Cardozo's Living Constitutionalism in Comparative Context

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I INTRODUCTION

Although he served as an Associate Justice on the United States Supreme Court from 1932-1938, the source of Benjamin Cardozo's preeminence has generally been his contributions to common law jurisprudence and his theories of common law judging. This essay argues that several of Cardozo's unpublished writings suggest he also developed a significant constitutional theory in dialogue with continental—and particularly French—legal thinkers. Despite not appearing prominently in Cardozo's published constitutional opinions, this theory influenced Chief Justice Hughes's majority opinion in *Home Building and Loan Association v. Blaisdell* (1934),[1] a case that not only stripped the Contract Clause of much of its adjudicatory power but also paved the way for the Supreme Court to undo the laissez-faire vision of the *Lochner* era.

Cardozo most clearly outlined his theory in an essay on "De Tocqueville and the Judicial Power," written shortly before his nomination to the Supreme Court, and in a draft concurrence in the *Blaisdell* case—one that he abandoned after Chief Justice Hughes modified his own opinion to incorporate several of Cardozo's paragraphs.[2] "De Tocqueville and the Judicial Power" develops Cardozo's views of judicial authority in America as refracted not only through Tocqueville's account but also through that of contemporary French jurists, including the comparative law scholar Édouard Lambert. Reading his *Blaisdell* concurrence against that backdrop both highlights the transatlantic conversations about judicial review ongoing during the 1930s and the potential for a French influence on Cardozo's understanding of rights.

In his critique of the U.S. constitutional adjudication of rights, *How*

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1. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

2. *See* MARK V. TUSHNET, THE HUGHES COURT: FROM PROGRESSIVISM TO PLURALISM, 1930 TO 1941, at 128 (2022).

Rights Went Wrong, Jamal Greene laments that, in overturning *Lochner*, the Supreme Court put forward a particularly absolutist view of rights.[3] Rather than recognizing that the government's rights and interests could trump contractual rights in various circumstances, the Court adopted the view that the right to contract was simply not protected.[4] This led, in Greene's account, to a form of rights absolutism that has detrimentally affected U.S. democracy. He posits that a European system of proportionality succeeds in balancing the social interests protected by government better with rights claims than does the U.S. alternative.[5] Most writers trace the widespread propagation of proportionality analysis to the post-WWII period, following its implementation in German administrative law.[6] Yet Cardozo arguably approached rights along the lines of proportionality in the 1930s. In doing so, he may have been influenced by his thoroughgoing exposure to European legal systems and intellectual exchange with them.[7]

The picture of constitutional adjudication that emerges from Cardozo's essay on Tocqueville and the *Blaisdell* draft concurrence conjoins three distinctive features. First, Cardozo endorses judicial supremacy rather than simply judicial review—affirming that the Supreme Court should be the final arbiter of constitutional questions. Second, he furnishes an early account of living constitutionalism. And third, he critiques an absolutist conception of rights in favor of a more flexible understanding of their place. These aspects of Cardozo's constitutional vision draw upon his common law theories, connecting constitutional change with the gradual transformation of the common law and preserving the relational view of law that characterized his common law decisions while simultaneously maintaining the role of the judiciary in determining the appropriate balance of interests.

While Greene and others have advocated for a move toward proportionality, originalists, including some on the Supreme Court, have recently abandoned longstanding methods of means-ends scrutiny in

3. *See* JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021). Vicki Jackson has also argued for the greater use of proportionality in U.S. constitutional law. Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).

4. *See* GREENE, *supra* note 3, at 40.

5. *See* GREENE, *supra* note **Error! Bookmark not defined.**, at 110.

6. *See* MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 10 (2013); ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE 64-68 (2019); Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 385 (2007).

7. To the extent that some have identified proto-proportionality in U.S. constitutional law of an earlier period, they have analyzed this development as separate from the German model. This paper suggests instead that an early dialogue linked the two versions. *See, e.g.*, Jud Mathews and Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 814-24 (2011) (examining late nineteenth-century Dormant Commerce Clause analysis as a variety of early proportionality review).

constitutional adjudication in favor of particular historical tests.[8] Cardozo's jurisprudence both elucidates the problems with that approach and furnishes an alternative from within the history of U.S. constitutional law.

This Symposium Essay in honor of Jim Whitman takes inspiration from his work in several ways. Whitman has brought to light many surprising connections between U.S. and European law, such as the influence of American race law on Nazi Germany, while also highlighting how cultural distinctions shaped the divergence between U.S. and European models of punishment and privacy.[9] Through the focal point of Cardozo's engagement with European jurisprudence, the Essay suggests the complicated interplay between cultural forces and individual idiosyncrasies that have shaped American forms of constitutional adjudication.

II COMPARATIVE CONTEXTS

From his days as an undergraduate at Columbia onwards, Cardozo was significantly influenced by European legal thought, as is evident from a brief perusal of the footnotes to *The Nature of the Judicial Process* and other works.[10] Both as an undergraduate and as a law student, Cardozo studied public law at Columbia's newly-established School of Political Science.[11] The School sprang from efforts by Francis Lieber and his successor John Burgess, both German-educated, to integrate the study of private law with public law and political science.[12] Burgess was initially brought to Columbia to fill Lieber's chair at the Law School and, in his own words, "to neutralize the intense professionalism of the Law School by supplementing the studies in Private Law of a considerable number of the students with those studies in Ethics, History, and Public Law necessary to complete the science of Jurisprudence."[13] But, finding that the study of public law remained marginalized within the law school curriculum, Burgess established an independent School of Political Science in 1880, modeled on the *École Libre des Sciences Politique*.[14]

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8. *See infra* notes 137-139 and accompanying text.

9. *See, e.g.*, JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL (2017); HARSH JUSTICE (2003); *The Two Western Cultures of Privacy*, 113 YALE L.J. 1151 (2003).

10. *See, e.g.*, James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399, 427 (1987) ("In [*The Nature of the Judicial Process*] Cardozo cited Pound fourteen times, Gény's *Méthode* eleven times, Ehrlich sixteen times, and Kantorowicz's *Kampf* seven times, as well as Gray, Jhering, Gmelin, Zitelman, and others.").

11. *See* ANDREW L. KAUFMAN, CARDOZO 32, 45 (2000).

12. *See* Robert W. Gordon, *The Geologic Strata of the Law School Curriculum*, 60 VAND. L. REV. 339, 344 (2019).

13. *See* JULIUS GOEBEL, A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY 87 (1955).

14. *See id.* at 88-90; R. GORDON HOXIE, A HISTORY OF THE FACULTY OF POLITICAL SCIENCE, COLUMBIA UNIVERSITY 8 (1955); Gordon, *supra* note 12, at 344; Karl Llewellyn, *The Study of Law as a Liberal Art*, *in* JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 375, 377-78 (1962); JOHN W. BURGESS, REMINISCENCES OF AN AMERICAN SCHOLAR 191-211 (1934); ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL

Coursework in the political science department introduced Cardozo to comparative law and the study of continental legal systems. Burgess was a proponent of the comparative law method, which he wrote was "chiefly followed by the German publicists" as "an attempt to apply the method, which has been found so productive in the domain of Natural Science, to Political Science and Jurisprudence."[15] Cardozo attended and took hundreds of pages of notes on Burgess's lectures on comparative constitutional law, which surveyed German theories of the state and compared the constitutional systems of France, Germany, Great Britain, and the United States.[16]

In these lectures, published that same year as *Political Science and Comparative Constitutional Law*,[17] Burgess sought to reconcile an organicist conception of the state with a vision of limited government, individual rights, and judicial supremacy.[18] Inspired by thinkers like Hegel and Johann C. Bluntschli, Burgess theorized the state as "the product of history," or "the gradual and continuous development of human society . . . towards a perfect and universal organization of mankind."[19] Burgess's rejection of the notion that political societies were founded upon a social contract likewise led him to reject the doctrine of natural or pre-political rights.[20] The state was the locus of sovereignty, and possessed an unlimited power over the individual. Burgess distinguished between the state and

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CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA 333-38 (1921).

