Review of Cardozo: A Study in Reputation, by R. Posner

Richard D. Friedman
University of Michigan Law School, rdfdman@umich.edu

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ON CARDozo AND REPUTATION: LEGENDARY JUDGE, UNDERRATED JUSTICE?

Review by Richard D. Friedman*

Judge Richard Posner has written a genial book about one of our greatest judicial icons, Benjamin N. Cardozo. He seeks not only to assess the merits of Cardozo's writings, both on and off the bench, but also to measure, and determine the causes of, Cardozo's reputation.

The book is an outgrowth of a lecture series, and it reveals its origins in at least two ways. First, the book attempts to reach a mixed audience, composed of both lawyers and laypeople, and in this aspect it is very successful. Nonlawyers, I believe, will have little difficulty following Judge Posner's essential arguments, but there is also plenty here to challenge and intrigue readers knowledgeable in the law.

Second, the book is written in a loose-limbed, almost conversational way. Often, Judge Posner strays from his main themes to make side points. In a larger work, this style might be a significant defect. In a book of this size, it adds to the fun—in large part because so many of Judge Posner's points are insightful and provocative. Indeed, because he does not offer any stunning surprises, with respect to either Cardozo or the nature of reputation, in this case I believe that getting there is almost all of the fun. So far as he has "aspire[d] to create" a genre—"[t]he full-length critical (not biographical) judicial study, employing tools of social science as well of legal doctrine" (p. viii)—I believe Judge Posner has fallen short; his attempts at social science are not persuasive, and I suspect this book will have few imitators. But there does not need to be a pot of gold at the end; the rainbow can be its own reward.

A book that has as many facets as this short one does invite comment on a wide variety of subjects. In Part I of this review, I will address in rather general terms Judge Posner's discussion of Cardozo

* Professor of Law, University of Michigan Law School. My thanks to David Goodhand for very able research assistance and to Andy Kaufman for comments that saved me from some embarrassing errors.

2 Judge Posner delivered the Cooley Lectures at the University of Michigan Law School in 1989.
3 Note, for example, the musings on reputation, some of which are quoted infra, page 1924; his concept of the "value added" of an opinion, discussed infra, page 1925; and his analytical gloss, generally from an economic perspective, on numerous Cardozo opinions.
and of reputation. In Part II, I will address a subject that is of relatively more interest to me than to Judge Posner, Cardozo as Supreme Court Justice.

I. CARDOZO AND REPUTATION

At the very outset, Judge Posner gives some suggestion of the ride ahead, when he says that “economic analysis of reputation is helpful in unraveling the mystery of Cardozo’s reputation” (p. vii). That statement should not be taken too seriously as an attempt to develop a formal economic model of reputation. For the most part, Judge Posner eschews such formality. Economics, however, does enter into this work overtly sometimes, in his analyses of some cases. Primarily though, it represents a mode of thought, one that enables him to perceive clearly the dynamics of various phenomena and their relationships to one another.

Thus, in his discussion of reputation in general—a discussion that is both graceful and playful—Judge Posner offers some refreshing insights, or at least he presents and sharpens old wisdom in an interesting way. A few examples will suffice. Early death may enhance a person’s posthumous reputation, in part because “the regression phenomenon” makes it unlikely that he will produce further works of the caliber of his previous best (p. 62). Reputation may feed on itself, because “[o]nce a person is widely known, people do not have to invest heavily to find out about him and his qualities” (p. 68), but his work will be judged according to the standard set by his previous work; it may remain faddish for awhile even without substantial quality, but “a persistent illusion of quality” (p. 69) is unlikely, in part because “[t]he urge to belittle is as strong as the urge to lionize” (p. 69). Similarly, although luck has something to do with reputation, “[i]n the long run, we expect good luck and bad luck to cancel out, like other random noise; in the long run, therefore, actual and deserved reputation should converge” (p. 64).

This question of the relationship between reputation and merit of work is important. As Judge Posner suggests, not only is the general nature of reputation a worthy subject for social scientists, but the nature of the reputation of judges and other legal writers warrants consideration by legal scholars. Even if the gap between reputation and quality (whatever each of those terms may mean) is likely to disappear over the long run when we are all dead, it may be highly signifi-

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4 Even after many years, Judge Posner’s extensive use of the economic lens still has the power to startle. See, for example, Posner’s discussion of Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922): “Commercial morality is perhaps the same thing as efficiency” (p. 101).
The fact that a judge or scholar is held in high repute may mean that her opinions or articles will have far greater impact than if they were written by an unknown.

This phenomenon may be in part because the highly reputed person’s work is more likely to be read, or at least more likely to be read more carefully. As Judge Posner puts it, that person’s work has a greater expected value (p. 69). Sometimes, though, this factor might cause readers to spend too much time on the great person’s poorer works, and to overlook or barely pay attention to the excellent work of the unknown.

