The Recall of Judicial Decisions and the Due Process Debate

by Stephen Stagner*

The Fourteenth Amendment represents the capitalistic theory that the country is menaced by improper suicidal legislation, and that its salvation is to be found in keeping things as nearly as possible as they are. The people of the United States . . . are to be kept under the tutelage of the courts, like imbeciles and idiots, in order that they may not perchance do something rash or unreasonable.

Henry Winthrop Ballantine

We cannot permanently go on dancing in fetters.

Theodore Roosevelt to Herbert Croly
February 29, 1912

Late in February 1912 Theodore Roosevelt journeyed to Columbus, Ohio, for the first speech of his young presidential campaign. The address was essentially a conservative exercise, expressing acceptance, as did most of the New Nationalism, of the emerging outlines of urban-industrial America. Except for one section, the speech contained nothing that might have endangered Roosevelt's hold on the moderate-conservatives of the business community who were disaffected with the vigorous anti-trust activity of his hand-picked successor, William Howard Taft.1 But in one passage Roosevelt declared: "I believe in pure democracy, . . . that human rights are supreme over all other rights, that wealth should be the servant, not the master of the people." He thundered on to attack "infallible" judges who used legal formalism to thwart the popular will. "Justice between man and man," Roosevelt claimed, ". . . is a living thing whereas legalistic justice is a dead thing." The passage culminated in the following proposal:

When the supreme court of the State declares a given statute unconstitutional, because in conflict with the State or National

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Constitution, its opinion should be subject to revision by the people themselves. Such an opinion ought always to be treated with great respect by the people, and unquestionably in the majority of cases would be accepted and followed by them. But actual experience has shown the vital need of the people reserving to themselves the right to pass upon such opinion. If any considerable number of people feel that the decision is in defiance of justice, they should be given the right by petition to bring before the voters at some subsequent election... after the fullest opportunity for deliberation and debate, the question whether or not the judges' interpretation of the Constitution is to be sustained. If it is sustained, well and good. If not, then the popular verdict is to be accepted as final, the decision is to be treated as reversed, and the construction of the Constitution definitely decided—subject only to action by the Supreme Court of the United States.²

With the next morning's papers, the recall of state judicial decisions was in the national arena.

Negative opinions were not slow in accumulating. To the New York Journal of Commerce the issue was "the most astonishing episode in the history of the United States." The Fort Worth Record thought it "absolutism gone mad. This is the doctrine that precipitated the war between the states. It is the principle of the French Revolution. It is the conceit of tyranny everywhere throughout the world." "Emma Goldman could not make a more violent assault upon our institutions," said Chancellor James Day of Syracuse University.³

By and large, historical opinion has regarded attitudes such as these typical of the 1912 controversy.⁴ From the premise that Roosevelt's recall plan was a mistaken political ploy and not a serious proposal, it has followed that respectable opinion—led by American lawyers en masse—rejected it totally. This was, however, not the case.

². Chicago Tribune. February 22, 1912.
³. All cited in Current Literature LIL (April 1912), 371-72. Chancellor Day, for one, had long been suspicious of T.R.
The judgment is especially incorrect as it applies to attorneys. Recent scholars such as Jerold Auerbach have put forward a view of the American legal profession as monolithic in its middle and upper class social orientation, unyielding in the face of social reform, unconcerned with any other goal besides professional stability. However, in the years leading up to and including 1912, the profession was anything but monolithic. It was in fact a hotbed of antagonisms. Disputes ranged from status problems (the lawyer as corporation clerk) and ethical concerns (the "monetization" of intellect) to more substantive legal questions such as the meaning of "due process of law."

It is as a part of an ongoing debate over due process that Roosevelt's plan for recalling state judicial decisions is important. Far from being universally deplored, the plan sparked in legal periodicals a lively debate that lasted several years. While the American Bar Association as an interest group took an extreme position in opposition to Roosevelt, it did not speak for all attorneys. Lawyers held an array of opinions on the matter; these can generally be separated into the categories of supporters, opponents, and qualified opponents. It is important for historians to assess the first and last of these categories, and to assess as well their importance vis-à-vis the more vehement and organized opponents who have heretofore monopolized historical commentary.

