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## CARDOZO ON THE SUPREME COURT: MEETING HIGH EXPECTATIONS

*Richard D. Friedman\**

### INTRODUCTION

President Trump announced his nomination of Neil Gorsuch—the sixth most senior judge on a federal appellate court in the hinterland—for a seat on the Supreme Court in a formal, nationally televised ceremony. Judge Gorsuch squeezed the shoulder of his wife, a gesture that signaled not only his thrill at the nomination but his joy at being able to share it with her. There followed a bitterly partisan process, featuring hearings at which the nominee testified and deflected questions about his substantive views. A change in the Senate rules, ending the possibility of a filibuster, was necessary to bring the nomination to a vote. That change was adopted by a virtual party line-vote, and then Judge Gorsuch was confirmed by a similar vote.

Now compare the nomination of Benjamin Cardozo in 1932. Cardozo was the chief judge of the New York Court of Appeals, the highest court in the largest and most important state in the nation, at a time when (as John Goldberg has pointed out) state courts occupied a greater position in the national consciousness than they do now.<sup>1</sup> He was the most revered and probably best known judge in the nation not on the Supreme Court. When Justice Holmes retired, and interest immediately centered on Cardozo, he insisted privately that he wished not to be asked and that he did not believe he ought to accept the nomination if it were offered.<sup>2</sup> But in fact he resolved that if asked he

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<sup>1</sup> See John C. P. Goldberg, *Benjamin Cardozo and the Death of the Common Law*, 34 *TOURO L. REV.* 147, 153 (2018).

<sup>2</sup> ANDREW L. KAUFMAN, *CARDOZO* 469 (1998).

would accept—as he put it a few months later, “as one must accept sickness or death.”<sup>3</sup> And so, when the offer came, by telephone, he accepted immediately. The White House announced without fanfare or elaboration that the President had sent Cardozo’s name to the Senate.<sup>4</sup> The nomination was received with nearly universal acclaim. As was the practice in those days, the hearing was quick and the nominee did not testify. Confirmation was unanimous, without need for a roll-call vote. Do not bet on that happening any time in the near future!

Though the nomination doubtless appealed to Cardozo’s vanity, his pleasure was considerably muted, because the woman who was his life partner, his sister Nellie, had died a little more than two years earlier; Cardozo described the loss as “[i]rreparable,”<sup>5</sup> and said, “I ask myself in wonderment why I should value [praise], now that the one who would have shared it with me so fully has gone from me for ever.”<sup>6</sup>

Indeed, Cardozo appears to have been suffering a mild form of depression during his tenure on the Supreme Court; he sometimes expressed a wish he were dead.<sup>7</sup> He was also in vulnerable physical condition, with a heart that was already significantly weakened by the time he took his seat.<sup>8</sup> He was in a strange city, far removed from his friends in New York and Albany, and dealing for the most part with an entirely new body of law, one that he enjoyed less than the docket of his old court.<sup>9</sup> For all but the last few months of his active tenure, he was the junior justice on the Court; that mattered, in large part because he was unlikely to get too many choice assignments.<sup>10</sup> And the Court was run by a Chief Justice whose style, in driving prompt decision-making, was very different from the slower, more deliberative process that Cardozo favored and to which he had become accustomed.

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<sup>3</sup> *Id.*

<sup>4</sup> *Cardozo is Named to Supreme Court; Nomination Hailed*, N.Y. TIMES, Feb. 16, 1932.

<sup>5</sup> KAUFMAN, *supra* note 2, at 196.

<sup>6</sup> KAUFMAN, *supra* note 2, at 195.

<sup>7</sup> KAUFMAN, *supra* note 2, at 475.

<sup>8</sup> KAUFMAN, *supra* note 2, at 195, 476.

<sup>9</sup> Interview with Joseph L. Rauh, Jr., in Washington, D.C. (Aug. 17, 1976).

<sup>10</sup> At one point, Felix Frankfurter, then a professor at Harvard, asked his former student, Joseph L. Rauh, Jr., who was clerking for Cardozo, “Joe, when will that swine Hughes stop giving Cardozo all the bad opinions?” *Id.* Decades later, Rauh remembered with certainty the porcine reference. *Id.*

And yet, for all that, Cardozo had what was probably the greatest short tenure in the Court's history. I believe several factors help account for this fact.