The phenomenon may also be attributable to the fact that, even if readers give works by the two authors equal attention, they will tend to rely more on, and accept more readily the views of, the person with the stronger reputation. Sometimes, such reliance and acceptance may be useful. Unless an author can put into her presentation the entire chain of evidence and inference on which her conclusions depend (including certified copies of any documents on which she has drawn and a complete explanation of the experiential bases of any intuitions that she has had), the reader will have to rely to some extent on what he knows, or assumes, about her. An opinion stated by an experienced, highly reputed author is therefore more valuable than the same opinion from an unknown. But sometimes, of course, the phenomenon of the emperor’s new clothes may be at work: The author’s reputation may make people treat her assertions as wise, or at least worthy of further reflection, even when they are very foolish.

It would be interesting to know whether readers put too much, too little, or just about the right amount of reliance on reputation in deciding what to read and what to rely on. Judge Posner, I suspect, would tend to believe that market mechanisms work successfully here—that people tend to rely on reputation to the extent their experience suggests is worthwhile. But a free market does not preclude a role for market research. This idea is not fanciful, either; at least it is not entirely fanciful. I wonder, for example, whether law reviews would be better off selecting articles by a blind read, by relying to the fullest extent possible on the reputation of the author, without purporting to assess the merits of the particular piece, or in the way I believe most do now, by relying in part on the reputation of the author and in part on what they perceive as the merits of the work. Perhaps different law reviews would have different optimal strategies. I suspect a serious study could shed some wisdom on the matter.5

5 For instance, such a study could ask each of several panels—some composed of professors, some composed of law review editors—to do one of three jobs: (1) rate a pool of articles
Judge Posner does not address in depth the question of how much reliance people put, or should put, on reputation. Nor does he discuss systematically why, at least for the short or intermediate term, a person's reputation might outstrip the merits of his work. But the choice of Cardozo as a subject offers a good forum for only part of such a discussion. Cardozo's reputation is based almost entirely on his legal work—his legal writing on and off the bench, and perhaps also, but to a lesser extent, his judicial votes. This does not necessarily mean that his reputation was entirely based on merit. One might conclude that there was something about his writing—perhaps his celebrated style—that helped build his reputation beyond its deserts. And so it is an important question whether there is a gap between legal writing that is good on the merits, however they are to be judged, and writing that is good for the author's reputation. For that question, Cardozo is a suitable subject; Judge Posner makes some interesting comments, to which I will return later, that touch on this matter.

Cardozo does not, however, provide a very good subject for discussing extrinsic factors that might go into making a reputation. His reputation was not based, at least not in significant part, on who he was, what else he did, whom he knew, or how he looked. To outward appearances, at least, he led an extremely bland life. Chief Justice Hughes stopped giving Cardozo his assignments on Saturday evening after conferences, because only by delaying them until Sunday morning could he ensure that Cardozo would take one night off. Cardozo had, as Judge Posner points out, an extremely attractive personality, but probably relatively few people who revered him when he was alive, or who do now, had a strong idea of that; there are not many good Cardozo anecdotes. For about a quarter century he was a judge of either the most visible state court in the nation or of the United States Supreme Court, and no doubt that made his reputation stronger than it would have been had he been, say, Chief Justice of Wyoming. But Cardozo had attained nearly legendary status even before President Hoover nominated him to the Supreme Court; in-

without knowing the name of the author; (2) rate the same articles with knowledge of the identity of the author; and (3) rate the authors. (Perhaps a panel that did job (1) could also be asked afterwards to do job (3).) The results would almost surely be interesting.


7 Judge Posner reports that Cardozo "treated other people decently whether or not they could help his career" (p. 65). In the course of interviewing a fair number of people who were young lawyers in the 1930s, I have found unanimous agreement on this.
deed, he was nominated because his stature was so great. Other judges have had careers of comparable or longer length, even entirely on the Supreme Court, without achieving anything near his reputation.

Now compare Holmes. Judge Posner says that "Holmes is, of course, the larger figure" (p. 138). Perhaps that is true, though I suspect it is more debatable than Judge Posner does. In any event, however justified Holmes's reputation may be, it was reinforced by many factors extrinsic to his legal writings. Holmes was the son of, and bore the same name as, one of the most famous and popular authors of nineteenth-century America. When he was nominated to the Supreme Court—after twenty years on the Supreme Judicial Court of Massachusetts—much of the press's attention was devoted to the fact that the nominee was Dr. Holmes's son, the wounded officer of the Doctor's essay "My Hunt After the Captain." Holmes had fought bravely in the Civil War, the watershed event of American history, and had been wounded three times. His height and broad mustache made him look the picture of an army officer even into old age. He was an American aristocrat, near the center of the circle of Boston Brahmins, and with a wider circle of eminent friends reaching across the Atlantic; he wrote and received colorful letters worthy of publication. He was already an old man when the public began to recognize him as one of the most progressive members of the Supreme Court, and to appreciate him for it, and he was a very old man when he left the Court. Through the latter part of his career, he had the good fortune to be revered by Felix Frankfurter, which meant that he had as law clerks and admirers a steady stream of extremely able young men, many of whom became famous themselves.

In short, Holmes's life was the stuff from which a biographical novel and play could be written—and have been. *Yankee from Olympus*  and *The Magnificent Yankee* have a stirring sound to them. What would be the comparable work on Cardozo—*The Gentle Sephardi*? Snore.