15. JOHN W. BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW, at vi (1890).

16. *See* Benjamin N. Cardozo Papers at the Columbia University Rare Book & Manuscript Library [hereinafter Cardozo Papers], Box 3A, Notes on Comparative Constitutional Law.

17. Cardozo's lecture notes, spanning hundreds of pages, are nearly identical to Burgess's treatise. *Compare* JOHN W. BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 49 (1890) ("Definitions of so comprehensive a term as the state are generally one-sided and always unsatisfactory. Nevertheless they are useful and helpful. This is primarily a question of political science. Not until the state has given itself a definite and regular form of organization, *i.e.* not until it has formed for itself a constitution, does it become a subject of public law.") *with* Cardozo Papers, Box 3A, Notes on Comparative Constitutional Law 58 ("Definitions of so comprehensive a Term are generally one-sided and always unsatisfactory. This is primarily a question wholly of political science, not of ethnology. Not until the state has given itself a definite organization and formed a constitution does it become a subject of public law.").

18. *Cf.* Sylvia D. Fries, *Staatstheorie and the New American Science of Politics*, 34 J. HIST. IDEAS 391, 401 (1973) ("The whole of Burgess' political science is built upon the tension between the German doctrine of the state which, like his colleagues, he considered the cornerstone of modern political science, and an ideological commitment to the individualism of traditional Anglo-American liberalism.").

19. JOHN W. BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 59 (1890). For a brief discussion of the influence of Bluntschli on Burgess, see Christian Rosser, *Examining Frank J. Goodnow's Hegelian Heritage: A Contribution to Understanding Progressive Administrative Theory*, 45 ADMIN. & SOC'Y 1063, 1078 (2013).

20. JOHN W. BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 88 (1890); *id.* ("There never was, and there never can be, any liberty upon this earth and among human beings outside of state organization."); *id.* at 175-6 ("The revolutionists of the eighteenth century said that individual liberty was natural right . . . . But it is easy to see that this view is utterly impracticable and barren.").

government, however, defining the latter as the "limited agent for accomplishing certain of the state's purposes."[21] If the government's power was limited by individual rights, it was only because the state had opted to establish such restrictions.

Burgess pushed the distinction between state and government further than other writers, faulting European and American publicists for ultimately failing to distinguish clearly between these two entities.[22] As a son of the Tennessee planter aristocracy who fought in the Civil War on the Union side, Burgess marshalled the distinction as a defense of the Union and the power of the federal government. Burgess argued that America had come into existence as a nation and a state with the American revolution, and that this sovereign constituting power preceded—both logically and historically—the reservation of powers to the states.[23] As he wrote, "[b]ack of the government lies the constitution; and back of the constitution the original sovereign state."[24] Against the Swiss legal theorist Johann Caspar Bluntschli, Burgess insisted on the impossibility of a federal state; Bluntschli had failed to see that such a state was merely a dual system of government under a common sovereignty.[25] Burgess therefore concluded that the confederacy was "no state at all; it is only government."[26]

Perhaps because he recognized the politically contingent status of the individual rights he prized, Burgess was deeply suspicious of American democratic politics. He viewed the legislature as "[t]hat branch of government in which, especially under universal suffrage, party blindness and passion are most sure to prevail, and in which the least sense of personal responsibility exists."[27] Burgess was also a social Darwinist who worried about the political effects of immigration by "non-Aryan elements"[28] and is remembered today as a proponent of the Dunning School interpretation of Reconstruction.[29]

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21. JOHN W. BURGESS, THE RECONCILIATION OF GOVERNMENT WITH LIBERTY 98 (1915). On the long history of the distinction between sovereignty and government, see RICHARD TUCK, THE SLEEPING SOVEREIGN (2016).

22. *See* BURGESS, *supra* note 15, at 68.

23. *See* John W. Burgess, *The American Commonwealth: Changes in its Relation to the Nation*, 1 POL. SCI. Q. 9, 18-19 (1886); KUNAL M. PARKER, THE TURN TO PROCESS 147 (2023).

24. BURGESS, *supra* note 15, at 57.

25. *Id.* at 79.

26. *Id. Cf.* FRANCIS LIEBER, WHAT IS OUR CONSTITUTION, LEAGUE, PACT, OR GOVERNMENT? 32-33 (1861).

27. JOHN W. BURGESS, 2 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 366 (1893).

28. John W. Burgess, *The Ideal of the American Commonwealth*, 10 POL. SCI. Q. 404, 407 (1895) ("We must preserve the Aryan nationality of the state, and admit to its membership only such non-Aryan race-elements as shall have become Aryanized in spirit and in genius by contact with it, if we would build the superstructure of the ideal American commonwealth.").

29. *See* JOHN W. BURGESS, RECONSTRUCTION AND THE CONSTITUTION, 1866-1876 (1902); Jessica Blatt, *John W. Burgess, the Racial State and the Making of the American Science of Politics*, 37 ETHNIC & RACIAL STUDS. 1062 (2014); Shepherd W. McKinley, *John W. Burgess, Godfather of the Dunning*

The "secret of the peculiarities and the excellencies of the political system of the United States," Burgess argued, was that it had empowered an "aristocracy of the robe."[30] The Supreme Court's power of judicial review served as a guarantor of individual liberty against legislative excess.[31] Burgess anxiously worried that the professionalization of the bar and its narrow focus on commercial matters would lead American jurists to lose "that spiritual influence over the consciousness of the people, which is the sole basis of their power."[32] Judicial supremacy ultimately rested on public opinion, and the public might lose its faith "that the judiciary is a better interpreter of [the Constitution's] fundamental principles than the legislature." Were that to occur, he wrote that "[t]he legislature will become almighty [and] will have at its mercy those individual rights which we term civil liberty."[33]

In addition to Burgess's comparative constitutional law course, Cardozo completed Frank Goodnow's course on "Comparative Administrative Law of the Principal States of Europe and of the United States."[34] Goodnow, who had studied abroad in Paris and Berlin, is generally regarded as the first to have taught a course in administrative law in the United States.[35] His course dealt primarily with the internal organization of administration, discussing judicial review of administrative action only in conjunction with executive and legislative control over the administration.[36] Later in his career, Goodnow also emerged as a proponent of a dynamic approach to constitutional interpretation that would be responsive to public opinion and

School, *in* THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION 49-76 (J. Smith & J. Lowery eds., 2013). For Burgess' advocacy of American projects of empire, see JOHN W. BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 47-48 (1890); JESSICA BLATT, RACE AND THE MAKING OF AMERICAN POLITICAL SCIENCE 13-34 (2018).

30. BURGESS, *supra* note 29, at 365.

31. Burgess argued that the Supreme Court's constitutional interpretation was in practice binding on other branches. *Id.* at 327 ("The general respect for judicial decision in the United States has, however, given to any particular judgment of the Supreme Court of the United States the force of a general rule, and has made it a part of our constitutional custom that the executive shall cease to undertake the further enforcement of a statute pronounced unconstitutional in any case.").

32. *Id.* at 365-66.

33. *Id.* at 366.

34. *See* Hoxie, *supra* note 14, at 305-06, 312 (noting that after 1883, Goodnow taught the course "Comparative Administrative Law of the Principal States of Europe and of the United States"); Cardozo Papers, Box 3, Lectures on Administrative Law 24 (on file with the authors) ("The lectures are divided into two parts. The first part will state the general principles of administrative law in the United States, England, France & Germany."); DAVID S. CLARK, AMERICAN COMPARATIVE LAW: A HISTORY 267 (2022). Goodnow published a two-volume treatise on comparative administrative law in 1893. *See* FRANK J. GOODNOW, 1-2 COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY (1893).

35. *See* Noah Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 22 (2022); BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 103 (2019).

