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## Popular Dissatisfaction with the Administration of Justice: A Retrospective (and a Look Ahead)<sup>†</sup>

BARRY FRIEDMAN<sup>\*</sup>

Roscoe Pound, law professor and longtime dean of the Harvard Law School, championed many reforms in the law and lived to see most achieved. Pound was also a deeply respected scholar and a leading jurisprude. But in some ways what Pound did best was diagnose—his diagnoses of problems of his day were the strongest part of his scholarship and perhaps have proven the most enduring.

In a widely remembered and much-lauded speech, Pound diagnosed early twentieth century disaffection with the judiciary.<sup>1</sup> He wrote at a time of extraordinary discontent about judges and the judicial system.<sup>2</sup> He began by cautioning his listeners that although dissatisfaction with the administration of justice was enduring, one ought to avoid “overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States to-day.”<sup>3</sup> Though many in his immediate audience found his bill of particulars uncomfortable, events at the time and afterward demonstrated what a perceptive diagnostician he was.

Pound’s address discusses a set of ills society faced some one hundred years ago and the place of the judiciary in it. The address provides some insight into why the citizenry can become disaffected with the judiciary, how we might think about such disaffection, and even how we might prevent or respond to such discontent if that is our goal. It is not easy to draw lessons from history, which has an uncanny way of *not* repeating itself precisely. Each generation is forced to muddle through its own difficulties as best it can. But if nothing else, history helps put the present in perspective. Once we see how we got from here to there, we often can see more clearly exactly where we stand today.

As will be apparent, I do not believe our world bears much relationship to Pound’s. I do not think people are discontented with the judiciary in anything approaching the way they were then, or for much in the way of related reasons. There clearly are pockets of discontent. Criticism of the judges may be quite voluble at times, which creates the impression of more widespread unhappiness. I will say a word about why this may be a healthy thing. I will also suggest some trends in politics that may indicate that real trouble still could lie ahead. I will not offer a solution, though my remarks hint in that direction. Ultimately, like Pound, I am merely diagnosing.

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<sup>\*</sup> This paper is based upon an address to the plenary session of the Conference of Chief Justices—Conference of State Court Administrators 2006 Annual Meeting. I would like to thank my friends and colleagues who so quickly and usefully offered help with this paper: Steve Burbank, Charlie Geyh, Sam Issacharoff, Bill LaPiana, René Lerner, Robert Post, Judith Resnik, and John Witt. I am deeply grateful to Tricia Halling for her research assistance with this project.

1. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Address Before the Annual Convention of the American Bar Association (Aug. 29, 1906), in 14 AM. LAW. 445 (1996) [hereinafter *Causes of Popular Dissatisfaction*].

2. See generally WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937* (1994).

3. *Causes of Popular Dissatisfaction*, *supra* note 1, at 445.

## I. POUND'S RECEPTION AND A ROADMAP

The fullest account we have of the immediate reception to Pound's talk is from John Wigmore, the accomplished evidence scholar.<sup>4</sup> Wigmore, who was then the dean at Northwestern University's Law School, was so impressed with Pound's address that he asked him to join the Northwestern faculty. Wigmore attributes to Pound's speech some of the more important judicial reform efforts of the last century.

According to Wigmore, at eight in the evening on August 29, 1906, some 370 members of the American Bar Association (ABA), "with many of their ladies," gathered in the Capitol building in St. Paul, Minnesota for the evening lectures—business having been done in a session earlier in the day.<sup>5</sup> Pound was the featured speaker. He was the dean at the University of Nebraska and all of thirty-six years old. Pound had been asked to talk by the president of the ABA, who happened to hear him speak to the Nebraska Bar Association the year before. The title of Pound's address was *Popular Dissatisfaction with the Administration of Justice*. The attendees, Wigmore felt, undoubtedly were wondering things like:

Dissatisfaction! Are the people dissatisfied? What can they be dissatisfied about? Do we not give them a good enough justice? Whose idea can it be that things are wrong?<sup>6</sup>

Nonetheless, politeness required listening, and in any event, the president's reception did not begin until nine-thirty in the evening.

Pound's address was not the usual fare. Wigmore says the "typical Bar Association address of that period was a sober, solid, exposition of some sober, static subject" by a leading luminary of the bench or bar.<sup>7</sup> Put another way, a staid affair. By contrast Pound's address was enough of a barnstormer that one member of the ABA rose to propose that four thousand copies be printed and mailed immediately to the membership, as well as to the House and Senate Judiciary Committees. The motion required unanimous consent, and it is an understatement to say such consent was not forthcoming.<sup>8</sup> Not everyone, it seems, agreed with Pound's diagnosis. In the face of objection, the matter was shunted to a committee, but peace did not prevail when the

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4. There is no reason to disbelieve Dean Wigmore, although the few newspaper accounts I have seen describe little of the fuss Wigmore details. See *American Laws "Behind Times,"* ATLANTA CONST., Aug. 30, 1906, at 1 (noting that Pound's views were "generally concurred in" during the discussion following his address); *Commerce and the States*, N.Y. TIMES, Aug. 30, 1906, at 5; *Lawyers From Many States in Session*, WASH. POST, Aug. 30, 1906, at 3.

5. For Wigmore's full account of the speech and its aftermath, see generally John H. Wigmore, *The Spark that Kindled the White Flame of Progress—Pound's St. Paul Address of 1906*, 46 J. AM. JUDICATURE SOC'Y 50, 51 (1962).

6. *Id.* (emphasis omitted).

7. *Id.*

8. Wigmore comments that this "outrageous motion let loose the repressed indignation of the assemblage," and the idea that the speech would be distributed in print was "Intolerable! Impossible!" *Id.* at 52.

matter arose again.<sup>9</sup> Though Pound plainly had supporters in the crowd, he had spoken heresy to others.

It would seem altogether appropriate at this juncture for me to tell you what Pound said. But I am not going to proceed that way, and for what I believe is good reason. Pound's talk is one that is particularly impossible to understand out of context. Modern readers tend to focus on Pound's familiar-sounding discussion about court organization and procedure, ignoring the vast portion of his talk—the most important part. In addition, Pound was oblique. He spoke in generalities, and pointed few fingers precisely. Perhaps this was out of deference to his audience; perhaps it was his genteel spirit.

Pound did not need to say everything we might need to hear. He and his audience shared a history; they all understood what it was he was talking about. They were living in the world together and it was for them in many ways a fraught one. I intend first to introduce Pound and his world. I will tell you a bit about Pound, about the recent history that shaped his milieu, about the issues of the time, and finally about his audience. At that point I will need to say remarkably little about Pound's talk itself, for you also will immediately understand. I will conclude by describing how Pound's world compares to our own.

## II. THE MAN

Pound was hardly a firebrand. He had come reluctantly to the law, and he was never a radical in it or in any other way. He was a "McKinley Republican" through and through, though he never completely warmed up to Teddy Roosevelt.<sup>10</sup> However, he was also by nature an inveterate reformer.<sup>11</sup> Pound apparently was unable to see a problem and not try to solve it. He was progressive and forward looking. Many Republicans were progressives in that era—progressivism was the early twentieth century's "Big Tent"<sup>12</sup>—but Pound was by nature a man of contradictions. He held a fine appreciation for the past, but saw clearly the future. He came to adulthood at a

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9. Even the proposal to simply refer the discussion of the address to a committee rather than distributing four thousand copies met with serious opposition. After several rulings on points of order, the resolution to refer the address to a committee passed. Wigmore further comments that when that committee met two days later, the "younger" lawyers who had "listened with thrills of admiration" to Pound's address "had no chance to take part in its defence" since the floor was dominated by "stout defenders of Things-As-They-Are." *Id.* at 52–53.

10. DAVID WIGDOR, *ROSCOE POUND* 221–22 (1974) (noting that Pound found both Theodore Roosevelt, and the proposal for the recall of judicial decisions that he supported, distasteful).

