ contains references to seven articles by major scholars exhibiting diverging views on the distinctions between bilateral and unilateral contracts.⁵⁶ In *Epstein v. Gluckin*,⁵⁷ Cardozo cited articles by Dean William Lewis⁵⁸ and Dean Harlan Stone,⁵⁹

52. Two of Butler's dissents contain citations to law reviews, but Van Devanter never cited to any. Newland, *supra* note 2, at 479, tbl. 2.

The reviews cited by the members of the Court of Appeals and Supreme Court came largely from the elite schools. The most cited titles during the Cardozo period were as follows:

New York Court of Appeals

	<i>Harv. L.Rev.</i>	<i>Yale L.J.</i>	<i>Col. L.Rev.</i>	<i>Corn. L.Q.</i>	<i>L.Q.R.</i>
Cardozo	51	12	11	0	11
Others	32	16	14	16	2
Total	83	28	25	16	13

United States Supreme Court

	<i>Harv. L.Rev.</i>	<i>Yale L.J.</i>	<i>Col. L.Rev.</i>	<i>U.Pa. L.Rev.</i>	<i>Mich. L.Rev.</i>	<i>Minn. L.Rev.</i>
Black	1	0	0	0	0	0
Brandeis	44	8	8	4	3	2
Cardozo	13	7	4	1	1	1
Hughes	1	2	2	0	0	0
McReynolds	0	0	2	0	0	0
Sutherland	0	1	0	0	0	0
Stone	12	7	8	2	1	2
Total	71	25	22	8	5	5

53. 174 N.E. 441 (N.Y. 1931) (holding that the defendant owed no duty of care to lenders who had relied on its careless audit).

54. *Id.* at 144. The articles cited were: Samuel Williston, *Liability for Honest Misrepresentation*, 24 HARV. L. REV. 415 (1911); Francis H. Bohlen, *Misrepresentation as Deceit, Negligence or Warranty*, 42 HARV. L. REV. 733 (1929); Jeremiah Smith, *Liability for Negligent Language*, 14 HARV. L. REV. 184 (1900); Leon Green, *Deceit*, 16 VA. L. REV. 749 (1930).

55. 117 N.E. 807 (N.Y. 1917) (holding that a promise to marry was consideration). For a description of the possible influence of law reviews on Cardozo's opinion in *DeCicco*, see Joshua P. Davis, *Cardozo's Judicial Craft and What Cases Come to Mean*, 68 N.Y.U. L. REV. 777, 801-02 (1993).

56. *DeCicco*, 117 N.E. at 808. The articles cited were: James B. Ames, *Two Theories of Consideration: Unilateral Contracts*, 12 HARV. L. REV. 515 (1899); James B. Ames, *Two Theories of Consideration: Bilateral Contracts*, 13 HARV. L. REV. 29 (1899); Christopher C. Langdell, *Mutual Promises as a Consideration*, 14 HARV. L. REV. 496 (1900); Joseph H. Beale, *Notes on Consideration*, 17 HARV. L. REV. 71 (1903); Frederick Pollack, *Afterthoughts on Consideration*, 17 L.Q. REV. 415 (1901); Samuel Williston, *Successive Promises of the Same Performance*, 8 HARV. L. REV. 27 (1894); Samuel Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503 (1914).

57. 135 N.E. 861 (N.Y. 1922).

58. *Id.* at 862 (citing William D. Lewis, *Want of Mutuality in Specific Performance*, 40 AM. L. REG. (N.S.) 270, 382, 447, 507, 559 (1901); 42 AM. L. REV. (N.S.) 591 (1902).

to apply the popular general rule that actions for specific performance required mutuality of remedy when a contract was made. Later, in *The Growth of the Law*, he praised the role these scholars had in preventing courts from continuing the harmful overextension of the old doctrine.⁶⁰ Cardozo also used topical review articles as authority to decide questions arising from recent international events. For example, *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*,⁶¹ an opinion holding that a Russian bank continued to exist as a legal entity in New York despite its nationalization by the Bolsheviks, included two articles relating to the legal implications of Soviet activity.⁶²

C. The Restatement

Cardozo was a founding member of the American Law Institute and an early promoter of the *Restatements*.⁶³ As would be expected, he cited to them as soon as they were written, using the *Restatement of Contracts*⁶⁴ and the *Restatement of Agency*⁶⁵ in 1929. Cardozo did not cite to the *Restatements* very often in the following years, but his totals still exceeded those of his colleagues. Cardozo's New York majority opinions contain eighteen citations to the *Restatements*, compared to only fifteen for the remainder of the court.⁶⁶ On the Supreme Court, Cardozo referred to the *Restatements* seven times in majority opinions, equal to the combined total of the other eight justices.

59. *Id.* at 862 (citing Harlan F. Stone, *The "Mutuality" Rule in New York*, 16 COL. L. REV. 443 (1916)).

60. CARDOZO II, *supra* note 28, at 14-16.

61. 170 N.E. 479 (N.Y. 1930).

62. Louis Connick, *The Effect of Soviet Decrees in American Courts*, 34 YALE L.J. 499 (1925); Paul Wohl, *Nationalization of Joint Stock Banking Corporations in Soviet Russia*, 75 U. PA. L. REV. 385 (1927). *Petrogradsky*, 170 N.E. at 481. Another example is *Techt v. Hughes*, 128 N.E. 185 (N.Y. 1920) (holding that an enemy alien could inherit property in New York). Cited in this case are T.E. Scrutton, *The Law and the War*, 34 L.Q. REV. 116 (1918); Arnold D. McNair, *Enemy Litigants*, 34 L.Q. REV. 134 (1918); Clyde M. Picciotto, *Alien Enemies in English Law*, 27 YALE L.J. 167 (1917); Comment, *The Right of Alien Enemies to Sue*, 27 YALE L.J. 104 (1917). *Id.* at 187.

Another example is *Sokoloff v. National City Bank*, 145 N.E. 917 (N.Y. 1924). It was held here that the confiscation of the assets of the Bank's Petrograd branch by the then unrecognized Communist government was no defense to dishonoring the plaintiff's check. *Id.* at 919. Cited in the opinion were Edwin D. Dickinson, *The Unrecognized Government or State in English and American Law*, 22 MICH. L. REV. 29 (1923), and Comment, *Can an Unrecognized Government Sue?* 31 YALE L.J. 535 (1922). *Id.* at 918.

63. For comments praising the work of the ALI, see CARDOZO, *supra* note 22, at 121-41.

64. Cited in *Schuylkill Fuel Corp. v. B.T.C. Nieberg Realty Corp.*, 165 N.E. 456, 457 (N.Y. 1929).

65. Cited in *Bosak v. Parrish*, 169 N.E. 280, 282 (1929).

66. Cardozo's heaviest use of the *Restatements* came in *Ultramares*, which contained cites to the *Restatement of Contracts*, *Torts*, and *Agency*. *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (1931).

Cardozo's levels of citation to the *Restatements* are far lower than for the legal treatises, and more closely approximate his citation rates to the lightly regarded encyclopedias and ALR annotations.⁶⁷ Thus, even Cardozo when looking for an authoritative synthesis of the law, was far more likely to cite to a legal treatise than to the *Restatements*.⁶⁸

D. Legal Encyclopedias and Annotations

Encyclopedias and annotations are not generally well regarded as sources of authority. Nevertheless, judges do cite to them, even jurists with scholarly reputations like Cardozo. He was responsible for thirty of the 97 encyclopedia cites in Court of Appeals majority opinions from 1914 to 1932. The most remarkable thing about Cardozo's cites to encyclopedias is that all but one is to *Halsbury's Laws of England*.⁶⁹ *Halsbury's* was popular with the other judges on the court, but unlike Cardozo they also made repeated references to American titles.⁷⁰ Encyclopedia cites were very rare on the Supreme Court between 1932 and 1937, with a grand total of only three, two by Cardozo to *Halsbury's*⁷¹ and one by Brandeis to *Corpus Juris*.⁷²

The Court of Appeals made even less use of LRA or ALR annotations than it did of the encyclopedias. These sources were cited only 29 times in

67. The *Restatement* has also fared poorly in several other studies when compared to encyclopedias and the ALR. Merryman, *supra* note 1, at 405 tbl. 14; Mann, *supra* note 1, at 58 tbl. VII-A; Manz, *supra* note 1, at 142; George R. Smith, *The Current Opinions of the Supreme Court of Arkansas*, 1 ARK. L. REV. 89, 91 (1947). Only Daniels' 1978 totals for the Supreme Court show the *Restatement* with a clear edge of 21 to seven. Daniels, *supra* note 1, at 6 tbl. 2.

68. One case where Cardozo cited but did not follow a *Restatement* provision was *Cullings v. Goetz*, 176 N.E. 397 (N.Y. 1931). If Cardozo had followed section 227 of the *Restatement of Torts*, he could have held a landlord liable for injuries to a tenant's guest caused by a defective garage door. Instead, Cardozo opted for the majority rule of no liability, demonstrating its predominance by citing 10 New York cases, seven from other states and three from Britain, as well as *Pollock on Torts* and *Salmond on Torts*. *Id.* at 399. Posner believes Cardozo chose not to follow the *Restatement* because he was convinced he could not carry the rest of the court with him. POSNER, *supra* note 5, at 120.

69. The one exception is a cite to *Ruling Case Law* in *Loucks v. Standard Oil Co.*, 224 N.Y. 198, 199 (1918).

70. Besides *Halsbury's*, encyclopedias that were available to the judges included the *American & English Encyclopedia of Law*, the *Encyclopedia of Pleading & Practice*, the *Cyclopedia of Law and Procedure*, *Corpus Juris* and *Ruling Case Law*. Citations to these titles were as follows:

	A&E	C.J.	Cyc.	Enc.P.P.	Hals.	R.C.L.
Cardozo	0	0	0	0	31	1
All Others	4	13	7	1	28	26

For a discussion of the nature and origins of legal encyclopedias, see Merryman I, *supra* note 1, at 634-46.

71. Cited in *Hubbard v. Commissioner*, 296 U.S. 300, 310 n.4 (1935); *Steward Machine Co. v. Davis*, 301 U.S. 548, 580 (1937).

72. Cited in *Loughran v. Loughran*, 292 U.S. 216, 227 n.8 (1934).

majority opinions, including five references by Cardozo. Similar to the Court of Appeals, low LRA and ALR rates prevailed on the Supreme Court, with only fourteen cites in majority opinions from 1932 to 1937. Here, Cardozo is the most frequent citer with seven references, followed by Hughes with five and Brandeis, McReynolds and Sutherland with one each.

E. Legislative Materials

Legislative materials were only a minor factor as a source of authority in New York during the Cardozo era. A general belief in the plain meaning rule and a scarcity of sources of legislative intent greatly limited use of this authority.⁷³ There were only nineteen such cites in majority opinions between 1914 and 1932, four by Cardozo.⁷⁴

With far more resources available, members of the Supreme Court made correspondingly higher use of sources of legislative intent.⁷⁵ Citations to House or Senate reports or to the *Congressional Record* were relatively common. Examples of Cardozo opinions that utilized this material include *United States v. Memphis Cotton Oil Co.*,⁷⁶ *Norwegian Nitrogen v. United States*,⁷⁷ and *DuParquet Huot & Moneuse Co. v. Evans*.⁷⁸ Along with Brandeis and Stone, Cardozo was one of the heavier users of such materials, although the most prolific citer in this area was Justice Hughes.

F. Other Secondary Sources

In addition to the traditional legal sources of authority, judges have consistently cited to an eclectic mix of material, including but not limited to various reports, attorney general opinions, dictionaries, books and magazines.⁷⁹ Cardozo was no exception, citing to a wide variety of such materials at the highest rate of any justice on the Court of Appeals.

73. See generally ROBERT ALAN CARTER, *LEGISLATIVE INTENT IN NEW YORK* (1981) (description of available legislative materials). See also ELLEN M. GIBSON, *NEW YORK LEGAL RESEARCH GUIDE* 103-16 (1988).

