

DAVID J. BREWER, 1837-1910;  
A KANSAN ON THE UNITED STATES SUPREME COURT

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D. S. E.

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## CHAPTER I

### INTRODUCTION

David J. Brewer is the only Justice in the history of the United States Supreme Court to call Kansas his home. This paper is a study of Justice Brewer: his life, the courts he served on, his beliefs, his influence and role in Kansas and American history. However, this is not only a study of Brewer the great jurist, but of Brewer the humanitarian, the orator, the educator, the defender of the faith, the worker for international peace, and the defender of the rights and liberties of individuals.

#### I. THE PURPOSE OF THE STUDY

As far as the writer is able to determine, no comprehensive study of Justice Brewer exists. The information that is available is scattered, and there is a need to bring all the available data together into one volume.

#### II. SOURCE MATERIAL

In one sense, the source materials are limited, for the only information concerning Brewer is found in encyclopedias, obituaries, memorials, and articles found in periodicals of his day. On the other hand, there are literally hundreds of volumes recording the most minute detail of court decisions, whether it be from the Kansas Supreme Court, the United States

Circuit Court, or the United States Supreme Court. There are also numerous textbooks and volumes written about the Supreme Court which include some mention of the Court from 1890 to 1910 and its members.

Primarily, the source material was found in the Kansas State Historical Society Library, Topeka; the Kansas Library, Law Division, Capitol Building, Topeka; the University of Kansas Law Library, Lawrence; and the University of Kansas City Law Library, Kansas City, Missouri.

### III. CONTENT AND ORGANIZATION OF THE THESIS

This paper is a study of the life of Justice Brewer and his significance as a lawyer, judge, and citizen. Chapter II will present a biographical sketch of Justice Brewer. Chapter III will consider his career in Kansas, as a lawyer, as a judge in the lower courts, as a member of the Kansas Supreme Court, and as a United States Circuit Court Judge for the Eighth District, the largest in area of the nine judicial districts of the United States. This chapter will also discuss his contributions in public life while a resident of Kansas. Chapter IV is a study of the United States Supreme Court from 1890 to 1910. It will attempt to give a summary of the Court's more famous decisions, its relationship with the other branches of the Federal Government, and an evaluation of the Supreme Court during Brewer's tenure on it. Chapter V is a study of

Brewer while he was a member of the Supreme Court. It will include his opinions for the Court, his philosophy of law, government, and politics, and an evaluation of his role on the Court. Chapter VI discusses Brewer's career in Washington, not as a Supreme Court Justice but as an orator, author, and his brief encounter with international arbitration. This chapter will also include some of Brewer's beliefs on various unrelated topics. The final chapter will constitute a summary to this study.

## CHAPTER II

### BIOGRAPHICAL SKETCH

David Josiah Brewer was a distinguished man from a distinguished family. His mother, Emilia Field Brewer, was the daughter of a Congregational minister, Rev. David Field of Stockbridge, Massachusetts. Her three brothers were famous in American history. David Dudley Field, the eminent New York lawyer, was known as the father of the reformed code of judicial procedure and an expert on constitutional law. He argued many cases before the United States Supreme Court. Cyrus W. Field accumulated a fortune in the mercantile business and spent it largely in laying the Atlantic cable. Stephen J. Field served as Chief Justice of the Supreme Court of California and later was appointed Associate Justice of the Supreme Court of the United States by President Lincoln. For the first time in the history of that court, when Justice Brewer became a member, it contained an uncle and a nephew.<sup>1</sup>

Paternally, Judge Brewer was descended from English ancestry. As early as 1600 there was a John Brewer living in Cambridge, England. His son John was born in 1642 and came to the United States in 1690. His son, Lieutenant John

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<sup>1</sup>See Bibliography, Section E, for standard biographical articles in reference works concerning Justice Brewer.

Brewer, was born in 1669 and died in 1709. His son, Captain John Brewer, was born in 1698 and died in 1758, leaving a son, Colonel Josiah Brewer. The latter was born in 1744 and died in 1830. One of his sons, Eliah, was a distinguished lawyer of Lenox, Massachusetts. Eliah was Justice Brewer's grandfather. He was born in 1770, graduated from Yale College, and died in 1804. Eliah's second son, Justice Brewer's father, Rev. Josiah Brewer, was born in 1796 in what is now Monterey, Massachusetts (formerly called South Tyrningham).<sup>2</sup>

Brewer's father was a graduate of Yale in 1821. In 1830 he was sent to Smyrna, Asia Minor, by the Congregational Church. His main job was to establish schools of the American and European standard for Greek women and girls. The Rev. Mr. Brewer was accompanied by his wife and by his brother-in-law, Stephen J. Field, who was thirteen years old at that time. Rev. Brewer was the pioneer missionary to Asiatic Turkey. He also established a Greek newspaper. While Rev. and Mrs. Brewer were in Asia Minor, Justice Brewer was born in Smyrna, June 20, 1837.

It may be supposed that David Brewer would be led toward an interest in law and religion by his environment and lineage. No doubt this had a tremendous influence upon his

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<sup>2</sup>Eminent and Representative Men of Virginia and the District of Columbia of the Nineteenth Century (Madison, Wisconsin: Brent and Fuller, 1893), pp. 58-59.

choice of a vocation and his lifelong interest in the church, and particularly foreign missions.

Shortly after Brewer's birth his parents returned to this country, locating in Connecticut. Brewer received his higher education from Wesleyan University, Middletown, Connecticut, and Yale University, graduating from Yale in 1856 with highest honors. Following graduation he began the study of law in the office of his uncle, David Dudley Field. Brewer completed his law studies at the Albany Law School in 1858.

After his admission to the bar Brewer entered the law office of his uncle in New York, and was urged by his relatives to remain there. However, he wished to prove his own worth, not to be known merely as his uncle's nephew. He went west, stopping first at St. Louis, then Kansas City, where he contracted the gold fever and went to Pike's Peak in Colorado. He returned to Kansas City and was unable to find an opening. He finally located at Leavenworth, Kansas, on September 13, 1859.

He first entered the law office of Johnstone, Stinson, and Havens and remained with them for several months. He then formed a partnership with P. B. Hathaway and they opened a law office as Brewer and Hathaway.

His exceptional ability was soon recognized, and in his case the probationary period of young lawyers was comparatively short. Step by step he began to climb the

ladder of success, and never halted until he attained the highest judicial honors the nation can bestow.<sup>3</sup>

In 1861, when he was twenty-four, he was appointed Commissioner of the Federal Circuit Court for the district of Kansas. In 1862 he was elected judge of the probate and criminal courts of Leavenworth County. From 1865 to 1869 he was judge of the First Judicial District of Kansas. From 1869 to 1870 he served as Leavenworth County Attorney and city attorney for Leavenworth. In 1870, at the age of thirty-three, he was elected to the Supreme Court of Kansas where he sat for fourteen years. In 1884 President Chester A. Arthur appointed him to the federal circuit court for the Eighth Circuit. He was appointed by President Harrison in 1889 as Associate Justice of the United States Supreme Court to succeed Justice Stanley Matthews. He was confirmed by the Senate December 18, 1889, by a vote of fifty-three to eleven. He remained on that court until his death March 28, 1910.

Judge Brewer married Louise R. Landon of Burlington, Vermont, in 1861. She is described as "a charming girl with a fine character."<sup>4</sup> Judge Brewer credits his wife with changing him from a restless youth to a more mature gentleman,

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<sup>3</sup>Wm. E. Connelly (ed.), Collections of the Kansas State Historical Society (Topeka: Kansas State Printing Plant, 1915), XIII, p. 119.

<sup>4</sup>Frank W. Blackmar (ed.), Kansas (Chicago: Standard Publishing Company, 1912), III, p. 48.

ready to pursue his chosen profession. From this marriage four daughters were born, Harriet E., Etta L., Fannie A., and Jeanie E. Mrs. Brewer died in April, 1898. In June, 1901, he married Emma Minor Mott of Washington, D. C., who survived him at his death.

While a resident of Leavenworth, Brewer was very active in civic duties. He was a member of the Leavenworth Board of Education from 1863-1865, superintendent of the Leavenworth schools from 1865-1868, secretary of the Mercantile Library Association from 1862-1863, and president of that organization in 1864. He was one of the founders of the First Congregational Church of Leavenworth where he served as superintendent of its Sunday School and for many years was teacher of its largest Bible class.

An ardent believer in public education, he was so well known throughout Kansas that he was chosen president of the Kansas State Teachers Association in 1869. In 1866-1867 he was chairman of the executive committee, also of a legislative committee, so that he must have been actively involved in laying the foundations of our school system. He was a brilliant orator and gave many addresses, two of which were the first commencement address at the Normal School of Emporia (now Kansas State Teachers College of Emporia) and the dedicatory address at the dedication of the administration building at the Normal School in 1880. While Supreme Court

Justice he was for several years a professor of corporation law at Columbian University (now George Washington University).

Brewer was president of the Associated Charities in Washington for five years. Always interested in missions, he served for years as vice-president of the American Missionary Association. He was also a loyal member of the Congregational Church of Washington, D. C. "We may put it in the foreground of anything to be said of him that he was always faithful to his religious principles."<sup>5</sup>

Brewer's working day began at four o'clock each morning. He felt that some of his best work was produced in the hours before breakfast. He was physically large and vigorous, genial in disposition, and democratic in his social relations.<sup>6</sup> Although Brewer had a strong sense of duty, it was coupled with a kindly humor which put all with whom he came in contact at their ease.

His character throughout was consistent, dignified, calm, gentle, and forcible; he approached all questions without fear or partiality and was able promptly and rightly to decide not only the greatest but the very least which came to him in the smaller affairs of ordinary life, and from which, as a good citizen, he did not seek to be relieved.<sup>7</sup>

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<sup>5</sup>Editorial in The Independent, April 7, 1910.

<sup>6</sup>Robert E. Cushman, "David J. Brewer," Dictionary of American Biography (New York: Charles Scribner's Sons, 1958), II, p. 23.