11. Pound became chairman of the Republican Party in Lincoln in 1896 and remained active in Nebraska politics until after the 1906 election. In the early twentieth century he settled in the moderate progressive wing of the Republican Party and often favored liberal candidates within the party. Later, his views would move to the right when the progressives left the Republican Party in 1912, but in 1906 he favored some form of progressivism and campaigned for progressive candidates in Nebraska. See N.E.H. HULL, *ROSCOE POUND AND KARL LLEWELLYN: SEARCHING AN AMERICAN JURISPRUDENCE* 61–63 (1997).

12. RICHARD HOFSTADTER, *THE AGE OF REFORM* 131 (1955); ARTHUR S. LINK & RICHARD L. MCCORMICK, *PROGRESSIVISM* 7 (1983).

time of tremendous change in the United States and was profoundly attuned to it. In part, this was a function of some unique training he had.

Pound was born in 1870, on the prairie, in Lincoln, Nebraska.<sup>13</sup> Lincoln itself was barely fifteen years old; as the town grew it was wistfully named after the recently fallen President. His father was a lawyer and also a judge. Both his parents came from “back East.” Finding the schools wanting, Pound’s mother home-schooled him and his two younger sisters until they were old enough to attend the University of Nebraska’s preparatory institution.<sup>14</sup> Pound excelled at things academic and was a small but outstanding drum major. He entered college at fourteen and graduated at the top of his class. He was also, by all accounts both then and afterward, what today we would call an exceedingly good networker. He collected people and formed groups, full of energy and enthusiasm.<sup>15</sup>

Pound’s first love was botany. As fate had it he was taught and later mentored by Charles E. Bessey, an accomplished and acclaimed botanist who built a fine program at Nebraska.<sup>16</sup> Pound had been interested in the flora and fauna of the prairie since youth, and took to botany like a duck to water. As we will see, much of what he took from botany he brought to law.

After graduation, Pound began to work with his father. He found the practice of law disheartening and went off for one year to study at Harvard. Apparently his motives were mixed; he hoped to spend considerable time in Harvard’s fine herbarium.<sup>17</sup> Harvard Law School in 1889 was under the thrall of Christopher Columbus Langdell, its first dean. Dean Langdell, along with Harvard President Charles Eliot, essentially created the modern American law school.<sup>18</sup> Before Langdell, many lawyers learned through apprenticeships and the rote writing of writs. If they attended school, it was to hear lectures. Langdell invented the case method.<sup>19</sup> Students would read cases in order to discern the true principles of the law. In addition to being revolutionary, the method

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13. The following historical narrative regarding Pound’s childhood, education, and early legal career relies primarily on three sources. See generally HULL, *supra* note 11, at 36–75; PAUL SAYRE, *THE LIFE OF ROSCOE POUND* 14–146 (1948); WIGDOR, *supra* note 10, at 3–131.

14. Paul Sayre includes an excerpt from a letter Pound wrote as a young lawyer, commenting, “I went to school less than two weeks, was pronounced an incorrigible fool, and sent home. From that time until I entered the University of Nebraska, my Mother attended to my instruction.” SAYRE, *supra* note 13, at 16.

15. As an undergraduate, Pound belonged to both literary and social societies at the University of Nebraska. *Id.* at 65. As a graduate student, he “joined with others to form a fraternal group, the Alpha Theta Chi, which made a distinct effort to pick men for their abilities and their real capacity for companionship.” *Id.* Pound’s family also belonged to the “Carroll Club” and “little skits based on Lewis Carroll’s stories and poems might [have been] the chief interest of a social evening in the Pound household.” *Id.*

16. WIGDOR, *supra* note 10, at 22–24.

17. WIGDOR, *supra* note 10, at 31.

18. ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 95 (1998) (noting that Langdell “saw himself as making a dramatic break from the Blackstonian treatise tradition that had dominated American law schools throughout the early and mid-nineteenth century” (citation omitted)).

19. *Id.* at 92 (explaining that Langdell “treated the decisions of courts as results from a ‘laboratory’ from which all reliable conclusions about the principles of law were drawn” (citation omitted)).

was also cost-effective. Many students could be taught at one time, something that still today speaks a great deal about the economics of running a law school.

At Harvard, Pound fell in love with the academic side of the law, studying with some of the greats of his time. His faculty members were a study in contrasts. He learned from James Barr Ames, a passionate advocate of the common law, and from John Chipman Gray, who was skeptical that precedent alone—rather than judges—decided cases.<sup>20</sup> Gray believed the law must change, and not so much as “a mere weaving of spider webs out of the bowels of the present rules of Law.”<sup>21</sup> Somewhat uncommon for his time, Gray urged intentional thought about what the law ought to be. Pound’s constitutional law professor was none other than James Bradley Thayer, the patron saint of judicial restraint.<sup>22</sup>

Life was dreary for Pound on his return to Lincoln. His bar interview took three hours, an unheard of amount of time, in large part because of his interlocutors’ wonders about exactly what he learned at Harvard.<sup>23</sup> He disliked the practice of law intensely, saying, “I shall always remember the years in which I was a combined collector of bad debts, messenger boy and stenographer in a big law office as the most irksome of my existence.”<sup>24</sup> Perhaps that is why he continued to study botany, ultimately earning Nebraska’s first Ph.D. in the field, and its second Ph.D. ever. He rose to immediate prominence in the field, amassing a long list of awards and achievements by the time he was thirty.<sup>25</sup> As a tribute to Pound’s accomplishments, as well as his distaste for necessarily naming a species after its discoverer, a German colleague named a fungus for him: *Roscoeopoundia*.<sup>26</sup>

Darwinism was having a profound influence on botany at the time Pound studied under Bessey, as it was on many other fields. The chief goal of the “old” botany was taxonomy, the classification of life. The Darwinian influence was to see organisms as living, evolving things, rather than simply static, awaiting classification into groups. Pound was one of the founders of a new branch of biology—what today we call ecology, the study of the interactions of life.<sup>27</sup>

Despite his lack of enthusiasm, Pound was having great success in the law. He brought his natural organizational skills to forming the Nebraska Bar Association.<sup>28</sup>

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20. WIGDOR, *supra* note 10, at 36–44.

21. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* 309 (1921).

22. *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, Speech Before the Congress on Jurisprudence and Law Reform (Aug. 9, 1893), in 7 *HARV. L. REV.* 129, 138 (1893).

23. WIGDOR, *supra* note 10, at 69.

24. HULLETT AL., *supra* note 11 at 41 (quoting a letter, dated January 5, 1915, from Roscoe Pound to George K. Gardner).

25. Pound was appointed honorary curator of the University of Nebraska Herbarium in 1898. In 1899, the Académie Internationale de Géographie Botanique awarded him their international scientific medal and he was elected to the Board of Directors of the Nebraska Academy of Sciences. Pound also became the first of his Nebraska group to receive a star in *American Men of Science*, an honor given to only one hundred botanists. WIGDOR, *supra* note 10, at 65.

26. *Id.*

27. *Id.* at 56–67.

28. Pound served on the Nebraska Bar Association’s Committee on Organization and helped draft its constitution that was adopted in 1900. Over the next six years, Pound devoted an

Bar associations were by invitation in those days, dedicated to professionalizing the bar. Pound was chosen to be a bar examiner himself in 1896. In 1901, at the age of thirty, he was chosen to be a commissioner for the state supreme court. The court had a backlog so it appointed commissioners to resolve appeals, but their decisions created no precedents. The appointment was quite prestigious.<sup>29</sup>

Throughout this time, Pound nurtured his love for the academic side of law, particularly for jurisprudence.<sup>30</sup> He read voraciously, including continental works. He had a great taste for the German jurists, whom he read in the original. His academic aspirations were recognized when he was made an assistant professor at Nebraska in 1899, rising quickly to become the dean in 1903.<sup>31</sup> He tried to quit once to pursue more lucrative endeavors, but the idea set off widespread protests by his admiring students, and he relented.<sup>32</sup>

So it was that in 1905 the President of the ABA heard the young dean talk to the Nebraska Bar Association. He was obviously intrigued and invited Pound to St. Paul.<sup>33</sup> The rest is, as we say, history.