74. Carter, *supra* note 73, at 13-14. See, e.g., *Carrier v. Carrier*, 123 N.E. 135, 137 (N.Y. 1919) (Reviser's Notes to 1 R.S., §§ 14-22, relating to the power of an owner to impose future limitations on an estate; Revisor's Notes were explanations to amendments); *Hoadley v. Hoadley*, 155 N.E. 728, 729 (N.Y. 1927) (Revisor's Notes to 2 R.S. 138, §§ 3-5, dealing with voidability of contracts); *People v. Ingber*, 162 N.E. 87, 88 (N.Y. 1928) (Revisers Notes to 2 R.S. 700, § 11); *Doyle v. Hofstader*, 177 N.E. 489 (N.Y. 1931) (concurrent resolution regarding an investigation into city agencies).

75. Use of these materials by the Court has risen sharply since the 1930's. See Jorge L. Carro and Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 9 J. OF LEGISLATION 282, 291 tbls. I, II (1982).

76. 288 U.S. 62, 63 (1933) (reports containing statistics on overassessment).

77. 288 U.S. 294, 305-06 (1933) (the history of the Tariff Act of 1922).

78. 297 U.S. 216, 219-21 (1936) (the history of Section 77B of the Bankruptcy Act).

79. For an extensive list of non-legal materials cited by the Supreme Court, see Daniels, *supra* note 1, at 19 nn.68-81, apps. 8-10 at 39-43.

Examples include treatises on banking in *Block v. Pennsylvania Exchange Bank*,⁸⁰ diplomatic correspondence in *Matter of D'Adamo*,⁸¹ an estate case; and works on colonial history in *Beers v. Hotchkiss*,⁸² a real property opinion. Unlike several other Court of Appeals judges, Cardozo never included any references to the *Old* or *New Testament*, nor to any novels or popular plays.⁸³

The Supreme Court made frequent use of miscellaneous secondary material, and Cardozo's use of these materials on the high court was correspondingly higher, although he was behind Brandeis, Hughes, and Stone. Most notably, his majority opinions cite miscellaneous secondary materials less than half as frequently do those of Brandeis. This disparity results from the relative dearth in Cardozo's opinions of citations to the economic and social material so often found in Brandeis' opinions, particularly in Brandeis' dissents and concurrences.⁸⁴

IV. PHILOSOPHY, STYLE, AND CITATION PRACTICE

Cardozo's high citation rates raise the question of how much authority is appropriate in an opinion. Are opinions with many citations in any way superior or are they merely padded with unnecessary material? This is a difficult question because, as one commentator has observed: "Jurisprudential theories (regarding citation patterns) typically offer little basis for predicting the amount of authority a decision will require."⁸⁵ Certainly there is no merit in mere volume of citations. Professor Wigmore criticized lengthy opinions that "redundantly quote well settled platitudes. . . ."⁸⁶ He also found fault with the "hodge-podge use by one State Court of the decisions of

80. 170 N.E. 900, 901 (N.Y. 1930).

81. 106 N.E. 81, 84 (N.Y. 1914).

82. 175 N.E. 506, 511 (N.Y. 1931).

83. The leader in this area was Judge Pound who cited 2 *Corinthians* 3:6 in *Heller v. Pope*, 164 N.E. 881, 882 (N.Y. 1928), *Ephesians* 5:24 in his dissent in *Van Allen v. Van Allen*, 159 N.E. 656, 661 (N.Y. 1927), *The Pickwick Papers*, *Lothair*, *It's Never Too Late*, *Hard Cash* and *Uncle Tom's Cabin* in *Corrigan v. Bobbs-Merrill*, 126 N.E. 260, 262 (N.Y. 1920), *Revelations*, Ch. 17-18, and *Shaw's Mrs. Warren's Profession*, in *People v. Wendling*, 180 N.E. 169 (N.Y. 1932). Cardozo included literary references in his extra-judicial writings. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 166 (1921) (citing Robert Browning's poem *Parcelsus*); Benjamin N. Cardozo, *Values*, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 3 (1947) (citing Alfred Noyes' poem *Watchers of the Skies*); CARDOZO, *supra* note 22, at 140 (citing Jonathan Swift's *Tale of a Tub*).

84. Cardozo's law clerk Alan M. Strook said Cardozo regarded Brandeis as too pedantic and resisted Brandeis' efforts to have Cardozo read this material. Rauh et al., *supra* note 8, at 21.

85. Peter Harris, *Difficult Cases and the Display of Authority*, 1 J.L. ECON. & ORGANIZATION 209, 210 (1985).

86. WIGMORE, *supra* note 42, at 244.

other State Courts.”⁸⁷ Professor Merryman reserves his criticism for judges who regularly cite less authority than their colleagues.⁸⁸ Merryman agrees that criticism of redundancy has merit, but believes the extreme application of this argument is simplistic, stating “[i]t assumes an imaginary world in which issues easily formulate themselves and the law is clear and readily applied to produce decisions.”⁸⁹ Merryman proposes a standard of “enough”—enough citation to show the continuous relation with prior law, enough to show that the judge has done his homework, enough to justify the decision as the law, enough to persuade us that it is right, and so on.”⁹⁰ Merryman also believes, however, that if overcomplication is avoided, a larger number of authorities is to be preferred since, “the broader the question and the more sensitively perceived its implications are, the greater the number of authorities potentially applicable to its decision.”⁹¹

If the amount of authority applicable to a case is determined by how the questions of the case are characterized, then Cardozo’s comments in *The Nature of the Judicial Process* regarding factors to be considered in decision-making help explain his high citation rate. Cardozo states that the judicial process must involve consideration of competing logic, with the result determined by such factors as history, custom, social utility, a sense of justice and the spirit of the law.⁹² Put into actual practice, Cardozo’s philosophy produced opinions which, as favorably described by one commentator, “lay bare the competing elements in a case and then make it appear as if their clash had been resolved by someone other than himself.”⁹³ In contrast, another observer calls Cardozo’s approach “elliptical, convoluted, [and] at times incomprehensible.”⁹⁴ However characterized, it is Cardozo’s method of deciding cases which makes him such a heavy citer.

Cardozo’s incremental approach to legal change also contributed to his heavy use of authority. As one commentator states, “Cardozo was not an avid creator of wildly new doctrine. He was a slow and cautious creator of expansions of old doctrine.”⁹⁵ Cardozo’s work in torts has been described

87. *Id.* at 245. For commentary claiming to find the faults enumerated by Wigmore in the work of a state supreme court, see generally Smith, *supra* note 67, at 96. The author uses as an example of overcitation, the string-cite laden opinion of *Missouri v. Foreman*, 119 S.W.2d 747 (Ark. 1938), with 85 case citations. *Id.* See also William L. Reynolds II, *The Court of Appeals of Maryland: Roles, Work and Performance*, 38 MD. L. REV. 148, 155 (1978) (referring to *Lightfoot v. State*, 360 A.2d 426 (Md. 1976) (54 case citations and several secondary citations, mostly in footnotes)).

88. Merryman II, *supra* note 1, at 418.

89. *Id.* at 421.

90. *Id.* at 418.

91. *Id.* at 422.

92. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 43 (1921).

93. WHITE, *supra* note 7, at 260.

94. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 75 (1977).

95. Andrew L. Kaufman, *Judging New York Style: A Brief Retrospective of Two New York Judges*, 1988 Y.B. SUP. CT. HIST. SOC’Y 60, 65.

as one of clarifying principles.⁹⁶ Professor Corbin states that Cardozo's contract cases produced an evolution of doctrines, "as reasonably required by the new facts before the courts."⁹⁷ This was the result of Cardozo's recognition of the "practical necessity for tying forward-looking opinions into the precedential past in order to make them acceptable to other judges, the bar and even to a tradition-minded public."⁹⁸ This evolution was achieved with more detailed discussions of legal doctrines and their development, necessitating a high citation rate.

An example of how Cardozo's opinions came to include copious numbers of citations is his famous ruling in *Allegheny College v. National Chautauqua Bank*.⁹⁹ This case involved a suit the college brought against an estate to collect the unpaid portion of a pledge revoked before the donor died. In a controversial decision, Cardozo ruled the gift was in fact supported by consideration. The opinion, as dissected by Professor Alfred Konefsky, consisted of a discussion of charitable subscriptions in New York, a description of promissory estoppel as a means to show the historical expansion of consideration, the fitting of charitable subscriptions into consideration, and a search for consideration in the facts.¹⁰⁰

In traversing this path, Cardozo cited to 34 cases, including one from 1587,¹⁰¹ as well as six treatises¹⁰² and three law review articles.¹⁰³ Judge Henry Kellogg's far shorter dissent, which found there was no contract

96. Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372 (1939).

97. Arthur L. Corbin, *Mr. Justice Cardozo and the Law of Contract*, 52 HARV. L. REV. 408, 409 (1939).

98. Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 724 (1979).

99. 159 N.E. 173 (N.Y. 1927).

100. Alfred S. Konefsky, *How to Read, or at Least Not Misread Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 645, 687 (1987). The author maintains the decision is so hard to understand that even Corbin misread it. *Id.* at 649-52.

101. *Allegheny College*, 159 N.E. at 176. Cardozo cited *Sturlyn v. Albany*, 78 Eng. Rep. 326 (1587). The case was utilized for the statement "when a thing is done by the plaintiff, be it ever so small, this is a sufficient consideration to ground the action."

102. *Allegheny College*, 159 N.E. at 174. One of the treatises is *The Common Law*, cited for its statement that courts were moving toward eliminating the distinction between detrimental reliance and the detriment which is the motive or the inducement.

103. *Id.* at 176.

and no consideration, contained only five cases and two contracts treaties.¹⁰⁴ The citation disparity in *Allegheny College* is not unusual. On the average, Cardozo outcited his dissenters by more than ten cases per opinion.¹⁰⁵ In *Allegheny College*, part of the imbalance can be attributed to length. But other cases show that disparities in citation frequency were sometimes equally wide where the difference in length was not as great. For example, in *MacPherson v. Buick Motor Co.*¹⁰⁶ the majority opinion contained citations to 27 cases, four treatises and one legal periodical. In an example of the significant use Cardozo found for English cases, he discussed at length Lord Esher's opinion in *Heaven v. Pender*,¹⁰⁷ which held a manufacturer had a duty, irrespective of contract, to those persons supplied with a product. Chief Judge Bartlett's shorter dissent arguing for the old general rule of no liability without privity only cited to eight cases and one treatise.¹⁰⁸ The majority

104. The two opinions compared as follows:

	<i>Cardozo</i>	<i>Kellogg</i>
Length	8.5	4.0
Case Cites		
N.Y. Ct. App.	16	4
Other N.Y.	1	0
U.S. Sup. Ct.	1	0
Other State	14	1
British	1	1
Legal Treatises	6	2
Legal Periodicals	3	0

105. A comparison of Cardozo's New York opinions to their accompanying dissents produces the following results:

	<i>avg. cases</i>	<i>avg. sec.</i>	<i>avg. pp.</i>
Cardozo	17.56	3.27	6.5
Dissents	7.49	.46	5.4

Non-Cardozo opinions outcite their dissents by 9.65 case citations to 7.58. Harris' study also shows a high level of citations in opinions where a dissent is present. Harris, *supra* note 85, at 210-11. Another study found fewer cites in opinions with dissents. Johnson, *supra* note 2, at 518-19. The author theorized that the cases with more citations discouraged dissents. *Id.*

106. 111 N.E. 1050 (N.Y. 1916). For a modern look at *MacPherson*, see generally Walter Probst, *Applied Jurisprudence: A Case Study of Interpretive Reasoning in MacPherson v. Buick and Its Precedents*, 21 U.C. DAVIS L. REV. 789 (1989).

107. 11 Q.B.D. 503 (1883).

108. *Id.* at 395-40 (Bartlett, J., dissenting). Cardozo's majority opinion, Bartlett's dissent, and the two previous Appellate Division opinions holding Buick liable, *MacPherson v. Buick Motor Co.*, 138 N.Y.S. 224 (3d Dept. 1912); *MacPherson v. Buick Motor Co.*, 145 N.Y.S. 462 (3d Dept. 1914), compare as follows:

opinion's citation count was higher because Cardozo included a more extensive review of the development of products liability law, distinguished more potentially negative cases, and added a discussion of the then current state of the law in Britain.