<sup>7</sup>William H. Baldwin, "Justice Brewer and Organized Charity," The Survey, XXIV (April 16, 1910), p. 119.

During his lifetime the following degrees were conferred upon Brewer by various institutions of higher learning: Bachelor of Arts, Yale University, 1856; Bachelor of Laws, Albany Law School, 1858; Master of Arts, Yale University, 1859; and Doctor of Laws from the State University of Iowa, 1884, Washburn College, 1888, Yale University, 1891, University of Wisconsin, 1900, Wesleyan University, 1901, University of Vermont, 1904, and Bowdoin College, 1905.

Justice Brewer had an unusually great intellectual and ethical inheritance--so great, indeed, that it seems to have dominated his energies and to have predetermined his career in life. With such an inheritance, and the best of educational advantages from childhood to manhood, it was but natural that he found his highest happiness and success in the consideration and application of questions of government, law, religion, and ethics--the greatest questions that concern mankind.<sup>8</sup>

Brewer died from apoplexy in 1910 at his home in Washington. He was buried in Mt. Hope Cemetery at Leavenworth, Kansas. After his death Brewer's vacancy on the United States Supreme Court was filled by Charles Evans Hughes, former governor of New York.

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<sup>8</sup>Connelly, loc. cit.

## CHAPTER III

### JUDICIAL CAREER IN KANSAS

#### I. LAWYER AND JUDGE IN LEAVENWORTH

Before Brewer was twenty-five years old he was elected judge of the probate and criminal courts of Leavenworth County. Older lawyers were somewhat dismayed that such a young man should be given such a responsible position. They appealed to the State Legislature to take the appointment away. Before the legislature had taken any action, young Brewer had conquered his critics by the way in which he discharged his duties. At the end of three years Brewer was made district judge upon the unanimous request of the Bar.<sup>1</sup>

Very little information can be found of Brewer's early career. We might conclude, however, because of his rapid rise up the judicial ladder that he must have gained knowledge and respect very quickly.

Brewer served four years as judge of the First Judicial District of Kansas (1865-1869). From 1869 until 1870 he served as Leavenworth County Attorney and also as city

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<sup>1</sup>Portrait and Biographical Record of Leavenworth, Douglas, and Franklin Counties. . . Kansas (Chicago: Chapman Publishing Company, 1899), p. 592.

attorney of Leavenworth. In 1870, at the age of thirty-three, he was elected to the Supreme Court of Kansas.<sup>2</sup>

## II. MEMBER OF KANSAS SUPREME COURT

Brewer served on the Kansas Supreme Court for fourteen years from 1870 until 1884. As a member of that court he rendered numerous opinions, some of which were very important in the history of Kansas.

Some of his most important work on that court was done in the interests of Kansas women. One of his opinions Wright v. Noell, 16 Kansas 601 (1876), resulted in the establishment of the eligibility of women for the office of county superintendent of public instruction of Coffey County. Julius Noell received the second highest number of votes. Noell argued that Miss Wright was ineligible for the job since she was a woman, and women did not have suffrage. Miss Wright argued that the State Constitution did not disqualify her because it placed no limitation of sex on this particular office. The Coffey County Court ruled that Miss Wright was ineligible for the position. Judge Brewer in his opinion for the Supreme Court reversed the decision of the County Court.

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<sup>2</sup>The writer has not found any pertinent information concerning the reason Brewer gave up the judgeship to assume the county attorney's office, nor the details concerning his election to the Supreme Court of Kansas. It would be most helpful to know this. Speculation would suggest that local and state political party factors contributed to these changes in office.

Another of Brewer's opinions involved the recognition and sustaining of the right of married women to property belonging to them before marriage, and to wages earned by them after marriage, Holthaus v. Farris, 24 Kansas 785.

Judge Brewer wrote the opinion of the Court in the famous child custody case, Chapsky v. Wood, 26 Kansas 650 (1881). In this case the Court awarded a child to its aunt rather than its parents, even though a strong case had been made for the parents.

From the time of the child's birth she was sent to Mrs. Chapsky's sister, Mrs. Wood, because of Mrs. Chapsky's ill health. Mr. Chapsky had little remorse in sending the child away. During the early infancy of the child, the question arose as to her legal custody--Mrs. Wood insisting that either the mother should take the child, or she should be given to her. Although no written agreement was reached, the Court felt that in fact a gift was made of the child by both mother and father to Mrs. Wood. After five and one-half years the parents wanted the child back and the case went through the Kansas courts. The parents argued that they were the child's natural parents, that they enjoyed greater wealth and pecuniary advantages than Mrs. Wood, and that the child had not legally been given to Mrs. Wood.

Judge Brewer in his opinion, in which all of the Justices concurred, said:

. . . We cannot believe it wise or prudent to take this child away from its present home, where it has been looked upon as an own child; and if we should see a child of ours in the same circumstances, we cannot believe that we should deem it wise or prudent to advise a change, notwithstanding the pecuniary advantages that might seem to be offered to it.<sup>3</sup>

This is one of the most famous cases ever to have come before the Kansas Supreme Court. It set a precedent which is often cited in similar cases. According to Mr. Justice Clark A. Smith in his memorial to Brewer, written in 1910:

Probably every judge in the state who in the last twenty-five years has had to determine the custody of minor children, especially of little girls, as between contesting parents or others asserting claims thereto, has reread Chapsky v. Wood and been inspired thereby to consider those influences which nurture the very well-springs of life and to minimize the advantages of mere social station and prospective wealth.<sup>4</sup>

In Kansas v. Commissioners of Nemaha County, 7 Kansas 492, the question before the Court was whether the acts of the legislature authorizing counties and cities to subscribe for stock in railroad corporations, and to issue bonds in payment of these stocks, were constitutional. Justice Valentine's opinion for the Court maintained the affirmative and Justice Brewer wrote the dissenting opinion.

Justice Smith in his memorial of Brewer says of this decision:

It has been asserted that the last word that can be said on either side of the question is to be found in

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<sup>3</sup>Kansas Reports, Vol. XXVI, pp. 657-8.

<sup>4</sup>Kansas Reports, Vol. LXXXIII, p. x.

these two opinions. Both opinions have since been widely quoted in textbooks and wherever the question has been raised.<sup>5</sup>

In this famous case, Brewer sums up his philosophy of government.

All power resides with the people. The ultimate sovereignty is with them. The Constitution is the instrument by which some portion of that power is granted to different departments of the government. Power is not inherent in the government, from which some portion is withdrawn by the Constitution. The object of the Constitution of a free government is to grant, not to withdraw, power. This is the primal distinction between the constitutions of the old monarchical governments of Europe, and those of this country. The former indicate the amount of power which the people have been enabled to withdraw from the government; ours the amount of power the people have granted to the government. The Constitution creates legislature, courts, and executive. It defines their limits, grants their powers. It should always be construed as a grant. The habit of regarding the legislature as inherently omnipotent, and looking to see what express restrictions the Constitution has placed upon its action, is dangerous, and tends to error. Rather regarding first those essential truths, those axioms of civil and political liberty upon which all free governments are founded, and secondly those statements of principles in the Bill of Rights upon which this governmental structure is reared, we may properly then inquire what powers the words of the Constitution, the terms of the grant, convey.<sup>6</sup>

In the so-called Druggist Test Cases, 24 Kansas 700, 25 Kansas 751, and others, the Court ruled on discrepancies in the Kansas Prohibition Amendment voted in the November, 1880, election. The Court ruled that the Prohibition Amendment was valid, but under it probate judges were allowed to issue

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<sup>5</sup>Kansas Reports, Vol. LXXXIII, p. xi.

<sup>6</sup>Kansas Reports, Vol. VII, p. 554.

licenses to druggists for the sale of liquor for medicinal purposes. Brewer in his opinion for the Court had to distinguish what sales of alcoholic beverages were legal under Prohibition.

In Board of Education v. Tinnon, 26 Kansas 1 (1881), Leslie Tinnon, a colored boy of school age, petitioned the principal of the Ottawa public schools to attend a school that was not segregated. The Court ruled in favor of Tinnon. Brewer dissented from the Court's opinion.

I dissent entirely from the suggestion that under the 14th Amendment of our federal Constitution, the State has no power to provide for separate schools for white and colored children. I think, notwithstanding such amendment, each State has the power to classify the school children by color, sex, or otherwise, as to its legislature shall seem wisest and best.<sup>7</sup>

This belief in States' Rights is consistent with Brewer's later views while a member of the United States Supreme Court.

Many hundreds of cases involving minor infractions and interpretations of the law were brought before the Court. Examples of the types of routine cases are: damage suits, election frauds, guardianship, division of estates, duties of county officials, payment for duties rendered, negligence of employees or companies, questions about insurance, quiet title suits, liability for injuries, questioning whether legal notices had sufficient publication, mechanic's liens, homestead claims, condemnation of private property for public use,

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<sup>7</sup>Kansas Reports, Vol. XXVI, pp. 23-24.

taxing of Indian lands, foreclosure of mortgages, recovery of rent, duties of school districts, breach of contract, county v. county, sale of securities, etc. Some of these cases in which Brewer rendered the Court's opinions will be cited.

In Johnson v. Brown, 13 Kansas 531, Brewer held that a contract made on Sunday to perform labor on any other day is valid.

In Shearer v. Commissioners of Douglas County, 13 Kansas 148, Shearer appealed to the Court for compensation for the loss of his land for a public highway. He had been ready to present his claim at the proper time and place when his mother became suddenly and seriously ill. This delay caused Shearer to present his claim after the legal deadline. The Commissioners refused payment on this technicality. Brewer very reluctantly held for the Commissioners. While his sympathy was with Shearer, the law was with the Commissioners.

In Neer v. Williams, 27 Kansas 1, Brewer held in his opinion that the grant of the Atchison, Topeka, and Santa Fe Railroad Company was only on lands on either side of the railroad, and did not extend beyond its terminus. This terminus was where the Leavenworth, Lawrence, and Galveston Railroad entered the Neosho Valley, and the lands on the east of the latter railway were not within the terms of the grant to this branch, and never could have been selected therefore, even if the branch had never been built.