I will not say a great deal more about Pound's life, though I will allude to it here and there. So that you are not left unawares, let me tell you that he took strong positions throughout, and some felt those positions perhaps changed over time.<sup>34</sup> Others believe Pound's love of things German led him to a certain blindness at critical times in history.<sup>35</sup> Pound was a complex man in many ways. I have offered you here, as best I could, the Roscoe Pound who took the podium in 1906.

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enormous amount of time to the Association, serving as its first secretary. *Id.* at 77–78.

29. Pound was the youngest of the nine men selected to serve on the Commission. Wigdore comments that, at the age of thirty, “Pound had reached the top of the Nebraska legal profession.” *Id.* at 83.

30. Pound advised a friend that jurisprudence “could act as an ‘antidote’ for the intellectual stultification of law practice,” and while practicing in Lincoln, he devoted two nights a week to the study of jurisprudence. HULL ET AL., *supra* note 11, at 41 (quoting letters, dated September 1, 1892 and September 11, 1892, from Roscoe Pound to Omer Hershey).

31. Pound had been an instructor at Nebraska since 1895, teaching courses in Roman Law and Civil Law in America, both in the Latin department. SAYRE, *supra* note 13, at 137–38.

32. Pound submitted his resignation in 1905. In response, the editors of the school newspaper staged a series of mass meetings, which were attended by students from many divisions of the university. When Pound eventually left Nebraska for Northwestern in 1907, there was a rally that included speeches from students and professors extolling Pound and a crowd-adopted resolution urging the regents to persuade Pound to stay at Nebraska. A song was even written for the occasion, entitled “Dean Roscoe of Nebraska” and sung to the tune of “Auld Lang Syne.” The lyrics included such stirring lines as: “We’d have you know, our Dean Roscoe / That it would give us woe, / To feel the blow of having you go / ‘Way from Nebrasko.” WIGDOR, *supra* note 10, at 121–31.

33. *Id.* at 123.

34. John Witt states that “Pound’s conservative streak grew stronger as Pound grew older” and that he drew back from many of the positions he had previously taken. JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 228–34 (2007). Witt’s work is a fascinating account of Pound’s later years, suggesting Pound ultimately gave way on values that seemed core to him in his youth. One might, however, read the same record as suggesting Pound’s conservative values (such as a love of the common law) had been there all along.

35. Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 529 (2006) (noting that Pound “knew a great deal about German jurisprudence and law” and that later in his

## III. POUND'S WORLD

On its face, Pound's speech is hardly the sort of thing that would cause people to come out of their seats. It is scholarly and dispassionate. It is, as was typical of Pound, full of erudite references. It is balanced.<sup>36</sup> Though Pound is relentless in his diagnosis, he recognizes reasons for dysfunction and acknowledges obstacles to reform.

It is only in context that one can begin to understand why Pound's address would cause his audience to squirm. His listeners were lawyers. They were conservative by nature and class. More important, they and their clients were under attack in the society at large. Most troubling, the challenge was leveled in particular at the "Holy of Holies," the law, and its high priests, the courts.

Understanding the context of Pound's speech means reaching back to the aftermath of the Civil War. That period, Reconstruction, is one of the most important in American history. Nonetheless, it has faded from the collective cultural memory of the American lawyer. The period that comes immediately post-Reconstruction is also almost entirely lost. Our shared narrative resurfaces in the period when Pound lived—what historians call the Progressive era, but lawyers know mostly by the name *Lochner*.<sup>37</sup> Yet, in truth, even our recall of that period is today remarkably vague.

Following the Civil War, America adopted three amendments to the Constitution, the primary (but hardly sole) purpose of which was to protect the rights of liberated slaves. The most important of these was the Fourteenth Amendment, which stated the terms of equal citizenship and applied constitutional protections against the States.<sup>38</sup> To this day it remains controversial whether those who adopted that Amendment intended by it to apply the Bill of Rights to the states, something that was done only much later, bit-by-bit through the process of selective incorporation.<sup>39</sup>

As it happened, the guaranty of equal citizenship did not get far either. Shortly after adoption of the Civil War Amendments the country tired of Reconstruction and of the efforts required to force the South to respect the verdict of the war. The nation turned its back on the emancipated slaves, and the Supreme Court followed the national mood.<sup>40</sup> In *The Slaughterhouse Cases*, the Court robbed the Fourteenth Amendment of

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career, his "apparent sympathy for Nazi Germany . . . led to his intellectual ostracization among realists").

36. Witt argues that "[W]hat Pound perfected in his American Bar Association address and in the years thereafter was the ability to situate himself right at the boundaries of his audience's tolerance—to provoke, but never to disturb, to be iconoclastic and forceful but never radical or revolutionary, to startle while confirming his audience's deepest convictions." WITT, *supra* note 34, at 230.

37. Of course, this is a reference to the Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905).

38. See U.S. CONST. amend. XIV, § 1.

39. Compare Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949–50), with AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

40. Despite an ambitious civil rights agenda, little came of the Reconstruction Congress's efforts. Even before Congress enacted the 1875 Civil Rights Act, the Supreme Court was tearing the teeth out of the measures. In 1888, George Holt published a comprehensive treatise on the jurisdiction of the state and federal courts. The section entitled "Civil Rights Suits" was a short one indeed. Though it went on just a few lines longer, the first sentence held all the punch: "The



most meaning;<sup>41</sup> in the *Civil Rights Cases*, the Court deprived Congress of the authority to regulate private conduct to ensure racial equality.<sup>42</sup>

Very quickly, though, the Fourteenth Amendment experienced a renaissance with a new client altogether: corporate America. The aftermath of the Civil War was a busy time in the United States, where the industrial revolution was moving into high gear. Railroads quickly crisscrossed the country.<sup>43</sup> No longer were the manufacture and distribution of goods a local matter. Manufacture increasingly occurred in factories, and distribution began to cross state lines.<sup>44</sup> Capital markets expanded as well. Mortgages in Indiana and westward would be held in New York; small businessmen in the heartland similarly obtained their financing from out of state.<sup>45</sup>

The enemy of national expansion was jealous state government. States and their citizens were resentful of rapid economic change operating seemingly to the advantage of out-of-state corporations. They adopted laws to restrict “drummers”—out-of-state salespeople.<sup>46</sup> Their courts sanctioned defaults on state bonds when the railroads proved a less appealing deal in reality than in prospect. State courts also notoriously favored the in-state citizens, or at least it seemed that way to out-of-state companies.<sup>47</sup>

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legislation of Congress for the protection of civil rights has been held by the United States Supreme Court to be, in its principal general provisions, unconstitutional . . .” GEORGE C. HOLT, *THE CONCURRENT JURISDICTION OF THE FEDERAL AND STATE COURTS* 29 (1888).

41. *Slaughter-House Cases*, 83 U.S. 36 (1872). By the time Justice Miller’s opinion for the Court majority was done, little remained of the three majestic clauses of Section 1. The *New York Times* termed it “a severe . . . blow to that school of constitutional lawyers who have been engaged, ever since the adoption of the Fourteenth Amendment, in inventing impossible consequences for that addition to the Constitution.” *The Scope of the Thirteenth and Fourteenth Amendments*, N.Y. TIMES, Apr. 16, 1873, at 6; see also 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1836–1918*, at 39–42 (rev. ed. 1987).