In *Palsgraf v. Long Island R.R.*, Cardozo's majority opinion contained more than twice as many citations as William Andrews' dissent, despite being three pages shorter.¹⁰⁹ As in *MacPherson*, Cardozo gave a more detailed treatment of the law and its historical development than did the dissent. Cardozo's key argument that to find for the plaintiff would entail liability for any and all consequences however novel or extraordinary was backed by four cases, three treatises and a casenote.¹¹⁰ One of Cardozo's most famous contracts opinions, *Jacobs & Young v. Kent*,¹¹¹ the Reading pipe case, used

	Cardozo	Bartlett	Betts (1912)	Kellogg (1914)
Length	10.5	6.5	5.0	4.0
Case Cite				
N.Y. Ct. App.	11	4	6	1
Lower N.Y.	3	0	2	1
U.S. Sup. Ct.	1	0	0	0
Lower federal	2	2	3	0
Other state	2	0	0	0
English	8	2	0	0
Treatises	4	1	1	0
Legal Periodicals	1	0	0	0
Legal Encys.	0	0	1	0
Total	32	9	12	2

109. 162 N.E. 99 (N.Y. 1928). For a critical comparison of Cardozo's *Palsgraf* opinion and Andrews's dissent, see POSNER, *supra* note 5, at 45-47. Posner believes the ineptitude of the dissent enhanced the importance of the majority opinion. *Id.*

110. *Palsgraf*, 162 N.E. at 101. Cited as authority for this position were *Bird v. St. Paul Fire & Marine Ins. Co.*, 120 N.E. 86 (N.Y. 1918) (a Cardozo opinion); *Ehrgott v. Mayor of N.Y.* (1884); *Smith v. London & S.W. Ry.*, L.R. [6 C.P. 14] (1870); *Matter of Polemis*, L.R. [1921] 3 K.B. 560; *Beven on Negligence*; Street, *Foundations of Legal Liability*; Green, *Rationale of Proximate Cause*; Note, 44 L.Q. REV. 142 (1928). A comparison of the citations in Cardozo's and Andrews' opinions as well as those in the Appellate Division decision finding for Mrs. *Palsgraf*, and its dissent, *Palsgraf v. Long Island R.R.*, 225 N.Y.S. 412 (2d Dept. 1927), is as follows:

	Cardozo	Andrews	Seeger	Lazansky
Length	6.5	9.5	1.5	.5
Case Cites				
N.Y. Ct. App.	12	10	0	0
Other N.Y.	0	0	2	0
U.S. Sup. Ct.	2	0	0	0
Other State	6	3	0	0
English	5	2	1	0
Legal Treatises	13	2	0	0
Legal Periodicals	3	0	0	0
Total	41	17	3	0

111. 129 N.E. 889 (N.Y. 1921).

twice as much authority as did Judge McLaughlin's dissent of almost equal length. Again, the reason for the disparity was Cardozo's more extensive discussion of the law.¹¹²

A similar disparity in frequency of citations to authority exists between Cardozo's majority opinion in *Atlantic Coast Line v. Florida*¹¹³ and the dissent of Justice Roberts, the second lightest citer on the Supreme Court. In holding that the railroad need not return money it collected under Interstate Commerce Commissioner rates which were later voided,¹¹⁴ Cardozo cited well over twice as much authority as did the dissent. Almost half his citations, including two treatises and four foreign cases, related to the question of restitution. Roberts cited no opinions on this issue. Instead, most of his precedents were railroad rate cases.¹¹⁵

A dissent by Cardozo which illustrates how his approach produced more citations is found in *People v. Grutz*,¹¹⁶ a noted New York evidence decision. Here, Judge William Werner, writing for the majority, applied the standard rule that a person may not be proven guilty by showing he committed other crimes.¹¹⁷ Cardozo took the position that the facts of the case made the defendant's prior criminal activities admissible as evidence of

112. Comparing the majority, the dissent, and the Appellate Division opinion finding for Jacobs & Young, *Jacobs & Young v. Kent*, 175 N.Y.S. 281 (1st Dept. 1919), produced the following results:

	<i>Cardozo</i>	<i>McLaughlin</i>	<i>Dowling</i>
Length	4.0	3.5	2.5
Case Cites			
N.Y. Ct. App.	11	9	0
Other State	4	0	0
British	2	0	0
Legal Treatise	2	0	0
Total	19	9	0

113. 295 U.S. 301 (1935).

114. *Id.* at 312.

115. A comparison of the *Atlantic Coast* opinions produced the following results:

	<i>Cardozo</i>	<i>Roberts</i>
Length	13.0	11.5
Case Cites		
U.S. Supreme Court	24	11
Lower federal	0	1
State	13	5
English	3	0
Canadian (Nova Scotia)	1	0
Legal Treatises	2	0
Other (ICC Report)	1	0
Total	44	17

116. 105 N.E. 843 (1914).

117. *Id.* at 845.

criminal agency.¹¹⁸ This argument, requiring discussion of more issues, produced a dissent with more than twice as many citations as the only slightly shorter majority opinion.¹¹⁹

V. REPUTATION AND THE USE OF AUTHORITY

Cardozo, a heavy citer, is regarded as a great judge. This pattern raises a question: are the best judges the heavy citers? Two California Supreme Court justices with excellent reputations, Roger Traynor and Mathew Tobriner, were both heavy citers, a fact that led Professor Merryman to conclude that a high citation rate was a possible indicator of judicial quality.¹²⁰ In New York, none of the better-regarded appeal court judges who served with Cardozo cited cases at rates much above average. The two whom Judge Posner regards as most comparable to Cardozo, Crane and Pound,¹²¹ had citation rates slightly below the average rate of Cardozo's colleagues, 7.15 cites per opinion. Chief Judge Hiscock was a bit above the mean at 7.71, and Judge Lehman was below it with 5.5. The second heaviest citer, Judge Collin at 11.76, has faded into obscurity.

The theory that great judges are heavy citers finds better support in an analysis of Cardozo's term on the Supreme Court. Here, the four heaviest citers, Brandeis, Cardozo, Hughes and Stone have achieved the best reputations. In addition, Justice McReynolds, who probably has the poorest reputation of the group,¹²² and who was heavily criticized both for his judicial opinions and for his caustic personality and social prejudices, was the lightest citer on the Court. McReynold's case citation rate of 6.05 is less than

118. *Id.* at 847.

119. A comparison of Cardozo's and Werner's opinions in *Grutz* gives the following results:

	<i>Cardozo</i>	<i>Werner</i>
Length	8.0	7.5
Case Cites		
N.Y. Ct. App.	3	5
Other N.Y.	1	0
U.S. Sup. Ct.	2	0
Lower federal	1	0
Other state	2	0
English	6	0
Legal Treatises	1	1
Total	16	6

120. Merryman II, *supra* note 1, at 419.

121. POSNER, *supra* note 5, at 84.

122. In the Blaustein-Mersky rankings, McReynolds is tied with Charles E. Whittaker for last place among the failures. BLAUSTEIN & MERSKY, *supra* note 5, at 40. For a discussion of which justice was least significant, see generally David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 446 (1983); Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV. 481 (1983). The choice here is Thomas Todd (1808-1825), selected for writing only fourteen opinions in seventeen terms. *Id.* at 497 app. A.

half that of Roberts, the next lightest citer, and only one-fourth that of Cardozo.

Reputations are both subjective and difficult to measure. One empirical method used to acquire evidence of reputation is to tally how often an individual's work has been subsequently cited. However, application of this approach to judicial opinions, as opposed to articles and books, is controversial and problematic. Cases may be cited for many reasons, including some which have nothing to do with perceived quality.¹²³

It is easier to determine whether the heaviest users of authority are themselves cited more often, than it is to ascertain whether they produced superior opinions.¹²⁴ This is certainly true of Cardozo's New York opinions. Table I-8 shows that he led by a wide margin in both total citations and citations per case.¹²⁵ Results for the other judges are mixed. The better-

123. See POSNER, *supra* note 5, at 80-91. For a criticism of Posner's efforts, as well as lists of articles on citation analysis and a discussion of the methods, problems, and controversies involved, see generally Virgil Blake, *Citation Studies—The Missing Background*, 12 CARDOZO L. REV. 1961 (1991). Another discussion of citation analysis appears in Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1540-44 (1985).

An example of how citation counts can be misleading is found in Cardozo's opinion in *Welch v. Helvering*, 290 U.S. 111 (1933), a tax case. *Shepard's* lists over 4300 citations to this opinion, taking up nine pages (582-91) in *United States Citations*. This is far more than the better known double jeopardy decision, *Palko v. Connecticut*, 302 U.S. 319 (1937), cited 943 times by 1994. *Welch* has only been cited 19 times by the Supreme Court and 21 times by the states. Over 3,500 of the *Welch* citations are in tax court decisions. *Palko* has been cited 153 times by the Supreme Court and 407 times by state courts. Thus, a reliance on a citation count to ascertain a case's importance here would lead to the erroneous conclusion that *Welch* is more significant than *Palko*.

For a detailed discussion of the reasons why authority is cited, see Merryman I, *supra* note 1, at 621-26.

124. The multi-state study found that cases subsequently cited more than fifty times had approximately three times the citations as other opinions. Friedman et al., *supra* note 1, at 815. This is hardly surprising. Cases with large numbers of citations are more apt to be cited because they are likely to touch on more issues and consequently have broader application. By 1994, New York Court of Appeals opinions written between 1914 and 1932 compared as follows:

Number of case cites	total cases	total times	cited 100+ pct.
0	280	1	.4
1-10	2,059	42	2.0
11-20	609	51	8.4
21-30	194	42	21.6
31-40	55	14	25.5
41+	27	9	33.3

125. Cardozo's position is certain to continue to improve. If only the 1989-1994 period is considered, he trails the rest of the court by only 1350 to 1026. Posner's study showed Cardozo's opinions to have a greater durability than those of Stone or Brandeis. POSNER, *supra* note 5, at 87 fig. 4.

The sixteen most cited Court of Appeals cases for 1914-1932 are all Cardozo opinions. By 1994, half of these had been cited over 350 times. They are as follows:
 969 - *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916);
 861 - *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928);
 719 - *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928);
 514 - *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931);

known New York judges, Crane, Hiscock and Pound, were all close-to-average citers. All three rank high in total citations due to their lengthy service, but are no better than average in citations per case. The leaders here are the less well-known Collin and Hubbs, both above-average users of authority. Those cited least per case are Bartlett and Hogan, the two lightest citers.

As previously noted, during Cardozo's tenure the heaviest citers on the U.S. Supreme Court also had the best reputations. There is, however, no general correlation between this factor and how often a justice's opinions are later cited. Table II-8 shows the most-cited justice to be the well-regarded Hughes, one of the heavier users of authority. However, the less-esteemed Sutherland, an average citer,¹²⁶ narrowly surpassed Cardozo for second place in total citations, and led the Court in cites per case. Trailing by a considerable margin in both categories is Brandeis. Cited least per opinion is McReynolds, the Court's lightest citer.

The infrequency with which Brandeis, Cardozo and Stone were cited reflects the Court's politics and the time parameters of this study rather than an inverse relationship between reputation and subsequent citation. As Chief Justice, Hughes was able to take a major share of significant cases. In contrast, Cardozo, Brandeis, and Stone, as members of the Court's liberal minority for much of the 1932-1937 period, did not get to write as many important opinions. Finally, major Sutherland opinions such as *Powell v. Alabama*,¹²⁷ *Grosjean v. American Press Co.*,¹²⁸ and *Carter v. Carter Coal Co.*¹²⁹ fell within the period studied, while heavily cited Brandeis

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- 492 - *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915 (N.Y. 1917);
 440 - *Schuykill Fuel Co. v. B & C Nieberg Realty Corp.*, 165 N.E. 456 (N.Y. 1929);
 395 - *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922);
 371 - *Wood v. Duff-Gordon*, 118 N.E. 214 (N.Y. 1917).