36. *See generally* Cardozo Papers, Lectures on Administrative Law.

the changing needs of society.[37]

Goodnow's and Burgess's lectures in particular would have exposed Cardozo to the comparative treatment of questions of the extent and limitations on the police power, out of which proportionality review grew in Prussian administrative law.[38] In the first volume of *Political Science*, Burgess explicitly draws together the continental European and American understandings of the police power, which he insists is an administrative activity.[39] The function of the police power, across these contexts, Burgess suggests, "is that of restraining the individual in the exercise of his rights when exaggerated by him to the point of becoming a danger to the community."[40] Goodnow echoed a similar understanding of the police power in his *Comparative Administrative Law* and further covered the Prussian reforms that led to the Supreme Administrative Law Court in 1875.[41] It was this Supreme Administrative Law Court that issued many decisions limiting how the police power was used in ways that restricted individual rights[42] and furnished the seeds of the development of proportionality review.

Cardozo also took courses on the comparative constitutional law of the Commonwealth and the history of European jurisprudence.[43] This coursework earned Cardozo a Master of Arts degree in 1890. In an era when law school curricula consisted almost exclusively of private-law subjects, Cardozo's exposure to the Columbia School of Political Science gave him an unusually extensive training in public law. More specifically, it introduced him to debates about the place of judicial review within the U.S. legal system and the comparative stakes of the exercise of and limitations upon the police power within Europe and the United States.

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37. *See* FRANK GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 6, 8-9, 209, 308 (1911). *See also* WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 235-36 (2022); Andrea Scoseria Katz, *The Lost Promise of Progressive Formalism*, 99 TEXAS L. REV. 679, 705 (2021).

38. *See* Carlos Bernal Pulido, *The Migration of Proportionality Across Europe*, 11 N.Z. J. PUB. & INT'L L. 483, 492-93 (referring to the genesis of proportionality "in the Prussian law governing police power" and explaining that "the Higher Prussian Administrative Court *(Oberverwaltungsgericht)* also contributed to the development of proportionality. This court began operating in 1875 and assiduously invoked the violation of proportionality as a reason for overturning coercive measures that excessively limited individual rights. The Higher Prussian Administrative Court understood proportionality mainly as a sub-principle of necessity; that is, as a test related to the least restrictive means. Because of these factors, at the end of the nineteenth and the beginning of the twentieth century, proportionality became a general principle of administrative law in Germany.").

39. BURGESS, 1 POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW, *supra* note 29, at 215.

40. *Id.* at 216.

41. *See* Goodnow, *supra* note 34, at 251-56 (explaining the hierarchy and procedures of the Prussian administrative courts); *id.* at 299-329 (elaborating on the motivations for and results of the Prussian reforms).

42. For examples of the Supreme Administrative Law Court's jurisprudence, see Kenneth F. Ledford, *Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court, 1876-1914*, 37 CENT. EUR. HIST. 203, 208-24 (2008).

43. *See* Cardozo Papers, Boxes 3-4; KAUFMAN, *supra* note 11, at 32, 45.

III JUDICIAL SUPREMACY

Cardozo tells the reader that, in order to write his 1925 essay on "Law and Literature," which surveys judicial styles, he "reread a few of the most famous of [Chief Justice Marshall's] judgments: Marbury *vs*. Madison; Gibbons *vs*. Ogden; McCulloch *vs.* Maryland."[44] After lavishing praise on Marshall in "Law and Literature," Cardozo relied on the same opinions in his later essay "On the Judicial Power in De Tocqueville" to bolster his account of judicial authority and constitutional interpretation. In doing so, Cardozo constructed a genealogy of judicial supremacy and what we would call living constitutionalism going back to Marshall and re-emerging in Cardozo's own jurisprudence. At the same time, this genealogy was refracted through the lens of the French reception, commentary upon, and critique of American-style judging.

Contemporary constitutional scholars often trace the ascendance of judicial supremacy back only to the Supreme Court's 1958 decision in *Cooper v. Aaron*, which, in the face of state executive-branch resistance to desegregation, announced that "the federal judiciary is supreme in the exposition of the law of the Constitution."[45] This assertion appeared to foreclose at least one alternative vision of constitutional interpretation, departmentalism, according to which each branch of government could present its own reading of the Constitution:[46] under *Cooper*, the judiciary, not Congress or executive-branch officials, is the arbiter of constitutional meaning. *Cooper* has also been read as changing the force of Supreme Court precedents by requiring governmental actors who were not parties to the original case to abide by the principle articulated in a decision.[47]

In writings leading up to his appointment to the Supreme Court, however, Cardozo already espoused these principles. The works of two French figures were of particular salience in his account of the judicial power—Alexis de Tocqueville's nineteenth-century *Democracy in America* and

44. Benjamin Cardozo, *Law and Literature*, *in* LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 11-12 (1931).

45. Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land"). For scholarly discussions of *Cooper* and judicial supremacy, see, for example, KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 1-3 (2007); LARRY KRAMER, THE PEOPLE THEMSELVES 220-21 (2004) ("[A]fter *Cooper v. Aaron*, the idea of judicial supremacy seemed gradually, at long last, to find wide public acceptance"); Josh Blackman, *The Irrepressible Myth of* Cooper v. Aaron, 107 GEO. L. REV. 1137 (2019) (contending that *Cooper* newly established both judicial supremacy and judicial universality).

46. *See, e.g.*, Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1031 (2004) (defining departmentalism as "the view that each of the three branches of the federal government possessed independent and co-ordinate authority to interpret the Constitution"); MARK TUSHNET, THE CONSTITUTION OF THE UNITED STATES OF AMERICA: A CONTEXTUAL ANALYSIS 134-35 (2009) (defining departmentalism as the view that "each branch has the right to interpret the Constitution independently, when constitutional questions come before it . . . even when those decisions are inconsistent with what a court has said").

47. *See* Blackman, *supra* note 45, at 1192.

Édouard Lambert's relatively recent *Le Gouvernement des Juges et La Lutte Contre La Législation Sociale aux États-Unis*.[48]

For Tocqueville, the judiciary played a crucial role in shaping American democracy.[49] He viewed the American judge as distinct from those of other nations in wielding significant political power and concluded that this power derived from the fact that "Americans have granted their judges the right to base their decisions upon the constitution rather than upon the laws. In other words, they have allowed them not to apply laws which would appear to be unconstitutional."[50] This had occurred because of the special status of the U.S. Constitution—unlike the French—as enduring and transcending ordinary legislation. Whereas in France, giving the judiciary the power to invalidate laws on the basis of the constitution would place the "constituent power" in the hands of the judges and allow them to "take the place of the nation," in the United States, it was the duty of judges to follow the primary source of law—the constitution—as opposed to the secondary—legislation.[51] An incidental effect of Tocqueville's exploration of the U.S. judiciary was therefore to reject the applicability of American-style judicial review in France.

Lambert, writing in the next century, similarly juxtaposed the U.S. with the French example, doing so explicitly in order to derive lessons for the French judiciary. In the early twentieth century, the leading public law scholars in France actively campaigned to introduce judicial review into French law as a constraint on legislative supremacy.[52] As Lambert suggested after presenting his account of American-style judicial review, the reader could judge whether it was a good idea or not to import a similar practice.[53] Despite nominally leaving the choice up to the reader, *Le Gouvernement des Juges* made evident Lambert's vehement opposition to implementing judicial review—which he deemed an inherently conservative force due to the background and identity of judges—in France.[54]

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48. *See* EDOUARD LAMBERT, LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ÉTATS-UNIS (1921).

49. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 116-37, 161-200 (Eduardo Nolla, ed., James T. Schleifer trans., 2010).

50. *Id.* at 118.

51. *Id.* at 119

52. *See* Alec Stone Sweet, *Why Europe Rejected American Judicial Review*, 101 MICH. L. REV. 2744, 2751-58 (2003); *id.* at 2759 ("Lambert . . . meant his book to be read as a direct response to 'the skillful and perseverant campaign . . . to introduce into our constitutional life judicial review[.]'") (quoting LAMBERT, *supra* note 48, at 4-7).