42. *Civil Rights Cases*, 109 U.S. 3, 11 (1883) (invalidating the Civil Rights Act of 1875 and stating that the Fourteenth Amendment did “not invest [C]ongress with power to legislate upon subjects which are within the domain of state legislation,” nor “authorize [C]ongress to create a code of municipal law for the regulation of private rights”).

43. Railroads expanded at an astonishing pace with some nine thousand miles of track in 1850 becoming 200,000 miles by the century’s end. See EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870–1958*, at 16 (1992).

44. The very nature of doing business changed as firms consolidated and populations centralized. In the previously disparate and agrarian economy, local purveyors of general merchandise provided goods. Centralization demanded a means to get the goods to market, and once there, economies of scale fostered specialization. The general merchant gave way to the middlemen and then to the corporate form. See TONY FREYER, *HARMONY & DISSONANCE: THE SWIFT AND ERIE CASES IN AMERICAN FEDERALISM* 56 (1981).

45. See, e.g., J.P. Dunn, Jr., *The Mortgage Evil*, 5 POL. SCI. Q. 65, 80 (1890) (calculating that “Indiana must make to non-resident capitalists an annual payment greater than the entire tax levy of the state”).

46. See Harry N. Scheiber, *Federalism, the Southern Regional Economy, and Public Policy Since 1865*, in *AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH* 81 (David J. Bodenhamer & James W. Ely, Jr., eds., 1984); Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 605 (1994); Tony A. Freyer, *The Federal Courts, Localism, and the National Economy, 1865–1900*, 53 BUS. HIST. REV. 343, 350 (1979); Stanley C. Hollander, *Nineteenth Century Anti-Drummer Legislation in the United States*, 38 BUS. HIST. REV. 479, 483 (1964).

47. See John V. Orth, *The Virginia State Debt and the Judicial Power of the United States*,

The savior of big business was the Federal Court system. These courts used the jurisdictional grants they had in creative ways to ensure access for corporations.<sup>48</sup> They used the negative, or dormant, part of Congress's commerce power to strike state laws that discriminated against interstate commerce. And, significantly, they interpreted the Due Process Clause of the Fourteenth Amendment to protect substantive rights, typically economic ones.<sup>49</sup>

America's economic growth was dazzling, but such rapid expansion inevitably takes its toll on individuals who lack shelter from the market's vicissitudes. In 1893, as Pound began practicing law, the economy crashed in a terrible way.<sup>50</sup> Until 1929, this was America's great depression. Even in better economic times, ordinary people suffered. Laborers—not only men, but also women and children—worked ten to fourteen hours a day, six or seven days a week, often in oppressive and unsafe conditions. Accidents were common, and when they occurred, compensation was rarely forthcoming. There were no workers compensation laws; doctrines like assumption of risk, contributory negligence, the fellow-servant rule, and limits on respondeat superior barred recovery altogether.<sup>51</sup> When cases were brought in state court, they were removed to federal courts—often a long and difficult journey from the plaintiffs' home—to languish there.

Economic toll breeds social discontent, which in turn fuels popular movements. At least it does in countries that have a relatively open and free political system, as the United States did then (if one does not count women or minority groups). Out of the plains rose the Grangers and the Populists; in northern and eastern factories unions began to organize. These groups clamored for relief and for rights.<sup>52</sup>

Unions also encountered the courts. State and federal courts alike relied on the common law to defeat the claims of victimized workers. They issued labor injunctions to forbid workers from collective action. The chief weapon in the judicial arsenal was

1870–1920, in *AMBIVALENT LEGACY*, *supra* note 46, at 116.

48. See *Current Topics*, 18 CENT. L.J. 281, 281 (1884) (observing “[t]hat corporations are desirous of having all their causes removed to the Federal courts is a fact so well established that one would have great temerity to deny it”).

49. See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 518 (2002) (detailing the pro-business leanings of the men appointed from 1870–1893). See also RICHARD FRANKLIN BENSEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900*, at 344–47 (2000); TONY FREYER, *FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY* 108 (1979).

50. The Panic of 1893 was particularly severe in Nebraska, where the most vital parts of the state's economy, agriculture and transportation, suffered greatly. WIGDOR, *supra* note 10, at 69.

51. See Elihu Root, *Judicial Decisions and Public Feeling*, Address Before the New York State Bar Association (Jan. 19, 1912), in ELIHU ROOT, *ADDRESSES ON GOVERNMENT AND CITIZENSHIP* 445, 448 (Robert Bacon & James Brown Scott eds., 1916) (arguing that in the face of the “great aggregations of capital in enormous industrial establishments,” any given worker “is quite helpless by himself”).

52. The Granger movement grew out of the Western plains in the 1860s, seeking the regulation of rates for the system of transportation of farmers' produce. The Grangers and Populists grew to become the Farmers' Alliance, which held its first national convention in 1880. See generally GEORGE W. ALGER, *THE OLD LAW AND THE NEW ORDER* 236–60 (1913); JOHN D. HICKS, *THE POPULIST REVOLT: A HISTORY OF THE FARMERS' ALLIANCE AND THE PEOPLE'S PARTY* 96–101 (University of Nebraska Press 1961) (1931).

the newfound substantive right to liberty.<sup>53</sup> In Pound's addresses and lectures, he time and again points a finger at these cases.

For example, in *Godcharles v. Wigeman*<sup>54</sup> the Pennsylvania Supreme Court had before it a law prohibiting the payment of wages in scrip. It was common at the time in the mines and elsewhere to pay workers in paper redeemable only in company stores. When legislatures forbade these practices, understanding why workers would prefer more fungible hard currency, courts struck them down. The *Godcharles* court explained that the law was an interference with the supposed liberty of contract, deeming it:

[A]n insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal; and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void.<sup>55</sup>

Pound and other contemporary critics believed these decisions grossly misunderstood the nature of relative bargaining power. As a description of the reality of the workers' lives, decisions like *Godcharles* fell woefully short.

A new breed of reformers grew up, traveling under the broad umbrella of "progressivism." Progressives knew no party lines, nor even social class.<sup>56</sup> They bonded together by their shared concern with extensive social dislocation and their grave disgust with corrupt machine politics funded by corporate dollars. Muckraking journalists exposed corruption and social illness; crusading do-gooders sought social solutions. Sometimes, just sometimes, they managed to pass laws to protect basic economic rights: the ten-hour workday in some trades,<sup>57</sup> laws governing regular payment of employees,<sup>58</sup> and even an income tax.<sup>59</sup>

Progressives also encountered the courts. The year 1895 was a banner year for the Supreme Court of the United States. That year it struck down the income tax,<sup>60</sup> affirmed the prison sentence of labor leader Eugene Debs for violating an injunction barring union activity,<sup>61</sup> and dramatically narrowed Congress's power to regulate

53. OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 164–72 (1993).

54. 6 A. 354 (Pa. 1886).

55. *Id.* at 356.

56. See HOFSTADTER, *supra* note 12, at 131 (1955); LINK & MCCORMICK, *supra* note 12, at 7.

57. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

58. WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 37 (1991).

59. If any single legislative initiative can be said a Populist triumph, it was the income tax enacted by Congress in 1894. See HICKS, *supra* note 52, at 443 (reproducing the Omaha Platform of the People's Party of America (July 1892), which included a "demand [for] a graduated income tax"); SIDNEY RATNER, AMERICAN TAXATION: ITS HISTORY AS A SOCIAL FORCE IN DEMOCRACY 164–67, 172–80, 184–89 (1942).

60. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895).

61. *In re Debs*, 158 U.S. 564 (1895).

monopolies.<sup>62</sup> Apparently combinations in restraint of trade were permitted, so long as those combining were not the employees. Or at least that is how those who opposed the courts saw it.