The highest total for another judge was 243 cites to Collin's opinion in *Miller v. Schloss*, 113 N.E. 337 (N.Y. 1916), a contracts decision. The most cited cases for the better known judges were:

- 236 - *Crane, People v. Grogan*, 183 N.E. 273 (N.Y. 1932);
 232 - *Hiscock, Wulfsohn v. Burden*, 150 N.E. 120 (N.Y. 1925);
 225 - *Lehman, Dowsey v. Village of Kensington*, 177 N.E. 427 (N.Y. 1931);
 211 - *Pound, People ex rel Durham Realty Corp. v. LaFetra*, 130 N.E. 601 (N.Y. 1921).

126. Sutherland wrote the most cited opinion of the 1932-1937 period. The 10 most-cited non-tax opinions were:

- 3059 - *Sutherland, Blockberger v. United States*, 284 U.S. 299 (1932);
 2574 - *Sutherland, Powell v. Alabama*, 287 U.S. 45 (1932);
 1735 - *Sutherland, Berger v. United States*, 295 U.S. 78 (1935);
 1324 - *Roberts, Nebbia v. New York*, 291 U.S. 502 (1934);
 1292 - *Hughes, Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937);
 1261 - *Hughes, Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936);
 1251 - *Hughes, National Labor Rel. Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937);
 1236 - *Hughes, Sorrells v. United States*, 287 U.S. 435 (1932);
 1046 - *Hughes, Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934);
 1034 - *Cardozo, Snyder v. Massachusetts*, 291 U.S. 97 (1934).

127. 287 U.S. 45 (1932).

128. 297 U.S. 233 (1936).

129. 298 U.S. 238 (1936).

cases like *Arizona v. California*¹³⁰ and *Erie R.R. v. Tompkins*¹³¹ do not, since Cardozo had retired from the Court before they were written.

A judge's reputation may in part rest on famous dissents or concurrences.¹³² These citations are particularly useful since they are wholly discretionary.¹³³ Table II-9 shows Brandeis' lengthy and heavily documented concurring and dissenting opinions led by a wide margin, with Cardozo's second. In comparison, citations to the dissents and concurrences of the Four Horsemen are few in number.¹³⁴

VI. CITATIONS AND IDEOLOGY

An unavoidable component of reputation is a judge's perceived ideological position. As the results of the Blaustein-Mersky study indicate, judges esteemed as innovative or progressive are generally more highly regarded than conservatives.¹³⁵ Theoretically, ideological orientation could affect citation practice. It might be postulated that a forward-looking judge would cite fewer cases because she would omit older cases she regarded as obsolete. In his day, Cardozo was considered a progressive liberal.¹³⁶ However, as this analysis proves, Cardozo's philosophy and style resulted in

130. 283 U.S. 423 (1931).

131. 304 U.S. 64 (1938).

132. These opinions do not appear in a count based on *Shepard's* because these citators do not include dissents or concurrences.

133. Another example of wholly discretionary citations are those by foreign courts. In this category, Cardozo completely dominates. Even a search limited to just the past few years results in numerous citations from a variety of countries. Some of these include:

1. England: *Billson v. Residential Apts., Ltd.*, [1992] 1 A.C. 494, 529 (citing *Graf v. Hope Building Corp.*, 171 N.E. 884 (N.Y. 1930)); *Alcock v. Chief Constable of the South Yorkshire Police*, [1992] 1 A.C. 310, 350, 364 (citing *Wagner v. International Ry.*, 133 N.E. 437 (N.Y. 1921)); *Ruxley Electronics and Construction Ltd. v. Forsyth*, [1995] 3 All E.R. 268 (C.A.) (citing *Jacobs & Youngs v. Kent*, 129 N.E. 889 (1921)); *Galoo, Ltd. v. Bright Grahame Murray*, [1995] 1 All E.R. 16, 33 (C.A.) (citing *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931));

2. Ireland: *Walsh v. Family Planning Services, Ltd.*, [1992] 1 I.R., 505 (Ir. S.C.) (citing *Schloendorff v. Society of New York Hospital*, 105 N.E. 92 (N.Y. 1914));

3. Australia: *Bryan v. Maloney*, No. 95/011 (Austl. Mar. 23, 1995), (LEXIS Aust. library, Ausmax file) (citing *Ultramares Corp.*);

4. New Zealand: *Benjamin Developments, Ltd. v. Robert Jones (Pacific), Ltd.*, [1994] 3 N.Z.L.R. 189, 197, 203 (citing *Utica City Nat'l Bank v. Gunn*, 118 N.E. 607 (N.Y. 1918));

5. Canada: *Canada v. Committee for the Commonwealth of Canada*, [1991] 1 S.C.R. 139, 170 (citing *Palko v. Connecticut*, 302 U.S. 319 (1937)); *Farro v. Nutone Electrical, Ltd.*, 72 O.R. 2d 637, 640 (1990) (citing *MacPherson v. Buick Motor Co.*, 111 N.E., 1050 (1916));

6. South Africa: *Abrams & Gross v. Cohen*, [1991] 2 S.A.L.R. 301, 308 (A.D.) (citing *Jacobs & Young v. Kent*).

Foreign cites to any of Cardozo's colleagues are rare. Only Brandeis, cited several times in the 1990's by Canadian courts, gathered even a fraction of Cardozo's numbers.

134. Although *Shepard's Citations* does not list dissenting and concurring opinions, citations to them can be discovered through LEXIS or Westlaw. (E.g. Brandeis /s dissent! /s "285 U.S. 22" will retrieve cites to Brandeis' dissent to Hughes opinion in *Crowell v. Benson*, 282 U.S. 22 (1932). A false retrieval would occur if the words Brandeis, dissent, dissented or dissenting, and the *Crowell* citation all appeared as part of a string cite.

135. BLAUSTEIN & MERSKY, *supra* note 5, at 37-40.

136. POSNER, *supra* note 5, at 3.

the citation of an unusual amount of authority of all kinds. His interest in linking his decisions to the past, as shown in Table I-9, resulted in an above-average rate of citation to older New York cases. Table II-10 indicates that although on the Supreme Court Cardozo's rate for older decisions fell to below average, it was still significant.

Citation rates for the other judges on the Court of Appeals do not follow any ideological pattern. For example, Cuthbert Pound, a Republican generally regarded as a liberal,¹³⁷ cited fewer cases overall than the moderate Republican Frank Hiscock,¹³⁸ although Pound had a higher rate for older cases. Democrat Irving Lehman, a light citer,¹³⁹ referred to the same number of older cases as did Hiscock. Samuel Seabury, a Progressive,¹⁴⁰ used more older cases than either of the two Republicans.

On the Supreme Court, where ideological lines were more clearly drawn, there was far more consistency. The three justices generally described as liberals; Cardozo, Brandeis, and Stone, were all heavier citers than the Four Horsemen. But, in the use of older cases, again no consistent pattern emerges. Stone, a liberal, had a higher citation rate for Supreme Court cases over 60 years old than did any conservative. The reactionary McReynolds, by virtue of citing the fewest cases of any kind, used the smallest number of older opinions.

One area where there is a clear difference between liberals and conservatives is in the Supreme Court's use of legal periodicals. Here, the results for all opinions, majority, dissenting and concurring, give the liberals an overwhelming 153 to three lead. This would appear to confirm the theory that the more innovative judges make greater use of law reviews.¹⁴¹ Unfortunately, the difference shown here appears to relate more to the justices' age than to their ideology. The conservatives came from a generation which, Brandeis excepted, rarely cited reviews. As previously

137. For a discussion of Pound's judicial career, see generally Henry W. Edgerton, *A Liberal Judge: Cuthbert W. Pound*, 21 CORNELL L.Q. 7 (1935). See also 21 DICTIONARY OF AMERICAN BIOGRAPHY 606 (1944).

138. A tribute to Hiscock describes him as balancing tradition and innovation. Edward H. Lewis, *A Life of Fulfillment*, 32 CORN. L.Q. 133, 134 (1946). Hiscock believed in adjusting the law to changing conditions, but was also concerned with paternalism and regulation as well as the "hysteria, partisanship, radicalism, and class legislation," purportedly espoused by the Progressive politician Robert La Follette and labor leader Samuel Gompers. Stephen Botein, "Frank Harris Hiscock," DICTIONARY OF AMERICAN BIOGRAPHY 379 (Supp. 4 1974).

139. Lehman was a liberal on civil liberties issues and an opponent of the Four Horsemen. William M. Wieck, "Irving Lehman," DICTIONARY OF AMERICAN BIOGRAPHY 451 (Supp. 3 1973).

140. Seabury favored public ownership of utilities, supported Brandeis' nomination to the Supreme Court, and is remembered for conducting the investigation into New York City political corruption which led to the resignation of the notorious Mayor James J. ("Jimmy") Walker. Herbert Mitgang, "Samuel Seabury," DICTIONARY OF AMERICAN BIOGRAPHY 569, (Supp. 6 1980). For a full length biography, see MITGANG, *THE MAN WHO RODE THE TIGER: THE LIFE AND TIMES OF JUDGE SAMUEL SEABURY* (1963).

141. The multi-state study found that the more innovative state courts cited law reviews more often than the non-innovative state courts did. Friedman et al., *supra* note 1, at 815.

noted, Chief Justice Hughes did not use legal periodicals often, nor did Justice Holmes.¹⁴² As the older justices retired the pattern changed. By the 1940s and 1950s, reviews were commonly used by judges of all political persuasions.¹⁴³

CONCLUSION

Cardozo's intellect and scholarly background produced opinions which included detailed analyses and pedagogic discourses, resulting in the heavy use of authority. A comparison of his citation practices to those of his colleagues from 1914 to 1937 reveals the following:

1. Cardozo used far more primary and secondary authority than the average judge.

2. Cardozo's case citation rate did not differ markedly from other jurists regarded as great.

3. Cardozo, unlike other judges, continued to make significant use of British cases. This reflected his admiration for English jurists and their opinion writing style.

4. Cardozo cited to a wider variety of treatises and exhibited an above-average use of legal periodicals patterns which reflect his scholarly interests.

5. Cardozo's use of the *Restatement* was low when compared to his frequency of citation to treatises and law reviews. But it was above average when compared to Restatement cites by other jurists. Like other judges, he made only minor use of encyclopedias and annotations.

6. Cardozo used more authority, not because he wrote longer opinions, but because he frequently discussed more legal implications and traced more completely the development of the law.

General conclusions which many be drawn about individual judicial citation patterns include:

1. Only judges with major reputations had high case citation rates.

2. Although there are some variations in the use of case authority among the average citers, any differences are small enough to be attributed largely to the cases assigned.

3. The lightest citers achieved their economy in the use of authority by largely ignoring the oldest opinions.

142. Holmes cited reviews in only two opinions between 1924 and 1932. Newland, *supra* note 2, at 479 tbl. 2. None of Cardozo's contemporaries on the Court of Appeals made heavy use of reviews. The only notable difference among them relates to the time of appointment. The judges most likely to cite to the reviews, such as Crane, Hubbs, Lehman and Pound, all joined the Court after Cardozo. This would indicate that, as with the Supreme Court, the onset of higher citation rates for the reviews related to change in the composition of the court.

143. *Id.* at 481. The rates of citation by Black, Douglas, Rutledge and Murphy were not to significantly different from those of Frankfurter, Jackson and Reed.

4. The opinions of the heaviest citers will not necessarily be the most frequently cited cases, because many variables affect the use of legal authority.

5. No notable differences were found in citation practice deriving solely from a liberal or conservative outlook. Liberal judges were as likely to cite older cases as conservatives.

6. There is strong evidence for the theory that the best judges are the heaviest citers. However, to authoritatively answer this question it would be useful to study how the citation practices of other leading figures, such as Felix Frankfurter, Oliver Holmes, Thomas Cooley, and Learned Hand, compare to those they served with. Therefore, the question of whether one can flatly conclude that the heaviest users of authority are also the greatest judges, must await further research.

Additional research on Cardozo's use of citation would be facilitated by publication of the briefs submitted in his cases.¹⁴⁴ Review of these briefs would provide an opportunity to ascertain the extent to which Cardozo utilized the arguments and sources provided by the parties to a case.¹⁴⁵ A related area of inquiry that merits attention is a closer look at how Cardozo actually applied the authorities he cited. There are, of course, numerous other possibilities. Cardozo's reputation makes it certain he will be the subject of books and articles long into the future.