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For the most part, those lawyers who rallied to the defense of Roosevelt in the summer of 1912 had a common argument—they saw the recall of decisions as a better method of amending those parts of state constitutions that applied to the scope of the police power. This was a line that the former president himself pursued during the campaign as he sought to stress the moderation of his proposal and separate it from the recall of judges. In 1911 the candidate had adopted Justice Holmes's definition of the police power as extending "to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." In the simplest terms what Roosevelt claimed for the recall of state judicial decisions was that it helped bring this definition to bear in state constitutional law. In so

far as the definition of the police power involved changing opinions, it was a fluid, not static, definition: when judges guessed wrongly about preponderant opinion, "recalling" decisions was one way of putting that opinion into the law without the normal process of amendment and without recalling judges. It was, in short, a method of public expression on due process questions where public interest collided with property rights.

Perhaps the most famous attorney to support Roosevelt on this point was the Dean of the University of Pennsylvania School of Law, William Draper Lewis. Lewis lent his name to the Bull Moose cause early, and after a mid-March meeting with Roosevelt at Oyster Bay, he was quoted often by the candidate. 7 In September he contributed an article to an edition of the *Annals of the American Academy of Political and Social Science* that was given over exclusively to a discussion of "direct government" techniques. In this article Lewis contended that most lawyers were protesting because they did not understand what was proposed. He used the phrase "recall of decisions" but clarified it by distinguishing two definitions of "decision"—one meaning the judgment in the case between plaintiff and defendant, the other meaning the opinion of the court that an act was contrary to the constitution. Clearly, Lewis saw, Roosevelt meant that only the last kind of decision could be recalled, "that after an affirmative vote by the people in favor of an act, the court cannot in a subsequent case declare that the act is invalid." 8 The question, for Lewis, was whether this method of constitutional amendment was better than the one in use.

To answer this question the Pennsylvanian argued that, unlike constitutional provisions that dealt with specific subjects and which were impossible to misunderstand, due process dealt with general principles with doubtful meanings. Because Roosevelt saw Lewis's position as close to his own, the analysis is worth quoting at length:

> If the act limits the freedom of the individual in a wholly unnecessary manner it violates "fundamental ideas of social justice," and the courts will declare it unconstitutional under the due process of law clause. In so doing, of necessity, the judges must determine whether the act in question does or does not

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7. There is little of substance in the T.R.-Lewis correspondence. After their meeting Lewis did write that he left Roosevelt with a sense of expectation fulfilled: "One's heroes do not always materialize just the way one expects, but in this case my felt sense of personal and intellectual sympathy has been strengthened." W.D.L. to T.R., March 15, 1912, Roosevelt MSS, Library of Congress. Lewis recommended to T.R. one William L. Ransom, who, in *Majority Rule and the Judiciary* (New York, 1912), wrote a book-length exposition of the plan.

violate fundamental ideas of social justice. But ideas of morality and social justice change with changing social and economic conditions. A regulation of persons or property which is arbitrary and unfair to one generation is not necessarily arbitrary and unfair to another. When, therefore, an act is attacked before a court as arbitrary and unfair, and therefore as depriving persons of their liberty or property without due process of law, the court is confronted with the question of the standard by which they shall test the question presented: Shall they test the act by the ideas prevalent in the past or by ideas prevalent today? The courts have not yet given a clear answer to this question, and yet on the answer depends the usefulness of the functions performed by the courts in this class of cases. If the courts continually declare acts which are in accord with modern ideas of social justice, unconstitutional, because they violate some outworn system of political economy, they become intolerable clogs on the orderly solution of present social and economic problems. On the other hand, if they only declare unconstitutional, under the due process of law clause, those acts which do violate the ideas of social justice existing at the present time, they perform a function of inestimable value.9