Many viewed the actions of the courts as part of a class war.<sup>63</sup> Lawyers served corporate interests. Judges were picked from the bar that had represented lawyers and corporations.<sup>64</sup> It was no wonder, they felt, that the little person lost and corporations won when it came to the law. Jane Addams, the respected leader of the settlement house movement, explained this, saying:

From my own experience I should say perhaps that the one symptom among the working-men which most definitely indicates a class feeling is a growing distrust of the integrity of the courts, the belief that the present judge has been a corporation attorney, that his sympathies and experience and his whole view of life is on the corporation side.<sup>65</sup>

Similarly, Learned Hand would insist:

That the legislature may be moved by faction, and without justice, is very true, but so may even the court. There is an inevitable bias upon such vital questions in all men, and the courts are certainly recruited from a class which has its proper bias, like the rest.<sup>66</sup>

A few years later *Everybody's Magazine* ran a several-part expose entitled *Big Business and the Bench*. It concluded with this illustrated jingle:

This is the people, bound and sold  
By the crafty Boss all brazen and bold,  
That joins with Business, out for gold,  
To send the lawyer in to mold,  
The mind of the judge all proud and cold.<sup>67</sup>

62. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

63. Defending the tax before the Court, James C. Carter warned: "When the opposing forces of sixty millions of people have become arrayed in hostile political ranks upon a question which all men feel is not a question of law, but of legislation, the only path of safety is to accept the voice of the majority as final." *Pollock*, 157 U.S. at 531-32 (1895) (reproducing oral argument by James C. Carter for appellee, Continental Trust Company).

64. One critic warned that the courts were filled with "men who for years and decades had faithfully served the interests of privileged corporations and trusts in their battle against the interests of the people," and concluded that the plutocracy would "have in the most invulnerable position a bulwark composed of men habituated to see things, not from the view-point of the people or even from a broad and impartial point of vision, but from the vantage-ground of privileged wealth." B.O. Flower, *The Courts, the Plutocracy and the People; or, the Age-Long Attempt to Bulwark Privilege and Despotism*, 36 *ARENA* 84, 85 (1906).

65. John R. Commons, *Is Class Conflict in America Growing and is it Inevitable?*, 13 *AM. J. Soc.* 756, 772 (1908).

66. Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 *HARV. L. REV.* 495, 508 (1908).

67. C.P. Connolly, *Big Business and the Bench VI*, 27 *EVERYBODY'S MAG.* 116, 119

Looking back, especially as lawyers and judges—part of that same relatively conservative class that sat and listened to Pound's address in 1906—we may be inclined to think the claims of class bias overstated. Yes, it might look like corporations often were winning and plaintiffs losing. But surely, we might suppose, there was nothing deliberate on the part of judges. The problem, if anything, was the law; judges were bound to follow it. Pound himself said so, at least when he was talking to lawyers and judges. When discussing decisions that troubled him with the Nebraska bar, he said, "I do not criticize these decisions. As the law stands, I do not doubt they were rightly determined."<sup>68</sup> In his lecture, he only once alluded to the problem of class bias, saying, "If discretion is given him, his view will be that of the class from which he comes."<sup>69</sup>

In truth, though, there was good reason to be concerned about class bias. Pound's one throwaway line speaks volumes. The judges and the lawyer class were deeply concerned about the growing voice of the people.<sup>70</sup> In it they saw the mob—and the spreading hand of socialism. The basic operating assumptions of this generation of lawyers and judges were entirely antithetical to our own today. Democracy was for them an ill, an evil.<sup>71</sup> Taxes were socialistic and progressive taxes even more so. Bargaining imbalances were either ignored or simply not appreciated. Legislation was an inappropriate interference with the common law.<sup>72</sup>

Remember how Wigmore described the usual fare of bar gatherings as boring? It is instructive to listen to some of the words of the leading members of the bench and bar as they explained their times. Some of these are from bar addresses or other public talks; others from leading publications.

Christopher Tiedeman was the author of one of the two leading treatises in the post-Reconstruction world.<sup>73</sup> He began by explaining that while a laissez-faire ideology had

(1912).

68. Roscoe Pound, *The Spirit of the Common Law*, 18 GREEN BAG 17, 20 (1906).

69. Causes of Popular Dissatisfaction, *supra* note 1, at 446.

70. United States Supreme Court Justice David Brewer cautioned at a Lincoln birthday celebration dinner at a Chicago club that "[a]n unrestricted and absolute legislative freedom would certainly sweep on to despotism of the mob, whose despotism is always followed by the man on horseback." Brewer avowed an "abiding faith in the judgment of the American people"—a faith that they would have "calm, deliberate judgment" after their "sober second thought" prevailed against the present "valleys of political clamor and noisy strife." David J. Brewer, Supreme Court Justice, *The Nation's Anchor*, Address Before the Marquette Club of Chicago (Feb. 12, 1898), in 57 ALB. L.J. 166, 167–69 (1898). See generally ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES BAR AND BENCH, 1887–1895* (1976).

71. In a book about judicial review written in 1912, the conservative author J. Hampden Dougherty insisted that "[i]t may shock the unreflecting to hear that the rule of the people would be synonymous with anarchy—but this is strictly true. The rule of the people so called is . . . the rule of a temporary majority." J. HAMPDEN DOUGHERTY, *POWER OF FEDERAL JUDICIARY OVER LEGISLATION* 112–13 (1912).

72. See Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383 (1908). In 1917, Justice Sutherland contended that "[a] foolish law does not become a wise law because it is approved by a great many people." George Sutherland, Supreme Court Justice, *Private Rights and Government Control*, Address Before the American Bar Association (Sept. 4, 1917), quoted in Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL RTS. J. 1, 45 n.195 (1997).

73. See CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES: CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT* (photo. reprint

long been dominant, “the political pendulum is again swinging in the opposite direction.”<sup>74</sup>

Governmental interference is proclaimed and demanded everywhere as a sufficient panacea for every social evil which threaten the prosperity of society. Socialism, Communism, and Anarchism are rampant throughout the civilized world. The State is called on to protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor, and how many hours daily he shall labor.<sup>75</sup>

Justice Henry Billings Brown sat on the Supreme Court from 1891 until 1906, and is most famous for writing the majority opinion in *Plessy v. Ferguson*.<sup>76</sup> He was thought of as relatively moderate; he joined the *Lochner* majority, but also voted in dissent to uphold the income tax.<sup>77</sup> He addressed the ABA in 1893.<sup>78</sup> At that time, the year of the Panic, he argued that laborers were never better off.

He not only practically dictates his own hours of labor, but in large manufacturing centers he is provided with model lodging houses for his family, with libraries, parks, clubs, and lectures . . . . [I]t is not too much to say that the American working man who does not own his own home must charge it to his own idleness and improvidence, or to other circumstances usually within his own control.<sup>79</sup>

One wonders if this was willful ignorance of reality. To put a point on it, Justice Brown retold the Exodus story, but with a twist, as a:

national protest against the oppression of capital, and to have possessed the substantial characteristics of a modern strike. How far this revolt was due to the order of Pharaoh that the Israelites should provide their own straw to make bricks, and how far to the hereditary aversion of the Jewish race to manual labor, we shall never know, at least until we hear the Egyptian side of the story.<sup>80</sup>

One assumes this was in jest, but it says something about the perspective of the listening audience as to what was funny.

The next year, William Howard Taft—then a circuit court judge, but later President and Chief Justice of the United States—gave an address at the University of Michigan. The point of the talk was that private property was under attack from “anarchy, socialism and communism.”<sup>81</sup> A central theme of the speech was the need to put union activity down firmly. “The influx of foreign workmen,” he explained, are “bringing

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2001) (1886).

74. *Id.* at vi.

75. *Id.*

76. 163 U.S. 537 (1896).

77. *Pollock v. Farmers’ Loan & Trust Co.*, 158 U.S. 601, 686–95 (1895) (Brown, J., dissenting), *aff’d on reh’g*, 158 U.S. 601 (1895).