144. The Court of Appeals records and briefs are available on microfilm, but currently only go back to volume 261 of *New York Reports* (1933).

145. For example, Konefsky's study of the Allegheny College briefs indicated that although Cardozo adopted some of the sources found there, neither side mentioned two of his key authorities, *The Common Law* and *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891) (consideration found in plaintiff's pledge to abstain from tobacco and betting on cards or billiards until the age of 21). Konefsky, *supra* note 100, at 661.

Posner's examination of briefs from 20 cases led him to conclude that Cardozo did not follow them as closely as his New York colleagues. POSNER, *supra* note 5, at 144.

APPENDIX I

New York Court of Appeals, 1914-1932

Table I-1

Case Citations Per Opinion

	Majority			Concurring			Dissenting		
	op.	ci.	avg.	op.	ci.	avg.	op.	ci.	avg.
Cardozo	551	7,640	13.87	9	110	12.22	12	150	12.50
Others	2,674	19,146	7.16	68	362	5.32	250	1,895	7.58
Andrews	191	1,238	6.48	5	27	5.40	11	43	3.90
Bartlett	74	322	4.35	5	14	2.80	5	23	4.60
Chase	157	1,540	9.81	3	0	0.00	15	123	8.20
Collin	153	1,800	11.76	2	6	3.00	12	170	14.17
Crane	439	3,010	6.86	15	105	7.00	55	388	6.47
Crouch	12	77	6.42	0	0	0.00	0	0	0.00
Cuddeback	71	401	5.65	0	0	0.00	2	15	7.50
Elkus	14	163	11.64	0	0	0.00	3	45	15.00
Hiscock	248	1,912	7.71	4	29	7.25	4	15	3.75
Hogan	145	700	4.83	1	3	3.00	11	71	6.45
Hornblower+	0	0	0.00	0	0	0.00	0	0	0.00
Hubbs	79	639	8.09	0	0	0.00	4	15	3.75
Kellogg	114	839	7.36	2	9	4.50	13	112	8.62
Lehman	223	1,227	5.50	13	33	3.00	24	83	3.46
McLaughlin	133	968	7.28	3	28	9.33	44	274	6.32
Miller	52	464	8.92	2	6	3.00	0	0	0.00
O'Brien	115	607	5.28	2	12	6.00	11	75	6.82
Pound	390	2,659	6.82	7	18	2.57	25	177	7.08
Seabury	38	330	8.68	3	71	23.67	14	75	5.36
Werner	26	250	9.62	1	1	1.00	1	5	5.00
Total	3,225	26,786	8.30	77	472	6.13	262	2,045	7.80

+ Wrote no opinions. Appointed Feb. 2, 1914, died June 16, 1914.

Table I-2

Average Majority Opinion Length & Case Cites Per Page

	<i>pp.</i>	<i>avg.</i>	<i>cpp.</i>
<i>Cardozo</i>	2,688.0	4.88	2.84
All Others	13,653.0	5.11	1.40
<i>Andrews</i>	770.5	4.03	1.61
<i>Bartlett</i>	359.5	4.85	.90
<i>Chase</i>	976.5	6.22	1.58
<i>Collin</i>	823.0	5.37	2.19
<i>Crane</i>	2,346.5	5.35	1.28
<i>Crouch</i>	38.5	3.21	2.00
<i>Cuddeback</i>	262.0	3.69	1.53
<i>Elkus</i>	104.0	7.43	1.57
<i>Hiscock</i>	1,621.5	6.54	1.18
<i>Hogan</i>	945.5	6.52	.74
<i>Hornblower</i>	0.0	0.00	.00
<i>Hubbs</i>	386.0	4.89	1.66
<i>Kellogg</i>	610.5	5.36	1.37
<i>Lehman</i>	1,291.5	5.79	.95
<i>McLaughlin</i>	543.0	4.08	1.78
<i>Miller</i>	271.0	5.21	1.71
<i>O'Brien</i>	396.0	3.44	1.53
<i>Pound</i>	1,590.0	4.08	1.67
<i>Seabury</i>	136.5	3.59	2.41
<i>Werner</i>	181.0	6.96	1.38

Table I-3

Total Case Citations

Majority	N. Y.	Oth. St.	U.S. S.Ct.	Oth. Fed.	For.	Adm.	Total Cases
Andrews	750	267	113	15	93	0	1,238
Bartlett	218	73	16	10	5	0	322
Cardozo	4,205	1,291	1,237	267	618	22	7,640
Chase	1,197	180	108	37	16	2	1,540
Collin	938	501	170	43	46	2	1,800
Crane	1,978	583	259	114	73	3	3,010
Crouch	65	8	3	1	0	0	77
Cuddeback	317	40	29	5	9	1	401
Elkus	112	17	23	4	7	0	163
Hiscock	1,071	528	175	54	84	0	1,912
Hogan	576	73	28	7	16	0	700
Hubbs	442	107	48	22	20	0	639
Kellogg	473	196	56	30	84	0	839
Lehman	716	243	132	43	93	0	1,227
McLaughlin	638	200	71	31	28	0	968
Miller	324	53	63	6	18	0	464
O'Brien	502	12	66	17	10	0	607
Pound	1,940	244	323	60	90	2	2,659
Seabury	241	52	27	4	6	0	330
Werner	158	42	19	7	24	0	250
Total	16,861	4,810	2,966	777	1,340	32	26,786

Concurring

Andrews	20	0	7	0	0	0	27
Bartlett	9	0	5	0	0	0	14
Cardozo	70	19	9	2	10	0	110
Chase	0	0	0	0	0	0	0
Collin	3	0	0	0	3	0	6
Crane	45	22	17	13	8	0	105
Hiscock	7	18	1	1	2	0	29
Hogan	3	0	0	0	0	0	3
Kellogg	9	0	0	0	0	0	9
Lehman	17	7	7	1	1	0	33
McLaughlin	11	11	2	3	1	0	28
Miller	5	0	1	0	0	0	6
Pound	10	1	6	0	1	0	18
O'Brien	11	0	1	0	0	0	12
Seabury	31	21	11	2	6	0	71
Werner	1	0	0	0	0	0	1
Total	252	99	67	22	32	0	472

<i>Dissenting</i>	<i>N.Y.</i>	<i>Oth. St.</i>	<i>U.S. S.Ct.</i>	<i>Oth. Fed.</i>	<i>For.</i>	<i>Adm.</i>	<i>Total Cases</i>
Andrews	28	4	3	0	8	0	43
Bartlett	10	8	0	3	2	0	23
Cardozo	85	33	21	2	9	0	150
Chase	76	31	9	7	0	0	123
Collin	206	125	44	8	5	0	388
Crane	231	76	26	10	13	0	356
Cuddeback	15	0	0	0	0	0	15
Elkus	27	2	9	1	6	0	45
Hiscock	12	2	1	0	0	0	15
Hogan	65	4	2	0	0	0	71
Hubbs	14	1	0	0	0	0	15
Kellogg	56	17	19	3	17	0	112
Lehman	50	11	12	3	7	0	83
McLaughlin	183	55	22	5	9	0	274
O'Brien	43	7	13	2	10	0	75
Pound	107	36	28	2	4	0	177
Seabury	42	5	13	10	5	0	75
Werner	5	0	0	0	0	0	5
Total	1,255	417	222	56	95	0	2,045

Table I-4

Total Secondary Citations

<i>Majority</i>	<i>Tr.</i>	<i>Leg. Per.</i>	<i>Enc.</i>	<i>Rs.</i>	<i>LRA ALR</i>	<i>Lgs. Mat.</i>	<i>Oth.</i>	<i>Tot. Sec.</i>
Cardozo	514	101	30	18	5	4	53	725
All Others	747	80	71	15	24	15	94	1,046
Andrews	32	2	0	0	0	2	11	47
Bartlett	24	0	2	-	0	1	0	27
Chase	42	1	16	-	0	1	8	68
Collin	24	0	2	-	0	0	0	26
Crane	125	15	12	3	4	1	20	180
Crouch	4	4	1	1	0	0	1	11
Cuddeback	9	0	4	-	1	0	0	14
Elkus	11	1	3	-	0	0	0	15
Hiscock	54	6	0	-	0	0	1	61
Hogan	18	0	1	-	0	1	2	22
Hubbs	27	6	6	2	9	0	3	53
Kellogg	115	5	3	6	1	1	8	139
Lehman	84	12	5	0	3	2	3	109
McLaughlin	39	2	7	-	1	0	4	53
Miller	15	0	1	-	0	0	0	16
O'Brien	26	1	0	0	0	0	1	28
Pound	70	25	8	3	5	5	26	142
Seabury	9	0	0	-	0	0	0	9
Werner	19	0	0	-	0	1	6	26

Concurring

Andrews	0	0	0	-	0	0	6	6
Bartlett	0	0	0	-	0	0	0	0
Cardozo	6	0	0	1	0	1	3	11
Chase	0	0	0	-	0	0	0	0
Collin	0	0	0	-	0	0	0	0
Crane	8	0	1	0	0	0	1	10
Hiscock	4	1	0	-	1	0	1	7
Hogan	0	0	0	-	0	0	0	0
Kellogg	0	0	0	0	0	0	0	0
Lehman	4	0	0	0	0	0	0	4
McLaughlin	0	0	0	-	1	0	0	1
Miller	0	0	0	-	0	0	0	0
O'Brien	0	0	0	0	0	0	0	0
Pound	2	1	0	0	0	0	1	4
Seabury	4	1	0	-	0	0	0	5
Werner	0	0	0	-	0	0	0	0
Total	28	3	1	1	2	1	12	48

<i>Dissenting</i>	<i>Tr.</i>	<i>Leg. Per.</i>	<i>Enc.</i>	<i>Rs.</i>	<i>LRA ALR</i>	<i>Lgs. Mat.</i>	<i>Oth.</i>	<i>Tot. Sec.</i>
Andrews	8	0	1	-	0	0	0	9
Bartlett	5	0	1	-	0	0	0	6
Cardozo	10	4	2	0	0	0	0	16
Chase	4	0	1	-	0	0	0	5
Collin	7	0	0	-	0	0	0	7
Crane	8	2	1	1	0	0	4	16
Cuddeback	1	0	0	0	0	0	0	1
Elkus	2	0	0	0	0	0	0	2
Hiscock	0	0	0	-	0	0	0	0
Hogan	1	0	0	-	0	0	0	1
Hubbs	1	0	0	0	0	0	0	1
Kellogg	14	0	1	1	0	0	2	18
Lehman	6	2	0	0	0	1	0	9
McLaughlin	2	0	2	-	2	0	0	6
O'Brien	0	3	0	0	0	0	0	3
Pound	8	5	0	0	0	0	4	17
Seabury	10	0	1	-	0	0	1	12
Werner	0	0	0	-	0	0	0	0
Total	87	16	10	2	2	1	11	129

Table I-5

Average Case Citations Per Majority Opinion

	N.Y.	Oth. St.	U.S. S.Ct.	Oth. Fed.	For.	Oth. Adm.	Tot.
<i>Cardozo</i>	7.63	2.34	2.25	.48	1.12	.04	13.87
All Others	4.72	1.32	.64	.19	.27	<.01	7.15
Andrews	3.93	1.40	.59	.08	.49	.00	6.48
Bartlett	2.95	.97	.22	.14	.07	.00	4.35
Chase	7.62	1.15	.69	.24	.10	.01	9.81
Collin	6.13	3.27	1.11	.28	.30	.01	11.76
Crane	4.50	1.33	.59	.26	.17	.01	6.85
Crouch	5.41	.67	.25	.08	.00	.00	6.42
Cuddeback	4.46	.56	.41	.07	.13	.01	5.65
Elkus	8.00	1.21	1.64	.29	.50	.00	11.64
Hiscock	4.32	2.13	.71	.22	.34	.00	7.71
Hogan	3.97	.50	.19	.05	.11	.00	4.83
Hubbs	5.59	1.35	.61	.28	.25	.00	8.00
Kellogg	4.15	1.72	.49	.26	.74	.00	8.09
Lehman	3.21	1.09	.59	.19	.42	.00	7.36
McLaughlin	4.80	1.50	.53	.23	.21	.00	5.50
Miller	6.23	1.02	1.21	.12	.35	.00	7.28
O'Brien	4.37	.10	.57	.15	.09	.00	8.92
Pound	4.97	.63	.83	.15	.23	.01	5.28
Seabury	6.34	1.37	.71	.11	.16	.00	6.82
Werner	6.08	1.62	.73	.27	.92	.00	9.62