53. *See* LAMBERT, *supra* note 48, at 221 ("En quel sense penche la balance? Du côté des avantages ou du côté des inconvénients? C'est là une question que je laisse aux lecteurs le soin de décider. Je leur ai mis sous les yeux les pièces du dossier et, en particulier, les témoignages irrécusables que sont les arrêts constitutionnels des cours de justice amériaines. A eux maintenant de juger.")

54. For a discussion of Lambert's opposition to judicial review and his tendency to "eschew[] formalist exegesis of jurisprudence and abstract legal categories, focusing instead on the socialization and ideological orientation of judges," see Sweet, *supra* note 52, at 2758-60.

In reviewing American exercises of judicial review, Lambert diagnosed two distinct stages—that from the time of the Founding to 1883 and from 1883 to the time of his writing, in 1921. In the initial period, the Supreme Court largely kept the states in check through judicial review and only in extreme instances invalidated actions of the coordinate federal branches. Lambert contended that the situation had changed since at least 1883 through the Court's use of the Due Process Clause of the Fourteenth Amendment to invalidate exercises of the police powers.[55] The *Civil Rights Cases* were, for Lambert, a key factor in the transition, as they eliminated, in his view, the capacity of Congress to enforce the provisions of the Fourteenth Amendment under Section 5.[56]

Despite his jaundiced view of the desirability of judicial review, Lambert strikingly argued that it would be possible to implement the practice in France without a constitutional amendment.[57] In doing so, French judges would not rely solely on the text of the most recent constitution to overturn conflicting legislation but would rather look to the Declaration of the Rights of Man and of the Citizen as conceptually incorporated into all subsequent French constitutions.[58] If this occurred, Lambert opined, the Declaration would provide a grounding for judicial review analogous to that which the Due Process Clause had furnished for American judges.[59]

Contemporaneous with Lambert's writing, a significant movement was taking place to universalize French rights, an early foray into human rights.[60] Lambert's book highlights the transnational stakes of the interest in rights encapsulated in his comparison between the French and U.S. regimes, but also raises the additional question of what these rights regimes mean for domestic constitutional adjudication and the capacity of courts to engage in judicial review.

In conversation with Tocqueville as well as Lambert, Cardozo's essay on "The Judicial Power in De Tocqueville" defended a version of judicial supremacy while critiquing the excesses of adjudication under the Due Process Clause. The piece was written shortly before Cardozo's elevation to the Supreme Court, around the time he gave a controversial speech to

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55. *See* LAMBERT, *supra* note 48, at 44-46.

56. *See id.* at 43; Civil Rights Cases, 109 U.S. 3 (1883) (striking down the Civil Rights Act of 1875 as exceeding Congress's enforcement powers under Section Five of the Fourteenth Amendment).

57. *See* LAMBERT, *supra* note 48, at 224-25 (arguing that implementing judicial review would not require inserting any additional language into the French constitution).

58. *See id.* at 225-26.

59. *See id.* at 226 ("La garde de la Déclaration de 1789-1791 fournira à notre magistrature les mêmes ressources que les *due process clauses* des constitutions américaines ont fournies aux judicatures des Etas-Unis pour l'établissement d'un contrôle sur la rationalité et l'opportunité des lois.")

60. Dan Edelstein has shown the importance of the role of constitutional lawyers in efforts to establish human rights during this period and has argued, *contra* Sam Moyn, that those promoting rights were not simply engaged in separate nationalist efforts but were instead working toward a more international consensus. DAN EDELSTEIN, ON THE SPIRIT OF RIGHTS 207-23 (2018). *But see* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

lawyers in New York, published under the heading "Jurisprudence."[61] In that talk, Cardozo had distinguished old from new realists and aligned himself with the former. While the speech angered realists like Jerome Frank,[62] it also provoked figures like Justice Van Devanter, on the conservative side, to opine privately that Cardozo would be a poor Supreme Court justice on account of his radical theories.[63] Perhaps partly on account of the pushback against this lecture, which also engaged with Lambert, Cardozo decided not to publish his piece on the judicial power.[64] In a letter to one of his early biographers, George Hellman, Nicholas Murray Butler attributed this determination to Cardozo's reticence to bring the essay before the public in light of his position on the Supreme Court.[65] Had it been put into print, it would definitely have outraged Van Devanter and others who endorsed a property- and contract-protective vision of the Due Process Clause.

"The Judicial Power" is striking for its significantly greater engagement with constitutional law and Supreme Court jurisprudence than Cardozo's earlier writings. At the same time, the piece draws on his considerable deliberations in *The Nature of the Judicial Process* and elsewhere on common law reasoning and the adaptation of doctrine to new circumstances.[66] With respect to judicial power itself, the essay reaffirms the capacity for judicial review that Tocqueville had diagnosed in the U.S. system following Chief Justice Marshall's opinion in *Marbury v. Madison* (1803), claiming that, when Tocqueville wrote, "Men had already become accustomed to the idea of judicial supremacy in cases of supposed conflict between statute and constitution."[67] Reflecting on judicial authority a hundred years after Tocqueville's contribution, Cardozo proclaimed that "The onslaughts [against it] have been well repelled, but they could not make their way, were they stronger than they are, against the practice of a

61. *See* BENJAMIN CARDOZO, *Jurisprudence*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 7-46 (Hall, ed., 1947). This essay also alluded to Lambert's book. In it, Cardozo suggested that French jurisprudes may have "gone ahead of their Anglo-American brethren in the freedom they have allowed themselves, though professing to lag behind us." *Id.* at 41.

62. Jerome New Frank Papers at Yale University, Box 2, Folder 33, Letter from Jerome Frank to Benjamin Cardozo, Sept. 9, 1932; KAUFMAN, *supra* note 11, at 461.

63. Van Devanter Papers, Library of Congress, Box 16, Letter from Van Devanter to Mrs. John Lacey, Feb. 29, 1932 ("Recently [Cardozo] made an address before a meeting of 1,400 lawyers in New York City and I think the address stamps him as unstable and as wishing to depart from old landmarks and take up with new and uncertain experiments.")

64. *See* KAUFMAN, *supra* note 11, at 470, 685 n.73; CARDOZO, *supra* note 61, at 41.

65. *See* Cardozo Papers, Box 3, Letter from Nicholas Murray Butler to George Hellman, Oct. 13, 1938 ("He never printed it because he thought his position on the Court made it inadvisable to do so.").

66. *See, e.g.*, BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 102-05 (1921).

67. Benjamin Cardozo, The Judicial Power in De Tocqueville 2 (circa 1925) (unpublished manuscript) (on file with authors). Cardozo uses the phrase "judicial supremacy" in several different ways in the essay; although he calls what Tocqueville is referring to "judicial supremacy," Cardozo's own critique of Tocqueville suggests that Tocqueville means judicial review rather than judicial supremacy.

century. . . . It remains, as it then was a capital fact in the life of American democracy."[68]

Yet Cardozo pushes back upon one limitation on the judicial power that Tocqueville had posited, suggesting that Cardozo interpreted the judicial role in terms more akin to the decision in *Cooper v. Aaron* than what scholars have often considered to be the widespread understanding prior to *Cooper*. In *Democracy in America*, Tocqueville argued that the Court's political power was greatly diminished by the fact that it could only decline to enforce an unconstitutional statute in the case before it. Tocqueville assumed, in effect, that this interpretation would not bind any other party. He wrote that "[t]he law censured in this way, moreover, is not destroyed; its moral force is lessened, but its material effect is not suspended. Only little by little, and under the repeated blows of jurisprudence, does it finally succumb."[69] As Cardozo recounts, "Tocqueville laid stress upon a distinction which, in spite of its formalism, has had a vigorous vitality, the distinction between a judgment setting a law aside generally, and one refusing to enforce it or even prohibiting its enforcement."[70] Cardozo believes that Tocqueville arrived at an erroneous conclusion because he did not fully understand the nature and force of precedent within common law reasoning. As Cardozo explains, "[Tocqueville] did not see that in our common-law system, a judgment is something more than the composition of a controversy or the declaration of sentence; it creates or fashions law."[71]