### Timing

Cardozo's timing was impeccable. He took his seat on March 14, 1932, near the low moment of the Great Depression, and less than a year before the beginning of the New Deal. His active tenure ended in December of the crisis year of 1937. Earlier in that year, the Court had issued an important set of decisions that helped set the framework of modern constitutional law,<sup>11</sup> and even more recently the Senate had defeated Franklin D. Roosevelt's Court-packing plan. FDR's appointment of Hugo Black to replace Willis Van Devanter consolidated the trend of decisions and ensured that the conservative bloc would not control results for the foreseeable future. One would be hard-pressed to pick another 5½ year period in which a single justice could make so much of a difference.

### The Right Side of History

At times, feeling his limited power as the junior justice, Cardozo consoled himself by saying that at least his votes mattered.<sup>12</sup> And they certainly did, for the Supreme Court not only was deciding matters of intense public interest, but it was closely divided on many of them. One issue above all was salient during Cardozo's tenure on the Supreme Court—the scope of governmental power, both state and federal, to achieve economic ends. The conservative foursome on the Court<sup>13</sup> were likely to regard some governmental regulations as undue

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<sup>11</sup> The most prominent of the decisions in the spring of 1937 were *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding a minimum wage law for women; 5-4 decision); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act; 5-4 decision); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (upholding, per opinion by Cardozo, unemployment compensation provisions of Social Security Act of 1935; 5-4 decision); and *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding, per opinion by Cardozo, provisions of Social Security Act for old-age benefits; 7-2 decision). I characterize the decisions as “important,” which they unquestionably were, rather than “revolutionary,” because I believe the latter term is wrong, or at least potentially misleading. See generally Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994).

<sup>12</sup> See KAUFMAN, *supra* note 2, at 493.

<sup>13</sup> The so-called Four Horsemen were Justices Willis Van Devanter, James C. McReynolds, George Sutherland, and Pierce Butler.

interferences with the free market and at times confiscatory, to try to impose limits on the power of taxation, and to try to confine federal power over interstate commerce within tight, categorical bounds.<sup>14</sup> Cardozo, along with Louis Brandeis and Harlan Stone, was one of three justices who consistently opposed them; if, but only if, they were joined both by Chief Justice Charles Evans Hughes and Owen J. Roberts, they would prevail. The pattern played out in one important decision after another<sup>15</sup>—even before the great decisions of 1937, all

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<sup>14</sup> Of course, the four also regarded many regulations and taxes as valid. *See generally* Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559 (1997). But they were significantly less likely to do so than were their colleagues.

<sup>15</sup> Major pre-1937 cases in which Cardozo helped form a 5-4 majority on the liberal side were *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (joining in Hughes's opinion, for a 5-4 Court, upholding a mortgage moratorium law); *Nebbia v. New York*, 291 U.S. 502 (1934) (joining in Roberts's opinion, for a 5-4 Court, upholding a state regulation of milk prices and making clear "that there is no closed class or category of businesses affected with a public interest" and so subject to price regulation); *The Gold Clause Cases* (comprising a set of four decisions, *Norman v. Baltimore & Ohio R.R.* and *United States v. Bankers' Tr. Co.*, 294 U.S. 240 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); and *Perry v. United States*, 294 U.S. 330 (1935), each decided 5-4, declining to give effect to contractual clauses that would have undermined federal decision to detach dollar from the value of gold); *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) (joining with Stone and Roberts in Brandeis's concurrence, expressing agreement with Hughes's majority opinion that the TVA acted validly in selling power generated by a dam, the building of which was justified on grounds of federal defense, but expressing the view that the Court should have followed a policy of avoiding constitutional issues, especially ones involving Congressional power, when possible).

Among the most significant pre-1937 cases in which Cardozo dissented from the liberal side were *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933) (dissenting, in an opinion joined by Stone, with Brandeis writing a separate dissent, from an opinion invalidating a statute that imposed heavier license fees on chain stores located in more than one county; asserting that "[t]he graduation of a tax upon the business of a chain store may be regulated by the test of territorial expansion, and territorial expansion may be determined by the spread of business from one county into another."); *Tex. & Pac. Ry. Co. v. United States*, 289 U.S. 627 (1933) (joining, with Hughes and Brandeis, in an opinion by Stone dissenting from a holding that severely restricted the power of the Interstate Commerce Commission to protect local ports against discrimination by carriers); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (dissenting alone from holding that statute purporting to give President power to ban shipment of "hot oil" in interstate commerce was an excessive delegation); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935) (joining, with the other liberals, in an opinion by Hughes dissenting from a decision invalidating key provisions of the Railroad Retirement Act on Commerce Clause and Due Process grounds); *United States v. Butler*, 297 U.S. 1 (1936) (joining, along with Brandeis, in Stone's dissent from opinion by Roberts invalidating a portion of the Agricultural Adjustment Act of 1933 as an inappropriate use of the taxing power to achieve economic coercion); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (dissenting, in an opinion joined by the other liberals, with Hughes writing a partial dissent, from an opinion by Sutherland invalidating the Bituminous Coal Conservation Act of 1935; concluding that the marketing provisions of the Act were valid, and that therefore there was no need to determine whether the labor provisions were as well); *Ashton v. Cameron Cty. Water Improvement Dist. No. 1*,

but one of which were decided 5-4, over the votes of all four conservatives.<sup>16</sup>