Table I-6

Average Secondary Citations Per Majority Opinion

	<i>Tr.</i>	<i>Leg. Per.</i>	<i>Enc.</i>	<i>Rs.*</i>	<i>LRA ALR</i>	<i>Lgs. Mat.</i>	<i>Oth.</i>	<i>Tot.</i>
<i>Cardozo</i>	.93	.18	.05	.13	.01	.01	.10	1.32
All Others	.28	.03	.03	.03	.01	.01	.04	.39
<i>Andrews</i>	.17	.01	.00	-	.00	.01	.06	.25
<i>Bartlett</i>	.32	.00	.03	-	.00	.01	.00	.36
<i>Chase</i>	.27	.01	.10	-	.00	.01	.05	.44
<i>Collin</i>	.16	.00	.01	-	.00	.00	.00	.17
<i>Crane</i>	.28	.04	.02	.01	.01	<.01	.05	.42
<i>Crouch</i>	.33	.33	.08	.08	.00	.00	.08	.92
<i>Cuddeback</i>	.13	.00	.06	-	.01	.00	.00	.20
<i>Elkus</i>	.79	.07	.21	-	.00	.00	.00	1.07
<i>Hiscock</i>	.21	.02	.00	-	.00	.00	.00	.23
<i>Hogan</i>	.12	.00	.01	-	.00	.01	.01	.15
<i>Hubbs</i>	.34	.08	.08	.03	.11	.00	.04	.65
<i>Kellogg</i>	1.00	.04	.03	.08	.01	.01	.07	1.22
<i>Lehman</i>	.37	.05	.02	.00	.01	.01	.01	.47
<i>McLaughlin</i>	.29	.02	.05	-	.02	.00	.03	.41
<i>Miller</i>	.27	.00	.02	-	.00	.00	.00	.29
<i>O'Brien</i>	.23	.01	.00	.00	.00	.00	.01	.25
<i>Pound</i>	.18	.06	.02	.01	.01	.01	.07	.36
<i>Seabury</i>	.24	.00	.00	-	.00	.00	.00	.24
<i>Werner</i>	.73	.00	.00	-	.00	.03	.23	.99

* Calculated from opinions from 1929-1932.

Table I-7

Percent of Majority Opinions Containing Types of Authority

	Cases			Secondary		
	<i>Oth. St.</i>	<i>U.S. S.Ct</i>	<i>Oth. Fed.</i>	<i>For.</i>	<i>Tr.</i>	<i>Leg. Per.</i>
<i>Cardozo</i>	55.2	49.8	13.9	32.7	41.6	9.5
<i>Others</i>	30.1	23.0	10.4	11.1	16.5	1.8
<i>Andrews</i>	29.8	21.5	6.2	13.0	9.9	1.0
<i>Bartlett</i>	25.7	14.9	4.1	5.4	20.3	0.0
<i>Chase</i>	32.4	27.4	9.6	6.4	17.1	.6
<i>Collin</i>	56.2	41.2	13.7	16.3	13.1	0.0
<i>Crane</i>	36.8	22.5	15.5	9.1	20.5	1.8
<i>Crouch</i>	25.0	16.6	8.3	0.0	33.3	16.6
<i>Cuddeback</i>	29.6	23.9	5.6	8.5	12.7	0.0
<i>Elkus</i>	42.8	35.7	28.6	14.3	28.6	7.1
<i>Hiscock</i>	38.3	25.8	12.5	11.7	13.3	1.2
<i>Hogan</i>	12.4	12.4	4.1	5.5	9.0	0.0
<i>Hubbs</i>	31.6	22.8	13.9	12.7	20.3	8.8
<i>Kellogg</i>	41.2	22.8	14.9	29.8	42.1	5.3
<i>Lehman</i>	29.7	23.9	11.7	12.6	23.9	2.7
<i>McLaughlin</i>	39.1	20.3	15.0	12.9	17.3	1.5
<i>Miller</i>	28.8	26.9	7.7	9.6	9.6	0.0
<i>O'Brien</i>	8.7	27.8	13.9	9.6	17.4	2.6
<i>Pound</i>	25.2	26.7	7.8	12.3	13.1	4.0
<i>Seabury</i>	39.2	21.1	7.9	7.9	13.2	0.0
<i>Werner</i>	26.9	30.8	3.5	6.1	8.7	0.0

Table I-8

Citations to Opinions By Other Courts

	All N.Y.	All Fed.	Oth. St.	Total	Avg. N.Y.	Avg. Fed.	Avg. St.	Avg. Tot.
Cardozo	19,191	4,434	6,956	30,581	34.9	8.1	12.6	55.6
All Others	58,007	6,394	11,041	75,442	21.7	2.4	4.1	28.2
Andrews	4,352	508	791	5,651	22.8	2.7	4.1	29.6
Bartlett	1,309	62	225	1,596	17.7	.8	3.0	21.6
Chase	3,405	310	578	4,293	21.7	2.0	3.7	27.3
Collin	4,497	484	824	5,805	29.6	3.2	5.4	38.2
Crane	8,991	1,045	1,718	11,754	18.3	3.2	5.4	26.8
Crouch	219	38	65	322	18.3	3.2	5.4	26.8
Cuddeback	1,221	112	242	1,575	17.2	1.7	3.4	22.2
Elkus	327	61	85	473	23.4	4.4	6.1	33.8
Hiscock	4,998	496	1,028	6,522	20.2	2.0	4.2	26.3
Hogan	2,238	185	419	2,842	15.4	1.3	2.9	19.6
Hubbs	2,398	285	395	3,078	30.4	3.6	5.0	39.0
Kellogg	2,327	320	469	3,116	20.4	2.8	4.1	27.3
Lehman	4,389	586	926	5,901	19.7	2.6	4.2	26.5
McLaughlin	2,855	341	586	3,782	21.5	2.6	4.4	28.4
Miller	955	113	256	1,324	18.4	2.2	4.9	25.5
O'Brien	2,208	289	304	2,801	22.4	2.5	2.6	24.4
Pound	9,700	975	1,770	12,445	24.9	2.5	4.5	31.9
Seabury	1,032	106	242	1,380	27.9	2.9	6.5	37.3
Werner	586	78	118	782	22.5	3.0	4.5	30.1

Table I-9

Age of Cited Court of Appeals and Court of Errors Opinions*

	Total Cites				
	0-20	21-40	41-60	61-80	80+
<i>Cardozo</i>	1,626	1,010	494	124	11
All Others	5,080	2,876	1,433	318	25
Andrews	256	180	112	15	4
Bartlett	88	76	13	1	0
Chase	476	247	87	12	0
Collin	403	255	121	20	2
Crane	764	413	206	57	5
Crouch	25	6	11	6	0
Cuddeback	132	73	37	7	0
Hiscock	411	274	109	23	2
Hogan	215	166	46	8	0
Hubbs	150	76	62	15	3
Kellogg	150	87	94	33	1
Lehman	321	150	103	21	2
McLaughlin	268	154	76	11	2
Miller	112	83	41	4	0
O'Brien	221	111	78	18	0
Pound	926	437	207	57	3
Seabury	92	52	21	6	1
Werner	70	36	9	4	0

* The Court of Appeals replaced the Court of Errors in 1847.

Cites Per Opinion By Age

	<i>0-20</i>	<i>21-40</i>	<i>41-60</i>	<i>61-80</i>	<i>80+</i>
<i>Cardozo</i>	2.96	1.83	.90	.23	.02
All Others	1.90	1.09	.54	.12	.01
<i>Andrews</i>	1.34	.94	.59	.08	.02
<i>Bartlett</i>	1.19	1.03	.18	.01	.00
<i>Chase</i>	3.03	1.57	.55	.08	.00
<i>Collin</i>	2.63	1.67	.79	.13	.01
<i>Crane</i>	1.74	.94	.47	.12	.01
<i>Crouch</i>	2.08	.50	.92	.50	.02
<i>Cuddeback</i>	1.86	1.03	.52	.10	.00
<i>Elkus</i>	2.79	2.43	.64	.21	.00
<i>Hiscock</i>	1.66	1.10	.44	.09	.01
<i>Hogan</i>	1.48	1.14	.32	.06	.00
<i>Hubbs</i>	1.89	.96	.78	.19	.04
<i>Kellogg</i>	1.32	.76	.82	.29	.01
<i>Lehman</i>	1.44	.67	.46	.09	.01
<i>McLaughlin</i>	2.01	1.15	.57	.08	.02
<i>Miller</i>	2.15	1.60	.79	.08	.00
<i>O'Brien</i>	1.92	.97	.68	.16	.00
<i>Pound</i>	2.37	1.12	.53	.15	.01
<i>Seabury</i>	2.42	1.37	.55	.16	.03
<i>Werner</i>	2.69	1.38	.35	.50	.00

Percent of Court of Appeals Case Cites By Age

<i>Cardozo</i>	49.8	30.9	15.1	3.8	.8
All Others	52.2	29.6	14.7	3.3	.3
<i>Andrews</i>	45.1	31.7	19.8	2.6	.7
<i>Bartlett</i>	49.4	42.7	7.3	.6	0.0
<i>Chase</i>	57.9	30.0	10.6	1.5	0.0
<i>Collin</i>	52.3	31.8	15.1	2.5	.2
<i>Crane</i>	52.9	28.6	14.3	3.9	.3
<i>Crouch</i>	52.1	12.5	22.9	12.5	0.0
<i>Cuddeback</i>	53.0	29.3	14.9	2.8	0.0
<i>Hiscock</i>	50.2	33.5	13.3	2.8	.2
<i>Hogan</i>	49.4	38.2	10.6	1.8	0.0
<i>Hubbs</i>	49.0	24.8	20.3	4.9	1.0
<i>Kellogg</i>	41.1	23.8	25.8	9.0	.3
<i>Lehman</i>	53.8	25.1	17.3	3.5	.3
<i>McLaughlin</i>	52.4	30.1	14.9	2.2	.4
<i>Miller</i>	46.7	34.6	17.1	1.7	0.0
<i>O'Brien</i>	51.6	25.9	18.2	4.2	0.0
<i>Pound</i>	56.8	26.8	12.7	3.5	.2
<i>Seabury</i>	53.5	30.2	12.2	3.5	.6
<i>Werner</i>	58.8	30.3	7.6	3.4	0.0

Table I-10

Citations in Types of Opinions

New York Court of Appeals, 1914-1932

	Negligence			Contracts			Criminal			Tax		
	op.	ci.	avg.	op.	ci.	avg.	op.	ci.	avg.	op.	ci.	avg.
Cardozo	60	697	11.62	40	497	12.42	29	452	15.59	20	243	12.15
Others	279	1493	5.35	210	1285	6.12	218	1677	7.89	81	484	5.98
Andrews	24	107	4.46	18	101	5.61	9	50	5.56	3	17	5.67
Bartlett	5	12	2.40	0	0	0.00	9	57	6.33	3	3	1.00
Chase	19	129	6.79	7	49	7.00	12	129	10.75	9	88	9.78
Collin	16	127	7.93	7	121	17.29	13	191	14.69	8	52	6.50
Crane	52	310	5.96	35	183	5.23	37	234	6.32	15	63	4.20
Crouch	2	5	2.50	2	16	8.00	1	12	12.00	0	0	0.00
Cuddeback	5	37	7.40	3	23	7.67	5	22	4.40	2	8	4.00
Elkus	1	2	2.00	2	25	12.50	2	42	21.08	0	0	0.00
Hiscock	21	94	4.48	28	143	5.11	21	184	8.76	9	75	8.33
Hogan	18	64	3.56	16	73	4.56	11	35	3.18	5	9	1.80
Hubbs	8	61	7.63	6	29	4.83	7	77	11.00	1	9	9.00
Kellogg	10	74	7.40	10	74	7.40	7	37	5.29	3	7	2.33
Lehman	17	69	4.06	23	107	4.65	28	210	7.50	2	7	3.50
McLaughlin	20	95	4.75	12	123	10.25	8	53	6.63	4	20	5.00
Miller	5	20	4.00	2	9	4.50	5	34	6.80	1	8	8.00
O'Brien	12	51	4.25	6	15	2.50	9	23	2.56	2	10	5.00
Pound	37	193	5.22	25	115	4.60	27	236	8.85	14	108	7.71
Seabury	2	11	5.50	3	28	9.33	4	34	8.50	0	0	0.00
Werner	5	32	6.40	5	51	10.20	3	17	5.67	0	0	0.00