If one wanted to write a truly useful case study of a legal reputation, therefore, Holmes would be an ideal subject. It would be interesting to study carefully how, when, and why Holmes's reputation developed among various audiences—the bench, the bar, legal academics, other academics, and the public. I suspect, though, that Judge Posner wanted to write about Cardozo, who has been less
“done” than Holmes, more than he wanted to write about reputation. But even with respect to Cardozo, the same type of study might have yielded interesting insights into how a great reputation might develop.  

Judge Posner did not attempt this type of study. He does present, in his opening chapter, a compendium of scholarly commentary on Cardozo, showing that, though “Cardozo is generally placed in the highest rank of American judges . . . there are and long have been doubters” (pp. 9-10). But he acknowledges that “virtually all the critics of Cardozo . . . dutifully acknowledge his greatness en route to delivering their criticisms” (p. 19). That, it would seem, should be enough to confirm that Cardozo has a strong reputation; if confirmation were really needed, perhaps an informal poll of judges, lawyers, and academics would be the best way of testing the point.  

Instead, Judge Posner offers computer games for lawyers. Judge Posner took advantage of LEXIS to examine how often Cardozo has been mentioned, in comparison to other judges and scholars—reaching as far back as Aristotle and as far forward as Laurence Tribe—in law review articles, and how often his opinions have been cited, in comparison to ones written by his colleagues, in later judicial opinions. This discussion may be the most attention-getting portion of the book; Judge Posner evidently hopes that it will be (p. ix). I will not comment here on the technical merits of this methodology. To me, the most significant aspect of it is that it is gratuitous. A detailed citation study was not necessary to demonstrate that Cardozo is well known; that “Cardozo’s reputation among legal professionals stands high when correction is made for the fact that he died more than half  

10 Such a study might, of course, have required more time than Judge Posner wished to devote to this book, and one cannot fault him at all for not wishing to make the book a work of greater scope. 

On the other hand, some of the research time that he did spend seems to me to have been relatively unproductive. I refer not only to the attention-getting citation studies discussed in the text, but also to his reading of selected briefs and records. Judge Posner is absolutely correct that reading the briefs and records alongside judicial opinions may yield useful information, and his use of the economic concept of “value added,” to express the contribution of the judge going beyond the briefs (pp. 111-12), is an interesting one. But his conclusion that Cardozo’s literary charm “owes nothing to the briefs” (p. 127), is totally unsurprising; if it did, more judges would sound like Cardozo. Nor is it surprising that to some extent Cardozo’s substantive arguments resemble those made in the briefs but that to a larger extent they do not (pp. 111-12, 127). For understanding what happened in a particular case and why, the briefs and record are a valuable source; for deriving the larger picture of Cardozo’s contribution, they are of rather slight value. 

11 Judge Posner did solicit the views of some of his academic colleagues at the University of Chicago Law School on Cardozo (pp. 11-12), but apparently he made no systematic effort to conduct a poll, however limited.
a century ago after serving only briefly on the Supreme Court" (p. 80) is hardly a revelation.12

The data are amusing, in the same way that baseball statistics, to which Judge Posner compares them (p. 138), are amusing. But therein lies a curiosity. However imperfect the data may be as a measure of anything useful—and Judge Posner acknowledges their limitations (pp. 67-73)13—they seem to offer a scorecard of sorts for ranking judges and legal academics. As Judge Posner says in the last paragraph of the book, “For better or worse, the legal system has its superstars, and most of them—or at least the most luminous of them—are judges” (p. 150). Inevitably, then, readers will wonder how one particular judicial superstar, not ranked by Judge Posner, would score on his various citation scales. Lest there be any doubt: As measured by citations, Richard Posner is a megastar.14

This raises the possibility that Judge Posner, however unconsciously, offered his statistical showing not for anything it says about Cardozo but for what it silently hints about Judge Posner. I wish he had not presented these statistics at all. His discussion of Cardozo did not need it, and neither did his own reputation, which is justifiably

12 See Freund, Reputation by Citation, N.Y. Times Book Review, Nov. 4, 1990, at 31 (“Quantitative research may have either of two values: to provide new or counter-intuitive information, or to affirm what we ‘always knew’ but now we know. With Cardozo, the data are of essentially the latter kind.”).

13 Particularly pertinent is this statement: “Citations are thus an imperfect proxy for reputation, and reputation itself an imperfect proxy for quality” (p. 71).

14 Table 2 (p. 76) shows the number of articles mentioning various well-known judges by title. A LEXIS search, conducted on March 20, 1991, in the LAWREV library of JUDGE POSNER AND DATE (< 1990) yielded 622 items—more than any other judge, other than Supreme Court Justices, listed in the tables. As Judge Posner points out, “current and recent Supreme Court justices receive the bulk of the law reviews’ attention” (p. 77).