It is easy enough to say from the perspective of eighty years that there are some areas in which the Court fell short, but I think it would be hard to come up with many decisions, major or minor, in which any other member of the Court appears from the modern perspective to have taken a more appealing position than the one that Cardozo did.

### Self-assurance

Cardozo's votes mattered, but while he was on the Court he also mattered in other ways and for other reasons. One important factor was a matter of personality, probably accentuated by long experience as a highly esteemed judge, and chief, of the most visible court in the nation apart from the Supreme Court. Cardozo had great self-assurance, which went along with a plentiful dose of guts and vanity. He knew his ability. Being the junior justice did not dissuade him at all from making his presence felt.

This quality is nicely illustrated by a story told to me years ago by Charles E. Wyzanski, Jr., who had been a young New Deal lawyer and later became a celebrated federal judge. Wyzanski argued a case of little significance, *Zimmern v. United States*,<sup>17</sup> for the government. His case fell apart at argument, and Cardozo wrote a brief opinion, reversing for a unanimous Court.<sup>18</sup> Some time later, Wyzanski visited Cardozo for tea, and the justice said, "I never thought that case was worthy of an argument by you or an opinion by me."<sup>19</sup>

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298 U.S. 513 (1936) (dissenting, joined by the other liberals and Hughes, from McReynolds opinion invalidating a federal statute extending bankruptcy protection, albeit with consent of state, to subdivisions of a state); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (joining, along with the other liberals, in dissent by Hughes from a decision invalidating a minimum wage law, and also joining, along with Brandeis, in Stone's dissent, which favored the overruling of precedent on which majority opinion relied). See also *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (writing a separate concurrence, joined by Stone, agreeing that a regulation was invalid on both Commerce Clause and delegation grounds, but taking a more flexible view on both than did Hughes's majority opinion).

<sup>16</sup> See *supra* note 11.

<sup>17</sup> 298 U.S. 167 (1936).

<sup>18</sup> See generally *id.*

<sup>19</sup> See Richard D. Friedman, *Cardozo the [Small r] realist*, 98 MICH. L. REV. 1738, 1749 (2000). Judge Wyzanski told me the story during an interview at his house in Cambridge, Mass., May 28, 1975.

Cardozo's first opinion on the Court, in a case argued one week after he took his seat, was a dissent.<sup>20</sup> That had not been true of any justice since before the time of John Marshall, who ended the prior practice in which the justices often issued seriatim opinions; this was indeed the first time since the Marshall era that a new justice's opinion was anything but an opinion for the court.<sup>21</sup> Cardozo's first opinion drew heavily on his common law knowledge, but he cited almost all federal cases; he came to the Court ready to do the job, and not afraid to speak out.

Thus, in one of the first cases to consider New Deal legislation, *Panama Refining Co. v. Ryan*,<sup>22</sup> Cardozo dissented alone from the Court's decision that a provision of the National Industrial Recovery Act delegated power to the President with insufficient guidance.<sup>23</sup> Chief Justice Hughes, a commanding figure who had known Cardozo since Hughes was a young law school graduate and Cardozo was a 14-year-old boy in knickerbockers,<sup>24</sup> wrote the majority opinion,<sup>25</sup> on an issue about which he cared deeply. The junior justice was not silenced. And, as discussed below, I think he got the better of the debate.

Delegation arose again later the same year in *A.L.A. Schechter Poultry Corp. v. United States*,<sup>26</sup> the famous "Sick Chicken" case. The case was a broad assault on the President's code-making authority under the same Act—an authority associated with the famous symbol of the Blue Eagle and probably the most expansive program of early New Deal legislation.<sup>27</sup> The Court, again per Hughes, unanimously held the authority unconstitutional, both on delegation grounds and as beyond Congress's power under the Commerce Clause.<sup>28</sup> This time, Cardozo agreed.<sup>29</sup> Concurring opinions were not nearly as common in the Hughes Court as they are now; most often, justices in the majority swallowed doubts they had concerning the precise articulation of

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<sup>20</sup> *Coombes v. Getz*, 285 U.S. 434, 448-52 (1932) (Cardozo, J., dissenting, joined by Brandeis & Stone, JJ.).