78. Henry B. Brown, *The Distribution of Property*, Address before the Annual Convention of the American Bar Association (Aug. 31, 1893), in 27 AM. L. REV. 656 (1893).

79. *Id.* at 662–63.

80. *Id.* at 657.

81. William H. Taft, *The Right of Private Property*, 3 MICH. L.J. 215, 218 (1894).

with them the socialistic ideas which prevail among the laboring classes of Europe."<sup>82</sup> He could not fully understand the turmoil: "Statistics show that the purchasing power of his wages is decidedly greater than in former years. Doubtless there is much misery in the world but there always has been."<sup>83</sup>

I could go on, at length, but one gets the idea. Those who felt there was class bias in the judiciary found some support out of the mouths of the lawyers and judges themselves.

#### IV. POUND'S SPEECH

This is the milieu in which Pound got up to give his talk. He did not intend to stir the hornet's nest. He believed himself to be one of them. He had his discomfort with the masses. He too was still somewhat leery of legislation, though this view of his was undergoing change. He fully appreciated the difficulties associated with rapid changes in the common law. He went on to be the dean of the Harvard Law School, and though he championed some progressive causes, he did so entirely from within the establishment. Later in life he found himself at war with the descendants of his own tradition, the Legal Realists. He ultimately would call Realism a "give-it-up philosophy."<sup>84</sup>

Pound brought to his talk, indeed to all of his writing, the best and worst of his deep affection for, and expertise in, botany. As others have observed, though Pound disdained the old botany's penchant for taxonomy, his writing suffered from over-categorization. This surely also reflected his immersion in German jurisprudence. In Pound's address there are five main categories of causes of popular dissatisfaction with the administration of justice and at least twelve subcategories. It is kindness to say the talk is repetitive.

We can, however, reduce Pound's many categories of "causes" to two. We can do this with entire confidence, for by the end he does just the same. When he turns to prescription, as we will see, his road is divided but once.

Pound was wont to repeat his addresses, varying them slightly by audience. His speech to the ABA was no exception. It was not unlike the Nebraska talk, and a paper he had recently published in the *Columbia Law Review*.<sup>85</sup> In some ways, though, it was sharper in tone than the Nebraska talk. Importantly, he added a strong dose of discussion about judicial organization and civil procedure. Pound undoubtedly was tailoring to his audience, though one wonders precisely how. The sharper tone suggests Pound might have been seeking a bigger splash. The dose of procedure might have been to provide his audience with something to do afterward, something tangible. It is difficult to know.

The secondary cause, or set of causes, for popular dissatisfaction—which Pound turns to only at the end—is a system of administration of justice that he refers to as "archaic" and "out of date."<sup>86</sup> By this he means the organization of the courts, and the

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82. *Id.* at 227.

83. *Id.* at 222–23.

84. EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 162 (1973).

85. HULL ET AL., *supra* note 11, at 65–67.

86. *Causes of Popular Dissatisfaction*, *supra* note 1, at 450.

use of procedural rules to foster what he calls—repeatedly quoting Wigmore—the “sporting theory of justice.”<sup>87</sup> This part of the talk includes a laundry list of needed reforms, most of which already are in our past. Pound condemns the multiplicity of courts of varying jurisdiction—bankruptcy courts, law courts, equity courts, probate courts—and the lack of a unified system of appeals. He conducted a small empirical study of several volumes of the *Federal Reporter* and found some twenty percent of the cases were thrown out for jurisdictional errors. “It ought to be impossible for a cause to fail because brought in the wrong place.”<sup>88</sup> Pound argued that judges do not seek substantively just outcomes; they see their role as umpiring the rules of the game. Under those rules too many cases are dismissed for misjoinder; too many new trials granted for non-prejudicial evidentiary errors. None of this should sound altogether alien to us.

Pound’s primary “cause” for public dissatisfaction, though, was the failure of the law to adapt itself to changing times. This was the main thing Pound came to say and the subject to which he devoted most of his time and energy. It was also a central part of his broader scholarly project. Pound’s great genius was in understanding—as he had in botany—the evolutionary nature of the law. His work put him among the other luminaries of his age—Holmes, Cardozo, Brandeis—in appreciating precisely what was going on even as they lived through it. As Pound had straddled the old and new worlds of botany, so too did he in law.

Rather than indict the judges for class bias, Pound’s target was the law itself. Given his awkward organization, Pound does not lay out his argument in a straightforward fashion. But it is not difficult to weave the argument together.

Pound recognized that he was living in a time of great change. Much of his talk is about the pressures imposed on law at such times, particularly in “an age of social and industrial transition.”<sup>89</sup> He found the pace of change quite profound, saying, “[t]he present is a time of transition in the very foundations of belief and of conduct.”<sup>90</sup>

What Pound understood, centrally, is that times of transition place great, and perhaps unbearable, pressures on law. This pressure inheres in the very nature of law. The law does not and should not change with every new fashion, nor respond to every passing passion. The necessary stability of law ensures that we are a society of laws, and not of men. Law does change. At some times, judges have more discretion to decide cases according to the equities, and this is when the rules alter. But the pace of change is glacial.<sup>91</sup>

The consequence of the slow pace of law’s change means that in times of transition the law will fall out of step with popular views. Law becomes, in such times, “a government of the living by the dead.”<sup>92</sup> That is because “law does not respond quickly

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87. *Id.* at 451.

88. *Id.* at 449.

89. *Id.* at 446.

90. *Id.* at 450.

91. Pound explains: “[L]aw formulates the moral sentiments of the community in rules to which the judgments of tribunals must conform. These rules, being formulations of public opinion, can not exist until public opinion has become fixed and settled and can not change until a change of public opinion has become complete.” *Id.* at 446.

92. *Id.*



in new conditions. It does not change until ill effects are felt; often not until they are felt acutely."<sup>93</sup> That was what Pound believed was happening at the time he spoke.

The problem is that the efficacy of law requires popular support. Yet, to have this support legal outcomes must comport to some degree with the ethical and moral sensibilities of the time.<sup>94</sup> The precise shortfall in his era, Pound comprehended, arose because of the conflict between the individualistic nature of the common law and the popular demand for collective solutions. The common law assumed people could take care of themselves. Pound identified this strain in the doctrines of contributory negligence and assumption of risk—all the things mentioned earlier. Yet, "[i]n our modern industrial society" it has become clear there is a need for administrative protection.<sup>95</sup> "To-day we look to society for protection against individuals, natural or artificial, and we resent doctrines that protect individuals against society for fear society will oppress us."<sup>96</sup>

Not only were courts doing nothing affirmative to alleviate the hardships of industrial transition, they were invalidating the laws enacted by the people to address these problems. This, Pound said, was the inevitable product of courts doing their job. However, "[i]n consequence, the courts have been put in the false position of doing nothing and obstructing everything, which it is impossible for the layman to interpret aright."<sup>97</sup>

The problem, in short, was judicial review. "[T]he common-law guaranties of individual rights are established in our constitutions, State and Federal."<sup>98</sup> The law restrains the will of the people because "our constitutional polity commits to the courts . . . matters of economics, politics, and sociology, upon which a democracy is peculiarly sensitive."<sup>99</sup> The people, he explained, were no more thrilled to see the income tax invalidated by the judges in a private litigation, than they were to see the Missouri Compromise declared unconstitutional in the context of *Dred Scott v. Sandford*.<sup>100</sup> In his state, Pound told his listeners, the courts were restraining the collection of taxes and invalidating railroad rates. Ultimately the result is that "[c]ourts are distrusted" and power is given to "executive boards and commissions with summary and plenary powers, freed, so far as constitutions will permit, from judicial review."<sup>101</sup>

Finally, it is worth pointing out that here, Pound's two "causes" come together. The cases in which the "sporting theory of justice" was causing public concern were often precisely those cases in which the common law's individualistic spirit was reigning supreme. These were cases of injury and economic loss to individuals, be they industrial accidents, workplace injuries, or mortgage and business loan defaults. People were angry that suits were removed to faraway federal courts and that verdicts were overturned when obtained. It was in these very areas that the people were seeking

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93. *Id.*

94. *Id.*

95. *Id.* at 447.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 448.