Table 4 (p. 78) estimates the number of articles mentioning various well-known judges and scholars by name. The figures are only estimates because some of the names are either “common proper names like ‘Jackson’ [or] common words like ‘hand’” (p. 74). Accordingly, Judge Posner discounted the number of citations containing the name of the given person in accordance with the results of a random sample of 30 articles containing that word (p. 75). A search on March 20, 1991 in the LAWREV library of POSNER AND DATE (< 1990)—that is the same search as before but not limited by the title—yielded 2,275 items. I am not sure how Judge Posner chose his random samples of 30, but a quick scan will show that the overwhelming majority of the cites to Posner are to Judge Posner—again, more than anybody on his list other than Supreme Court justices, and more than many often-cited Supreme Court justices as well. (In a check of every 75th article, beginning with number 75, each one referred to Judge Posner; some of the others do not.)

The data presented in this footnote are not strictly comparable to those in Judge Posner’s book, because new entries are continually being added to the LEXIS library, even for closed periods. Thus, a March 20, 1991 search of JUDGE CARDOZO OR JUSTICE CARDOZO AND DATE (< 1990) yielded 503 items, as compared to the 412 indicated by Judge Posner. But this factor does not seem to alter the basic conclusion of this footnote—that Judge Posner is cited more than anyone else around except for a few Supreme Court justices.
secure.15

One interesting point does emerge from the citation studies, though Judge Posner does not emphasize it. Cardozo's opinions from the New York Court of Appeals have, by Judge Posner's estimate, been cited by the New York courts 1.65 times as often as those of his colleagues on that court, but 7.12 times as often by the courts of other states (p. 84). Judge Posner offers an interesting and persuasive hypothesis for this: "[T]here is far more substitutability within the class of nonauthoritative citations" (p. 84) than there is among binding decisions, and so judges of courts in other jurisdictions are especially likely to cite the opinion by the superstar, even if another opinion is nearly as good (pp. 67-68, 84). These figures raise one other possibility, however: It may be that the 7.12 figure, indicating use of Cardozo's opinions by courts that did not need to, reflects the strength of his reputation; if so, does the 1.65 figure, representing a far smaller skew of use by courts that need authority, indicate that Cardozo's work is less effective—less useful as authority, less likely to "get the job done"—than his reputation would suggest?

Perhaps so—though the figures themselves could not prove the point.16 I think Judge Posner's deeper response would be that usefulness in this sense is not a good test of merit, or at least of lasting merit. "The competent, even brilliant, analysis of yesterday's legal problems has little current interest," he points out. "The literary judge wears best over time" (p. 143). He carries this point rather far: He suggests that the style of Cardozo's opinions is more important than their substance (p. 23). This might seem startling, but, at least if construed properly, it may be reasonable.17 Substance is essential; a judge will not perform well if he is a poor analyst or if his vision of the


16 In some cases, no matter how poor or pedestrian an opinion of a court of last resort may be it is bound to be cited often simply because it is binding authority.

17 I question, though, Judge Posner's apparent view that substance is relatively more important to style in academic as opposed to judicial writing (pp. 23, 133). A judicial opinion, at least from an important court, is sure to have some effect, irrespective of its style, because of its source; its substance can do great harm or good, irrespective of its persuasive power. Academic writing, on the other hand, will often drop out of sight unless its style encourages readers to pay attention to it. If it is substantively good, it may not accomplish much unless it is persuasively presented; even if it is substantively bad, it might be useful if it generates productive debate.
world and of the law is untenable. But good substantive qualities are not necessarily all that hard to come by. Cardozo, for example, was "a highly competent legal analyst but no more so than many judges who are deservedly much less eminent than he" (p. 134). No matter how sound the substance, its impact will be greater if it is presented in a clear, forceful, and memorable way. Thus, there is a premium on literary skill, and it is that, more than anything else, that set Cardozo apart.

Because he regards literary skill—communicative ability—as so important to judicial performance, I believe Judge Posner sees a large degree of congruence between those qualities that give judicial work merit and those that build the reputation of the author. Indeed, when he contends—justifiably, I think—that Cardozo's rhetoric is the most important factor underlying his "eminence" (p. 126), it is difficult to be certain whether he means "eminence" to refer to Cardozo's reputation or his merit; it seems, though, that he is talking about both.

In any event, Judge Posner does a fine job in analyzing Cardozo's rhetoric. Sometimes he uses a high-powered microscope to examine carefully miniature examples of Cardozo's celebrated writing style. But he also takes the broader view, emphasizing "the architecture of his opinions" (p. 126).

Nor does Judge Posner ignore substance. Indeed, he spends a great deal of his time analyzing the substance of Cardozo's nonjudicial writings and of some of his most important opinions on the New York Court of Appeals. He offers the intriguing, and probably accurate, judgment that:

little that has survived of legal realism cannot be found, more ar-

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18 Posner discusses word inversions in Cardozo's writing (p. 44); analyzes the rhetorical power of the famous sentence from People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926): "The criminal is to go free because the constable blundered." (pp. 55-56); analyzes and characterizes as poetry the clause "danger invites rescue" from Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921) (pp. 101-02); and presents several more of Cardozo's "epigrammatic utterances" (pp. 118-19).