<sup>21</sup> Friedman, *supra* note 19, at 1749 nn.47-48. Marshall tended to hog the big opinions, and so two justices during his time as Chief issued concurrences as their first opinions. Friedman, *supra* note 19, at 1749 n.48.

<sup>22</sup> 293 U.S. 388 (1935).

<sup>23</sup> *Id.* at 433-48 (Cardozo, J., dissenting).

<sup>24</sup> 1 MERLO J. PUSEY, CHARLES EVANS HUGHES 74 (1951).

<sup>25</sup> *See generally Pan. Ref.*, 293 U.S. at 388.

<sup>26</sup> 295 U.S. 495 (1935).

<sup>27</sup> *See generally id.*

<sup>28</sup> *Id.* at 551.

<sup>29</sup> *See id.* at 551, 554 (Cardozo, J., concurring).

standards made in the majority opinion. Cardozo did not do so. He concurred in an opinion, joined by Stone, that agreed with the Court on both points but took a softer line on both.<sup>30</sup> Ultimately, on both, the law moved in his direction (and beyond).

In other cases, Cardozo spoke up, and with substantial effect, but only in private, without ultimately publishing an opinion. According to Andrew Kaufman, it was Cardozo's threat to publish a dissent from a grant of *certiorari* that led the Court to stop taking cases to review verdicts won by injured railroad workers.<sup>31</sup> And in at least three notable cases the historical record reveals Cardozo's behind-the-scenes impact. In *Home Building & Loan Ass'n v. Blaisdell*,<sup>32</sup> which upheld, by a 5-4 vote, Minnesota's mortgage moratorium law,<sup>33</sup> Cardozo found Hughes's draft opinion rather bloodless. He drafted a concurrence that was, as Kaufman has written, "a forceful and candid justification for reinterpreting constitutional provisions in light of their purposes and in light of changing conditions of society."<sup>34</sup> Hughes added a passage to his draft incorporating much of the substance of Cardozo's, and Cardozo then withdrew his.<sup>35</sup> In *Grosjean v. American Press Co.*,<sup>36</sup> a draft opinion by Cardozo had an even more dramatic impact. The case involved a challenge to a statute of Huey Long's Louisiana that taxed the advertising receipts of newspapers and other periodicals. Justice Sutherland drafted an opinion for the Court that would have held the tax invalid as a denial of equal protection because it made the size of the tax depend on the publication's circulation. Finding this basis unpersuasive, Cardozo drafted an opinion concluding that, because the tax discriminated against newspapers in favor of other forms of business, it violated the freedom of the press.

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<sup>30</sup> *Id.* at 551-55.

<sup>31</sup> KAUFMAN, *supra* note 2, at 479.

<sup>32</sup> 290 U.S. 398 (1934).

<sup>33</sup> *Id.* at 448.

<sup>34</sup> KAUFMAN, *supra* note 2, at 502.

<sup>35</sup> KAUFMAN, *supra* note 2, at 500-02. Cardozo's draft, portions of which are published in PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 571-72 (6th ed. 2015), spoke of the state "furthering its own good by maintaining the economic structure on which the good of all depends." *Id.* at 572. This emphasis on the importance of growing social interaction was not new for him. See BENJAMIN N. CARDOZO, *Introduction. The Method of Philosophy*, in THE NATURE OF THE JUDICIAL PROCESS 9, 24 (1921) (speaking of "the growing complexity of social relations" as having revealed the inadequacy of the earlier rule "that A. may conduct his business as he pleases, even though the purpose is to cause loss to B., unless the act involves the creation of a nuisance"). The unpublished *Blaisdell* opinion is discussed further below. See *infra* notes 91-95 and accompanying text.

<sup>36</sup> 297 U.S. 233 (1936).



Evidently Sutherland, and the Court, were persuaded; the ultimate opinion adopted a rationale much like Cardozo's.<sup>37</sup> And in *Railroad Retirement Board v. Alton Railroad Co.*,<sup>38</sup> Cardozo helped Hughes make his fine dissent more persuasive. In that case, the Court held unconstitutional a federal statute requiring railroads subject to the Interstate Commerce Act to establish retirement and pension plans.<sup>39</sup> In a letter, Cardozo suggested that Hughes make the analogy between a pension law and workmen's compensation laws.<sup>40</sup> "What is the distinction," he asked, "between compensating men who have been incapacitated by accident (though without fault of the employer), and compensating men who have been injured by the wear and tear of time, the slow attrition of the years?"<sup>41</sup> Hughes took the point and adopted much of Cardozo's language.<sup>42</sup>

It bears emphasis that Cardozo was the junior justice throughout this time. Compare the action of Owen Roberts, the next most junior justice. At the critical moment in 1936 when the Court invalidated New York's minimum wage law,<sup>43</sup> Roberts went along with the majority; he failed to write separately, despite the fact that the majority opinion adopted a position that he must have found appalling, and apparently he even failed to state his mind clearly in conference.<sup>44</sup> One cannot easily imagine Cardozo acting like that.