100. 60 U.S. (19 How.) 393 (1856).

101. Causes of Dissatisfaction, *supra* note 1, at 445.

legislative, administrative, and new jurisdictional solutions—often to find them reversed by common law and constitutional decisions.

#### V. POUND'S PRESCRIPTIONS

So, what did Pound think should be done about this? Having identified two problems, he had two “solutions.” I use scare quotes because Pound had promised to diagnose, not solve. And even when he turned generally to prescription, he then turned his back on the larger half of the problem.

With regard to the “archaic,” “behind the times” system of justice—here the solution was evident. Reform should come from within the legal community. Pound pointed to the growth of bar associations and judges’ associations and how they were already making recommendations for things like a unified system of courts.<sup>102</sup>

With regard to the broader problem of law, however, Pound’s conclusion sounds almost cavalier. These causes of dissatisfaction, he said, “inhere in all law and are the penalty we pay for uniformity”; some “inhere in our political institutions and are the penalty we pay for local self-government and independence from bureaucratic control”; and some “inhere in the circumstances of an age of transition and are the penalty we pay for individual freedom of thought and universal education.”<sup>103</sup> Pound said, “[t]hese will take care of themselves.”<sup>104</sup>

#### VI. THE AFTERMATH

What became of Pound’s “causes”? By 1938, enormous headway had been made on both of them, though by very different routes. Pound had a hand in each.

Following Pound’s address, Wigmore tells us, a small group met to discuss what could be done.<sup>105</sup> Out of this small group, and other efforts, great progress was made on Pound’s concern for the archaic system of justice. The American Law Institute was formed to deal with the burgeoning and inaccessible case law, a specific problem Pound identified.<sup>106</sup> Pound was one of the founders of the American Judicature Society (AJS),<sup>107</sup> which has devoted itself to the complex issues of judicial selection and retention methods. Pound vigorously involved himself in these reform efforts. One upshot of the reformist impulse was the adoption in 1938 of the Federal Rules of Civil Procedure, which address many of Pound’s key complaints. Procedural reform in the

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102. *Id.* at 451.

103. *Id.*

104. *Id.*

105. The group met on the steps of the Minnesota state capitol and while little is known of what transpired on those steps, Wigmore reports that there was a mutual conviction among the attendees “to do *something* about” the intransigence of the ABA’s conservative practitioners “in [their] own limited spheres.” Wigmore, *supra* note 5, at 53 (emphasis in original).

106. N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 *LAW & HIST. REV.* 55, 58 (1990).

107. “The American Judicature Society works to maintain the independence and integrity of the courts and increase public understanding of the justice system. We are a nonpartisan organization with a national membership of judges, lawyers and other citizens interested in the administration of justice.” American Judicature Society, <http://www.ajs.org/> (last visited Mar. 27, 2007).

states proceeded apace, and took varied courses, as befits our system of federalism. Still, many of Pound's concerns have been answered in the state systems as well.<sup>108</sup>

Pound also had a hand in addressing his primary "cause" of popular dissatisfaction—the law. Here, his effort was scholarly. He continued to preach the disjunction between the law and—to use Holmes's phrase—the "felt necessities of the time."<sup>109</sup> He decried formalist legal reasoning and urged a "sociological" turn to the law, one that invited judges to decide cases based not on abstract concepts, but on grounded factual realities.<sup>110</sup> One tangible reflection of these efforts was the "Brandeis Brief,"<sup>111</sup> in which lawyers would devote more attention to the factual milieu of cases and less to arguing legal concepts. Still, recall that though Pound was a progenitor of the Realists, later in life—long after these events were over—he broke with them, expressing profound skepticism about their project.<sup>112</sup>

The great collision came, of course, in 1937, when President Franklin D. Roosevelt threatened to pack the Supreme Court.<sup>113</sup> His "proposal" was made after several years of intransigent refusal by the Court to realize the times had changed and that a national economy required national regulation.<sup>114</sup> The scholarly efforts of Pound and others like him paid off, for when the Court fight came, the popular, widespread complaint about the Supreme Court was that it was out of step with the times.<sup>115</sup> Society now had dramatically different expectations of what was expected of judges. This popular sense is what gave impetus to FDR's bold move. As we all know, FDR's plan failed, but not before the judges capitulated and the direction of the law changed.

## VII. DISSATISFACTION TODAY

I finish the story of Pound's address in 1938, in the aftermath of the Court-packing plan. This is the perfect jumping-off point for what seems to be our last piece of business: talking a bit about what this all means today. I want to go out on a limb and argue something aggressively.

Today, there is *nothing even approaching* the popular dissatisfaction with the judiciary that existed in Pound's time. That is not to say it could not happen. There are

108. See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Tidmarsh, *supra* note 35, at 518, 523–24.

109. OLIVER WENDELL HOLMES, *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

110. See generally Roscoe Pound, *Enforcement of Law*, 20 GREEN BAG 401 (1908); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

111. Ellie Mangolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 199 & n.12 (2000).

112. See Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 700 (1931) (criticizing the Realists' scientific gathering of facts as being subject to "their own preconceptions of what is significant" and lacking an ultimate purpose).

113. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 978 (2000).

114. See *id.*

115. *Id.* at 1019–22 (discussing critiques of the Supreme Court that appeared in books and articles).

warning signs on the horizon that suggest trouble, but Pound's time was very different than our own. It is important to understand precisely why such is the case.

It is natural to think that widespread discontent exists, particularly if one is on the receiving end of complaints about the judiciary. By virtue of the positions that judges hold, they inevitably will be the recipients of such complaints. Sometimes dissatisfaction will be expressed in well-reasoned and deliberate form. Too often it will come as invective. Living in our own moment, though, it is often difficult to put such complaints into perspective.

I would like to move quickly over Pound's concerns about the adequacy of the system of procedure. Worries about procedure and the administration of justice are a constant, as are ideas about how to improve it, which is a good thing. There undoubtedly are many problems: dockets are frequently back-logged, and the cost of discovery—and adjudication—should trouble us all. Technology presents great challenges, but also great possibilities. All is hardly happy in the area of judicial administration. Still, little of this provokes harsh attacks on judges today.

Turning to Pound's primary cause—the disconnect between what judges pronounced as the law and what the people perceived the law should be—it simply is difficult to see a problem today. There are always strident accusations, of course. Matters of constitutional law in particular rouse popular passions, whether they relate to the administration of the death penalty, abortion, gay rights, religion in the public sphere, or any set of new and upcoming issues that arise from the time of great change we are living through. These issues are difficult because we are divided—yet, courts must decide. Whenever the populace is divided, and courts decide, the losers will complain.

Unlike Pound's time, though, there is no systematically entrenched loser. I am unaware of any segment of society today that either loses all its battles or feels that it does. Rather, one hears complaints from many quarters, about disparate things.

Compared to our own time, Pound's was positively revolutionary. The masses were unhappy and some parts of the populace at least sought to rise up. The lawyering class, Pound's audience, certainly perceived matters that way. People did not just disagree with this or that decision; they believed with some cause that the entire judicial and legal deck was stacked against them. Scholars have pointed out that, in reality, judicial decisions in Pound's day were far more mixed in result, and they were.<sup>116</sup> But enough

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116. According to Warren, from 1887 to 1911, the Supreme Court rendered 560 decisions involving the validity of state statutes and state action challenged under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and it held only three of these unconstitutional. Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295 (1913). In a later book, Warren argued that the Court had not systematically acted in opposition to the interests of organized labor. CHARLES WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 233 (Johnson Reprint Corp. 1968) (1925). He pointed out that in at least sixty cases, the Court had sustained challenged state labor statutes while invalidating only six of these statutes. *Id.* Regarding the insignificance of the Supreme Court's invalidation of federal law, Warren noted that, from 1789 to 1924, only fifty-three acts of Congress were invalidated by the Supreme Court. *Id.* at 134.