19 He also occasionally takes Cardozo to task for distorting the facts (p. 137). Sometimes, I believe, he attributes too much significance to delicate shadings of Cardozo's factual presentations. For instance, with respect to the factual statement in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), Judge Posner says:

The plaintiff is described as standing on the platform rather than as waiting for a train; the effect is to downplay the carrier-passenger relationship (created by the purchase of the ticket) that entitled Mrs. Palsgraf under traditional legal principles to the highest degree of care (p. 39).

This does not strike me as persuasive. Cardozo said expressly that Mrs. Palsgraf was standing on the platform after having bought a ticket. Having said that, he might have thought it superfluous to say that she was waiting for a train. Had he said that she was waiting for a train without saying that she was standing on the platform he would have omitted a fact crucial to understanding how she was injured.
tically as well as more temperately expressed, in Cardozo's jurisprudential writings. The limitations of his jurisprudence are the limitations of pragmatic jurisprudence generally (pp. 31-32).

And he considers that, after rhetoric, "[t]he second most important factor in Cardozo's eminence may well be his judicial program, clearly stated in The Nature of the Judicial Process, of bringing law closer to the (informed) non-lawyer's sense of justice" (p. 127). This judgment, too, seems sound, and Justice Posner's analyses of various cases are lucidly presented, distinctive in style, and often persuasive.20

One might also consider that Cardozo had a "program" on the Supreme Court, similar to that of most liberals of the day, of bringing constitutional interpretation closer to the needs of the public. Judge Posner devotes relatively slight attention to Cardozo's Supreme Court career, though, because he believes that Cardozo's performance there "was an anticlimax" (p. 123). I do not.

II. CARDOZO AS SUPREME COURT JUSTICE

Judge Posner says that "Cardozo did not place a strongly individual imprint on any field of Supreme Court jurisprudence," and that his Supreme Court opinions "lack the verve and punch of his opinions for the New York Court of Appeals" (pp. 121-22). I disagree. In my opinion, Cardozo's was one of the greatest short tenures on the Court in its history, and it left a strong imprint on the field that was at the center of the Court's consciousness in those years—the power of federal and state governments to regulate a modern economy.21

20 I believe I am unpersuaded by his analysis of the foreseeability issue in Palsgraf. "What is special about what actually happened?" he asks. "A bundle can contain anything smaller than itself; it is as likely to contain fireworks as it is to contain a Ming vase" (p. 41). True; the precise outcome of any event is ex ante very improbable; as Posner remarks, "Of course, any Supreme Court appointment is, ex ante, a low-probability event" (pp. 3-4 n.7). But the relevant category into which fireworks fit—things that make a very big boom when they are dropped—is much rarer, at least in the circumstances of the case, than the relevant category of Ming vases—things that are valuable and will break if they are dropped. Whether tort liability should be determined in part by the foreseeability of such general categories of event is, of course, another matter.

21 I confess myself unable to understand this passage: "The times may have been at fault, not Cardozo. The 1930s may just have been a trough in judicial creativity, a time when the initiative for reform, at both the state and federal levels, shifted for a time to nonjudicial reformers . . . ." (p. 123). But the 1930s were the era of the great transformation of American constitutional law. Often, indeed, scholars speak of the judicial "revolution of 1937." See, e.g., Epstein, Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 5, 44 (1988). (I believe that the change was much less discontinuous than this phrase would suggest, but that is a different matter.) For the courts, this was a time of great ferment, not a trough of creativity.
Judge Posner probably is correct that "the work [and] working conditions of the Supreme Court did not suit his temperament" (p. 121); Cardozo was uncomfortable with the pace of decision set by Chief Justice Hughes, and he preferred the common-law orientation of the New York Court of Appeals' docket. But he had a job to do, and he did it magnificently. In Albany, he may have been the "consummate insider" (p. 128), "avoiding the pose of an ostentatious liberal" (p. 121). But in Washington, he was an uncompromising liberal, often in dissent, and sometimes sharply so.

A prime example is *Panama Refining Co. v. Ryan*, a case not mentioned by Judge Posner. Writing for eight members of the Court, Chief Justice Hughes held that section 9(c) of the National Industrial Recovery Act ("NIRA"), which authorized the President to prohibit the interstate transportation of "hot oil," was an invalid delegation that would concede the President "an uncontrolled legislative power." Cardozo dissented alone, and he was utterly persuasive.

To him, the Court's worries seemed slightly hysterical. "Discretion," he wrote "is not unconfined and vagrant. It is canalized within banks that keep it from overflowing." And, with a touch of irony, he added that "[t]here is no fear that the nation will drift from its ancient moorings as the result of the narrow delegation of power permitted by this section." What the President could do under section 9(c) was "definite beyond the possibility of challenge"; his only latitude was in the occasion on which he could do it. Although section 9(c) itself did not limit that latitude, it was reasonable to incorporate into that provision an understanding that the President should make the order only when he found that doing so would effectuate the policies of Congress stated at the beginning of the statute. Cardozo put the point, I believe, with plenty of "verve and punch":

Either the statute means that the President is to adhere to the declared policy of Congress, or it means that he is to exercise a merely arbitrary will. The one construction invigorates the act; the other saps its life. A choice between them is not hard.

