Cardozo's Use of Authority: An Empirical Study

William H. Manz

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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 But Cardozo covered more issues, addressed more legal implications, and included frequent historical references.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


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, 53 STAN. L. REV. 773 (1981); James Leonard, An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990, 86 L. LIB. 1, 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 reputation with competent, but by now largely forgotten, state judges. 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. 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. 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 Raleagh, 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 F. 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. 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.

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 Berigan, 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.

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
I. METHODOLOGY

Statistical data for this article was taken from all the majority, concurring, and dissenting opinions published in United States Reports during the years of Cardozo's service. Per curiam and memorandum opinions, joint concurring and dissenting opinions, and Supreme Court reports were omitted. Separate opinions were included with concurring opinions. Primary sources analyzed include judicial opinions, statutes, and Supreme Court concurrences and dissents. The legal sources include the following: United States Reports, New York Reports, New York Court of Appeals Reports, New York Law Journal Reports, and New York Supreme Court Reports. The results are not necessarily representative of the opinions of the Court.

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, page counts were checked, where possible, by LEXIS-NEXIS, or Westlaw searches. Page counts were taken from United States Reports and California Western Law Review, Vol. 32 [1995], No. 1, Art. 4.

II. RESULTS

The frequency of citations by source provides a measure of the legal dependence between the decisions of the Court and the primary sources analyzed. The results indicate a significant reliance on the United States Reports and New York Reports, which are the official, detailed, and authoritative sources of the decisions of the Court. Other sources, including Supreme Court reports, New York Court of Appeals Reports, and New York Law Journal Reports, are also important but are used less frequently.

The analysis of the frequency of citations by source also reveals a significant reliance on dissenting opinions and concurring opinions. Dissenting and concurring opinions are often lengthy and detailed, and they provide a valuable perspective on the legal issues presented in the majority opinions. The reliance on dissenting and concurring opinions suggests that the Court is willing to consider a wide range of viewpoints when deciding cases.

The analysis also reveals a significant reliance on works of scholarship, including treatises, books, and periodicals. These sources provide a valuable perspective on the legal issues presented in the Court's decisions, and they help to inform the Court's understanding of the legal landscape.

In conclusion, the analysis of the frequency of citations by source provides a useful measure of the legal dependence between the decisions of the Court and the primary sources analyzed. The results indicate a significant reliance on the United States Reports and New York Reports, which are the official, detailed, and authoritative sources of the decisions of the Court. Other sources, including Supreme Court reports, New York Court of Appeals Reports, and New York Law Journal Reports, are also important but are used less frequently. The reliance on dissenting and concurring opinions suggests that the Court is willing to consider a wide range of viewpoints when deciding cases. The analysis also reveals a significant reliance on works of scholarship, including treatises, books, and periodicals. These sources provide a valuable perspective on the legal issues presented in the Court's decisions, and they help to inform the Court's understanding of the legal landscape.
cited were derived from Shepard's New York Supplement Citations and Shepard's United States Citations.

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. As Table I-11 indicates, he was the most prolific judge from 1914-1921, in 1923, and again from 1928-1931. He cited the most cases per majority opinion in every year but 1919, averaging 13.87 case cites per opinion. The remainder of the court averaged only 7.15, with only a few judges significantly above or below the average. 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. Thus,

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:

<table>
<thead>
<tr>
<th>Judge</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crane</td>
<td>47</td>
</tr>
<tr>
<td>Hogan</td>
<td>32</td>
</tr>
<tr>
<td>Andrews</td>
<td>40</td>
</tr>
<tr>
<td>Lehman</td>
<td>28</td>
</tr>
<tr>
<td>McLaughlin</td>
<td>17</td>
</tr>
<tr>
<td>Collin</td>
<td>11</td>
</tr>
<tr>
<td>Bartlett</td>
<td>10</td>
</tr>
<tr>
<td>O’Brien</td>
<td>8</td>
</tr>
<tr>
<td>Cardozo</td>
<td>7</td>
</tr>
</tbody>
</table>

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. 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.

Cardozo admired the style of English jurists and their ability to bring everyday experience into their opinions. Unlike his fellows, he made regular and significant use of British cases. 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. Stylistically, Supreme Court opinions included footnotes, were generally longer, and contained far more citations than those of the New York court.