Through fashioning law, Cardozo makes explicit, courts likewise bind coordinate political branches, rather than permitting them to arrive at independent judgments about constitutional validity. Constitutional departmentalism broadly conceived suggests that "each branch has the right to interpret the Constitution independently, when constitutional questions come before it . . . even when those decisions are inconsistent with what a court has said."[72] Cardozo attributes a similar position to Tocqueville, noting that "[h]is thought, it seems, was that even after the invalidity of the statute had been declared, the executive officers of the government would be free to enforce it against every one except the suitor who had brought his grievance into court. . . ."[73] Under Cardozo's view, this was not an accurate representation of U.S. practice: "This is not the path that the march of events has followed. The other departments of the government, legislative as well as executive, give way when the courts have spoken. The statute pronounced void is thereafter held for void, not merely for the contesting

68. *Id.* at 4.
69. TOCQUEVILLE, *supra* note 49, at 174.
70. Cardozo, *supra* note 67, at 5.
71. *Id.* at 6.
72. TUSHNET, *supra* note 46, at 134-35.
73. Cardozo, *supra* note 67, at 6.

suitor, but broadly, for all the world."[74]

In "The Judicial Power" and his other writings, though, Cardozo suggested that courts should be reluctant to invalidate the actions of coordinate branches. He warned that "[a] power that in great causes can still be greatly used, one that is even now a prop for liberty of speech and conscience, must not be frittered away, its high capacities obscured, in causes cheapening or doubtful."[75] In this respect, Cardozo had a characteristically progressive commitment to judicial restraint. In *The Nature of the Judicial Process*, he had endorsed the position that "statutes are to be sustained unless they are so plainly arbitrary and oppressive that right-minded men and women could not reasonably regard them as otherwise," drawing on Learned Hand's reworking of James Bradley Thayer's beyond-a-reasonable-doubt test for judicial review.[76] At the same time, Cardozo defended judicial review as a force that stabilized and rationalized legislative judgments.[77] In response to Lambert's critique of the American due process jurisprudence, he argued that courts' growing understanding of social and economic conditions would lead to greater "moderation and humility."[78] While Tocqueville had hoped that courts would "lend a helping hand in saving democracy from itself" by introducing an aristocratic element into the polity, Cardozo concluded that "[w]e know today that their function is to help it realize itself."[79]

As a Supreme Court Justice, Cardozo repeatedly turned to the Thayerian clear error rule to dismiss challenges to Congress's power. For instance, in an equal protection challenge to a statute prescribing a minimum price for milk, Cardozo concluded that "[t]o say that the statute is not void beyond a reasonable doubt is to say that it is valid."[80] He often refused to second-guess the motives of Congress in enacting a statute, or the necessity of drawing a particular distinction. In another case, he reminded the majority of the "wise and ancient doctrine that a court will not adjudge the invalidity of a statute except for manifest necessity. Every reasonable doubt must have been explored and extinguished before moving to that grave conclusion."[81]

Under Cardozo's view, although the judiciary might enjoy supremacy, that supremacy should not be wielded often or with a heavy hand.

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74. *Id.* at 7.

75. *Id.* at 46.

76. BENJAMIN CARDOZO, *supra* note 66, at 91, 92 n.76; *see* Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 BUFF. L. REV. 873, 892-94 (1995) (stressing the extent to which progressives like Hand modified Thayer's ideas).

77. CARDOZO, *supra* note 66, at 92-3.

78. Cardozo, *supra* note 67, at 48-53.

79. *Id.* at 56.

80. Mayflower Farms v. Ten Eyck, 297 U.S. 266, 278 (1936) (Cardozo, J., dissenting).

81. United States v. Constantine, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting); *see also* Ashton v. Cameron Cnty. Water Imp. Dist. No. 1, 298 U.S. 513, 540 (1936) (Cardozo, J., dissenting) ("To overcome an act of Congress, invalidity must be proved beyond a reasonable doubt.").

IV LIVING CONSTITUTIONALISM

Cardozo was also an early proponent of what we would now call living constitutionalism, developing this theory of constitutional interpretation across his published writings, his draft essay on Tocqueville, and in Supreme Court cases.[82] In *The Nature of the Judicial Process* (1921), Cardozo instructed readers that "the content of constitutional immunities is not constant, but varies from age to age[.]"[83] The general and abstract nature of constitutional provisions meant that judges enjoyed "greater freedom of choice in the construction of constitutions," and Cardozo assumed that judges would resolve constitutional questions through the tools of common law reasoning.[84]

Interestingly, though, Cardozo primarily described this evolutionary method of constitutional interpretation as the application of an ascendent continental approach to statutory construction—the "method of free decision" associated with writers like François Gény and Rudolf von Jhering.[85] The method of free decision was intended as a legal tool for "gap-filling," ensuring that written law could maintain its coherent and complete character in the face of changing social conditions. But where continental writers were almost exclusively concerned with gap-filling in the context of private law, Cardozo saw its primary application in American public law. He wrote that, "in the field of constitutional law, the method of free decision

82. *See, e.g.*, DAVID STRAUSS, THE LIVING CONSTITUTION 1 (2010) ("A 'living constitution' is one that evolves, changes over time, and adapts to new circumstances, without being formally amended."). Most scholarship dates the rise of living constitutionalism to the early twentieth century. *See, e.g.*, Howard Gillman, *The Collapse of Constitutional Originalism and the Rise of the Notion of the "Living Constitution" in the Course of American State-Building*, 11 STUDS. IN AM. POL. DEV. 191, 192 (1997); Morton Horwitz, *Foreword—The Constitution of Change: Legal Fundamentality without Fundamentalism*, 107 HARV. L. REV. 30, 44 (1993). In *The Constitution and the New Deal*, Ted White discussed the role of another Columbia figure, political scientist Howard McBain, in popularizing the phrase "living constitution" in his book of that name. *See* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 206-211 (2000); *see also* HOWARD MCBAIN, THE LIVING CONSTITUTION (1927). McBain had previously written about European constitutionalism. *See* HOWARD MCBAIN AND LINDSAY ROGERS, THE NEW CONSTITUTIONS OF EUROPE (1922). Although Cardozo did not cite to McBain either in his essay on Tocqueville or the *Blaisdell* draft concurrence, he did reference an article by McBain on a different subject in several opinions he wrote as a member of the New York Court of Appeals. *See* Browne v. City of New York, 241 N.Y. 96, 119 (N.Y. 1925) (citing "McBain, New York Proposal for Municipal Home Rule, 37 Pol. Science Quarterly, 655, 674"); Adler v. Deegan, 251 N.Y. 467, 487 (N.Y. 1929) (Cardozo, J. concurring).

83. BENJAMIN CARDOZO, *supra* note 66, at 83.

84. *Id.* at 71, 76.

85. *Id.* at 16. Others have noted the influence of the method of free decision on Cardozo, but do not focus on his constitutional theory. *See* Duncan Kennedy & Marie-Claire Belleau, *François Gény aux États-Unis*, *in* FRANÇOIS GÉNY, MYTHE ET RÉALITÉS 304 (Claude Thomasset & Jacques Vanderlinden eds., 1999) ("Parmi les jurists américains, le juge Benjamin Cardozo fut sans doute l'admirateur américain le plus assidu de Gény, dont il connaissait à fond l'oeuvre."); James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399, 427 (1987) ("The last important and influential work to transmit directly the ideas of the German free law movement was Benjamin Cardozo's famous book, *The Nature of the judicial Process*, published in 1921.").

has become, I think, the dominant one today."[86] The method of free decision looked beyond the "meaning and intent of lawmakers whose collective will has been declared" to "supplement[] the declaration, and fill[] the vacant spaces, by the same processes and methods that have built up the customary law."[87] Cardozo appears to have been significantly influenced by the efforts of continental jurists to increase the flexibility of judicial interpretation and theorized constitutional interpretation in the terms supplied by François Gény.[88] He seems to have given little attention, though, to whether the function and significance of "free decision" differed between the constitutional and statutory contexts.