Obviously what Lewis sought was a practical way to apply the Holmes test of a community standard in determining the meaning and extent of due process. But unlike Holmes, Roosevelt and Lewis were unwilling to trust judges themselves or the amending process to insure the use of this test. By amending the due process clause, Lewis thought, the people sanctioned not a particular compensation act or regulation of hours act but rather any compensation or hours act that might be passed, no matter how arbitrary its provisions. With recalcitrant courts, successive amendments of this breadth would practically abrogate the due process provisions and endanger other constitutional guarantees. Roosevelt’s plan was seen as superior to this kind of broad amendment, providing “a method of obtaining legislation which does correspond to the prevailing ideas of social justice, while at the same time retaining in our constitutions the principle that no act which is arbitrary or unfair should be recognized as law.”10 In the end, the idea was a less sweeping, more direct form of constitutional amendment.

9. Ibid., 313-14.
10. Ibid., 317-19. At least one observer did not think Lewis eminent or his ideas stimulating. When President Taft proposed that Elihu Root debate Lewis, the Senator termed him a “crank professor” and refused to give him a debate, suggesting instead that “a sheriff with a writ de lunatico would be more appropriate.” Root to W.H.T., March 18, 1912, Taft MSS, Library of Congress.
A good many lawyers picked up this idea of the recall of decisions as a superior plan of amendment. Peter S. Grosscup was a former judge of the federal Circuit Court of Appeals who had handed down the injunction against the Pullman strike in 1894. But in 1912 Grosscup agreed with Lewis on the recall of decisions, thinking the plan "nothing more than a method of adjusting the constitution to the needs of the times as they arise without interfering with the wholesale guarantees in any other respect." 11 Others took a different tack than Lewis in attempting to prove that the plan was an improvement over the ordinary course of amendment. Whereas the law professor focused on the dangers inherent in broad amendments to the due process clause, Harold Remington, of the New York bar felt that specific amendments would also be harmful. If the precedent was established that enacting a workmen's compensation act required a constitutional amendment, then the laborious process of amendment would be necessary for each and every act of a similar nature. As a result, Remington thought, future labor legislation would be more difficult to obtain. 12

Writing in the Georgetown Law Journal, Daniel Baker also found the normal process of amendment to be defective. If an amendment was passed validating an act that had been declared unconstitutional, he argued, the result would simply be an excuse for further litigation to define the amendment and determine whether or not this act came within its scope. There would be long delays, great expense, and "nothing gained over the direct recall except the right often given for the benefit of some special interest, again to litigate the matters of right of recovery through the courts." 13 The amending process was too circuitous and inexact, Baker believed, and instead of amendments which merely create new litigation, raise new questions of constitutional law, is it not common sense, is it not reasonable, to have amendments that go direct to the heart of the matter, and amendments that will destroy and recall the decisions of courts without having to wait for a further decision of a court? Is there anything revolutionary in this? Is it not a plain, reasonable proposition? Why should the people be going from court to legislature and legislature to court, when they can by direct enactment have the matter settled immediately? 14

14. Ibid., 11.
Another New Yorker, Berkeley Davids, asserted in *Law Notes* that no amendment of "due process" or "equal protection" had ever been attempted and that, furthermore, the amending process could not even get at an important part of the problem of judicial conservatism—the power of construction. Judges could emasculate a law without declaring it unconstitutional by construing it so that it operated upon nothing. An amendment, he argued, could not correct this situation; recalling decisions could.15

Davids also defended the recall of decisions by insisting that constitutions are the enactments of the people and that "the true meaning and import of any particular provision must be what the body of the people who adopted it conceive its meaning and import to be."16 But when he spoke of the people who adopted the Constitution, Davids meant not the voters of 1787 but the voters of 1912. "The people" were a growing, changing entity with the right to make continual demands upon the Constitution. Likewise, the nation’s fundamental charter was not a sacred, inviolate document setting up permanent, untouchable institutions and limitations; rather, it evolved with the changing country. The duty of a judge was not to preserve the *sanctum sanctorum* but to adjust, to adapt. Once again, the demand was for the community standard. As Albert M. Kales told the Illinois State Bar Association, anyone who favored the recall of decisions was simply asserting "that there is no special virtue imparted to a constitutional provision because the courts have declared that it shall have a certain meaning."17 Like J. Allen Smith, Charles Beard, and other academic critics, these attorneys questioned the very concept of constitutionalism. Echoing Arthur Bentley’s quip that "the Constitution is always what it is," they underscored the political nature of the judicial process in America.18