In Kansas Pacific Railway Company v. Kessler, 18

Kansas 523, Brewer held that the Railway Company must pay \$20 to recover damages for a wrongful expulsion from a train and \$800 exemplary damages because of gross and wanton negligence.

A large number of cases came before the Court concerning railroad negligence. In these cases either animals were killed, fields burned, or property damaged through the negligence of the railroads. The Court ruled against the railroads in these cases. Brewer wrote opinions of this kind in 20 Kansas 531, 20 Kansas 527, 20 Kansas 66, 11 Kansas 302, 12 Kansas 328, and others.

In Kansas Pacific Railway Company v. Culp, 9 Kansas 38, the question to come before the Court was whether or not the State has the right to tax land granted to it by Congress to aid in the construction of their road. Brewer held that the lands were subject to taxation. This case was taken before the United States Supreme Court, where the decision of the Kansas Supreme Court was reversed.

In Missouri, Kansas, and Texas Railway Company v. City of Fort Scott, 15 Kansas 435, the city sought to recover \$100,000 from the railroad for alleged breach of contract. The lower court ruled in favor of the city, but the Supreme Court reversed that decision, Brewer speaking for the Court.

In Kansas Pacific Railway Company v. Cutter, 19 Kansas 83, Brewer ruled against the railroads, giving Mrs. Cutter

\$1,320 damages for the death of her husband while a passenger on that railroad.

In John Francis v. Atchison, Topeka, and Santa Fe Railroad Company, 19 Kansas 303, the decision of the lower court was reversed, Brewer writing in his opinion that the railroads were subject to tax even in the unorganized counties of the State.

In Kansas Pacific Railway Company v. McCoy, 8 Kansas 538, the question arose of railroads using their influence for selfish gain. Brewer in his opinion gave a discourse on the subject of influencing legislation.

The use of money to influence legislation is not always wrong. It depends altogether on the manner of its use. If it be used to pay for the publication of circulars or pamphlets, or otherwise, for the collection or distribution of information openly and publicly among the members of the legislature, there is nothing objectionable or improper. But if it be used directly in bribing or indirectly in working up a personal influence upon individual members, conciliating them by suppers, presents, or any of that machinery so well known to lobbyists, which aims to secure a member's vote without reference to his judgment, then it is not only illegal, but one of the grossest infractions of social duty of which an individual can under the circumstances of the present day be guilty. For it is the way of death to republican institutions.<sup>8</sup>

An interesting case in Kansas history was Russell et. al. v. The State, 11 Kansas 308. An election was held in Wilson County for the relocation of the county seat. It appeared that Fredonia received 1168 votes and Neodesha 938 votes. The board proclaimed Fredonia the new county seat.

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<sup>8</sup>Kansas Reports, Vol. VIII, pp. 543-4.

Fraud was charged and it was found that Fredonia had prepared the poll books with fictitious names and refused admittance to the polls to known friends of Neodesha. Brewer, deploring the dishonesty shown by election officials, declared Neodesha the county seat.

Judge Brewer affirmed a lower court ruling on the charges that Pryor, an attorney, was guilty of contempt in the case of In re Pryor, 18 Kansas 72.

The independence of the profession [law] carries with it the right freely to challenge, criticize, and condemn all matters and things under review and in evidence. But with this privilege goes the corresponding obligation of constant courtesy and respect toward the tribunal in which the proceedings are pending.<sup>9</sup>

In 1877 Brewer ruled in favor of his friend Preston B. Plumb in a minor suit involving a mortgage, Plumb v. Bay, 18 Kansas 415. It will be noted later that Plumb was instrumental in Brewer's appointment to the United States Supreme Court.

In Fretwell v. City of Troy, 18 Kansas 271, Brewer upheld the right of a third-class city to impose a license-tax on auctions. It was argued that this tax was in restraint of trade. The Court did hold, however, that if auctions were to be taxed the auctioneers could not also be taxed.

Branner v. Stormont, 9 Kansas 51, was an action for malpractice. The plaintiff alleged that the doctor used

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<sup>9</sup>Kansas Reports, Vol. XVIII, p. 75.

unskillful and negligent treatment on his fractured leg. Brewer ruled for the physician affirming a lower court decision.

In Wicks v. Mitchell, 9 Kansas 80, Frances Wicks had signed a promissory note with her husband on his debt of \$677.81. After his death, when the note was due, she refused to pay, arguing that the note had been against the husband's business, not her separate property. Brewer ruled in favor of Mitchell.

In Johnson v. Leggett, 28 Kansas 590, Mr. Johnson, age forty-five, promised to marry Miss Leggett, age eighteen. He courted her for a number of months, even setting the wedding date. He then abruptly married a Miss Cary. Miss Leggett sued Mr. Johnson to receive damage for breach of promise. Brewer upheld a lower court ruling which awarded Miss Leggett \$1,250 damages.

In Baughman v. Baughman, 29 Kansas 283, P. C. and Barbara Baughman were the parents of D. P. Baughman, deceased. As parents they claimed to be his sole heirs. The defendant Mary Baughman claimed to have been the legal wife of D. P. Baughman and, there being no children, his sole heir. To support her claim she offered her own testimony and the testimony of two other witnesses who claimed to have been present at the wedding ceremony. The lower court held that since there were no written records establishing the marriage, there had been no legal marriage. Brewer reversed that decision,

arguing that anyone present at the marriage may be witnesses to prove that fact.

In the case of Henicke v. Griffith, 29 Kansas 516, Brewer gave his opinion on slander.

If they mean to claim that the language on its face must be so specific and definite as necessarily to impute the crime, it is a mistake. Such a rule would permit a person to be guilty of that worst form of slander--the insinuating and indirect accusation of crime--without any responsibility for the wrong occasioned thereby.<sup>10</sup>

In Brown et. al. v. Steele et. al., 23 Kansas 672, a Nancy Bluejacket was a reservee and patentee under the treaty with the Shawnee Indians of 1854. She occupied her land in Wyandotte County until her death in 1876. She never married, and her nearest blood relatives were the plaintiffs, children of a deceased sister, and Mary Rogers, who under the defendants' claim was the daughter of a deceased brother. By the Kansas law of descents, plaintiffs and defendants would share the land equally; but by the Shawnee law, as the father of the plaintiffs was a Wyandotte, and both parents of Mary Rogers were Shawnees, the latter should inherit all the land. Brewer held that since the United States Government recognized tribal organization, the descent is cast, not under the Kansas law, but under the Shawnee law.

In a damage suit for assault and battery, Brewer said, "That which makes good the loss compensates, and is therefore

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<sup>10</sup>Kansas Reports, Vol. XXIX, pp. 518-9.

the measure of damages. But punitive damages mean more than compensation, and are to deter the wrong-doer, as well as compensate the injured."<sup>11</sup>

In 1879 in the case of The State v. Bancroft, 22 Kansas 170, Mr. E. P. Bancroft was found guilty in a lower court of embezzling \$9,000 from the State Normal School of Emporia. Brewer upheld that decision.

In City of Emporia v. Partch et. al., 21 Kansas 202, the State Legislature had passed an act and the city of Emporia then passed an ordinance authorizing it to issue bonds to the amount of \$6,000 for the purpose of erecting and completing boarding houses for the use of students at the State Normal School. Rent from the buildings sufficient to meet the interest of the bonds was to be paid annually to the city treasury. The boarding houses were built on lots belonging to the city and afterward taken possession of and occupied by the Normal School. The school paid a total of \$138.25 rent for the buildings. The city felt that the school had not met the conditions of the ordinance, hence they could recover possession of the buildings. The school argued that it had not been possible to rent the buildings for sufficient return to pay the interest on the bonds issued to build. The District Court ruled in favor of the defendants, Miss Partch, et. al., on the

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<sup>11</sup>Kansas Reports, Vol. XXI, p. 723.

grounds that the ordinance specified the buildings were for the use of students at the State Normal School. Brewer in his court opinion reversed the order of the lower court.

Three interesting cases to come before the Court during Brewer's tenure on that court involved Brewer himself.

In McCahon v. The Commissioners of Leavenworth County, 8 Kansas 437, the case was brought before the Court before Brewer had become a member, but was not heard until Brewer was on the Court. The only brief on file on behalf of the Commissioners was filed by Brewer when he was Leavenworth County Attorney. Brewer did not sit on this case and the decision was for the County Commissioners.

In Haas and Company v. Fenlon, 8 Kansas 601, the case was appealed from the District Court of Leavenworth where Brewer was the judge in 1868. The Supreme Court, with Brewer not sitting on the case, sustained Brewer's previous decision.

In Commissioners of Leavenworth County v. Brewer, 9 Kansas 307, David Brewer, then Leavenworth County Attorney, made a claim against the County for \$1,167.50 for services rendered by him in 1869 and 1870 for Leavenworth County at the request of the county board of commissioners. The case was appealed from the District Court to the Supreme Court, where Brewer pleaded his own case before the Court. The

Court ruled for Brewer, affirming the ruling of the lower court. Brewer did not sit on this case.<sup>12</sup>

The various cases cited in this chapter are included to provide some insight into Brewer's particular interpretation of the law. This provides some background for a later chapter on Brewer's philosophy of law, government, and politics.

### III. UNITED STATES CIRCUIT COURT JUDGE

It was customary that the party in power would choose a member from its own ranks to fill the vacancy on the United States Circuit Court. In this case the judge should be a Republican. The leading Democratic senators from the Midwest, Senators Cockrell and Vest, while forced to choose from the opposition party, wanted to be sure their choice would be acceptable to the people of the Eighth Judicial District.<sup>13</sup> Senator Vest wrote the secretary of the Democratic State Central Committee of Kansas, H. Niles Moore, asking whether the appointment of Judge Brewer would be suitable to the Democratic Party and the people of Kansas. Moore sent back

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<sup>12</sup>The writer has found no commentary on this unusual instance of a judge stepping down into the lawyer's position to argue his own case before his colleagues on the Bench.