*Panama Refining* was only prelude, because the Court avoided

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23 293 U.S. 388 (1935).
24 That is, petroleum and petroleum products produced or withdrawn from storage in excess of the amounts permitted by state authority. *Id.* at 418.
25 *Id.* at 432.
26 *Id.* at 440 (Cardozo, J., dissenting).
27 *Id.* at 443.
28 *Id.* at 434.
29 *Id.* at 439.
considering the validity of the NIRA's most important provision, which authorized the President to write industry codes of fair competition. That issue was squarely presented a few months later by *A.L.A. Schechter Poultry Corp. v. United States.* There, the Court, again through the Chief Justice, held the code-making authority invalid, both as an improper delegation of power and as in excess of Congress's power over interstate commerce. Unlike today, in the 1930s, Justices rarely wrote separate concurrences; if they did not write the Court's opinion, they usually dissented or remained silent. But Cardozo, this time joined by Justice Stone, felt the need to write a separate concurrence—a gutsy move for the Court's junior Justice, in the face of an opinion by a Chief who was no doubt eager to mass the Court as it struck down a major New Deal program.

Interestingly, Cardozo concurred on both grounds. Once again, his opinion is more appealing than Hughes's. On delegation, he neatly distinguished *Panama Refining:* "Here in effect is a roving commission to inquire into evils and upon discovery correct them." Indeed, the delegation of code-making authority was extraordinarily broad, practically an abdication of legislative power. On the commerce clause issue, Hughes had characterized "the distinction between direct and indirect effects of intrastate transactions upon interstate commerce" as "fundamental." Cardozo did not object to such categorical language, but he made clear that he did not accord it generative power; rather, the issue of federal power must be resolved by "considerations of degree."

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30 295 U.S. 495 (1935).
31 It is somewhat mysterious why both Hughes and Cardozo felt the need to address the commerce clause issue given the holding on delegation. The mystery is compounded by the fact that Cardozo first drafted an opinion relying solely on the delegation ground, and then another solely on the commerce clause ground. Kaufman, *Benjamin Cardozo* in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 2287, 2296-97 (L. Friedman & F. Israel, eds., 1969). There is some reason to believe that Hughes relied on both grounds so that he could produce an opinion for the Court—but this does not explain why Cardozo, writing a separate concurrence, felt the need to use both grounds. Perhaps he felt it desirable, in a case striking down a major New Deal program, to back up the Chief to the fullest extent that his principles would allow. It is possible also that the breadth of the two opinions dissuaded the conservative justices from holding the code-making authority invalid on an even broader basis, as a violation of due process. For speculation on this score, see R. Friedman, *Charles Evans Hughes as Chief Justice, 1930-1941* (unpublished D. Phil. thesis, Oxford Univ., 1979), ch. 6.
32 *Schecter,* 295 U.S. at 551 (Cardozo, J., concurring). Note also Cardozo's epigram in shrugging aside the argument that the codes were invalid because the statute authorized the President to act at the instance of trade or industrial associations: "When the task that is set before one is that of cleaning house, it is prudent as well as usual to take counsel of the dwellers." *Id.* at 552.
33 *Id.* at 548.
34 *Id.* at 554 (Cardozo, J., concurring).
Nearly a year later, Cardozo elaborated on this approach while dissenting in *Carter v. Carter Coal Co.* The Bituminous Coal Conservation Act of 1935 had been passed in response to *Schechter.* The Act imposed a heavy sales tax on bituminous coal but rebated ninety percent of it for those producers accepting a code that was to be formulated, from statutory specifications, by a National Bituminous Coal Commission. The specifications authorized the Commission to set minimum prices for bituminous coal at every mine in the United States. They also included some labor provisions that the Act’s sponsors recognized were of doubtful constitutionality under prevailing law. As a precaution, the drafters included a severability clause. But their foresight was to no avail. Justice Sutherland, writing for the majority, held the labor provisions unconstitutional. Then, riding roughshod over Congress’s expression of intent, he held that the price-fixing provisions could not be severed from the labor provisions; the entire code, and with it the tax, fell without the validity of the price-fixing provisions ever being considered.

Cardozo, joined by Justices Brandeis and Stone, wrote a sparkling dissent. (Chief Justice Hughes dissented separately, in a rather curious opinion.) Cardozo believed that the price-fixing provisions were clearly valid, at least as applied to the complaining producers, and that given the severability clause this validity should have been enough to sustain the tax without determining the validity of the labor provisions, which had not yet come into operation:

> The opinion of the court begins at the wrong end. To adopt a homely form of words, the complainants have been crying before they are really hurt.