Table I-11

Annual Averages

1914	maj. op.	avg. cases	avg. sec.	avg. pp.
Bartlett	21	3.48	.24	4.36
Cardozo	31	11.65	.74	4.89
Chase	23	8.13	.30	6.57
Collin	16	10.63	.13	4.53
Cuddeback	12	6.00	.42	3.79
Hiscock	22	6.45	.18	7.68
Hogan	16	4.63	.13	5.53
Hornblower	0	.00	.00	.00
Miller	25	6.68	.12	4.48
Werner	20	10.55	1.30	7.35
1915				
Bartlett	24	6.75	.41	6.46
Cardozo	32	15.31	.66	5.14
Chase	22	10.27	.63	5.95
Collin	18	10.33	.11	4.92
Cuddeback	11	10.45	.27	4.41
Hiscock	24	10.67	.29	8.92
Hogan	17	7.76	.41	6.59
Miller	27	10.62	.44	5.89
Pound	7	3.71	.00	3.29
Seabury	19	8.47	.32	6.26
Werner	6	6.50	.00	6.67
1916				
Bartlett	29	3.00	.41	3.88
Cardozo	37	13.57	.76	4.78
Chase	30	9.27	.53	6.40
Collin	31	10.26	.23	5.45
Cuddeback	22	5.78	.14	4.09
Hiscock	23	7.48	.13	6.17
Hogan	12	9.08	.17	11.91
Pound	28	7.21	.36	3.66
Seabury	19	8.89	.16	6.18

	<i>maj.</i> <i>op.</i>	<i>avg.</i> <i>cases</i>	<i>avg.</i> <i>sec.</i>	<i>avg.</i> <i>pp.</i>
1917				
Andrews	15	4.33	.13	3.37
Cardozo	26	14.31	1.31	4.40
Chase	18	10.67	.44	5.38
Collin	25	9.08	.16	4.50
Crane	11	12.00	.18	4.45
Cuddeback	9	5.00	.11	3.22
Hiscock	15	11.13	.13	6.37
Hogan	16	6.13	.00	5.53
McLaughlin	15	7.27	.73	4.93
Pound	18	7.94	.22	3.03

1918

Andrews	18	6.44	.06	5.31
Cardozo	24	17.25	1.50	4.38
Chase	22	9.32	.73	6.23
Collin	22	13.09	.09	6.25
Crane	22	8.77	.32	5.66
Cuddeback	8	2.63	.25	3.06
Hiscock	19	6.05	.32	6.24
Hogan	14	3.29	.00	4.64
McLaughlin	12	10.92	.58	4.38
Pound	22	11.68	.41	4.61

1919

Andrews	14	3.50	.00	3.25
Cardozo	28	15.18	.86	4.45
Chase	21	11.57	.24	6.09
Collin	22	15.55	.14	6.16
Crane	27	8.96	.15	6.15
Cuddeback	9	2.33	.00	2.72
Hiscock	18	11.83	.44	6.50
Hogan	12	3.17	.25	6.71
McLaughlin	12	7.42	.00	3.70
Pound	19	4.74	.00	3.50

1920	<i>maj.</i> <i>op.</i>	<i>avg.</i> <i>cases</i>	<i>avg.</i> <i>sec.</i>	<i>avg.</i> <i>pp.</i>
Andrews	21	6.76	.05	3.67
Cardozo	23	17.48	2.04	5.33
Chase	14	9.93	.07	6.32
Collin	19	14.05	.32	5.66
Crane	15	5.80	.07	5.53
Elkus	14	11.64	1.07	7.43
Hiscock	14	6.29	.07	5.93
Hogan	9	4.44	.00	5.78
McLaughlin	19	10.31	.79	3.84
Pound	15	6.60	.33	4.10

1921

Andrews	13	9.92	.15	5.80
Cardozo	28	12.04	.89	4.04
Chase+	7	10.00	.14	7.43
Crane	24	5.71	.38	4.43
Hiscock	18	5.44	.17	5.53
Hogan	9	4.00	.00	7.72
McLaughlin	10	7.50	.10	3.50
Pound	20	8.30	.15	4.55
+ died June 25, 1921				

1922

Andrews	20	5.85	.55	3.58
Cardozo	22	13.09	1.59	4.68
Crane	29	6.28	.69	4.93
Hiscock	18	7.72	.33	6.19
Hogan	19	3.42	.21	6.03
McLaughlin	15	8.20	.33	4.40
Pound	22	6.82	.18	3.91

1923

Andrews	21	9.38	.43	4.19
Cardozo	37	11.49	.78	4.04
Crane	35	7.37	.29	6.10
Hiscock	25	6.05	.40	5.50
Hogan	21	2.95	.14	6.29
McLaughlin	20	5.30	.25	4.37
Pound	26	5.62	.19	3.90

1924	<i>maj. op.</i>	<i>avg. cases</i>	<i>avg. sec.</i>	<i>avg. pp.</i>
Andrews	16	7.00	.50	3.91
Cardozo	24	10.92	.68	4.54
Crane	20	7.55	.25	6.23
Hiscock	10	4.70	.00	5.80
Lehman	24	3.75	.08	6.42
McLaughlin	7	4.14	.14	7.00
Pound	25	5.76	.08	3.96

1925

Andrews	18	4.44	.00	3.69
Cardozo	29	12.14	1.03	5.21
Crane	31	5.45	.39	6.19
Hiscock	22	7.59	.14	5.75
Lehman	22	2.55	.32	5.45
McLaughlin	6	7.00	.83	4.00
Pound	18	4.11	.39	3.83

1926

Andrews	5	10.00	.60	4.00
Cardozo	23	12.57	1.22	6.15
Crane	33	4.97	.33	4.83
Hiscock	20	7.85	.40	7.48
Lehman	26	4.88	.54	7.17
McLaughlin	17	4.00	.18	3.44
Pound	30	6.70	.37	4.67

1927

Andrews	11	6.27	.64	4.32
Cardozo	31	15.42	2.06	5.65
Crane	31	8.68	.48	7.15
Kellogg	16	7.50	.69	6.59
Lehman	20	9.25	.65	6.15
O'Brien	16	5.31	.06	4.22
Pound	21	6.24	.57	3.98

	<i>maj. op.</i>	<i>avg. cases</i>	<i>avg. sec.</i>	<i>avg. pp.</i>
<i>1928</i>				
Andrews	19	5.89	.16	3.71
Cardozo	42	15.57	2.10	5.54
Crane	36	7.81	.58	5.13
Kellogg	25	7.08	1.60	5.14
Lehman	36	6.39	.47	5.36
O'Brien	26	5.35	.08	3.54
Pound	31	7.26	.94	5.27
<i>1929</i>				
Cardozo	27	15.22	1.70	4.80
Crane	24	5.17	.46	4.83
Hubbs	18	6.78	.22	5.28
Kellogg	17	7.71	1.05	5.88
Lehman	20	5.60	.50	5.35
O'Brien	17	5.35	.41	3.12
Pound	20	6.30	.35	4.48
<i>1930</i>				
Cardozo	36	15.25	1.64	5.57
Crane	30	7.50	.83	5.07
Hubbs	18	9.22	.78	4.61
Kellogg	13	10.77	1.69	6.50
Lehman	20	5.56	.40	5.20
O'Brien	16	5.12	.12	2.63
Pound	22	6.68	.68	4.23
<i>1931</i>				
Cardozo	37	12.49	1.95	5.86
Crane	37	6.14	.51	4.51
Hubbs	18	8.28	.78	5.00
Kellogg	24	8.17	1.54	4.67
Lehman	25	6.04	.96	5.71
O'Brien	18	6.61	.56	4.03
Pound	21	6.24	.24	3.57

1932	<i>maj. op.</i>	<i>avg. cases</i>	<i>avg. sec.</i>	<i>avg. pp.</i>
Cardozo+	13	12.00	1.31	5.12
Crane	34	5.03	.26	4.24
Crouch	12	6.42	.92	3.21
Hubbs	25	8.12	.84	4.72
Kellogg	19	3.89	.47	4.21
Lehman	30	5.47	.40	5.50
O'Brien	22	4.05	.27	3.14
Pound	25	8.04	.56	3.58
+ resigned March 3, 1932				

Appendix II

United States Supreme Court, 1932-1937

Table II-1

Case Citations Per Opinion

	<i>Majority</i>			<i>Concurring</i>			<i>Dissenting</i>		
	<i>op.</i>	<i>ci.</i>	<i>avg.</i>	<i>op.</i>	<i>ci.</i>	<i>avg.</i>	<i>op.</i>	<i>ci.</i>	<i>avg.</i>
Black	2	15	7.50	0	0	.00	1	0	.00
Brandeis	84	2,416	28.76	3	150	50.00	4	495	123.75
Butler	105	1,839	17.51	1	1	1.00	10	197	19.70
Cardozo	128	3,097	24.20	2	8	4.00	24	507	21.13
Holmes	2	6	3.00	0	0	.00	0	0	.00
Hughes	136	2,870	21.10	1	11	11.00	4	53	13.25
McReynolds	94	575	6.05	2	7	3.50	12	93	7.75
Roberts	130	1,741	13.39	1	17	17.00	9	259	28.77
Stone	124	2,702	21.79	4	19	4.75	27	708	26.22
Sutherland	104	1,690	16.25	1	0	.00	10	87	8.70
Van Devanter	24	367	15.29	1	30	30.00	1	11	11.00
Avg.	933	17,318	18.56	16	243	15.19	102	2,410	23.63

Table II-2

Average Majority Opinion Length and Cites Per Page

	<i>pp.</i>	<i>avg.</i>	<i>cpp</i>
Black	11.5	5.75	1.30
Brandeis	718.5	8.55	3.36
Butler	712.5	6.79	2.58
Cardozo	1,079.0	8.43	2.87
Holmes	3.0	1.50	2.00
Hughes	1,382.5	10.17	2.08
McReynolds	364.0	3.87	1.58
Roberts	938.5	7.22	1.85
Stone	909.5	7.33	2.97
Sutherland	828.0	7.96	2.04
Van Devanter	226.0	9.42	1.62
Avg.	7,173.0	7.69	2.41

Table II-3

Total Case Citations

Majority	U.S. S.Ct.	Oth. Fed.	St.	For.	Adm.	Total Cases
Black	12	0	3	0	0	15
Brandeis	1,278	563	443	38	94	2,416
Butler	1,238	270	268	19	44	1,839
Cardozo	1,627	495	833	92	50	3,097
Holmes	2	3	0	1	0	6
Hughes	2,221	293	268	54	34	2,870
McReynolds	399	110	53	3	10	575
Roberts	1,145	281	236	9	69	1,740
Stone	1,844	395	344	43	76	2,702
Sutherland	1,112	266	287	21	4	1,690
Van Devanter	240	59	46	19	3	367
Total	11,119	2,735	2,781	299	384	17,318

Concurring

Brandeis	145	3	0	0	2	150
Butler	1	0	0	0	0	1
Cardozo	6	1	1	0	0	8
Hughes	11	0	0	0	0	11
McReynolds	7	0	0	0	0	7
Roberts	11	6	0	0	0	17
Stone	17	0	0	2	0	19
Sutherland	0	0	0	0	0	0
Van Devanter	12	3	15	0	0	30
Total	210	13	16	2	2	243

Dissenting

Black	0	0	0	0	0	0
Brandeis	347	54	62	4	28	495
Butler	97	48	42	10	0	197
Cardozo	375	46	80	6	0	507
Hughes	52	0	1	0	0	53
McReynolds	76	8	7	2	0	93
Roberts	173	8	76	2	0	259
Stone	498	56	100	7	47	708
Sutherland	72	1	10	4	0	87
Van Devanter	6	0	5	0	0	11
Total	1,696	221	383	35	75	2,410