<sup>13</sup>The Eighth Judicial District during the 1880's included the following states: Arkansas, Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wyoming.

strong assurance that the choice of Brewer was entirely satisfactory and urged Senators Vest and Cockrell to work for the nomination. He felt "that Judge Brewer was eminently qualified for the position not only as having no superior in the state as a lawyer and jurist, but as a gentleman of unimpeachable honor and integrity of character and well worth in every respect of the high and honorable position."<sup>14</sup> Brewer's nomination was unanimously confirmed by the Senate.

A large number of the cases brought before the Circuit Court at this time involved the clarification of land titles. These titles were vague and uncertain because of government land grants to individuals and railroads. These grants were often overlapping. The situation was further complicated by certain individuals and companies who gained land through fraudulent schemes. Although the title to the land was uncertain it was sold to homesteaders. Judge Brewer, as a Circuit Court Judge and later as a member of the United States Supreme Court, ruled that whoever has title to the land owns the land, whether the title was gained legally or illegally. Brewer received much criticism for this but the individual settlers now were given assurance that the land was legally theirs and could not be taken away.

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<sup>14</sup>H. Miles Moore, Early History of Leavenworth City and County (Leavenworth, Kansas: Sam'l Dodsworth Book Company, 1906), p. 313.

In the case of United States v. Edwards, 33 Federal 104, the United States attempted to reclaim land from an individual whom they felt had defrauded the government in the sale of former Indian land. Brewer held that Edwards had not defrauded the government but was within his legal bounds to secure the land as he did.

The famous Maxwell Land Grant Cases, 21 Federal 19, 26 Federal 118, and 41 Federal 275, involved 1,700,000 acres of disputed land on the eastern slope of the Morena Valley in present-day New Mexico.<sup>15</sup> After the treaty of Guadalupe Hidalgo, by which the United States acquired the territory in question, the Surveyor General of the New Mexico territory was asked to ascertain the origin, nature, character, and extent of the private land claims in that territory. Concerning the grant in question, the Surveyor General found it to be a valid grant according to the laws and customs of the Republic of Mexico. The problem became more difficult because there were certain lands outside the grant that because of poor wording in the grant were in dispute. Agitation over the grant came particularly from the people

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<sup>15</sup>This land was granted to Charles Beaubien and Guadalupe Miranda by the Republic of Mexico. It came to Lucian B. Maxwell of Illinois when he married Luz Beaubien. When Maxwell failed, British capitalists and later Dutch investors owned that vast empire. Part of this land finally came to an Oklahoma oil magnate, Waite Phillips, who gave 36,000 acres to the Boy Scouts of America in 1937 and 91,000 acres more to that same organization in 1941.

living in the 265,000 acres in Colorado. These people charged that the survey included thousands of acres not included in the original grant. The United States Attorney General, Benjamin Harris Brewster, filed a bill of equity for a decree setting aside the patent in the United States District Court of Colorado August 25, 1882, alleging that the surveyors had conspired to cheat and defraud the government out of land by running an incorrect line.

United States Circuit Judge Brewer handed down the Court's decision in January, 1886, holding the patent to be good and valid and therefore legally belonging to the defendant. This decision was appealed to the United States Supreme Court in 1887. The Court upheld the decision of the Federal District Court.<sup>16</sup>

This period in Kansas and American history was marked by an unprecedented growth in the railroads. By the 1880's the railroads controlled more than 10,000,000 acres of land in Kansas alone. There was a loud demand for some form of regulation because of the railroads' growing power. Complaints against the railroads included:

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<sup>16</sup>Among the works concerning the Maxwell Land Grant are The Maxwell Land Grant by Jim Berry Pearson (Norman: University of Oklahoma Press, 1961); Maxwell Land Grant by William A. Keleher (Santa Fe: Rydal Press, 1942); New Mexico by Erna Fergusson (New York: Alfred A. Knopf, 1955); and History of Arizona and New Mexico, 1530-1888, Volume XVII of The Works of Hubert Howe Bancroft (San Francisco: The History Company, 1899).

1. The railroads were slow in opening their lands for sale or patent. These lands could not be taxed until they had been patented, so state and local governments were deprived of needed revenue.
2. Railroads did not carry a proportionate tax burden.
3. Railroads sold land in large blocks to land speculators.
4. Many railroad lines were poorly built in their haste to secure a fortune from gifts and bonuses.
5. Railroads abused their wealth and power through bribery and governmental lobbying.
6. High freight rates.
7. The watering of railroad stocks.

The railroads fought many expensive court cases to insure their land titles and their favored position. Perhaps as a result of the many railroad cases to come before the courts on which Brewer served, he was led to consider that the possible solution might be to have public transportation conducted by the government on the same system as the post office.<sup>17</sup>

In Ames v. Union Pacific Railway Company, 64 Federal 165, the question before Brewer was whether a state (Nebraska) could prescribe the maximum rates for transportation of freight by railroads within that state. Brewer held that Nebraska was entitled to put maximum rates on wholly intrastate commerce.

The question of railroad receiverships was brought up in Mercantile Trust Company of New York v. Missouri, Kansas

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<sup>17</sup>Article in the Topeka State Journal, September 6, 1897.

and Texas Railway Company, 36 Federal 221. Judge Brewer's opinion was: When a railroad cannot meet its payments on its debts (in this case \$28,000 per mile of track), and it is in danger of foreclosure, the mortgagee may have the Court appoint a receiver whose job it is to make sure the interest is paid rather than having the money spent elsewhere.

In United States v. Kane et. al., 23 Federal 748, employees of a railroad company that was in the hands of a receiver appointed by the Court were dissatisfied with the wages paid by the receiver. They abandoned their work and forced other employees to do the same. Because of this strike the receiver could not operate the railroad. Brewer ruled they were guilty of contempt of court and were to be punished. Brewer said these employees, who felt they had been wronged by the receiver, should have reported it to the Court and the judge would have tried to do justice to the employees as well as the receiver.

In Central Trust Company v. Wabash, St. Louis and Pacific Railway Company, 26 Federal 11, Brewer held that a corporation in the hands of a receiver of a court is not exempt from seizure and sale by the collector of taxes if the taxes are not paid.

In Pullman's Palace Car Company v. Twombly, 29 Federal 658, Brewer held that Iowa could tax the Pullman Company even if its cars traveling through that state were engaged in interstate commerce.

In a different type of case, Chicago, B. and Q. R. Company v. Wasserman, 22 Federal 872, a man, about to die, who had a five year old child and whose wife was soon to have another child, made a will leaving all his property to his wife. The legal question involved was whether the deceased intended to disinherit his child and unborn child. Brewer ruled that since there was no mention of it in the will the assumption was that the father believed the mother could handle the property more advantageously for herself and her children if the interests were not divided.

One of Judge Brewer's decisions brought down on his head the wrath of the Prohibitionists. In the case of State of Kansas v. Walruff, 26 Federal 178, the defendant, Walruff, had constructed a brewery in Lawrence, Kansas. As a brewery it was worth \$50,000 but for any other purpose worth only \$5,000. At the time it was erected and for six years after, the making of beer was legal in Kansas. In 1880 a Constitutional amendment prohibiting the sale of beer was passed. The defendant argued that the new amendment deprived him of his property without due process of law or compensation. Brewer ruled that Walruff must be compensated for his loss. This case was not appealed but a similar case, Mugler v. Kansas, 123 U. S. 623, went to the United States Supreme Court where the opinion of Judge Brewer was reversed. An interesting fact was that of the nine Justices on the Supreme

Court only one dissented from this opinion. He was Mr. Justice Field, uncle of Judge Brewer. "Blood is thicker than water, or even beer," was one comment.<sup>18</sup>

A great variety of cases came before the Eighth Circuit Court. A few more representative cases will be cited.

In Richardville v. Thorpe, 28 Federal 52, Brewer upheld the rights of Indians to pass on property without a "certificate of identity" required by the Department of Interior, nor must the deed be formally approved by the Secretary of the Department of the Interior.

The city of Topeka had required that all animals must be inspected before slaughtering, and must be slaughtered within one mile of the city limits if they were to be sold in Topeka. The effect of this city ordinance was to exclude all dressed meat brought from a distance. In Ex parte Kieffer, 40 Federal 399, Brewer ruled that such a law was unconstitutional because it interfered with the free commerce between the states.

A. G. Hulbert tried to recover damages from the city of Topeka, in the case of Hulbert v. City of Topeka, 34 Federal 510, on the grounds that Frances G. Hulbert died as a result of injuries caused by the negligent manner in which that city kept its streets. Judge Brewer agreed with Hulbert.

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<sup>18</sup>Tom W. Campbell, Four Score Forgotten Men (Little Rock, Arkansas: Pioneer Publishing Company, 1950), p. 288.

Brewer's work as a Circuit Court Judge gained him national prominence. After serving in this capacity for six years, he was appointed to the United States Supreme Court.

#### IV. PUBLIC LIFE WHILE A RESIDENT OF KANSAS

Although Brewer's duties as a judge required long hours of work and study, he was deeply interested in the activities of the church and school. He was frequently called upon to write articles or give speeches for civic functions. He met these demands, delivering finished, thoughtful addresses whether giving lectures to law students or speaking to public gatherings.

As mentioned in the biography, Brewer assumed an active role as an educational leader in Kansas. In a dedicatory address at the Kansas State Normal School in Emporia, June 16, 1880, Brewer eloquently proclaimed Kansas the "School State." In speaking of the faith of Kansas in her schools he said, "With such a faith, so general, so potent, so significant, Kansas well deserves the name, with which in the presence of this audience, of the educators and thinkers of the state, I now baptize her, by the name of the School State."<sup>19</sup> In this same address Brewer commended the Normal School and its lofty purpose of training teachers.

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<sup>19</sup>Catalogue of the Officers and Students of the Kansas State Normal School (Emporia: Rowland Brothers, 1880), p. 27.

In another address he showed deep admiration for the intelligence and determined fortitude of the "Yankee School Marm."<sup>20</sup>

Judge Brewer believed that politics should be taught in the school room. In an article written in 1867, before woman suffrage, Brewer advocated teaching government to girls as well as boys. His reasons for teaching government to future voters are the same as his reasons for all education.