### Judicial Modesty and the Nature of Law and Legal Change

Cardozo's personal self-assurance while on the Supreme Court ran alongside a trait that might be called judicial modesty. Three tendencies stand out as part of this trait: deference to the political branches, avoidance of unnecessary issues, and favoring open-textured standards and incremental changes over broad, categorical pronouncements.

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<sup>37</sup> KAUFMAN, *supra* note 2, at 539-41.

<sup>38</sup> 295 U.S. 330 (1935).

<sup>39</sup> *Id.* at 360.

<sup>40</sup> KAUFMAN, *supra* note 2, at 519-20 (citations omitted).

<sup>41</sup> KAUFMAN, *supra* note 2, at 520.

<sup>42</sup> *See R.R. Ret. Bd.*, 295 U.S. at 384.

<sup>43</sup> *Morehead*, 298 U.S. at 587.

<sup>44</sup> Richard D. Friedman, *Taking Decisions Seriously*, 24 J. SUP. CT. HIST. 314, 320-21 (1999) (reviewing BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998)).

### *Deference*

Many of Cardozo's great decisions on the New York Court of Appeals concerned the extent to which courts—most frequently, trial courts—should defer to jurors. Whether Cardozo showed an appropriate amount of deference to the jury is a matter of debate.<sup>45</sup> But when he reached the Supreme Court, the proper role of the jury receded in importance. The great issue dominating the Court during Cardozo's time was the extent to which courts—most importantly, the Supreme Court itself—should defer to choices made by the political organs of government. And in this context, Cardozo was highly deferential, not only to legislators<sup>46</sup> but also to administrators.<sup>47</sup> That differential in attitude, assuming it existed, may be attributable in large part to elitism on Cardozo's part; jurors did not have the stature of a coordinate branch of government.

And indeed, Cardozo regarded government as a largely cooperative enterprise. His opinion in *Charles C. Steward Machine Co. v. Davis*,<sup>48</sup> one of the Social Security cases and so one of the few plum assignments he received from Hughes, is a good example. The Social Security Act imposed a payroll tax on employers but allowed a credit of 90% to employers for contributions to unemployment funds established under state law that complied with standards established by the Act.<sup>49</sup> The taxpayer objected that this program coerced the states into enacting federally-prescribed programs.<sup>50</sup> Cardozo, for a 5-4 majority, responded:

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<sup>45</sup> The matter was indeed debated at the 2017 Touro conference on Cardozo, of which this paper was a part.

<sup>46</sup> See *supra* note 11.

<sup>47</sup> See, e.g., *Jones v. Sec. & Exch. Comm'n*, 298 U.S. 1 (1936). In that case, the SEC began an investigation of a securities registration statement before it became effective. *Id.* at 661. The issuer then attempted to withdraw the statement, but the SEC refused to allow withdrawal and continued its investigation. *Id.* The Supreme Court, by a 6-3 vote, held this improper. Cardozo, joined by Brandeis and Stone, dissented. See *id.* at 663-65 (Cardozo, J., dissenting). Cardozo emphasized that the Commission had “plenary authority . . . to conduct all investigations believed to be necessary and proper for the enforcement of the act and of any of its provisions.” *Id.* at 664 (Cardozo, J., dissenting). And, he said, “[t]here will be only partial attainment of the ends of public justice unless retribution for the past is added to prevention for the future.” *Id.*

<sup>48</sup> 301 U.S. 548 (1937).

<sup>49</sup> *Charles C. Steward*, 301 U.S. at 586.

<sup>50</sup> *Id.*

Who . . . is coerced through the operation of this statute? . . . Not the state. Even now she does not offer a suggestion that in passing the unemployment law she was affected by duress. . . . For all that appears, she is satisfied with her choice, and would be sorely disappointed if it were now to be annulled.<sup>51</sup>

Another example is *Ashton v. Cameron County Water Improvement District No. 1*,<sup>52</sup> in which the majority—the conservative four plus Roberts—invalidated a federal statute that allowed a political subdivision of the state to secure bankruptcy protection.<sup>53</sup> Cardozo, writing for the four dissenters, found the majority’s conclusion baffling. Acknowledging that there might be a serious problem if the state’s consent were not necessary, he wrote that the statute was in fact “framed with sedulous regard to the structure of the federal system,” and that it would “maintain the equilibrium between state and national power.”<sup>54</sup> And, he said, to hold that the protective purpose of the statute “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.”<sup>55</sup> Also reflecting a sense of a cooperative form of government, in this context between legislature and executive, were Cardozo’s views on delegation; as discussed below, they were more receptive than those of any other justice.