If there was one thread that united all of these legal defenders of the recall of decisions it was their insistence that the courts consider the community standard in determining the boundaries between individual liberty and private property rights. These rights were "always held subject to the advancing views of mankind," Remington wrote and others echoed. Court decisions on their extent represented a judicial guess as to what the popular views were. In place of that guess, the Roosevelt plan sought a way of registering the change in opinion, of furnishing judges positive evidence as to popular ideas about fairness.

16. Ibid., 5.
What Lewis, Remington, and Davids were attacking was only the construed meaning of the Fourteenth Amendment, and even within the legal profession their position was far from the most radical one articulated. Henry Winthrop Ballantine, for example, put the case for the community standard in stronger terms. Due process, he argued, was intended to protect the individual against arbitrary executive and judicial action; legislative action should by definition be considered due process of law. Yet by "judicial slight of hand" the clause had been made into "a broad bill of property privileges, of vested rights to exploit others." Ballantine's solution was not to work for the broader interpretation of the Fourteenth Amendment but to work for its repeal, thus leaving it to the states to determine the power of legislatures over business and property. Roosevelt spoke of using wealth for the benefit of the community, but he certainly did not put the community's claim as strongly as Ballantine, who suggested

... a single amendment to the Federal Constitution to the effect that all business and all uses of capital for profit are, when so declared by competent legislative authority, public callings or services; and, further, that they are subject to any regulation whatsoever in favor of workers, consumers, or competitors, regarding prices, profits, quality of product, hours, wages, conditions of work, and industrial accident insurance, so long as a reasonable return is allowed on the investment, as in the public services now recognized.

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There existed, therefore, in 1912, a group of reform-minded lawyers who were willing to accept the Roosevelt proposal as an antidote to the perversion of the Fourteenth Amendment. This in itself is sufficient warning to those who would accept without question the claims of the American Bar Association and conservative lawyers that the Roosevelt proposal was totally inimical to the entire Western tradition of law and justice. At least some trained in that tradition apparently did not believe so.

Furthermore, between this reformist group and the bar association was a middle group whose reactions to the plan represents a further "road not taken" by the ABA. Many of this group objected to the Roosevelt plan on workability grounds. Yet at the same time they had a clear sense of the inflexibility of the law which had given

20. Ibid., 228.
rise to the controversy. And while denying that the recall of decisions was the proper palliative, the moderates insisted that the law had to "produce results or face a revolution." 21

Arthur Eddy—later a spokesman for "‘The New Competition’”—was a perfect representative of this line of thought. Speaking to the Chicago Bar Association early in 1912 on "‘The Recalls,” Eddy chided his fellow lawyers for being “balky mules” in the face of reform, instinctively opposing change when they should be seeking to guide it. The recall of judges was crude, unfair, and cumbersome in its operation, he admitted, but the “cry for the recall is a protest—and therein lies its strength.” His own reading of the popular reception of the Roosevelt proposal left Eddy with the impression that the people were not really interested in the recall of decisions; they sought a more fundamental reform—truly independent judges. The current system of partisan nominations and elections sank judges into “the slimy rut of machine politics”; this was responsible for the charges of subservience to bosses and powerful political interests. Eddy’s own proposal was to replace this “vicious,” “pernicious” system of “periodic recalls” with election for life, combined with the recall for aggravated cases. While this suggestion could itself be attacked on the basis of efficacy, Eddy was at least responding to what he perceived to be a demand on the part of the populace for independent judges. 22

Theodore Schroeder of the New York bar made a similar call for a truer form of judicial independence. Though his answer was a scientific theory of law rather than elections for life, Schroeder realized that the criticism of the courts was but a response to the abusive, class-oriented use of judicial power. The reformers, he argued, had no sense of the generality, uniformity, and certainty needed in all state-enforced rules of conduct. On the other hand, the corporation lawyer who mounted the bench and continued to see problems through the eyes of the privileged classes was as culpable as the reformer. 23