We are all agreed that the objective of education is not simply to give information, but also efficiency. It takes the raw material of brain and character which the Almighty has given as his endowment and weaves it into the finer fabric of the educated man, and this not for show but for use. That which justifies the time and expense of education is the increased power of accomplishment as well as the clearer vision of judgment.<sup>21</sup>

Brewer outlined the way he felt a course in government should be organized.

We use the term [politics] in its higher and truer sense, including the science of government, our form of government, the Constitution, the relations of the state to the Federal Government, the reciprocal rights and duties of each, the different modes of governmental action, several parts in the administration of the laws the citizen may be called to take and under what circumstances.<sup>22</sup>

In a related article Brewer discussed the question-- should teachers engage in politics. He says first that

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<sup>20</sup>Review of an address in the Topeka Commonwealth, May 15, 1880.

<sup>21</sup>David J. Brewer, "Politics in the School Room," Kansas Educational Journal, IV (December-January, 1867-8), p. 173.

<sup>22</sup>Ibid., p. 174.

teachers are citizens and with the rights of citizenship go duties. He advances three conditions which could release the teacher from these duties: (1) The teacher's profession unfits him for fulfilling these duties; (2) The teacher's participation is not needed; and (3) Discharging these duties would weaken the teacher's efficiency. Brewer refutes each of these conditions as being untrue. Therefore, "Teachers of Kansas, fear not to speak your mind and bear your part in the political contests of the day. Engaging in politics is a high and holy mission."<sup>23</sup>

In 1880 Brewer made several practical suggestions for improving Kansas government with reference to its judicial system: (1) The Supreme Court should be increased by at least two members;<sup>24</sup> (2) The judicial districts should be reorganized; and (3) To guard against accumulation of court business in any district, authority should be given to other district judges to help the judge who is behind in his docket.<sup>25</sup>

Although born on foreign soil, raised in New England, and taken from Kansas by judicial duties for his last twenty years of life, Brewer acknowledged no other home but Kansas.

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<sup>23</sup>David J. Brewer, "Should Teachers Engage in Politics; and Should They Teach It?" Kansas Educational Journal, V (August, 1868), p. 88.

<sup>24</sup>At that time the Supreme Court was composed of three judges. In 1900 it was increased from three to seven judges.

<sup>25</sup>David J. Brewer, "Constitutional Convention," The Western Homestead, III (November, 1880), pp. 70-71.

In various speeches and articles he gives the reasons for his deep pride in Kansas and her people. He singles out her treatment of women, quoting the Wyandotte Constitution of 1859, asserting that no other constitution prior to that time had ever declared for the mother's equal rights in the possession of her children. He praises her educational system, the high moral purpose of her early inhabitants, her churches, her adoption of prohibition, and the fact that Kansas was a leader in the war to preserve the Union.

Some of Brewer's most descriptive prose was contained in speeches about Kansas. At the Kansas Day Dinner held in New York, January 30, 1910, two months prior to his death, Brewer as the featured speaker sentimentally described his adopted home:

In the many and varied experiences which came to the state, especially in its early days, is found an answer to the question why Kansans love Kansas. We know the bushwacker and the jayhawker, the red-leg and the Indian. We have seen the hot winds sweep through her growing corn and in a dozen hours destroy the expected crop, the grasshoppers covering the state and eating everything green and growing. We have felt the touch of poverty and even of famine. We have seen the state plastered over with mortgages, while the tax gatherer hunted almost in vain for property from which to collect taxes.

We have repeated the story of Egypt and have had the lean years and the fat years like those which came to that land in the time of the Pharaohs, with this difference, that in Kansas the fat years have eaten up the lean years. Do we wonder that those who had a share in those changing experiences have a marvelous love for the state in which they passed through them?

It is no wonder that in the past history of the state every Kansan glories, and in her future believes. . . . It is honor enough to have lived in Kansas and have been a part of her history.<sup>26</sup>

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<sup>26</sup>Review of an address in the Kansas City Star, January 30, 1910.

## CHAPTER IV

### A STUDY OF THE UNITED STATES SUPREME COURT FROM 1890-1910

#### I. PERSONNEL OF THE COURT

Justice David Brewer served on the United States Supreme Court with fifteen other justices, eleven Republicans and four Democrats. These men served for an average of nineteen years on the Bench. Most commentators of the Court's history consider all but Justices Holmes, Moody, and perhaps Bradley as conservatives in their interpretation of the Constitution.<sup>1</sup>

The most notable of Brewer's associates included Melville W. Fuller, John Marshall Harlan, Stephen J. Field, Joseph McKenna, William Henry Moody, and Oliver Wendell Holmes, Jr.

Chief Justice Fuller served on the Court for twenty-two years, from 1888 to 1910. He was a strong Democrat who believed in States' Rights and individual liberties. He was considered a strict constructionalist in his interpretation of the Constitution. He was thought to have been an excellent presiding officer, notable for his dignity, tact, good temper and courtesy. His colleagues held him in high esteem.

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<sup>1</sup>Conservative in this instance implies that the Justices were primarily strict constructionalists.

Prior to his appointment, Fuller had been one of the busiest and best paid corporation lawyers in Chicago.<sup>2</sup>

Justice Harlan, a conservative Republican, was a former slave holder. In his thirty-three years on the Court he showed an almost religious reverence for the Constitution. He was a stern defender of civil liberties and a strict constructionalist. He was a firm defender of the states' police powers. Compromise was difficult for him, as evidenced by his vigorous dissents in 316 cases.<sup>3</sup>

Justice Field, Brewer's uncle, was the last of Lincoln's appointees to the Court. He was appointed to the Supreme Court with the help of Leland Stanford, one of the four magnates who controlled the Central and the Southern Pacific Railroads. Some critics doubt that Field was completely unprejudiced in the many railroad cases coming before the Court.

He was a man of consistency and power, completely unswayed by the varying winds of public opinion. Especially in his later years, he became somewhat arrogant in his views---as evidenced by his constant assertion in his opinions that God was on his side. Like a baseball umpire he could not tolerate the thought that he may be wrong.<sup>4</sup>

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<sup>2</sup>Francis S. Philbrick, "Melville Weston Fuller," Dictionary of American Biography (New York: Charles Scribner's Sons, 1958), IV, p. 61.

<sup>3</sup>Robert E. Cushman, "John Marshall Harlan," Dictionary of American Biography (New York: Charles Scribner's Sons, 1958), IV, pp. 269-72.

<sup>4</sup>Jerre S. Williams, The Supreme Court Speaks (Austin, Texas: University of Texas Press, 1956), p. 106.

Field served on the Court for thirty-four years, two months longer than Chief Justice John Marshall. It has been suggested that Justice Field served on the Court too long. In 1895 he wrote only four brief opinions for the Court and in 1896 he wrote no opinions. Justice Harlan was asked by the other Justices to suggest to Field that he should resign. Field retired at the age of eighty-one.<sup>5</sup>

Justice McKenna is included because, while a member of the House of Representatives, he voted against the creation of the Interstate Commerce Commission in 1887. This gives a hint of his opinions in the various cases concerning the regulation of interstate commerce.<sup>6</sup>

Justice Moody was a close friend of Theodore Roosevelt. He served as Attorney General for Roosevelt and helped the United States prosecute in the famous anti-trust cases. Moody believed in a strong central government and a loose interpretation of the Constitution.<sup>7</sup>

Justice Holmes, son of the famous essayist and poet, was known as "The Great Dissenter." He was appointed to the

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<sup>5</sup>Edwin S. Corwin, "Stephen Johnson Field," Dictionary of American Biography (New York: Charles Scribner's Sons, 1958), III, pp. 372-6.

<sup>6</sup>Francis S. Philbrick, "Joseph McKenna," Dictionary of American Biography (New York: Charles Scribner's Sons, 1958), VI, pp. 87-88.

<sup>7</sup>Charles P. Sisson, "William Henry Moody," Dictionary of American Biography (New York: Charles Scribner's Sons, 1958), VII, pp. 107-8.

Court by Theodore Roosevelt and incurred the displeasure of the President when he dissented in the famous Northern Securities case. Roosevelt then said of Holmes, "I could carve out of a banana a judge with more backbone than that."<sup>8</sup> Holmes was liberal in his views and interpreted the spirit of the Constitution rather than following judicial precedent. He felt that the Constitution was flexible, and changed with varying social conditions. His beliefs were poles apart from the views of the other Justices on the Supreme Court. It might be said that Holmes's political philosophy was more akin to the Franklin D. Roosevelt era than the Theodore Roosevelt era.<sup>9</sup>

## II. SIGNIFICANT DECISIONS OF THE COURT

The period during which Brewer served on the Court was one of tremendous national growth, especially in transportation and business. Most of the cases to come before the

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<sup>8</sup>William Henry Harbaugh, Power and Responsibility: The Life and Times of Theodore Roosevelt (New York: Farrar, Straus, and Cudahy, 1961), p. 162.

<sup>9</sup>There is a vast volume of literature concerning Justice Holmes. Among basic works are Justice Oliver Wendell Holmes by Mark De Wolfe Howe (Cambridge: Belknap Press of Harvard University, 1957); Mr. Justice Holmes and the Supreme Court by Felix Frankfurter (Cambridge: Harvard University Press, 1938); Holmes-Laski Letters edited by Mark De Wolfe Howe (2 vols. Cambridge: Harvard University Press, 1953); and Constitutional Doctrines of Justice Oliver Wendell Holmes by Dorsey Richardson (Baltimore: The Johns Hopkins Press, 1924). Catherine Drinker Bowen's Yankee From Olympus, Justice Holmes and His Family (Boston: Little, Brown and Company, 1944) has had wide popular appeal.

Court during this period were concerned with the Commerce Clause, the Fourteenth Amendment, individual rights and liberties, the relationship of the states to the Federal Government, what constitutes police power, and the states in their relations with each other.

During Chief Justice Fuller's reign the Commerce Clause in particular was expanded through the acts of Congress and the Court, thus giving the National Government more and more centralized power.