By drawing this connection between American constitutional flexibility and the method of free decision, Cardozo was able to frame ostensibly separate debates as one transatlantic dialogue over judicial method. Perhaps alone among American readers, for instance, Cardozo treated Lambert's *Le Gouvernement des juges* as an attack on both American-style judicial review and the method of free decision.[89] Lambert's book was indeed a thinly-veiled critique of Gény and focused on the connections between judicial review and statutory interpretation, noting how the creative construction of statutes could function as "a substitute for constitutional review."[90] Cardozo treated the French and American experiences, across both constitutional and statutory law, as intertwined.

In his essay on Tocqueville, Cardozo constructed a historical pedigree for his theory of living constitutionalism, beginning with Marshall. Cardozo ranked protection of the federal commerce power from Marshall's decision in *Gibbons v. Ogden*[91] as "the foremost contribution that the judicial power has made to our constitutional development," closely followed by Marshall's rejection in *McCulloch* of states rights' advocates' "clamor[] for a strict construction" of the Necessary and Proper Clause, thereby "assur[ing] to the government of the nation the freedom in the choice of methods without which the national authority would have been paralyzed and crippled."[92] He also emphasized the significance of the Contract Clause, the interpretation of which, in the 19th century, "laid the basis for the

86. BENJAMIN CARDOZO, *supra* note 66, at 17.

87. *Id.*

88. Cardozo read much of Gény's work in the original, and frequently cited a 1917 essay collection, *The Science of Legal Method*, that aimed to introduce English and American readers to free judicial decision. THE SCIENCE OF LEGAL METHOD (E. Bruncken & L. Register trans., 1917).

89. Cardozo, *supra* note 67, at 48 (writing that Lambert "warns his fellow-countrymen against a form of the judicial process that would introduce them, as he believes, under the guise of free interpretation, 'la recherche libre,' to a system like to ours"). For American reviews of *Le Gouvernement des Juges*, see Learned Hand, Book Review, 37 POL. SCI. Q. 149 (1922); Max Radin, Book Review, 11 CAL. L. REV. 63 (1922).

90. LAMBERT, *supra* note 48, at 130 ("Un substitut du contrôle de constitutionnalité – la construction du statut").

91. 22 U.S. 1 (1824).

92. Cardozo, *supra* note 67, at 12, 14-15.

development of the doctrine of vested rights."[93] Concurring with Lambert's historical account, Cardozo viewed the Contract Clause as rendered to a certain extent moot by the rise of a jurisprudence of due process following ratification of the Fourteenth Amendment: "As the years have passed, the emphasis once placed upon the contract clause has been transferred to the 'due process' clause," he wrote.[94]

Cardozo further developed his theory of living constitutionalism in the case of *Home Building and Loan Association v. Blaisdell*,[95] drawing on the genealogy of constitutional development elaborated in the essay on Tocqueville. Decided shortly after Cardozo's elevation to the Supreme Court, the *Blaisdell* case upheld a Minnesota mortgage moratorium against challenge under the Contract Clause. The Court viewed the context of economic emergency during the Depression as one that highlighted the need for flexibility in interpretation of the underlying right.[96] The majority decision, penned by Chief Justice Hughes, spelled the end of the era of rigorous enforcement of the Contract Clause; more broadly, it presaged the demise several years later of *Lochner*-era jurisprudence undermining the government's ability to regulate in ways that would affect private economic or property rights under the doctrine of substantive due process.[97]

Cardozo penned a draft concurrence in *Blaisdell* that insisted on the need for change in constitutional interpretation, or, as Cardozo's biographer Andrew Kaufmann said, "reinterpreting constitutional provisions in light of their purposes and in light of changing conditions in society."[98] Cardozo's draft concurrence was never published, although several paragraphs from it found their way into Chief Justice Hughes' opinion. Cardozo's emphasis was less on the emergency than on the evolutionary flexibility of the Constitution over time. Hence his opinion, even more than the published decision, set the stage for what would come to be called living constitutionalism. Strikingly, the paragraphs that Chief Justice Hughes inserted into his majority opinion to take account of Cardozo's additional points anticipated and rejected both what have come to be known as original application and original meaning originalism.

In his *Blaisdell* draft concurrence, Cardozo reiterated the argument that

93. *Id.* at 17.

94. *Id.*

95. 290 U.S. 398 (1934).

96. *See id.* at 425-29, 444-45; Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 DEPAUL L. REV. 539, 542, 563-66 (2007).

97. *See* JOHN A. FLITER & DEREK S. HOFF, FIGHTING FORECLOSURE: THE *BLAISDELL* CASE, THE CONTRACT CLAUSE, AND THE GREAT DEPRESSION 6-8 (2012) (challenging the idea that the transformation of jurisprudence came only in 1937 and asserting that "*Blaisdell* revealed an increasing willingness to uphold state efforts to respond to the Great Depression and augured the Court's complete acceptance of the New Deal in 1937")

98. *See* TUSHNET, *supra* note 2, at 127-28; KAUFMAN, *supra* note 11, at 502; *see also* Thomas Halper, *The Living Constitution and the (Almost Dead) Contracts Clause*, 9 BRIT. J. AM. LEGAL STUD. 387, 389 (2020) (noting Cardozo among living constitutionalists).

the advent of the Fourteenth Amendment altered the significance of and necessity for enforcement of the Contract Clause.[99] This argument in and of itself could be made consistent with contemporary originalist arguments. These sometimes look to both the Founding and the Reconstruction Amendments when interpreting the original meaning of the Constitution.[100] Cardozo went further to emphasize that a transformation in social conditions, including the industrial revolution, necessarily changed the appropriate scope of the government's activity and rendered government more crucial.[101]

As in the Tocqueville essay, he relied on Chief Justice Marshall as a guide, and began with Marshall's declaration in *McCulloch* that "We must never forget that it is a *constitution* we are expounding."[102] In addition to flagging the evolution that had occurred over the course of a century, Cardozo specifically discounted the notion that constitutional text could be the sole guide for interpretation. As he wrote of the Contract Clause in particular, "From the beginning it was seen that something must be subtracted from the words of the Constitution in all their literal and stark significance."[103] Furthermore, Cardozo concluded the draft by specifically rejecting the idea that the Framers' conception of the scope of the Constitution in 1787 should control its interpretation in the present. As Cardozo elaborated:

> To hold this may be inconsistent with things that men said in 1787 when expounding to compatriots the newly written constitution. . . . It may be inconsistent with things that they believed or took for granted. Their beliefs to be significant must be adjusted to the world they knew. It is not in my judgment inconsistent with what they would say today, nor with what today they would believe, if they were called upon to interpret 'in the light of our whole experience' the constitution that they framed for the needs of an expanding

99. Benjamin Cardozo, unpublished concurrence in Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), at 2-3, Harlan Fiske Stone Papers, Library of Congress, Box 60 ("The Fourteenth Amendment came, and with it a profound change in the relation between the federal government and the governments of the states. . . . Their statutes affecting property or liberty were brought within the supervision of independent courts and subjected to the rule of reason. The dilemma of 'all or nothing' no longer stared us in the face.").

100. *See, e.g.*, Kurt Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439 (2022).

101. *See Blaisdell* draft concurrence, *supra* note 99, at 3 ("The economic and social changes wrought by the industrial revolution and by the growth of population have made it necessary for government at this day to do a thousand things that were beyond the experience or the thought of a century ago.").

102. *Id.* at 1 (quoting McCulloch v. Maryland, 17 U.S. 316, 407 (1819)). Morton Horwitz has also emphasized the significance of the citation to *McCulloch* in Cardozo's draft concurrence as connected with Cardozo's "vision of the changing constitution" and a broader conception of living constitutionalism during this period. *See* Morton J. Horwitz, *Forward: The Constitution of Change*, 107 HARV. L. REV. 32, 53-57 (1993).