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 1-2. In contrast, the sixty Cardozo opinions used in Posner's sample were slightly longer than average. POSNER, supra note 5, at 155.

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.


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.


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 Holmes\(^ {28}\) and the English judge, Lord Mansfield,\(^ {29}\) more often than did all the decisions of his colleagues combined.\(^ {30}\)

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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:

<table>
<thead>
<tr>
<th></th>
<th>Total N.Y. Cites</th>
<th>N.Y. Pct. of State Cites</th>
<th>N.Y. Pct. of All Cites</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brandeis</td>
<td>38</td>
<td>15.6</td>
<td>1.6</td>
</tr>
<tr>
<td>Butler</td>
<td>22</td>
<td>8.2</td>
<td>1.2</td>
</tr>
<tr>
<td>Cardozo</td>
<td>254</td>
<td>30.5</td>
<td>8.2</td>
</tr>
<tr>
<td>Hughes</td>
<td>53</td>
<td>19.7</td>
<td>1.8</td>
</tr>
<tr>
<td>McReynolds</td>
<td>8</td>
<td>15.0</td>
<td>1.4</td>
</tr>
<tr>
<td>Roberts</td>
<td>23</td>
<td>10.0</td>
<td>1.3</td>
</tr>
<tr>
<td>Stone</td>
<td>59</td>
<td>17.2</td>
<td>2.0</td>
</tr>
<tr>
<td>Sutherland</td>
<td>31</td>
<td>10.8</td>
<td>1.8</td>
</tr>
<tr>
<td>VanDevanter</td>
<td>6</td>
<td>13.0</td>
<td>1.6</td>
</tr>
</tbody>
</table>

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. 503 (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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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

\textsuperscript{31} Landes & Posner, supra note 18, at 259.

\textsuperscript{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.


\textsuperscript{34} CARDOZO II, supra note 28, at 10-11. Williston's contracts treatise is described as a "treasury of learning." \textit{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

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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:

<table>
<thead>
<tr>
<th>N.Y. Court of Appeals</th>
<th>Cardozo</th>
<th>Others</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Williston on Contracts</td>
<td>46</td>
<td>68</td>
<td>104</td>
</tr>
<tr>
<td>Wigmore on Evidence</td>
<td>25</td>
<td>49</td>
<td>74</td>
</tr>
<tr>
<td>Williston on Sales</td>
<td>17</td>
<td>20</td>
<td>37</td>
</tr>
<tr>
<td>Blackstone’s Commentaries</td>
<td>10</td>
<td>15</td>
<td>25</td>
</tr>
<tr>
<td>Dillon on Mun. Corp.</td>
<td>2</td>
<td>22</td>
<td>24</td>
</tr>
<tr>
<td>Pomeroy’s Equity Juris.</td>
<td>6</td>
<td>18</td>
<td>24</td>
</tr>
<tr>
<td>Kent’s Commentaries</td>
<td>8</td>
<td>13</td>
<td>21</td>
</tr>
<tr>
<td>Mecham on Agency</td>
<td>11</td>
<td>10</td>
<td>21</td>
</tr>
<tr>
<td>Pollock on Torts</td>
<td>12</td>
<td>9</td>
<td>21</td>
</tr>
<tr>
<td>Holdsworth, Hist. Eng. Law</td>
<td>15</td>
<td>4</td>
<td>19</td>
</tr>
<tr>
<td>Anson on Contracts</td>
<td>10</td>
<td>8</td>
<td>18</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>United States Supreme Court</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Story on the Constitution</td>
<td>3</td>
<td>18</td>
<td>21</td>
</tr>
<tr>
<td>Blackstone’s Commentaries</td>
<td>0</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>Wigmore on Evidence</td>
<td>9</td>
<td>4</td>
<td>13</td>
</tr>
<tr>
<td>Benedict on Admiralty</td>
<td>0</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Pomeroy’s Equity Juris.</td>
<td>3</td>
<td>6</td>
<td>9</td>
</tr>
<tr>
<td>Williston on Contracts</td>
<td>6</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>Cooley on Const. Law</td>
<td>0</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>Hyde on International Law</td>
<td>2</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>Moore on International Law</td>
<td>1</td>
<td>6</td>
<td>7</td>
</tr>
<tr>
<td>Thayer on Evidence</td>
<td>4</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Holdsworth, Hist. Eng. Law</td>
<td>3</td>
<td>3</td>
<td>6</td>
</tr>
</tbody>
</table>