The following are a number of important Supreme Court decisions during Brewer's tenure on the Court. They are included to give an idea of the Court's philosophy in a wide range of cases. Many of these decisions have no necessary relationship to each other, but are nevertheless important in constitutional development.

One of the first cases sustaining the national power was Fong Yue Ting v. United States, 149 United States 698 (1893), in which the power of a sovereign nation to forbid the entry of foreigners or to expel or deport them was upheld as absolute and unqualified. Justices Fuller, Field, and Brewer dissented. Brewer in his dissent felt this was giving the Federal Government an unlimited and arbitrary power that is inconsistent with the Constitution.

In 1890 in Geofroy v. Riggs, 133 United States 258, the Court unanimously held that it was within the scope of

the treaty power to regulate alien inheritance of lands in the states.

In Leisy v. Hardin, 135 United States 100, the Court reaffirmed the Original Package Doctrine and its application to articles in interstate commerce (6-3 Brewer dissenting). This decision was criticized in the American Law Review where it was described as the "most crushing blow against the rights of the states which has ever been dealt by that tribunal."<sup>10</sup>

The Court increased the power of the National Government over its territories in Corporation of Latter Day Saints v. United States, 136 United States 1. The Court annulled the charter of the Mormon Church for some of its practices. The Court claimed jurisdiction, reasoning that the people of the United States are owners of the national territories and have supreme power over them and their inhabitants (6-3 Brewer with majority).

In McElvaine v. Brush, 142 United States 155, the Court unanimously held that the punishment of death by electricity does not deprive a criminal of due process of law; and that a state statute which provides for the punishment of death by electricity, and which is held by the state courts not to inflict a cruel and unusual punishment, does not abridge the privileges and immunities of a convict under the United States Constitution.

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<sup>10</sup>American Law Review, XXIV (1890), p. 474.

In Chicago, Milwaukee, and St. Paul Railroad Company v. Minnesota, 134 United States 418, the Justices decided by a vote of five to four, Brewer with the majority, that the question of the reasonableness of railroad rates could not be left by the legislature to a state commission, but must be subject to judicial review. By this decision the Court became a censor over the states' power to regulate rates.

In a similar case, Reagan v. Farmer's Loan and Trust Company, 154 United States 362, the Court held unanimously that federal courts of equity may restrain the enforcement of rates made by state commissions, if they deem the rates unreasonable or unjust.

In Interstate Commerce Commission v. Cinn., N. O. and T. P. R., 167 United States 479, the Court held that the Interstate Commerce Commission lacked the power to prescribe fair railroad rates, and could only veto unfair rates (8-1 Brewer with majority).

An important statement of the relation between the police power of a state and the power of Congress to regulate interstate commerce is found in Louisville and N. R. Company v. Kentucky, 161 United States 677. The Court ruled unanimously that states may prohibit the consolidation of parallel and competing lines of railroads since it does not interfere with the power of Congress over interstate commerce.

In Re Rapier, 143 United States 110, it was held in a unanimous decision that Congress can judge whether the matter

contained in a newspaper passing through the mails is moral or immoral, legal or illegal. Specifically it gave Congress the right to exclude lotteries from the mails.

The year 1895 was notable for the decisions in three famous cases, all of which had a great bearing on United States history. In United States v. E. C. Knight Company, 156 United States 1, the Sugar Trust case, the Court decided by a vote of eight to one, Brewer with the majority, that the corporations involved were not engaged in interstate commerce. This was the first time that the Court had passed on the Sherman Anti-Trust Act in its application to commercial corporations. Fred Rodell in Nine Men criticizes this decision, ". . . The high riding Justices, instead of calling the new Sherman Anti-Trust Act invalid under the Constitution, so emasculated it, in the course of interpreting its meaning that it has never since recovered its virility."<sup>11</sup> The Fuller Court redeemed itself on anti-trust cases as later decisions showed.<sup>12</sup>

The second important case of 1895 was Pollock v. Farmers' Loan and Trust Company, 158 United States 601, which declared Income Tax unconstitutional by a vote of five to four, Brewer with the majority. The Court held that a tax on income from property of any kind was a direct tax and must be collected only by apportionment among the states according to

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<sup>11</sup>Fred Rodell, Nine Men (New York: Random House, 1955), p. 144.

<sup>12</sup>See cases discussed on pp. 47 ff.

population. This decision brought so much protest that it resulted eventually in the adoption of the Sixteenth Amendment which authorized the collection of income taxes without apportionment.

In the other important case of 1895, In re Debs, 158 United States 564, the Court unanimously upheld the right of the government to use injunctions to stop a strike that was detrimental to the public interest. All three of these decisions were criticized as favoring Big Business and the propertied class. These decisions made the Court so unpopular that it led to condemnation of the Court by the Democratic Party in its platform of 1896.

We denounce arbitrary interference by Federal authorities in local affairs as a violation of the Constitution of the United States and as a crime against free institutions, and we especially object to government by injunction as a new and highly dangerous form of oppression by which Federal Judges, in contempt of the law of the states and rights of citizens, become at once legislators, judges, and executioners. . . .<sup>w13</sup>

According to Charles Warren,<sup>14</sup> the Court announced the broadest definition of the right of Congress to legislate for the general welfare when it sustained in a unanimous decision the taking by eminent domain of the Gettysburg battlefield for a National cemetery, in United States v. Gettysburg Electric Railway Company, 160 United States 668.

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<sup>13</sup>American Law Review, XXX (1896), p. 579.

<sup>14</sup>Charles Warren, The Supreme Court in United States History (Boston: Little, Brown, and Company, 1923), II, p. 428.

In 1896, in Plessy v. Ferguson, 163 United States 537, the Supreme Court over the sole dissent of Justice Harlan adopted the theory that racial segregation was not a denial of the Constitutional demand of equal protection as long as the facilities afforded both races were the same.<sup>15</sup> Justice Brown in his opinion stated that separation of the two races is not unreasonable or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate but equal schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned.

The Fuller Court refused to define what the rights of the Negroes were. The right of suffrage was neither granted nor protected. In Williams v. Mississippi, 170 United States 213, the Court unanimously sustained a Mississippi voting qualification against a charge that it discriminated against Negroes. Under this law Mississippi citizens, in order to qualify as voters, were required to read a portion of the State Constitution and understand what they read.

The Fuller Court in its latter years pleased some of its critics by putting strength into the Sherman Anti-Trust Act. In 1897, the Court for the first time announced, in United States v. Trans-Missouri Freight Association, 166

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<sup>15</sup>Brewer did not hear the arguments or participate in the decision of this case. As noted in the similar case of Board of Education v. Tinnon, p. 16, Brewer's thinking was in agreement with the decision of the Court.

United States 290, that railroad pools were illegal under the Sherman Act (5-4 Brewer with majority). In 1904, the decision of the Northern Securities Company v. United States, 193

United States 197, was that the Sherman Act was applicable to a holding company (5-4 Brewer with majority). In 1908 the Court held unanimously in Loewe v. Lawlor, 208 United States 274, that the use of primary and secondary boycotts by labor is an attempt to restrain interstate trade, hence it is a violation of the Sherman Anti-Trust Act and could be enjoined.

The case Addyston Pipe and Steel Company v. United States, 175 United States 211, was also instrumental in strengthening the Sherman Act. Six companies engaged in the manufacture and sale of iron pipe, operated under an agreement whereby each company was given the exclusive right to sell pipe in an area allotted to it. The Supreme Court ruled unanimously that competition between the companies in an area comprising thirty-six states and territories was eliminated, and that it was in restraint of trade and commerce between the states.

In Swift and Company v. United States, 196 United States 375, the Court's unanimous opinion held that the sending of cattle from other states to Chicago for sale in its stockyards was interstate commerce. Consequently, a combination among the leading dealers in meat in the United States, agreeing not to bid against each other in order to regulate prices and to get less than lawful rates from railroads to

the exclusion of competitors, was a violation of the Sherman Anti-Trust Act.

In Smyth v. Ames, 169 United States 466, the Court upheld a former Court ruling (Munn v. Illinois, 94 United States 113) by a unanimous decision. The ruling was that the Federal Government had the right to fix rates to be charged in business affected with a public interest. This particular case involved a railroad company.

In the case of United States v. Wong Kim Ark, 169 United States 649, the defendant had been denied admission to the United States under the Chinese Exclusion Acts of 1882-1888. Wong Kim Ark argued that this did not apply to him because he was born in San Francisco and was therefore a United States citizen, despite the fact that his parents were aliens and incapable of being naturalized. Justice Gray speaking for the Court affirmed the ancient and fundamental rule of citizenship by birth within a nation even though the children are born of aliens. The vote was seven to two, Brewer with the majority.

In 1899, there began a long series of cases growing out of the Spanish-American War. The problems were to determine the status and the constitutional rights of Cuba, Puerto Rico, and the Philippines. There were two opinions on the Court: (1) These territories were a part of the United States, and could be dealt with only in the manner provided by the Constitution. This belief that the Constitution

follows the flag was generally held by the Democratic Party at that time. (2) The United States has the power to acquire and hold territory without incorporating it into the United States, and Congress can determine when the acquired territory should enter into and become a part of the United States. This was the general Republican view. In these cases, known as the insular cases, De Dima v. Bidwell, 182 United States 1, Downes v. Bidwell, 182 United States 244, Dooley v. United States, 182 United States 222, et. al., first one view was held by the Court and then the other.<sup>15</sup> Finally the Republican view became the final word of the Fuller Court.

In the case of McCray v. United States, 195 United States 27, the Court upheld by a vote of six to three, Brewer with the majority, an act of Congress placing upon artificially colored oleomargarine an excise tax so heavy as to be prohibitive.

In 1905, state sovereignty was greatly impaired by the decision in South Carolina v. United States, 199 United States 437. Justice Brewer stated in the Court's opinion that state agents selling liquor must pay a Federal license tax. The vote in this case was six to three.

In Lochner v. New York, 198 United States 45, the Court held that the New York bakers' ten-hour law was unconstitutional

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<sup>15</sup>The votes on these cases were as follows: De Dima v. Bidwell (6-3 Brewer with majority); Downes v. Bidwell (6-3 Brewer with majority); and Dooley v. United States (5-4 Brewer with majority).