Michael Phillips differs from Warren on the numbers, but substantiates Warren's assessment "that the *Lochner* Court rejected considerably more substantive due process claims than it granted." Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453, 489 (1998). Additional statistics can also be found in JULIE NOVKOV, CONSTITUTING

cases that mattered went against popular legislation, against the working classes, and against reform, that many viewed the judiciary as a serious stumbling block to social progress.<sup>117</sup> Nothing exists like that today.

Indeed, if anything is unique to our time—and I think it is—it is that we hear complaints about the judiciary coming fairly regularly from both the political left *and* the right. There is some potential difficulty in this, as I will explain in a moment. But in an important sense this is a healthy sign. If everyone is complaining about something—but that something is different for everyone—then it means the judges are doing something right. There are no systematic winners or losers; who comes out ahead varies from issue-to-issue and case-to-case. *This*, it strikes me, is the first sign of an independent judiciary, up and running.

Complaints must be expected. This is a democracy, and courts are but one institution of government in that democracy. Courts are different, it is true. It is more difficult for judges to respond, but courts are not and should not be immune from criticism.

In saying that our time is nothing like Pound's, however, I do want to offer one important cautionary note. I am not an alarmist. Having spent well over a decade studying the relationship between popular opinion and judicial review, my sense is that this is a time of relative calm. There is always some background level of attacks on judges. There are certainly low and depressing incidents today. Still, it does not seem to me a particularly virulent time, nor one in which the broad public is participating in these attacks.

Where I fear that trouble might be coming is in what I view as increasing ideological and partisan extremism with regard to matters of judicial selection and retention. Such extremism is not, in our society, unique to matters involving the judiciary. Many are expressing concern that the extreme wings of both parties are capturing electoral and legislative processes.<sup>118</sup> Studies show that there is greater consensus among the American people than is reflected in our politics and political

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WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS 131–42 (2001) (demonstrating that the Court was more willing to uphold legislation that benefited women and children).

117. Many of the laws that were struck down during the Populist-Progressive Era were taken to be among the most important. Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63, 88 (1985) (“[A]lthough only a few decisions . . . came down to invalidate . . . laws, they invariably generated the majority of press commentary about the courts.”).

In addition, what may seem to be a small, absolute number of overrulings looked like a sea of change to observers living at the time. As Herbert Hovenkamp has written, “[D]uring the substantive due process era the Supreme Court seemed to give government regulation much closer scrutiny, striking down many more statutes than it had in the past.” Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2312 (1995) (reviewing OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910* (1994)).

118. See, e.g., Janet Hook & Peter Wallsten, *Miers Nomination Withdrawn; Right Stares Down White House, and Wins*, L.A. TIMES, Oct. 28, 2005, at A1; Morton M. Kondracke, *Can GOP Moderates Exert Power in Party Dominated by Right?*, ROLL CALL, Aug. 8, 2005, available at [http://www.rollcall.com/issues/51\\_15/kondracke/10267-1.html](http://www.rollcall.com/issues/51_15/kondracke/10267-1.html); John Micklethwait & Adrian Wooldridge, *How the Right Has Won in the U.S.*, THE SPECTATOR (UK), Sept. 11, 2004, available at <http://www.spectator.co.uk/archive/features/12567/how-the-right-has-won-in-the-US.shtml>.

outcomes.<sup>119</sup> There are reasons for this, which my electoral and political science colleagues explain well. Longtime members of Congress suggest the current environment is unique, partisan gerrymandering is rampant, and interest groups are more and more demanding ideological purity. Our politics is becoming deeply polarized.

With regard to partisan politics in general, I also do not want to play “Chicken Little.” Just as it is common to believe the judiciary is under special attack, it is familiar to claim that politics today is particularly bruising. One does not study 225 years of judicial politics without getting a pretty good sense of politics in general. Politics were rough in 1800, they were rough in Andrew Jackson’s day, and the Populist era was no tea party. Politics have often been rough-and-tumble and sometimes infected with corruption as well. This may not be a healthy thing, but it is hardly unique today.

What is unique, and ought to matter to us, is that today one big goal in politics is to stack the bench with the most devout ideological partisans, if one can. The very same forces of polarization at work in the body politic are rearing their heads in the process of judicial selection. At the federal level, fights over confirmation indicate a fervent desire for the more extreme wings to get their woman or their man onto the bench. At the state level, there is evidence that similar extremism is rearing its head in retention elections.

I think there is a reason we are seeing this phenomenon. In part, it is a reflection of a greater sharpening of political lines; but, in an odd sense, judicial review is a partial cause as well. Many issues resolved by courts in the 1950s, 1960s, and 1970s angered pockets of the population. There were some attempts to impose systematic change on the federal judiciary, such as by stripping its jurisdiction. But all of these failed. In addition, those frustrated with individual decisions often were not a majority of the population.

Nonetheless, these unpopular decisions mobilized interest groups. Those mobilized interest groups then pushed for the appointment or election of judges who would decide cases in a certain way. This was true in state and federal appointments and retention processes alike. It rarely was phrased this way. Typically, it was explained in a code, such as “decide according to fundamental values,” or “decide according to the strict construction of the Constitution.”

Despite some demonstrated influence in appointments, judicial decisions did not change in the way interest groups wished. The high profile decisions remained, as they have since the New Deal, largely supported by the mainstream of American popular opinion. This only served to frustrate those interest groups, who pushed yet harder on politics in an effort to get “dependable” judges. Some of what we see today in politics generally is a result of that interest group mobilization—on both sides of the political aisle.

The irony is, unlike other times in history, the issues that form the basis of contention over judicial positions are *not* at the forefront of what the public says are its concerns. Professor Frederick Schauer makes this point in his recent *Harvard Foreword*.<sup>120</sup> Judicial battles are fought heavily over gay rights and abortion, as well as

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119. See generally Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415 (2004).

120. Frederick Schauer, *Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L.

over class actions and products liability cases, but these are not nearly at the top of the public's list of concerns. The public is worried about what you would imagine, things like the war in Iraq, the economy and gas prices, Social Security, healthcare, and ethics in government.<sup>121</sup> Many of these, I need hardly point out, are issues on which the public is not being satisfied. The parties are fighting hard over votes; the electorate is closely divided. In close electoral times, the courts are being used as a wedge issue, as a pawn in broader partisan politics.

The way to crisis is when the judiciary and the law depart from the core common sense and judgment of the American people. In this, Pound was absolutely right. The question is whether we are headed there. *If* there is risk of the law getting out of line with the American people's basic sense of what is right, it is because of the increasingly extreme influences.

I am not certain there is a risk. In the past, the institutions of government have worked to bring us back into equilibrium. In addition, perhaps there is some odd balance if *both* sides get their extremists on the bench. Nonetheless, I do wonder. I have some concerns that the extreme partisanship we see threatens the very embedded traditions and institutions that grease the road to a return to normalcy when things go awry. And I think if the bench becomes more ideologically divided, even if from both sides, this only feeds the phenomenon we see at work.

I am, however, more certain there is trouble ahead if only one side—either side—prevails for a long period in making extreme appointments, especially should the tide of popular opinion start moving in the other direction. This is the real risk of an ideological appointment process: that it departs from the core values of the mainstream of either party, let alone the ground between them. If this occurs, then the judiciary may well move in different directions than the body politic. And if this happens, then Pound's time may well again be our own.