Table II-4

Total Secondary Citations

<i>Majority</i>	<i>Tr.</i>	<i>Leg. Per.</i>	<i>Enc.</i>	<i>Rs.</i>	<i>LRA ALR</i>	<i>Lgs. Mat.</i>	<i>Oth.</i>	<i>Tot. Sec.</i>
Black	0	2	0	0	0	0	2	4
Brandeis	28	32	1	1	1	46	108	217
Butler	29	0	0	0	0	18	9	56
Cardozo	105	28	2	7	7	41	44	234
Holmes	0	0	0	0	0	0	0	0
Hughes	70	9	0	2	5	62	58	206
McReynolds	15	2	0	0	1	4	9	31
Roberts	13	0	0	1	0	32	22	68
Stone	54	12	0	2	0	44	76	188
Sutherland	41	1	0	0	1	18	13	74
Van Devanter	17	0	0	1	0	9	8	35
Total	372	86	3	14	15	274	349	1,113
<i>Concurring</i>								
Brandeis	1	2	0	0	0	2	34	39
Butler	0	0	0	0	0	0	0	0
Cardozo	0	0	0	0	0	0	0	0
Hughes	0	0	0	0	0	0	0	0
McReynolds	0	0	0	0	0	0	0	0
Roberts	0	0	0	0	0	0	0	0
Stone	0	0	0	0	0	0	0	0
Sutherland	0	0	0	0	0	0	0	0
Van Devanter	0	0	0	0	0	0	0	0
Total	1	2	0	0	0	2	34	39
<i>Dissenting</i>								
Black	0	0	0	0	0	0	0	0
Brandeis	18	53	0	0	0	17	178	266
Butler	11	0	0	0	0	0	6	17
Cardozo	3	2	0	1	1	12	20	39
Hughes	0	0	0	0	0	1	4	5
McReynolds	0	0	0	0	0	1	8	9
Roberts	0	0	0	0	1	2	4	7
Stone	10	22	0	2	0	37	23	94
Sutherland	3	0	0	0	0	3	17	23
Van Devanter	0	0	0	0	0	0	0	0
Total	45	77	0	3	2	73	260	460

Table II-5

Average Case Citations Per Majority Opinion

	<i>U.S. S.Ct.</i>	<i>Oth. Fed.</i>	<i>St.</i>	<i>For.</i>	<i>Adm.</i>	<i>Tot.</i>
Brandeis	15.21	6.70	5.27	.45	1.12	28.76
Butler	11.79	2.57	2.55	.18	.42	17.51
Cardozo	12.72	3.87	6.51	.72	.39	24.20
Hughes	16.33	2.15	1.97	.40	.25	21.10
McReynolds	4.24	1.17	.56	.03	.11	6.05
Roberts	8.81	2.16	1.82	.07	.53	13.39
Stone	14.87	3.19	2.77	.35	.61	21.79
Sutherland	10.69	2.56	2.76	.20	.04	16.25
Van Devanter	10.00	2.46	1.92	.79	.13	15.29
Total Avg.	11.92	2.93	2.98	.32	.41	18.56

Table II-6

Average Secondary Citations Per Majority Opinion

	<i>Tr.</i>	<i>Leg. Per.</i>	<i>Enc.</i>	<i>Rs.</i>	<i>LRA ALR</i>	<i>Lgs. Mat.</i>	<i>Oth.</i>	<i>Tot.</i>
Brandeis	.34	.38	.01	.01	.01	.50	1.30	2.54
Butler	.28	.00	.00	.00	.00	.17	.09	.54
Cardozo	.82	.22	.02	.05	.05	.32	.35	1.83
Hughes	.51	.06	.00	.01	.04	.50	.42	1.54
McReynolds	.16	.02	.00	.00	.01	.04	.10	.33
Roberts	.10	.00	.00	.01	.00	.25	.17	.53
Stone	.44	.09	.00	.02	.00	.35	.61	1.51
Sutherland	.39	.01	.00	.00	.01	.17	.13	.71
Van Devanter	.71	.00	.00	.04	.00	.38	.33	2.17
Total Avg.	.40	.09	<.01	.02	.02	.29	.37	1.19

Table II-7

Percent of Majority Opinions Citing Types of Authority

	<i>Cases</i>		<i>Secondary</i>	
	<i>St.</i>	<i>For.</i>	<i>Tr.</i>	<i>Leg. Per.</i>
Brandeis	51.2	9.5	14.3	16.7
Butler	46.7	2.9	17.1	0.0
Cardozo	69.5	20.3	27.3	9.4
Hughes	33.8	12.5	18.4	2.2
McReynolds	20.2	1.1	10.6	1.1
Roberts	30.0	1.5	5.4	0.0
Stone	19.4	12.1	17.7	6.5
Sutherland	54.8	8.7	21.2	1.0
Van Devanter	41.7	12.5	33.3	0.0

Table II-8

Majority Opinions Cited by Other Courts

	<i>S.Ct.</i>	<i>Fed.</i>	<i>St.</i>	<i>Avg.</i>		<i>Avg.</i>		<i>Tot.</i>
				<i>Tot.</i>	<i>S.Ct.</i>	<i>Fed.</i>	<i>St.</i>	
Brandeis	785	5,270	2,087	8,142	9.3	62.7	24.9	96.9
Butler	765	6,551	2,209	9,525	7.3	62.4	21.0	90.7
Cardozo	1,641	15,107	5,745	22,493	12.0	118.0	44.9	175.7
Hughes	2,746	15,391	8,176	26,313	20.2	113.2	60.1	193.5
McReynolds	345	3,362	1,349	5,056	3.7	35.8	14.4	54.8
Roberts	1,259	7,729	3,339	12,327	9.7	59.5	25.7	94.8
Stone	1,615	8,929	3,341	13,885	15.5	72.0	26.9	112.0
Sutherland	1,654	13,314	7,545	22,513	15.9	128.0	72.5	216.5
Van Devanter	158	2,034	344	2,536	6.6	84.8	14.3	105.7

Table II-9

Citations to Dissenting & Concurring Opinions

	<i>Dissenting</i>		<i>Concurring</i>	
	<i>Total</i>	<i>Avg.</i>	<i>Total</i>	<i>Avg.</i>
Brandeis	333	83.3	808	269.3
Butler	6	.8	-	-
Cardozo	137	5.7	15	15.0
Hughes	9	2.3	2	2.0
McReynolds	4	.4	1	.5
Roberts	12	1.3	83	83.0
Stone	91	3.4	4	1.0
Sutherland	6	.6	0	0.0
Van Devanter	0	0.0	0	0.0

Table II-10

Age of Cited United States Supreme Court Opinions

	<i>Total Citations</i>				
	<i>0-12</i>	<i>21-40</i>	<i>41-60</i>	<i>61-80</i>	<i>80+</i>
Brandeis	710	409	112	19	28
Butler	711	358	104	27	38
Cardozo	925	504	136	23	39
Hughes	1,224	647	187	74	89
McReynolds	257	111	21	3	7
Roberts	675	358	72	19	22
Stone	947	643	150	62	42
Sutherland	550	359	126	28	47
Van Devanter	102	83	32	11	12

Citations Per Opinion By Age

Brandeis	8.45	4.86	1.32	.27	.33
Butler	6.77	3.41	.99	.26	.36
Cardozo	7.48	3.93	1.06	.18	.30
Hughes	9.00	4.76	1.38	.54	.65
McReynolds	2.73	1.18	.22	.03	.07
Roberts	5.19	2.75	.55	.15	.17
Stone	7.64	5.19	1.21	.50	.34
Sutherland	5.29	3.45	1.21	.27	.47
Van Devanter	4.25	3.45	1.33	.46	.50

Percent of Supreme Court Citations By Age

Brandeis	55.6	32.0	8.7	1.5	2.2
Butler	57.4	28.9	8.4	2.2	3.1
Cardozo	56.9	31.0	8.4	1.4	2.4
Hughes	55.1	29.1	8.4	3.3	4.0
McReynolds	64.4	29.1	5.3	.8	1.8
Roberts	59.0	31.3	6.3	1.7	1.9
Stone	51.4	34.9	3.1	3.4	2.3
Sutherland	49.5	32.3	11.4	2.5	4.4
Van Devanter	42.5	34.6	13.3	4.6	5.0

Table II-11

Citations in Types of Opinions

	<i>Int. Rev.</i>			<i>Criminal</i>			<i>Admiralty</i>			<i>Comm. Cl.</i>		
	<i>op.</i>	<i>ci.</i>	<i>avg.</i>	<i>op.</i>	<i>ci.</i>	<i>avg.</i>	<i>op.</i>	<i>ci.</i>	<i>avg.</i>	<i>op.</i>	<i>ci.</i>	<i>avg.</i>
Brandeis	3	118	39.33	1	1	1.00	3	153	51.00	9	160	17.78
Butler	11	175	15.91	4	60	15.00	4	76	19.00	9	168	18.67
Cardozo	4	82	20.50	6	224	37.33	3	123	41.00	6	125	20.83
Hughes	7	104	14.86	9	216	24.00	8	273	34.13	22	573	26.04
McReyn.	19	53	2.79	4	26	6.50	2	33	16.50	2	11	5.50
Roberts	10	107	10.70	7	75	10.71	2	51	25.50	10	183	18.30
Stone	12	132	11.00	4	104	26.00	9	221	24.55	12	341	28.41
Suthrlnd.	6	15	2.50	8	145	18.12	2	23	11.50	9	160	17.78
Van Dev.	1	26	26.00	1	10	10.00	3	24	8.00	0	0	0.00
Total	73	812	11.12	44	861	19.57	36	977	27.14	79	1721	21.78

Table II-12

Annual Averages

	<i>maj. ops.</i>	<i>avg. cases</i>	<i>avg. sec.</i>
1932			
Brandeis	14	32.21	1.71
Butler	22	14.36	.14
Cardozo	16	13.94	.93
Holmes	2	3.00	.00
Hughes	29	24.59	1.75
McReynolds	15	6.67	.13
Roberts	22	8.23	.14
Stone	26	17.81	.62
Sutherland	23	18.17	.39
Van Devanter	1	11.00	.00
1933			
Brandeis	15	28.67	3.47
Butler	19	15.79	.32
Cardozo	24	23.50	2.45
Hughes	22	18.68	1.63
McReynolds	17	8.12	.24
Roberts	23	15.78	1.35
Stone	19	21.00	2.30
Sutherland	18	18.67	.39
Van Devanter	4	15.50	3.50
1934			
Brandeis	17	29.84	2.53
Butler	21	16.14	.48
Cardozo	26	26.62	1.88
Hughes	21	24.52	1.95
McReynolds	14	6.86	.36
Roberts	21	17.76	.52
Stone	22	19.77	1.68
Sutherland	14	13.64	.93
Van Devanter	5	26.20	.00

	<i>maj.</i> <i>ops.</i>	<i>avg.</i> <i>cases</i>	<i>avg.</i> <i>sec.</i>
<i>1935</i>			
Brandeis	12	42.00	6.67
Butler	17	17.00	.94
Cardozo	22	26.27	1.00
Hughes	23	19.17	1.00
McReynolds	16	6.13	.63
Roberts	22	11.82	.36
Stone	25	23.76	1.16
Sutherland	18	16.72	.83
Van Devanter	3	12.33	.23

1936

Brandeis	13	13.08	.23
Butler	13	25.33	.23
Cardozo	19	23.31	1.37
Hughes	18	15.88	2.00
McReynolds	16	5.50	.25
Roberts	21	13.05	.48
Stone	15	22.53	.80
Sutherland	15	15.40	1.40
Van Devanter	5	8.00	.40

1937

Black	2	7.50	2.00
Brandeis	13	27.23	1.15
Butler	13	20.69	1.38
Cardozo	21	28.48	3.00
Hughes	23	21.95	.83
McReynolds	16	3.44	.13
Roberts	21	13.00	.24
Stone	17	27.83	2.88
Sutherland	16	13.31	.50
Van Devanter	6	14.33	2.33