Struggle for Law might even appear in a routine opinion like *Morningstar v. Lafayette Hotel Co.* 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. His repeated refusal to pay one dollar for this service led to his ejectment from the hotel dining room. In endorsing the plaintiff's right to bring a wrongful ejectment 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."

In his treatise on evidence, Professor Wigmore complained that judges fail to demonstrate knowledge of legal history. 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," 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.*, *Loucks v. Standard Oil*, and *Palko v. Connecticut*, 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, I 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.


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

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

B. Legal Periodicals

Cardozo’s admiration of the work of scholars extended particularly to their work in law reviews. Unlike previous Court of Appeals judges, who rarely cited to legal periodicals, he quickly began to make use of this resource. 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. 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. References to the reviews appeared only twice in the

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

<table>
<thead>
<tr>
<th>New York Ct. of Appeals</th>
<th>United States Supreme Ct.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cardozo</td>
<td>Cardozo</td>
</tr>
<tr>
<td>Pound</td>
<td>Stone</td>
</tr>
<tr>
<td>Seabury</td>
<td>Brandeis</td>
</tr>
<tr>
<td>Andrews</td>
<td>Hughes</td>
</tr>
<tr>
<td>Kellogg</td>
<td>All Others</td>
</tr>
<tr>
<td>Bartlett</td>
<td></td>
</tr>
<tr>
<td>Collin</td>
<td></td>
</tr>
<tr>
<td>Crane</td>
<td></td>
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<tr>
<td>Crouch</td>
<td></td>
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<tr>
<td>All Others</td>
<td></td>
</tr>
</tbody>
</table>


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.

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

Cardozo used law reviews in various contexts. \textit{Ultramares Corp. v. Touche}\textsuperscript{53} includes three cites illustrating scholarly interest in the subject of inroads on privity.\textsuperscript{54} \textit{DeCicco v. Schweitzer}\textsuperscript{55} contains references to seven articles by major scholars exhibiting diverging views on the distinctions between bilateral and unilateral contracts.\textsuperscript{56} In \textit{Epstein v. Gluckin},\textsuperscript{57} Cardozo cited articles by Dean William Lewis\textsuperscript{58} and Dean Harlan Stone.\textsuperscript{59}

\begin{verbatim}
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:

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|c|c|c|}
\hline
& & & & & & & & & \\
\textbf{New York Court of Appeals} & & & & & & & & & \\
\hline
\hline
Cardozo & 51 & 12 & 11 & 0 & 11 & \\
Others & 32 & 16 & 14 & 16 & 2 & \\
Total & 83 & 28 & 25 & 16 & 13 & \\
\hline
\textbf{United States Supreme Court} & & & & & & & & & \\
\hline
\hline
Black & 1 & 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 & \\
\hline
\end{tabular}
\end{table}

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).


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

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. 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*, 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.

C. The Restatement

Cardozo was a founding member of the American Law Institute and an early promoter of the Restatements. As would be expected, he cited to them as soon as they were written, using the *Restatement of Contracts* and the *Restatement of Agency* 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. On the Supreme Court, Cardozo referred to the *Restatements* seven times in majority opinions, equal to the combined total of the other eight justices.

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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).
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 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.
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

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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:

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<thead>
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</tr>
</thead>
<tbody>
<tr>
<td>Cardozo</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>31</td>
<td>1</td>
</tr>
<tr>
<td>All Others</td>
<td>4</td>
<td>13</td>
<td>7</td>
<td>1</td>
<td>28</td>
</tr>
</tbody>
</table>

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


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. There were only nineteen such cites in majority opinions between 1914 and 1932, four by Cardozo.