Just as some moderates accepted Roosevelt’s accusation that judicial independence was menaced, so others were put off by the excessive formalism of the conservative argument and lauded the attack on judge-as-oracle. A young Felix Frankfurter, recently come to Washington, wrote in his diary of a dinner partner’s comment that next to the press, the legal profession had been “the meanest and

most selfish force in resisting just reforms and perpetuating public abuse in the administration of laws." Frankfurter concluded that "this sacrosanct notion of our judiciary must be hit whenever it can be effectively. . . . There is a natural tendency of self-reverence by the members of an institution and it's up to the bar to keep our alert eyes on the courts. Thanks to T.R. there is live thought on the subject." There was nothing to be gained, W. F. Dodd similarly told the readers of the *Michigan Law Review*, by treating judges as syballines or oracles. Instead, in a realistic note, he urged public acceptance of the political function of judges and judicial acceptance of the bench's corresponding political responsibilities which the judiciary had forgotten.25

More important, a number of lawyers were surprisingly receptive to the argument of "judicial usurpation," and realized that the roots of the present discontent were inextricably tied to judicial activism. Charles G. Haines, in the same Michigan journal, surveyed the dissenting opinions in important cases since 1890 in which dissenters had protested against courts going too far in overturning legislative action and making law themselves. His conclusion: Had these dissents been listened to, had the Fourteenth Amendment been given a more limited application to the states, had greater discretion in rate-making and corporation control been left to the legislatures, then probably the judiciary would be under less criticism and there would be no reason to resort to recall.26 Even such a conservative figure as Ezra Ripley Thayer, dean of the Harvard Law School, while boldly attacking the Roosevelt proposal as feeble, inapt, and injurious, admitted that it sprang directly from the court's failure to recognize the scope of legislative power.27 Another commentator noted that it had become a recognized administrative rule that

the courts should not assume to review the wisdom of legislative action, or pass upon the facts which actuated such action;

26. C. G. Haines, "Judicial Criticism of Legislation by Courts," *Michigan Law Review* XI (November 1912), 28-49. Many of the dissenting opinions that Haines studied were also quoted by Roosevelt, who liked to boast that in his own criticism of the courts he was merely echoing judges.
and that the action of the legislature should be supported unless it clearly and unmistakably exceeded the limitations of the Constitution. A more consistent adherence to this rule would have done much to prevent the current agitation.\textsuperscript{28}

The courts, many recognized, had pulled the building down upon themselves.

The "usurpation" had extended so far, argued some, that the outside limits of judicial review had been reached. In a tediously argued article in the \textit{Harvard Law Review}, John G. Palfrey (a friend of Justice Holmes) claimed that with respect to "that class of cases in which acts of the legislature are set aside on the grounds that in their effect upon individual rights they are arbitrary, . . . there are grounds for belief that they impose burdens on the courts too grievous to be borne." Not that these decisions are not proper judicial functions, he went on, but the consequences are "so vast and the public and political import so overwhelming" that the responsibility of decision should rest on a more accountable body.\textsuperscript{29} This was, in a sense, the conservative belief in the people's incompetence turned on its head and applied to the courts. When the courts, asked Palfrey, are dealing with "facts which are in the peculiar knowledge of legislatures, and of which the courts have only limited sources of information, is it fair that they should be expected to decide that ultimate question of degree which lies between the rational and the arbitrary in legislative action?"\textsuperscript{30}

One final aspect of the Roosevelt critique that moderate lawyers picked up without buying the accompanying solution was the idea that socioeconomic conditions in America were changing much faster than the legal-political ideas which legitimized them. Edward Keasbey told the Maryland Bar Association in 1911:

Democracy has reached the state in which the need is not for the protection of the rights of the individual either with respect to person or property, but rather the satisfaction of the desires of whole classes for a larger share in the products of human activity, whether in property or in the enjoyment of all that life has to offer.