### *Avoidance*

Cardozo tended, where possible, to avoid definitive pronouncement on doubtful issues. This approach is most often associated with Brandeis’s concurring opinion in *Ashwander v. Tennessee Valley Authority*,<sup>56</sup> which Cardozo joined, along with Stone and Roberts.<sup>57</sup> One notable opinion by Cardozo exemplifying it was

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<sup>51</sup> *Id.* at 589 (internal citations omitted).

<sup>52</sup> 298 U.S. 513 (1936).

<sup>53</sup> *Id.* at 513.

<sup>54</sup> *Id.* at 538-39; *id.* at 540.

<sup>55</sup> *Id.* at 541.

<sup>56</sup> 297 U.S. 288 (1936).

<sup>57</sup> In that case, the four would have avoided pronouncing on the constitutionality of a contract between the TVA and a power company; they would simply have held that the plaintiffs, shareholders in the power company, had no standing to sue. On similar grounds, the same four justices would have held in *Helvering*, that a corporate shareholder had no

his concurrence in *Carter v. Carter Coal Co.*,<sup>58</sup> an important 1936 case in which the Court, by a 5-4 majority, nullified the Guffey Coal Act.<sup>59</sup> The Act imposed a tax on coal processors, 90% of which would be credited if the producer came within a code for which the statute provided.<sup>60</sup> Among the code's provisions were some prescribing conditions, including price, for interstate marketing of coal and others prescribing labor conditions in coal production.<sup>61</sup> The labor provisions were obviously far more vulnerable constitutionally than were the marketing conditions, because the prevailing doctrine was still that production lay beyond the commerce power.<sup>62</sup> Sutherland, for the conservative four and Roberts, held the labor provisions unconstitutional and then—withstanding a severability clause in the statute—held that the marketing provisions were inseverable, so that the entire statute fell.<sup>63</sup> Hughes agreed with the majority's ultimate conclusion with respect to the labor provisions, but he concluded that the marketing provisions were constitutional and that they were enough to support the entire statute.<sup>64</sup> Cardozo's dissent, joined by the other liberals, essentially agreed with the latter part of Hughes's opinion—the marketing provisions were valid and sufficient to support the tax—but given those conclusions he saw no reason to address the labor provisions at all.<sup>65</sup> “The opinion of the Court begins at the wrong end,” wrote Cardozo at the end of his opinion.<sup>66</sup> “To adopt a homely form of words, the complainants have been crying before they are really hurt.”<sup>67</sup>

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standing to complain about the Social Security Act's imposition on the corporation of a tax for old-age benefits; the corporation had acquiesced. Nevertheless, Hughes assigned the opinion to Cardozo; his opinion, after summarizing the divide of the Court on the issue, went on to uphold the tax on the merits. *Helvering*, 301 U.S. at 619.

<sup>58</sup> 298 U.S. 238 (1936).

<sup>59</sup> *Id.* at 238.

<sup>60</sup> *Id.* at 281.

<sup>61</sup> *Id.* at 305.

<sup>62</sup> Note, though, that the seeds for overthrow of that doctrine had already been laid, *see, e.g.*, *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372 (1933) (Hughes, C.J.: “When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry.”), and it would be definitively overthrown the next year in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>63</sup> *Carter Coal*, 298 U.S. at 316.

<sup>64</sup> *Id.* at 317-24 (Hughes, C.J., concurring in-part).

<sup>65</sup> *Id.* at 324-41 (Cardozo, J., dissenting).

<sup>66</sup> *Id.* at 341.