(6-3 Brewer with majority). The Supreme Court stated that the right of a person to make contracts in relation to his business was part of the liberty of the individual protected by the Fourteenth Amendment. The Court in later decisions finally gave way in matters of regulation of hours of labor.

In 1907 the Court for the first time made a decision with respect to claims of rival states for use of interstate waters. Brewer's opinion for the unanimous Court in the historic case Kansas v. Colorado, 185 United States 125, restated the basic relations between the two forms of sovereignty in our federal system.

In Adair v. United States, 208 United States 161, the Court decided by a vote of seven to one, Brewer with the majority, that regulation of employment with reference to union conditions had no reasonable relation to interstate commerce. This case involved railroad discrimination against union labor and the Court's decision allowed railroads to blacklist union laborers. This decision was widely criticized.

An act of Congress made all interstate carriers liable to their employees for injuries resulting from negligence of the carriers' agents and officers, or from inadequate equipment. In Howard v. Illinois Central Railroad, 207 United States 463, the Court held this act unconstitutional (5-4 Brewer with majority) because, although within the power of Congress in respect to employees of interstate carriers actually engaged in interstate commerce, it by its terms also

applied to employees not so engaged, and as to them was a police regulation not warranted by the Constitution.

In 1908, in the case of Ex parte Young, 209 United States 123, the Court decided by a vote of eight to one, Brewer with the majority, that the Attorney General of Minnesota could be enjoined from bringing any proceedings to enforce against the Northern Pacific Railroad in the state courts the State Railroad Rate Law, and could be fined for contempt if he disobeyed the injunction. This decision again brought the wrath of critics upon the Supreme Court because it appeared the Court was favoring the railroads.

### III. EVALUATION OF THE COURT

In the book History of the Supreme Court of the United States by Gustavus Myers the author consistently denounces the Fuller Court. For more than one hundred pages Myers systematically condemns the Court, decision by decision. Myers' views are probably the most critical written about the Court, and it should be noted that he was somewhat of a radical. At the time he wrote this book, he was a member of the Socialist Party and had formerly been a member of the Populist Party. Myers also wrote History of the Great American Fortunes, which he was unable to have published anywhere but by a Socialist publishing house.

Briefly, his criticisms of the Fuller Court are:

1. The Court consistently favored railroads and other large corporations.

2. The Court was pro-Trust and could be depended upon to validate any Trust in maintaining its monopoly.
3. The Court fostered the growth of capitalism by its decisions, and undermined the working class.
4. The decisions rendered were inconsistent, thus making the Court an arbitrary, contradictory body.
5. He implies that various Justices (particularly Fuller, Field, and Brewer) were not entirely unobligated in their decisions because of their appointments, previous employment, property holdings, etc.
6. The Court was primarily composed of former corporation lawyers who had gained recognition by defending these companies. Now as Justices they generally continued to hand down decisions in line with what they, as attorneys, had argued.
7. The Court blocked much needed social legislation.<sup>16</sup>

Myers made an evaluation of Justice Field which seems to exemplify his opinion of many of the other Justices on the Fuller Court:

Here again was another example of a judge who by his decisions had given vast properties and privileges to individuals and corporations but who was incorruptible as far as bribes or jobbing were concerned. Probably no judge was ever a more open, undisguised tool of great capitalistic interests than Field; no judge served their purposes more unblushingly and with less disingenuousness. But it is evident that he personally profited nothing; his corruption was that of a purely mental subservience induced by his class views, attachments and obligations.<sup>17</sup>

Against the impressive list of criticisms Myers has one compliment for the Court:

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<sup>16</sup>Gustavus Myers, History of the Supreme Court of the United States (Chicago: Charles H. Kerr and Company, 1918), pp. 578-695.

<sup>17</sup>Ibid., p. 640.

They [the Court] declined to interfere with the orderly transition of society from an older, outworn, crumbling stage to a newer, more modern era. At a time when legislatures and Congress were fatuously bent upon seeking to revivify historic anachronisms, the Supreme Court of the United States was the one body that thrust aside those reactionary laws and facilitated industrial progress.<sup>18</sup>

President Taft in 1910 was also critical of several of the Justices. He described Fuller as almost senile, Harlan as unproductive, Brewer as too deaf to hear the arguments and inaccurate in his opinions, and said several Justices sleep through almost all of the arguments.<sup>19</sup>

President Theodore Roosevelt criticized the Court in a more constructive manner. He felt that if the nation was to have a more healthy growth, the Constitution must be interpreted more liberally. He said that because judges are long term appointees rather than elected officials, they are prone to slower, more conservative action, not being as close to public demands.<sup>20</sup> This slow judicial process, while leaving the courts open to criticism, is precisely what our Founding Fathers intended.

While it must be said that the Fuller Court was criticized by many, there are several points which should be made in the Court's defense.

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<sup>18</sup>Ibid., pp. 661-2.

<sup>19</sup>John P. Frank, Marble Palace (New York: Alfred A. Knopf, 1958), p. 255.

<sup>20</sup>Henry F. Pringle, Theodore Roosevelt (New York: Blue Ribbon Books, Incorporated, 1931), p. 477.

1. It facilitated industrial progress.
2. It was the first Court to enforce the Sherman Anti-Trust Act.
3. It facilitated National growth through its interpretation of the Commerce Clause.
4. It enumerated the conditions of citizenship.
5. It held to a belief in strict construction of the Constitution.
6. The Court was independent of politics. There was only one case involving a constitutional question on which all the Republican judges had lined up on one side and all the Democratic judges on the other.
7. Labor attacked the Court because of its decisions in Loewe v. Lawlor, and Lochner v. New York. They felt the Court favored the capitalist class. However, these cases were decided by a Court composed of practically the same judges who had decided the Northern Securities Case and the United States v. Trans-Missouri Freight Association case where a capitalist holding company and a capitalist railroad pool were held illegal under the Sherman Act.
8. The Fuller Court protected the individual's rights despite acts of Congress.
  - a. Congress tried to authorize criminal prosecution of a man after compelling him to testify before a grand jury--prevented by the Court in Counselman v. Hitchcock, 142 United States 547.
  - b. Congress attempted to take private property for public use without full compensation--prevented by the Court in Monongahela Navigation Company v. United States, 148 United States 312.
  - c. Congress attempted to authorize imprisonment of persons at hard labor without an indictment by a grand jury--prevented by the Court in Wong Wing v. United States, 163 United States 228.
  - d. Congress attempted to violate the provision of the Constitution requiring a defendant in criminal prosecution to be confronted with the witnesses against him--prevented by the Court in Kirby v. United States, 174 United States 47.

- e. Congress attempted to allow an appeal by the Government in a criminal trial after the accused has been found guilty by a jury--prevented by the Court in United States v. Evans, 213 United States 297.<sup>21</sup>

By way of summary, we might characterize the Fuller

Court as follows:

1. The Court held to established doctrines.
2. The majority of the Court believed in strict construction, that inherent powers are inconsistent with a Constitution of enumerated and implied powers.
3. The Supreme Court became censors of the state legislatures especially over state regulatory functions such as rate fixing.
4. The Court expanded Federal power, even though most of the Justices agreed with Brewer that "the paternal theory of government is to me odious."<sup>22</sup>
5. The Court was conservative. It was very slow to warm up to new social trends. However, in the last years of this period, especially from 1900, touches of liberalism were becoming more evident.
6. There was an expansion of federal power into areas heretofore well within the reserved powers of the states such as federal regulation of crime, immorality, and business.
7. The members of the Court believed essentially in economic laissez-faire.

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<sup>21</sup>Charles Warren, Congress, The Constitution and the Supreme Court (Boston: Little, Brown, and Company, 1925), pp. 150-1.

<sup>22</sup>United States Reports, Vol. CXLIII, p. 551.

## CHAPTER V

### BREWER AND THE COURT

#### I. BREWER'S COURT OPINIONS

Judge Brewer was appointed to the Supreme Court to succeed Justice Stanley Matthews, deceased, in December, 1899, and was formally commissioned December 18, 1899.

There is a slight discrepancy as to the circumstances of Brewer's appointment to the United States Supreme Court. Most sources agree with the following account. Brewer was appointed by President Harrison, largely through the influence of Kansas Senator Preston B. Plumb. William Allen White in his autobiography tells of a conversation he had with former President Harrison concerning the Brewer appointment. Plumb submitted Brewer's name to the President, and spoke to Harrison several times about it. Harrison was carefully investigating the qualifications of each candidate. A situation arose in the Senate where Harrison needed Plumb's support. Having heard rumors of some other candidate, Plumb went to the President and demanded Brewer's appointment instead. He threatened to withdraw his support in the Senate unless his demand was met. Actually, President Harrison had already decided upon Brewer and had his commission made up before Plumb's visit. It is to Harrison's credit that he calmly let Plumb rage at him and was man enough to resist

the temptation to tear up Brewer's appointment because of Plumb's insolent and arrogant attitude.<sup>1</sup>

"Mr. Justice Brewer's place is among the two or three ablest members of the Supreme Court, according to the estimates of his colleagues and of the leading members of the bar, many of whom regard him as the greatest lawyer on the Bench."<sup>2</sup>

Another writer says of Brewer, "Far more influential on the Fuller Court than its Chief was David Brewer of Kansas . . . ."<sup>3</sup>

Justice Brewer was especially well versed in corporation law, international law, relations between the United States and the Indian tribes, and laws relating to public lands.

In an effort to show Brewer's role and influence on the Court a number of representative cases have been chosen in which Brewer wrote either the majority or dissenting opinion. Through these illustrations an attempt is made to provide insight into Justice Brewer's reasoning and philosophy.

One of Justice Brewer's most notable decisions was in Kansas v. Colorado, 206 United States 46. The Court had to decide the question of how far a state by instituting

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<sup>1</sup>The Autobiography of William Allen White (New York: The Macmillan Company, 1946), pp. 358-9.

<sup>2</sup>Portrait and Biographical Record of Leavenworth, Douglas, and Franklin Counties. . . Kansas (Chicago: Chapman Publishing Company, 1899), p. 591.