Yet as society had moved from individualism to social welfare, Keasbey argued, judicial opinion based on precedent had stood still and had not kept abreast of new conditions and new conceptions of

\textsuperscript{29} Ibid., 522-23.
\textsuperscript{30} Ibid., 523.
the rights and duties of the individual and society. 31 Similarly, the Ohio Law Bulletin editorialized (not altogether enthusiastically) about the "thralldom of precedent" and the spirit of the times. One thing seemed certain to the editors—"unless the judges are able in the very near future to break in some measure their thralldom to precedent and respond more adequately to the social demands of the day, the proud eminence of the judiciary in this country is at an end." 32 The charge was essentially one Roosevelt made in proposing the recall of judicial decisions—that the law was bound by precedent to a society based on individualism while the people demanded a new order of things. 33

Keasbey's solution to this problem was perhaps the most common one advanced by the legal moderates opposed to the recalls. The true remedy, he felt, was for lawyers and judges

to keep themselves in touch with the facts of life as they are; to know the conditions under which men and women work and to study with sympathy as well as with knowledge the facts which determine what sort of legislation is needed for the promotion of the public health, safety, and welfare, and so to understand what is in truth the opinion of reasonable men on the question of what is a bona fide exercise of the police power and not an undue invasion of individual liberty. 34

The cry for honest, tolerant judges was also sounded by Palfrey and many others who accepted Roosevelt's critique but not his solution. Yet this cry should not be taken at face value. A tolerant judge was but the capstone of a theory of judging which emphasized the highly politicized and idiosyncratic nature of the process and constantly referred to the social context of decisions. 35 The personages around whom this theory is often defined—Oliver Wendell Holmes

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and Roscoe Pound—occupied a centrist position in the debate over the recall. Both were quoted often by Roosevelt; both believed that state judges had gone too far in substituting their social and economic philosophies for the law; and both recognized the obligation of the law to public opinion. Yet they tended to see political reformers of the law as a somewhat light-headed lot and insisted that the law was of necessity always behind the times. As Holmes told the Harvard Law Association of New York:

> It means that the law is growing. As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action; while there is still doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not entitled to the field.  

Pound, in an address on "Social Justice and Legal Justice," held that

> law formulates the moral sentiments of the community in rules to which the judgment of tribunals must conform. These rules, being formulations of public opinion, cannot exist in any settled form until public opinion has become fixed and settled, and cannot change in any far-reaching particular until a change of public opinion has been complete. . . . Public opinion must affect the administration of justice through the rules by which justice is administered rather than through the direct administration.

This passage was cited as evidence by an opponent of the Roosevelt plan, but Pound's position was more complex than that. While he disdained the popular opinion that law was but a formulation of the general will, he also rejected what he called the theory of the American lawyer—that "the principles of law are absolute, eternal, and of universal validity," that the "Common law teaches that principles of decision must be found, not made," and that "law is above and beyond all will." Each theory, he felt, contained only an element of the truth, and jurists should seek "to work out the

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relation of each to the end of the law." 39 Holmes, in his turn, asked the same flexibility of judges. He warned against translating fears of socialism into doctrines of law, and urged what he called "education in the obvious." We need, he said, "to learn to transcend our own convictions and to leave room for much that we hold dear to be done away with short of revolution by the orderly change of law." 40

One other important legal figure who directly confronted the recall of judges and decisions in 1911-12 was Learned Hand. A confidant of Roosevelt and a committed progressive, Hand also had ambivalent feelings about the recalls. In May 1911 he wrote to Roosevelt that the "stiffness" of the courts in their views of legislative experiments was threatening the entire system of constitutional control by the courts. While he did not believe in the principle of the recall, he understood that it was but a response to inflexibility. "It is strange," he noted, "that those very persons who generally most deplore the referendum should as a class be eager for that control which renders the referendum an absolute necessity." As Roosevelt began later in the year to develop the idea of recalling decisions, Hand thought the initial expressions of the plan both impracticable and dangerous. The popular will, he wrote,

when clearly ascertained, cannot wisely be withstood in a democracy, but there are a good many occasions when before it has been authoritatively expressed, a judge is tempted to interpret what he finds about him in popular form. Except in so far as that helps him to an honest interpretation of what has reached authoritative expression, I have not the least doubt that he should, and indeed he must, wholly disregard them. If he does not he is just as much a usurper of authority if they be popular, and even the matrix of future laws, as though he followed his personal, but unpopular predilections. 41

In spite of his misgivings, Hand supported Roosevelt in 1912, the cure, apparently, being no worse than the disease. But some forty years later he would still be shy of using the courts as a check on popular passion. His objection was that "although the judge would be exempt from immediate gusts of popular passion, they might be quite out of line with the dominant beliefs—principles we'll call them—and there would be no way, if they are going to keep their independence, by which they could be made to correspond."