103. *Blaisdell* draft concurrence, *supra* note 99, at 5.

future.[104]

It is not coincidental that this account of constitutional interpretation bookends the opinion along with Cardozo's quotation from Chief Justice Marshall at the beginning. In both his essay on Tocqueville and his draft *Blaisdell* concurrence, Cardozo traced a genealogy of constitutional interpretation from Marshall to the present; his statement of what we would think of as living constitutionalism presents Marshall as furnishing the seeds for a subsequent development of constitutional reasoning.

When emending the majority opinion in light of Cardozo's draft, Chief Justice Hughes followed a similar example. He likewise quoted Marshall, but further rejected a distinction between the Framers' intended meaning and intended application of constitutional terms, one that has carried some weight in contemporary originalist circles. As he noted, "Nor is it helpful to attempt to draw a fine distinction between the intended meaning of the words of the Constitution and their intended application."[105] Instead, Hughes suggests that the "spirit of the Constitution" has been preserved, even if not the letter or the precise meaning.[106]

Scholars have often seen *Blaisdell* as an early and exceptional case—one that may have augured the so-called "switch in time" of 1937 but largely represented an isolated response to the financial exigencies of the Depression.[107] Yet the modification of Hughes's opinion to include Cardozo's comments, which pushed the case in the direction of living constitutionalism, is significant; it suggests that, even if the changes *Blaisdell* portended were not fully realized immediately, the Court was engaged in a self-conscious deliberation about living constitutionalism, rights, and judicial review that paved the way for a more thoroughgoing shift.

V A MEASURED APPROACH TO RIGHTS

Finally, Cardozo developed a measured approach to rights, eschewing the excesses of *Lochner*-era due process fetishism despite his advocacy for judicial supremacy in constitutional interpretation. Because of its emphasis on the public interest that the government is promoting, which may require limitations on rights, Cardozo's stance, although not developed

104. *Id.* at 6.

105. *See* Harlan Fiske Stone Papers, Library of Congress, Box 60, Hughes insert 2; *Blaisdell*, 290 U.S. at 443.

106. *Blaisdell*, 290 U.S. at 443.

107. *See, e.g.* David A. Pepper, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 Marquette L. Rev. 63, 94 (1998) (arguing that many aspects of *Blaisdell* could have and did limit its immediate applicability *contra* revisionist historical accounts); Samuel R. Olken, *Historical Revisionism and Constitutional Change*, 88 Va. L. Rev. 265, 311-317 (2002) (contending, *contra* G. Edward White, that the methodological change represented by *Blaisdell* was not significant); *but see* WHITE, *supra* note 82, at 211-215 (analyzing Hughes's opinion in *Blaisdell* as a version of living constitutionalism).

systematically, bears some resemblance to what is now thought of as proportionality in other constitutional contexts.[108] Cardozo's treatment of the appropriate boundaries of the police power and their capacity to constitutionally limit rights may furthermore have drawn upon the early history of proportionality in the European context, which he was exposed to through the lectures of Frank Goodnow and John Burgess.[109]

In the early twentieth century, a range of thinkers on both sides of the Atlantic began to invoke the language of balancing as an alternative to formalistic and deductive legal thought. François Gény's work, which was particularly influential among American progressives, described balancing as a component of the new method of free scientific research.[110] Gény argued that "the true and just limitations of individual rights will be discovered only by an examination of their economic and social object, and a comparison of the importance of this object with that of the interests opposed to it."[111] Gény focused on the application of balancing techniques to private law disputes, where judges were faced with competing private rights.

By contrast, American writers like Holmes and Pound extended the language of balancing to public law contexts as a means of preventing absolutism in rights protection.[112] In this frame, private rights could be balanced against diffuse public interests. In *Hudson County Water Co.*, for instance, Holmes wrote that all rights are "limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."[113] Holmes noted that the police power set limits on the private right of property, and narrowed the circumstances in which the state had to compensate for interfering with the exercise of a private right.[114] While Holmes' attack was primarily on the inadequacy of prevalent legal methods, Roscoe Pound connected the discourse of balancing to a critique of laissez-faire constitutionalism as exemplified by the *Lochner*

108. For an outline of the more structured approach to proportionality today, see Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3110-21 (2015).

109. *See supra* notes 36-42 and accompanying text.

110. *See* JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS 60 (2013).

111. François Gény, *Judicial Freedom of Decision: Its Necessity and Method*, *in* THE SCIENCE OF LEGAL METHOD 39 (Bruncken & Register eds., 1917); FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 173 (1899) ("[L]'on ne découvrira la mesure, juste et vrai, des droits individuels, qu'en scrutant leur but économique et social, et en comparant son importance à celui des intérêts qu'ils contrariant.").

112. *See* MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 32-33 (2013).

113. Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

114. Duncan Kennedy, *A Transnational Genealogy of Proportionality in Private Law*, *in* THE FOUNDATIONS OF EUROPEAN PRIVATE LAW (Brownsword et al. eds., 2011); COHEN-ELIYA & PORAT, *supra* note 112, at 35.

decision.[115]

In his published writing, Cardozo argued that, as a descriptive matter, balancing was an inherent component of adjudication, though rarely adverted to by judges. In *The Nature of the Judicial Process*, he concluded that legal decisions depended ultimately "upon the comparative importance or value of the social interest that will be thereby promoted or impaired."[116] Later, Cardozo declared that "[w]e are balancing and compromising and adjusting every moment that we judge."[117] Adjudication always involved the weighing of conflicting values—such as logical consistency and justice—with the conflicts resolved through the exercise of judgment on a case-by-case basis. In constitutional law, Cardozo stressed the "need for compromise" between the excesses of egoism and altruism, as well as the difficulty of constructing precise formulas.[118]

Faced with the difficulty of discerning when the impairment placed on a constitutional immunity becomes undue, Cardozo offered what he termed a "gospel of moderation and humility[.]"[119] In the draft essay on Tocqueville, he warned that it was often hard to discern where to draw a line in cases where a liberty or property interest conflicted with a valid use of the police power. Cardozo wrote that "liberty and property are terms of changing content, and [] the kind or measure of restraint that is arbitrary or wrongful will vary with the social needs of time and place and circumstance."[120] The balancing of competing interests was therefore a particularized, fact-bound inquiry, tied to changing moments in time.

Cardozo counseled that judges should often defer to legislative judgments of the relative weight of competing social interests when faced with constitutional challenges. Given the difficulty of line drawing, judicial review "is a power to be held in reserve for use in rare extremities."[121] In *The Paradoxes of Legal Science*, Cardozo discussed the case of *Chastleton Corp. v. Sinclair*,[122] which turned on whether a congressionally-declared emergency that had justified a federal rent control statute in the wake of World War I was still ongoing. He argued that where courts lacked "full disclosure of the facts, there should be submission, readier than has

115. *See, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 616 (1908); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

116. CARDOZO, *supra* note 66, at 112.

117. BENJAMIN CARDOZO, THE PARADOXES OF LEGAL SCIENCE 75 (1928)

118. *Id.* at 128.

119. Cardozo, *supra* note 67, at 53.

120. *Id.* at 45.

121. *Id.* at 46; *see also* CARDOZO, *supra* note 117, at 121 ("The censor will have need of caution and humility. In a representative democracy, the occasions will be rare indeed when a cataclysmic rupture of the existing legal order will have approval of a legislature chosen from the body of the people.").

122. 264 U.S. 543 (1924).

sometimes been accorded, to the judgment of the lawmakers."[123]

Cardozo applied this measured approach to rights adjudication in his draft concurrence in the *Blaisdell* case.[124] He described the dilemma in the language of balancing, writing that "the court in its interpretation of the contract clause has been feeling its way toward a rational compromise between private rights and public welfare."[125] The Court sought to avoid the arbitrary destruction of binding contracts and to keep the impairment of contracts "within the limits of fairness, of moderation, and of pressing or emergent need."[126] Cardozo contrasted this approach with the view that the Contract Clause "was either all or nothing," offering an absolute protection that risked paralyzing the state.