In defending the validity of the price-fixing provisions, Cardozo artfully reconciled his approach to the commerce clause with the categorical language of the prevailing law:

> Mining and agriculture and manufacture are not interstate commerce considered by themselves, yet their relation to that commerce may be such that for the protection of the one there is need to regulate the other. Sometimes it is said that the relation must be "direct" to bring that power into play. In many circumstances such a description will be sufficiently precise to meet the needs of the occasion. But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective. . . . Always the setting of the facts is to be viewed if one would know the close-

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35 298 U.S. 238 (1936).
36 *Id.* at 341 (Cardozo, J. dissenting). Under Section 3 of the Act, acceptance of the code did not estop a producer "'from contesting the constitutionality of any provision of said code, or its validity as applicable to such producer,'" *Id.* at 281 (quoting § 3 of the Act).
ness of the tie. Perhaps, if one group of adjectives is to be chosen in preference to another, "intimate" and "remote" will be found to be as good as any. At all events, "direct" and "indirect," even if accepted as sufficient, must not be read too narrowly.  

The next year, Cardozo must have taken a measure of satisfaction when Hughes wrote, in his magisterial opinion for the Court in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, "[t]he close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry, when separately viewed, is local." A year later, shortly after Cardozo's failing health ended his active service on the Court, the majority nearly echoed Cardozo's *Carter* dissent. In *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, Hughes wrote that "[d]irect" effects might be contrasted with "indirect," or "remote" with "close and substantial," but:  

[W]hatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek for mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution such as "interstate commerce," "due process," and "equal protection." In maintaining the balance of the constitutional grants and limitations, it is inevitable that we should define their applications in the gradual process of inclusion and exclusion.

And two years later, in *Sunshine Anthracite Coal Co. v. Adkins* the reconstituted Court explicitly relied on the *Carter* dissents in upholding the marketing provisions of the Bituminous Coal Act of 1937, the Congressional response to *Carter's* invalidation of the earlier statute.

Perhaps all this would have happened, and perhaps no sooner, had Cardozo not been there. A flexible view of the commerce clause did not have to be pushed on Hughes, the author of the *Shreveport* rate case, or on Franklin Roosevelt's appointees to the Court. But in the darkest time, Cardozo was the prime bearer of the torch.

Judge Posner's treatment of Cardozo's opinions in *Schechter* and *Carter* is curious. He acknowledges that they "make a powerful case for applying a rule of reason approach to the scope of Congress's

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37 Id. at 327-28 (Cardozo, J., dissenting) (citations omitted).
38 301 U.S. 1 (1937).
39 Id. at 38.
40 303 U.S. 453 (1938).
41 Id. at 466-67.
42 310 U.S. 381 (1940).
43 Id. at 396-97.
44 234 U.S. 342 (1914).
power to regulate economic activities that affect interstate or foreign commerce" (p. 122). But what he emphasizes is Cardozo's perception of the need for limits on federal power, offering the hope that "[p]erhaps his approach will someday persuade a majority of justices" (p. 122). He does not indicate at all that Cardozo was at the very forefront of the Court in urging a generous approach to federal power under the commerce clause.

Other opinions as well demonstrate that approach, and also that Cardozo did not limit his generosity to the commerce clause. Consider the following:

—Jones v. SEC.45 Jones had issued a securities registration statement but, when the SEC began to investigate its apparent falsehoods and omissions to determine whether a stop order was necessary, he quickly attempted to withdraw it. The SEC, eager to retain its broad investigative authority over the case, refused to consent to withdrawal. Justice Sutherland held for the Court that this refusal was illegal. Cardozo delivered a sharp and shining dissent for the liberal contingent. "Recklessness and deceit do not automatically excuse themselves by notice of repentance," he wrote.46 The Securities Act authorized the SEC to conduct investigations, and wrongs such as those charged here should be "dragged to light and pilloried."47 This was no wimp speaking.

—Ashton v. Cameron County Water Improvement District 1.48 The majority struck down a congressional statute passed in 1934 to give bankruptcy relief to governmental units, more than two thousand of which were known to be in default. That the state's consent was necessary to relieve any of its subdivisions was immaterial, held Justice McReynolds for the Court, because the state could not constitutionally impair the obligation of a contract. And if the readjustment could be made despite the objections of the state, the bankruptcy power would impinge on their independence. Cardozo, joined in dissent by Hughes, Brandeis, and Stone, made McReynolds look silly:

To hold that [Congress's] purpose must be thwarted by the courts because of a supposed affront to the dignity of a state, though the state disclaims the affront and is doing all it can to keep the law alive, is to make dignity a doubtful blessing. Not by arguments so divorced from the realities of life has the bankruptcy power been brought to the present state of its development during the century

45 298 U.S. 1 (1936).
46 Id. at 30.
47 Id. at 32.
and a half of our national existence.\footnote{Id. at 541.}

—The Social Security Cases.\footnote{Steward Machine Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).} These are beautifully wrought opinions, written during the Court-packing crisis of 1937. They demonstrated the breadth of the congressional spending power under the general welfare clause\footnote{In United States v. Butler, 297 U.S. 1 (1937), the Court had declared that the broad, Madison-Story view of the clause was the proper one. But that discussion in Butler was pure dictum: The Court—with Cardozo and Brandeis joining a bitter dissent by Stone—held against the spending program.} and Congress's ability, when seeking to cooperate with the states, to condition spending on state agreement to congressional restrictions. To say, as Judge Posner does, that the opinions “are mainly of historical interest” (p. 122) understates the importance of this type of arrangement.