With far more resources available, members of the Supreme Court made correspondingly higher use of sources of legislative intent. 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., Norwegian Nitrogen v. United States, and DuParquet Huot & Moneuse Co. v. Evans. 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. 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; Reviser’s Notes were explanations to amendments); Hoadley v. Hoadley, 155 N.E. 728, 729 (N.Y. 1927) (Reviser’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. Höfstander, 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).
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.
86. Wigmore, supra note 42, at 244.
other State Courts.” Professor Merryman reserves his criticism for judges who regularly cite less authority than their colleagues. 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.” 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. 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.”

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. 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.” In contrast, another observer calls Cardozo’s approach “elliptical, convoluted, [and] at times incomprehensible.” 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.” 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.
93. WHITE, supra note 7, at 260.
as one of clarifying principles. Professor Corbin states that Cardozo’s contract cases produced an evolution of doctrines, “as reasonably required by the new facts before the courts.” 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.” 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. 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.

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

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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 over 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

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104. The two opinions compared as follows:

<table>
<thead>
<tr>
<th></th>
<th>Cardozo</th>
<th>Kellogg</th>
</tr>
</thead>
<tbody>
<tr>
<td>Length</td>
<td>8.5</td>
<td>4.0</td>
</tr>
<tr>
<td>Case Cites</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N.Y. Ct. App.</td>
<td>16</td>
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</tr>
<tr>
<td>Other N.Y.</td>
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<td>0</td>
</tr>
<tr>
<td>U.S. Sup. Ct.</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Other State</td>
<td>14</td>
<td>1</td>
</tr>
<tr>
<td>British</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Legal Treatises</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Legal Periodicals</td>
<td>3</td>
<td>0</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th></th>
<th>avg. cases</th>
<th>avg. sec.</th>
<th>avg. pp.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cardozo</td>
<td>17.56</td>
<td>3.27</td>
<td>6.5</td>
</tr>
<tr>
<td>Dissents</td>
<td>7.49</td>
<td>.46</td>
<td>5.4</td>
</tr>
</tbody>
</table>

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. \(\text{Id.}\)


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

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

<table>
<thead>
<tr>
<th>Cardozo</th>
<th>Bartlett</th>
<th>Betts (1912)</th>
<th>Kellogg (1914)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Length</td>
<td>10.5</td>
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</tr>
<tr>
<td>Case Cite:</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>N.Y. Ct. App.</td>
<td>11</td>
<td>4</td>
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<td>U.S. Sup. Ct.</td>
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<td>1</td>
</tr>
<tr>
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<td>0</td>
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<tr>
<td>Legal Encys.</td>
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</tr>
<tr>
<td>Total</td>
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<td>9</td>
<td>12</td>
</tr>
</tbody>
</table>

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.*


<table>
<thead>
<tr>
<th>Cardozo</th>
<th>Andrews</th>
<th>Seeger</th>
<th>Lazansky</th>
</tr>
</thead>
<tbody>
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</tr>
<tr>
<td>Case Cite:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N.Y. Ct. App.</td>
<td>12</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>Other N.Y.</td>
<td>0</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>U.S. Sup. Ct.</td>
<td>2</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Other State</td>
<td>6</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>English</td>
<td>5</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Treatises</td>
<td>13</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Legal Periodicals</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>41</td>
<td>17</td>
<td>3</td>
</tr>
</tbody>
</table>

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:

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

¹¹³. 295 U.S. 301 (1935).

¹¹⁴. *Id.* at 312.

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

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

¹¹⁶. 105 N.E. 843 (1914).

¹¹⁷. *Id.* at 845.
This argument, requiring discussion of more issues, produced a dissent with more than twice as many citations as the only slightly shorter majority opinion.\textsuperscript{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 lead Professor Merryman to conclude that a high citation rate was a possible indicator of judicial quality.\textsuperscript{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,\textsuperscript{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,\textsuperscript{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

\textsuperscript{118} Id. at 847.

\textsuperscript{119} A comparison of Cardozo’s and Werner’s opinions in Grutz gives the following results:

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

\textsuperscript{120} Merryman II, supra note 1, at 419.

\textsuperscript{121} POSNER, supra note 5, at 84.