Chief Justice Hughes' majority opinion likewise adopted the language of balancing. As he framed it, the question was "whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."[127] In particular, he stressed that "the relief afforded and justified by the emergency, in order not to contravene the constitutional provision, could only be of a character appropriate to that emergency, and could be granted only upon reasonable conditions."[128]

Although Hughes adopted some of the tenor of Cardozo's draft concurrence for the *Blaisdell* majority, Cardozo went further in several respects in developing a theory of how rights should be interpreted flexibly. Notably, the Minnesota Mortgage Moratorium at issue in *Blaisdell* did not eliminate a creditor's right to foreclose on a property but rather postponed their ability to do so, requiring the mortgage holder to pay rent in the interim.[129] Whether this delay constituted an impairment of the "obligation of contracts" is the gravamen of the dispute between the majority and dissent in *Blaisdell*.

In holding that the Minnesota Mortgage Moratorium did not violate the Contract Clause, Hughes weighed heavily both the emergency setting and the fact that "the legislation is temporary in operation," postponing the remedy for breach of contract rather than eliminating it altogether.[130] Cardozo, by contrast, never mentioned emergency (although he did refer several times to "crisis") and focused more on the need for rights to be interpreted flexibly in relation to regulatory goals.

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123. CARDOZO, *supra* note 117, at 125.

124. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 963-64 (arguing that the roots of public law balancing in the U.S. are in the late 1930s and early 1940s, and noting that "Chief Justice Hughes in 1934 balanced the interests in upholding the Minnesota Mortgage Moratorium Law in *Home Building & Loan Association v. Blaisdell*").

125. *Blaisdell* draft concurrence, *supra* note 99, at 5.

126. *Id.* at 6.

127. *Blaisdell*, 290 U.S. at 438.

128. *Id.* at 445.

129. *Id.* at 416.

130. *Id.* at 446-47.

Cardozo's essay on Tocqueville had already contemplated the question of where to draw the line between an unconstitutional violation of property rights and less significant regulatory adjustments of those rights. In doing so, he invoked the police power, the scope of which was at the heart of the Prussian Higher Administrative Court's development of a form of proportionality analysis.[131] As he claimed:

> There are difficulties . . . when property or a right of property is the subject of the supposed immunity. Countless are then the shades of difference. There is little trouble in understanding that the individual has been deprived of his property within the meaning of the constitution when his lands or his goods have been seized and permanently appropriated. The problem becomes baffling enough, however, when in the exercise of the police power, for the real or ostensible purpose of promoting the public good, the enjoyment or use of property has been subjected to some restraint. Regulation and confiscation will then be easily confused.[132]

While this passage speaks to recent discussions of regulatory takings,[133] it also previews the situation at issue in *Blaisdell*. There, Cardozo claimed that, understanding the Contract Clause in light of the Fourteenth Amendment, "There was to be no impairment [of contract], even though not arbitrary, except within the limits of fairness, of moderation, and of pressing or emergent need. But a promise exchanged between individuals was not to paralyze the state in its endeavor at times of direful crisis to keep its life-blood flowing."[134]

Governmental justifications for action may vary according to the times, and not just under emergency circumstances. As Cardozo wrote in the Tocqueville draft, "Our notions of what is essential in private ownership of property are derived from the institution as we have known it. This does not mean that limitations for the public good will be illegitimate or arbitrary tomorrow because they are unknown or unnecessary today. We must have the vision to disentangle the substance and the accident, the permanent and the transitory."[135] Just as the meaning of the Constitution might alter during the course of constitutional history, the reasons for governmental regulation could change depending on the historical moment.

The decision in *Blaisdell* preceded the levels of scrutiny that would come to dominate rights analysis later in the twentieth century.[136] Justice

131. *See supra* notes 38-41 and accompanying text.

132. Cardozo, *supra* note 67, at 44.

133. *See, e.g.*, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302 (2002); Joseph William Singer, *Justifying Regulatory Takings*, 45 OHIO N. U. L. REV. 601 (2015).

134. *Blaisdell* draft concurrence, *supra* note 99, at 6.

135. Cardozo, *supra* note 67, at 44.

136. For one historical account of the development of the levels of scrutiny, see G. Edward White, *Historicizing Judicial Scrutiny*, 57 S. C. L. REV. 1 (2005); for a genealogy dating the rise of strict scrutiny to the 1960s, later than conventionally understood, see Richard H. Fallon, *Strict Judicial*

Cardozo's reasoning in the case, as well as what Chief Justice Hughes adopted from it, resonated more than the Court's later cases with European models of proportionality and balancing. To the extent that we wish to follow Jamal Greene's suggestion and import proportionality into U.S. jurisprudence, it would not be an innovation but rather a form of return.

Cardozo's writings furthermore reveal some of the reasons why recent originalist efforts to replace the levels of scrutiny with a different way of applying constitutional rights are flawed.[137] Some originalists have critiqued the levels of scrutiny as "hav[ing] no basis in the text or original meaning of the Constitution."[138] In *New York State Rifle & Pistol Association v. Bruen*, Justice Thomas cashed out this critique in practice, rejecting the intermediate scrutiny analysis that lower courts had applied to adjudicate Second Amendment rights as well as any interest-balancing approach and instead examining whether the challenged regulation was consistent with historical limitations on Second Amendment rights.[139]

But this logic is precisely what Cardozo had rejected in his *Blaisdell* concurrence. It assumes that changes in how government implements the public good or what is needed to serve the public good are impermissible under the constitutional scheme.[140] Cardozo's living constitutionalism emphasized not only that the meanings and relevance of particular constitutional provisions might alter over time but, perhaps even more importantly, that the nature of the public interest could change depending on historical occasion and that constitutional rights might need to bend accordingly.

Scrutiny, 54 UCLA L. REV. 1267 (2007).

137. For a critique of the levels of scrutiny from an originalist perspective, see Joel Alicea and John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, NAT'L AFFAIRS (2019).

138. *Id.*

139. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022). This critique was reaffirmed by several of the justices in this past Term's decision in *United States. v Rahimi*, 144 S. Ct. 1889 (2024).

140. There are similar suggestions about the impermissibility of legislative innovation in Chief Justice Roberts' opinion in the Affordable Care Act case of *NFIB v. Sebelius*, 567 U.S. 519 (2012) ("Given its expansive scope, it is no surprise that Congress has employed the commerce power in a wide variety of ways to address the pressing needs of the time. But Congress has never attempted to rely on that power to compel individuals not engaged in commerce to purchase an unwanted product. Legislative novelty is not necessarily fatal; there is a first time for everything. But sometimes the most telling indication of a severe constitutional problem is the lack of historical precedent for Congress's action. At the very least, we should pause to consider the implications of the Government's arguments when confronted with such new conceptions of federal power." (cleaned up)). Justice Sotomayor makes a related critique in her concurrence in *Rahimi*, 144, S. Ct. at 1905 (Sotomayor, J., concurring) ("I remain troubled by *Bruen*'s myopic focus on history and tradition, which fails to give full consideration to the real and present stakes of the problems our society today. In my view, the Second Amendment allows legislators 'to take account of the serious problems posed by gun violence,' . . . not merely by asking what their predecessors at the time of the founding or Reconstruction thought, but by listening to their constituents and crafting new and appropriately tailored solutions. Under the means-ends scrutiny that this Court rejected in *Bruen* but 'regularly use[s] . . . in cases involving other constitutional provisions,' . . . the constitutionality of § 922(g)(8) is even more readily apparent.").

V CONCLUSION

Developing his theories in dialogue with French and other European jurisprudential debates, Cardozo endorsed an early synthesis of judicial supremacy with living constitutionalism and an approach to rights that weighed the public interest as well. Later versions of living constitutionalism embraced more definite levels of scrutiny; those have been called into question alongside living constitutionalism, with *Bruen* presenting one originalist alternative. At the same time, some have argued that originalism itself is waning.[141] Perhaps this moment of instability presents an opportunity for reviving Cardozo's constitutional jurisprudence and adopting the logic of his more measured adjudication of rights.

141. *See generally* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).