<sup>67</sup> *Id.*

*Incrementalism*

In many cases, as one might expect from Cardozo's jurisprudential writings and his Court of Appeals opinions, his approach was marked by incremental rather than dramatic changes and by soft tests rather than bright-line rules delineating sharp categorizations. As he put it in his *Carter Coal* dissent, "a great principle of constitutional law is not susceptible of comprehensive statement[s] in an adjective."<sup>68</sup>

Cardozo's opinions in two 1935 cases concerning provisions of the National Industrial Recovery Act, *Panama Refining* and *Schechter Poultry*, provide good illustrations. *Panama Refining* turned on the constitutionality of a provision of the Act that gave the President the authority to prohibit transportation in interstate commerce of hot oil—that is, oil produced or withdrawn in violation of state law.<sup>69</sup> Because the provision did not contain explicit standards limiting the President's discretion in exercising this authority, Hughes, for the entire Court but Cardozo, wrote that if it were upheld,

it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function. . . . Instead of performing its lawmaking function, the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body.<sup>70</sup>

To Cardozo, this fear seemed mildly hysterical. The statutory provision did not give the President "any roving commission to inquire into evils and then, upon discovering them, do anything he pleases."<sup>71</sup> On the contrary, the provision authorized the President only to prohibit interstate transportation of hot oil, and Cardozo believed that the statute's general statement of policies – preventing unfair competitive practices, conserving natural resources, preserving long-term productive capacity—was sufficiently definite guidance to satisfy

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<sup>68</sup> *Carter Coal*, 298 U.S. at 327 (Cardozo, J., dissenting).

<sup>69</sup> *Pan. Ref.*, 293 U.S. at 405.

<sup>70</sup> *Id.* at 430.

<sup>71</sup> *Id.* at 435 (Cardozo, J., dissenting).

constitutional requirements.<sup>72</sup> At the same time, ascertainment of the facts that would determine how these policies should play out

was a task too intricate and special to be performed by Congress itself through a general enactment in advance of the event. All that Congress could safely do was to declare the act to be done and the policies to be promoted, leaving to the delegate of its power the ascertainment of the shifting facts that would determine the relation between the doing of the act and the attainment of the stated ends.<sup>73</sup>

To Cardozo, the question of the validity of delegation, like so many others, was one of degree; in this case, he was persuaded that the President's discretion was "not unconfined and vagrant" but rather "canalized within banks that keep it from overflowing."<sup>74</sup>

By contrast, in *Schechter Poultry*, the degree of delegation was sufficiently great to persuade him to turn those metaphors around. The entire Court agreed that the delegation of code-making authority to the President was unduly broad.<sup>75</sup> Cardozo did not concur in Chief Justice Hughes's opinion, but instead wrote separately, joined by Stone.<sup>76</sup> The delegation, he said, was "as wide as the field of industrial regulation," including "whatever ordinances may be desirable or helpful for the well-being or prosperity of the industry affected," and so allowing "a comprehensive body of rules to promote the welfare of the industry, if not the welfare of the nation, without reference to standards, ethical or commercial, that could be known or predicted in advance of its adoption."<sup>77</sup> This, said Cardozo, was "delegation running riot."<sup>78</sup>

And perhaps he, as well as the rest of the Court, was right in that conclusion. But in any event, from the vantage point of eighty years, Cardozo's attitude towards delegation, more receptive than that of any of his colleagues, appears to have been sound; without it, the modern administrative state would be hard to imagine.

In *Schechter Poultry*, the Chief Justice went beyond the delegation point to hold that the code in question exceeded Congress's

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<sup>72</sup> *Id.* at 440.

<sup>73</sup> *Id.* at 437.

<sup>74</sup> *Pan. Ref.*, 293 U.S. at 440.

<sup>75</sup> *See generally Schechter Poultry*, 295 U.S. at 495.

<sup>76</sup> *Id.* at 551-55 (Cardozo, J., concurring).

<sup>77</sup> *Id.* at 553; *id.* at 552; *id.* at 553.

<sup>78</sup> *Schechter Poultry*, 295 U.S. at 553.

power under the Commerce Clause.<sup>79</sup> And Cardozo agreed.<sup>80</sup> But Hughes, perhaps to keep the conservative four and Roberts from adopting more restrictive language, spoke in categorical terms in describing the type of impact on interstate commerce that would justify federal regulation; he asserted that “there is a necessary and well-established distinction between direct and indirect effects.”<sup>81</sup> Cardozo also used the word “direct,” but he folded it into a discussion making clear that in his view this was far from a binary matter.<sup>82</sup> “The law is not indifferent to considerations of degree,” he wrote.<sup>83</sup> “Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain.”<sup>84</sup> In the case before him, though, he declared, “There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere.”<sup>85</sup> The non-categorical approach espoused by Cardozo soon came to dominate the Court’s treatment of the commerce power.<sup>86</sup>

In the context of individual liberties as well, Cardozo made clear his preference for a non-categorical approach. He coined the term “tyranny of labels,”<sup>87</sup> and cautioned that it “must not lead us to leap to a conclusion that a word which in one set of facts may stand for

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<sup>79</sup> *See id.* at 551-55.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 546. Hughes also spoke in less categorical terms. Drawing on a leading opinion of his from his prior tenure on the Court, he said that

the dominant authority of Congress necessarily embraces the right to control [common carriers’] intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service.