\textsuperscript{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.\footnote{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.}

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.\footnote{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:}

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

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 - Machpherson 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, 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*, *Grosjean v. American Press Co.* and *Carter v. Carter Coal Co.* 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);

The highest total for another judge was 243 cites to Collin's opinion in Miller v. Schloss, 113 N.E. 357 (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);
127. 287 U.S. 45 (1932).
128. 297 U.S. 233 (1936).
129. 298 U.S. 238 (1936).

https://scholarlycommons.law.cwsl.edu/cwlr/vol32/iss1/4
cases like Arizona v. California130 and Erie R.R. v. Tompkins131 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:

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 is dissent! is “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 57-40.
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. Wick, “Irving Lehman,” DICTIONARY OF AMERICAN BIOGRAPHY 451 (Supp. 3 1973).


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. As the older justices retired the pattern changed. By the 1940s and 1950s, reviews were commonly used by judges of all political persuasions.

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 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.\textsuperscript{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.\textsuperscript{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.

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

\textsuperscript{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, \textit{The Common Law} and \textit{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, \textit{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. \textit{Posner, supra} note 5, at 144.
## APPENDIX I

New York Court of Appeals, 1914-1932

### Table I-1

<table>
<thead>
<tr>
<th>Case Citations Per Opinion</th>
<th>Majority</th>
<th>Concurring</th>
<th>Dissenting</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>op.</td>
<td>ci.</td>
<td>avg.</td>
</tr>
<tr>
<td>Cardozo</td>
<td>551</td>
<td>7,640</td>
<td>13.87</td>
</tr>
<tr>
<td>Others</td>
<td>2,674</td>
<td>19,146</td>
<td>7.16</td>
</tr>
<tr>
<td>Andrews</td>
<td>191</td>
<td>1,238</td>
<td>6.48</td>
</tr>
<tr>
<td>Bartlett</td>
<td>74</td>
<td>322</td>
<td>4.35</td>
</tr>
<tr>
<td>Chase</td>
<td>157</td>
<td>1,540</td>
<td>9.81</td>
</tr>
<tr>
<td>Collin</td>
<td>153</td>
<td>1,800</td>
<td>11.76</td>
</tr>
<tr>
<td>Crane</td>
<td>439</td>
<td>3,010</td>
<td>6.86</td>
</tr>
<tr>
<td>Croucher</td>
<td>12</td>
<td>77</td>
<td>6.42</td>
</tr>
<tr>
<td>Cuddeback</td>
<td>71</td>
<td>401</td>
<td>5.65</td>
</tr>
<tr>
<td>Hiscock</td>
<td>14</td>
<td>163</td>
<td>11.64</td>
</tr>
<tr>
<td>Hiscock</td>
<td>248</td>
<td>1,912</td>
<td>7.71</td>
</tr>
<tr>
<td>Hogan</td>
<td>145</td>
<td>700</td>
<td>4.83</td>
</tr>
<tr>
<td>Hornblower+</td>
<td>0</td>
<td>0</td>
<td>0.00</td>
</tr>
<tr>
<td>Hubbs</td>
<td>79</td>
<td>639</td>
<td>8.09</td>
</tr>
<tr>
<td>Kellogg</td>
<td>114</td>
<td>839</td>
<td>7.36</td>
</tr>
<tr>
<td>Lehman</td>
<td>223</td>
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*Calculated from opinions from 1929-1932.
Table I-7

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Table I-9

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* The Court of Appeals replaced the Court of Errors in 1847.
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https://scholarlycommons.law.cwsl.edu/cwlr/vol32/iss1/4
## Table I-10

**Citations in Types of Opinions**

*New York Court of Appeals, 1914-1932*

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| 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 |

<p>| 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 |
|------|---------|-------|----------|-----------|----------|---------|
| 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 | 16  | 7.27     | .73       | 4.93     |
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| 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     |
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|      | Crane   | 27    | 8.96     | .15       | 6.15     |
|      | Cuddeback| 9     | 2.33     | .00       | 2.72     |
|      | Hiscock | 18    | 11.83    | .44       | 6.50     |
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+ resigned March 3, 1932
Appendix II

United States Supreme Court, 1932-1937

Table II-1

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**Citations to Dissenting & Concurring Opinions**

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### Table II-10

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**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

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### Table II-11

**Citations in Types of Opinions**

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