41. Learned Hand to T.R., May 8, 1911; November 20, 1911; February 27, 1912, Roosevelt MSS.
"That," he told an interviewer, "happened in 1912. That was really the Bull Moose movement, more than anything else." 42

In the same interview Judge Hand defined his interpretation of due process as "that compromise on a given occasion which would result in the maximum of content, or minimum of discontent, . . . in the society which is concerned. . . . The only thing it can mean is . . . that the legislature has acted in—well, I think we might call it an honest way.". He admitted review only on occasions when there had not been an honest effort to give each man his own, and that, he said, is almost impossible to find. 43 It is easy to see the roots of such a view in the events of 1912.

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In conclusion, then, lawyers as a group did not castigate the plan for the recall of state judicial decisions. While the ABA's spokesmen thought the plan demagogic, misguided, and destructive of any and every constitutional limitation, the proposal was supported by law professors and judges, as well as members of the bar. For these men the plan represented an antidote to the perversion of the Fourteenth Amendment that had made due process a wall against state action. They insisted, with Holmes, that the trade-off between due process of law and the police power was not a static relationship but a dynamic one in which preponderant morality was a variable to be considered.

The conflict between the static and dynamic definitions of due process—or, in other words, over the degree to which judges should oversee state action—was perhaps the central legal conflict in America from the late nineteenth century until 1937. Roosevelt's proposal for the recall of state judicial decisions must of necessity be seen as a beachhead in this larger battle. It certainly had its legal supporters. And while the demand of Holmes, Pound, Palfrey and others for tolerant judges and flexibility in the law constituted a rejection of the recall of decisions, it was a rejection fraught with ambiguity and sincere in the effort to understand and solve the problems that had given rise to the plan. It was, furthermore, only a partial rejection—a refusal to abide by the solution but in no way a repudiation of the philosophy behind that solution.

The opposition of the moderates to Roosevelt's specific proposal obscured the fact that they shared in his indictment of American jurisprudence. Consider, for example, what David Wigdor has pointed to as the central theme of Roscoe Pound's writings during

42. Interview with Learned Hand, Columbia University Oral History Project.
43. Ibid.
these years: The deductive method has created a closed system of legal rules that enshrined ephemeral anachronisms as fundamental principles, in conscious disregard of the society that law served. How did that differ from Roosevelt's theme? Pound scored American legal theory for its individualism and its suspicion of the legislature. So did Roosevelt. Pound, as Roosevelt, saw the degree to which industrialism had made the old theories outmoded and argued that legal ideas must be judged in terms of the results they achieved. The legal moderates shared with Roosevelt the notion that law was profoundly a human construct marked by continuous change, growth, and adaptability. They were responding to a sense of crisis in the law that was widespread both within and outside of the profession, and it was not a crisis manufactured by a demagogue.

For students of the American legal profession, the events of 1912 are important because they indicate fundamental disagreements within the profession about the development of American law. To this extent and for this period, images of a monolithic bar must be tempered with nuance. Whether or not these events disprove the existence of the legal elite posited by Auerbach is another question. For certainly when the organizational resources of the American Bar Association were entered into the fray, they were entered without ambivalence on the anti-Roosevelt side. Furthermore, the base from which the ABA spokesmen generally attacked the recall was an archaic constitutional theory that saw property rights as absolute, popular majorities as menacing, and judges as the upholders of limitations. The notion of a legal elite in bar politics deserves further study, in this period as in others. But insofar as this notion implies fundamental unanimity, it deserves revision.