*Id.* at 544.

<sup>82</sup> *Schechter Poultry*, 295 U.S. at 552 (Cardozo, J., dissenting).

<sup>83</sup> *Id.* at 554.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> In *Jones & Laughlin*, Hughes, for a 5-4 majority, wrote: “Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.” 301 U.S. at 37. For support, he cited *Schechter Poultry*, which had used similar language—but he did not repeat the direct-indirect dichotomy, which *Schechter Poultry* had also articulated. 295 U.S. at 547.

<sup>87</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934).

oppression or enormity is of like effect in every other.”<sup>88</sup> And so in *Palko v. Connecticut*, handed down shortly before his health failed, he articulated an approach to the Due Process Clause of the Fourteenth Amendment that did not depend on incorporating against the states the protections of the Bill of Rights in their entirety; instead, he believed the Court must measure “the particular situation laid before [it]” in a given case against a general standard measuring whether the right asserted in that context was “of the very essence of a scheme of ordered liberty.”<sup>89</sup>

Cardozo’s incrementalist approach reflected both a normative view of how decisions should be shaped and a historical view of how law changes over time. This combination played out with force and clarity in a concurrence that Cardozo drafted in *Blaisdell*, in which the Court, by a 5-4 vote, upheld a mortgage moratorium law enacted by Minnesota.<sup>90</sup> To the four conservatives, the law was a blatant violation of Article I, Section 10 of the Constitution, which forbids states to impair the obligation of contracts; Justice Sutherland marshalled the argument in a powerful dissent arguing that this type of debtor-protection law, enacted in desperate economic times, was precisely the type that the framers had meant to prohibit.<sup>91</sup> Unsatisfied by Hughes’s draft opinion for the majority, Cardozo constructed an argument that recognized the categorical way in which the Contracts Clause had been interpreted in the past but that treated the adoption of the Fourteenth Amendment as mitigating the hard edge of that Clause: the Amendment created “a profound change in the relation between the federal government and the governments of the states,” subjecting the latter to “the rule of reason” and so eliminating the “dilemma of ‘all or nothing.’”<sup>92</sup> Thus, over time “a process of evolution” had occurred, by which courts, recognizing the interconnection of “the welfare of the social organism in any of its parts” and “the welfare of the whole,” felt their way “toward a rational compromise between private rights and public welfare.”<sup>93</sup> This meant that the words of the Contracts Clause

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<sup>88</sup> *Palko v. Connecticut*, 302 U.S. 319, 323 (1937).

<sup>89</sup> *Id.* at 327; *id.* at 325; *see also id.* at 328 (“We deal with the statute before us and no other.”); KAUFMAN, *supra* note 2, at 553 (“Th[e] notion that incorporation of the Bill of Rights should be handled on a case-by-case, issue-by-issue basis was very congenial to Cardozo’s incremental common law approach to decision-making.”).

<sup>90</sup> *See generally Blaisdell*, 290 U.S. at 398.

<sup>91</sup> *Id.* at 448-83 (Sutherland, J., dissenting).

<sup>92</sup> BREST ET AL., *supra* note 35.

<sup>93</sup> BREST ET AL., *supra* note 35, at 572.



were no longer given “their literal and stark significance,” but more general “limits of fairness, of moderation, and of pressing and emergent need” would still constrain the states.<sup>94</sup>

Cardozo withdrew the concurrence when Hughes—who found the thinking congenial—incorporated much of its substance into his majority opinion. But the draft remains a powerful statement of the nature and cause of changing constitutional interpretation. I do not mean to suggest that categorical rules, and for that matter non-continuous transformation, have no proper role in constitutional law; surely they do. But the process that Cardozo outlined describes much of how constitutional law develops, and of why it is capable of development along the lines of the common law.

### CONCLUSION

Some observers regard Cardozo’s years on the Supreme Court as paling besides his tenure on the New York Court of Appeals.<sup>95</sup> It is true that as junior justice Cardozo did not have comparable opportunities to speak for the Court in important cases. But he sat on the Supreme Court at a crucial time in history, and his performance was outstanding. He exercised more influence than one might expect for the junior justice. His pen still glittered. His views have stood up well as the decades have passed. And his firm grasp of the nature of law and of legal change gave his opinions special force. In all but length of years, Cardozo’s tenure easily met the high expectations that so many Americans expressed when, practically by acclamation, the President nominated him to the Supreme Court.

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<sup>94</sup> BREST ET AL., *supra* note 35, at 572.

<sup>95</sup> See, e.g., RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 121-22 (1990).