Nor was Cardozo’s contribution limited to those cases in which he signed an opinion. Sometimes, he exerted a significant impact on his colleagues behind the scenes. Home Building & Loan Association v. Blaisdell,\footnote{290 U.S. 398 (1934).} the great contracts clause landmark, is a prime example. Cardozo thought Chief Justice Hughes’s first draft opinion, upholding the Minnesota Mortgage Moratorium Law, lacked a sound policy base. He circulated a draft concurring opinion,\footnote{Excerpts are published in Paul Brest & Sanford Levinson, Processes of Constitutional Decisionmaking 296-98 (2d ed. 1983).} arguing that decisions under the clause must take into account the changing legal and economic context of a century and a half. Publication of the concurrence became unnecessary when Hughes incorporated much of its substance into his own opinion.\footnote{Cardozo also lent substantial assistance to Hughes in preparation of Hughes’s excellent dissent in Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935), suggesting the analogy of a railroad pension law, which the Court invalidated, to workers’ compensation laws. Letter from Benjamin N. Cardozo to Charles Evans Hughes (Apr. 24, 1935), (Charles Evans Hughes Papers, Library of Congress, vol. 5B); copy of letter from Cardozo to Hughes (Apr. 10, 1935), (Harlan Fiske Stone Papers, Library of Congress, vol. 61). He apparently also had some impact on Hughes' opinion in Perry v. United States, 294 U.S. 330 (1935), the most difficult of the celebrated gold clause cases; on the proofs of a late draft of Hughes's opinion, he wrote, “I think it has finally been worked out.” Hughes Papers, supra, vol. 157. Finally, Cardozo had a major impact on the Court's decision in Grosjean v. American Press Co., Inc., 297 U.S. 233 (1936), which invalidated a state tax on newspapers of substantial size. The majority originally agreed to hold the statute unconstitutional on equal protection grounds but switched to a freedom-of-press rationale after Cardozo drafted an opinion on that basis. Cardozo then withdrew his opinion. It was, according to Professor Kaufman, “one of his best.” Kaufman, Cardozo, Benjamin N., in 1 Encyclopedia of the American Constitution 210, 212 (L. Levy, ed., 1986).}

And beyond all that, of course, were Cardozo’s votes. In all, or
virtually all, of the major cases of the day, and the minor ones, too, for that matter, if any member of the Court was on the side of the angels—as the angels' side would be determined by most observers today—Cardozo was: Nebbia v. New York,\textsuperscript{55} the gold clause cases,\textsuperscript{56} United States v. Butler,\textsuperscript{57} Morehead v. New York ex rel. Tipaldo,\textsuperscript{58} West Coast Hotel v. Parrish,\textsuperscript{59} and on and on. Sometimes he provided a crucial vote for a bare liberal majority, and sometimes his vote bolstered a liberal dissent. Nobody on the Court was more consistently hospitable to broad assertions of governmental power to regulate economic matters.\textsuperscript{60}

I have concentrated here on only one area of Cardozo's Supreme Court jurisprudence, but it is the most important. I have tried to show, albeit briefly, that both in style and in substance Cardozo's tenure on the Court easily satisfied the high expectations created by his brilliant career in New York. If his Supreme Court years have tended to be overlooked, as Judge Posner has largely done, it may be in part because, while there have been other great Supreme Court Justices, "among state court judges of this century Cardozo has no peer" (p. 143). More than anything, though, it may be that six years was only enough time to burnish the monumental reputation that Cardozo brought to Washington, as our outstanding common-law judge; it was not enough time to build a new reputation as one of our finest expositors of constitutional law.

\textsuperscript{55} 291 U.S. 502 (1934).
\textsuperscript{57} 297 U.S. 1 (1936).
\textsuperscript{58} 298 U.S. 587 (1936).
\textsuperscript{59} 300 U.S. 379 (1937).
\textsuperscript{60} Cardozo's voting record in important cases was nearly identical to those of Brandeis and Stone. Brandeis, however, had an abhorrence of big government as reflected in the NIRA. And Cardozo's opinion in Panama Refining suggests, however tentatively, that he might also have had a more hospitable attitude towards regulation than did Stone. Cf. Letter from H.F. Stone to C.E. Hughes (Jan. 4, 1935), (Stone Papers, Library of Congress, vol. 75) (saying that Cardozo had written the Panama Refining dissent "in his usual masterly fashion," but that Stone was unconvinced).

On occasion, the liberals may have been even too willing to accept governmental explanations for the exercise of power. Note Cardozo's dissent, joined by Brandeis and Stone, in United States v. Constantine, 296 U.S. 280 (1935). Congress had laid a $25 tax on retail liquor dealers, and a $1000 special excise tax on those dealers who conducted their business in violation of state law. For the majority, Justice Roberts held that this provision was not genuinely meant to collect revenue but rather had a "penal and prohibitory intent." \textit{Id.} at 295. Cardozo suggested that an illegal business was likely to yield larger profits than a legal one; "[n]ot repression, but payment commensurate with the gains is thus the animating motive." \textit{Id.} at 297. One might wonder whether that argument—he offered others as well, but this was his first—persuaded Cardozo himself.