<sup>3</sup>Rodell, op. cit., p. 169.

extensive irrigation works within its boundary could deprive another state of the water of a non-navigable river (Arkansas River) flowing from one state into the other, thereby reducing the arable land of that state to a desert condition. Brewer in his opinion for the Court sustained the right to prevent a state from diverting the water of an interstate stream. Kansas, however, in the judgment of the Court had not demonstrated that it had been sufficiently deprived of the waters of the river to justify the interposition of the Court, but the time might come when it would have to intervene to protect the interests of Kansas. In this opinion, Justice Brewer also defined the freedom of the States from the control of the Federal Government, and its sovereignty over its own affairs. In the opinion of North American Review Brewer's decision in Kansas v. Colorado was worthy of Chief-Justice John Marshall.<sup>4</sup>

In Northern Securities Company v. United States, 193 United States 197, two competing railway companies agreed to create a holding company for the expressed purpose of doing away with competition. The Court held that this was a combination in the restraint of interstate commerce and was illegal under the Sherman Anti-Trust Act of 1890. Justice Brewer concurred with Justice Harlan's opinion that the merger must be dissolved, but he disagreed with Justice Harlan on the

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<sup>4</sup>"Great Minds of Great Men," North American Review, CLXXXVII (January, 1908), p. 6.

scope of the Sherman Act. He contended that Congress did not intend to reach all contracts in partial restraint of trade. He felt that the purpose of the anti-trust law was to place statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Brewer felt that to restrain all combinations would unsettle business enterprises, stifle business, and invite harmful court actions.

In Keller v. United States, 213 United States 213, the Court had to rule on the constitutionality of the White Slave Law which made it a felony for any person to keep an alien woman for an immoral purpose within three years after she had entered the United States. It was agreed by the Court that the Federal Government has no jurisdiction in matters like this and it should be left to the jurisdiction of the states under their police powers. Brewer said, "But can it be within the power of Congress to control all the dealings of her citizens with resident aliens? If that be possible, the door is open to the assumption by the National Government of an almost unlimited body of legislation."<sup>5</sup>

The case of In re Debs, 158 United States 564, aroused the anger of labor against the Supreme Court. The Railroad Brotherhoods unionized only the four operating crafts. They

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<sup>5</sup>United States Reports, Vol. CCXIII, p. 148.

made no effort to unionize the other railroad workers. In 1891 Eugene V. Debs left his post as secretary of the Brotherhood of Locomotive Firemen and helped unionize the American Railway Union, which included all branches of railroading other than the Brotherhoods. The American Railway Union, against Debs' counsel, participated in the Pullman Strike of 1894. The railwaymen, specifically, refused to handle Pullman cars, hence train service was halted. The federal courts issued an injunction against the strikers in order to insure delivery of the mails and not to obstruct interstate commerce. Debs violated the writ of injunction and was declared guilty of contempt of court and sentenced to jail. Brewer in his Supreme Court opinion upheld the right of the lower court to act as it did. "As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the National Government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the National Government may prevent any unlawful and forcible interference therewith . . ."6

The interesting results of the Debs decision were:

(1) It gave the government a real weapon in halting strikes through the use of the injunction; (2) Organized labor turned its political wrath against judges in general and the Supreme

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<sup>6</sup>United States Reports, Vol. CLVIII, p. 581.

Court in particular; and (3) Eugene V. Debs became a militant Socialist.

Justice Brewer wrote a dissenting opinion in Magoun v. Illinois Trust and Savings Bank, 170 United States 283, which concerned an Illinois inheritance tax law.

I am unable to concur in the foregoing opinion, so far as it sustains the constitutionality of that part of the law which grades the rate of the tax upon legacies to strangers by the amount of such legacies. If this were a question of political economy I would not dissent, but it is one of constitutional limitations. Equality in right, in protection and in burden is the thought which has run through the life of this Nation and its constitutional enactments from the Declaration of Independence to the present hour. Of course, absolute equality is not attainable, and the fact that a law, whether tax law or other, works inequality in its actual operation does not prove its unconstitutionality . . . . But when a tax law directly, necessarily and intentionally creates an inequality of burden, it then becomes imperative to inquire whether this inequality thus intentionally created can find any constitutional justification . . . . I think the Constitution of the United States forbids such inequality.<sup>7</sup>

Brewer's strict regard for what he considered reasonable freedom of contract led him to agree with the Court in invalidating the ten-hour law for bakers (Lochner v. New York, 198 United States 45), to dissent in cases sustaining the eight-hour law for miners (Holden v. Hardy, 169 United States 366) and an eight-hour law on public work (Atkin v. Kansas, 191 United States 207). Brewer, however, wrote the Court's opinion in Muller v. Oregon, 208 United States 412, because he felt it was within the state's police powers to

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<sup>7</sup>United States Reports, Vol. CLXX, pp. 301-3.

regulate hours concerning women in industry. As seen by the other related cases he did not think it was within the state's police powers when it applied to men.

In Wilson v. Shaw, 204 United States 24, the plaintiff invoked the assistance of the courts to prevent the Government of the United States from constructing the Panama Canal because the United States did not have legal title to the land for the Canal. Brewer held that the United States had a valid lease for perpetual use of the canal strip.

An interesting case to come before the Court was Camou v. United States, 171 United States 277. Camou filed with the United States his petition to a tract of land in the Territory of Arizona. This land had been granted to him by the State of Senora, Mexico. Following this transaction, the land was sold to the United States by Santa Anna.<sup>8</sup> Brewer, in his opinion for the Court, held that the land grant entitled Camou legally to the tract of land.

Brewer wrote the Court opinion in Fairbank v. United States, 181 United States 283. Fairbank had been convicted by a lower court of issuing an export bill of lading upon wheat shipped from Minneapolis to Liverpool without affixing an internal revenue stamp as required by law. The Supreme Court ruled that this requirement was unconstitutional because

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<sup>8</sup>The area in question is known as the Gadsden Purchase.

was in effect a tax on exports and therefore repugnant to Article I, Section 9, of the Constitution.

In United States v. Des Moines Navigation and Railway Company, 142 United States 510, the company in question was granted land for the purpose of aiding in the improvement of the navigation of the Des Moines River. The United States argued that this company was interested in the land for speculative reasons, not for the purpose of improving navigation. Brewer ruled for the Court that the company was the bona fide owner of the land regardless of intent.

In South Carolina v. United States, 199 United States 37, the state of South Carolina established dispensaries for the sale of intoxicating beverages and prohibited sale by others than the dispensers. The United States demanded the license taxes prescribed by the internal revenue act for dealers in liquors. The Court gave judgment in favor of the United States, and Brewer in his opinion stated:

If all the states should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the states to practically destroy the efficiency of the national government.<sup>9</sup>

Brewer in this opinion also stated his philosophy on understanding the meaning of the Constitution.

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<sup>9</sup>Robert Adam Maurer, Cases on Constitutional Law (Rochester: The Lawyers Co-operative Publishing Company, 1941), p. 955.

Brewer vigorously dissented in the Chinese Exclusion Cases, Fong Yue Ting v. United States, 149 United States 698, and United States v. Ju Toy, 198 United States 253. He expressed the belief that aliens are entitled to protection under our Constitution and that in both cases these Chinese were deprived of liberty without due process of law.

In the Church of the Holy Trinity v. United States, 143 United States 437, Brewer, in his opinion for the Court, wrote that the act prohibiting the importation of foreigners and aliens to perform labor in the United States could not apply to ministers of the Gospel.

In Carnegie Steel v. Cambria Iron Company, 185 United States 409, the Court ruled on a suit deciding that Andrew Carnegie was entitled to a valuable patent for manufacturing steel. Brewer and three other Justices dissented saying that by thus being allowed to exact tribute from the steel and iron-making industry, Carnegie was in a position to hinder the operations of other steel makers from keeping pace with the natural evolution of modern industrial development.

It is impossible to attempt to estimate the weight of Justice Brewer's decisions and utterances. It can be said that he was unflinching in his devotion to law and justice and that he earnestly endeavored to fulfill the oath which he took on his accession to the Bench.

As evidenced by Brewer's Court opinions, he was a stern defender of personal liberty and property rights. In

his constitutional principles he was categorized as a moderate conservative. He was very much concerned with the drift toward federal centralization, yet in his opinions in Kansas v. Colorado, South Carolina v. United States, Wilson v. Shaw, and others, he actually condoned such centralization. He has been characterized as a strict constructionalist, yet some of his decisions upheld powers not expressed or implied in the Constitution. While a member of the United States Supreme Court, Brewer wrote the opinion of the Court in 526 cases. He dissented in 215 cases, 53 in which he wrote separate dissenting opinions.

Brewer's decisions show him to be a firm believer in the doctrine of economic laissez-faire.

In an obituary of Brewer, The Outlook said:

. . . in many cases, what is nominally a Constitutional decision is really an interpretation of social facts. In the interpretation of such facts Justice Brewer followed the standards of an individualistic age from which this magazine believes the country is emerging.<sup>10</sup>

It might be said of Brewer that his philosophy was like the majority of the other Supreme Court Justices of that period. Whether he influenced the Court in this regard or vice versa is a matter of conjecture. Possibly his philosophy of law is characteristic of learned jurists at the turn of the century.

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<sup>10</sup>"Obituary," The Outlook, XCIV (April 9, 1910), p. 786.

## II. BREWER'S PHILOSOPHY OF LAW, GOVERNMENT, AND POLITICS

In the case, Cotting v. Kansas City Stock Yards,

183 United States 84, Brewer stated his ideas on popular sovereignty:

It has been wisely and aptly said that this is a government of laws and not of men; that there is no arbitrary power located in any individual or body of individuals; but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them.<sup>11</sup>

In South Carolina v. United States, 199 United States

437, Brewer showed his reverence for the Constitution and its changeless principles.

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. . . . The powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded.<sup>12</sup>

In Budd v. New York, 143 United States 551, Brewer in

his dissenting opinion gave the often quoted statement of his conservative philosophy.

The paternal theory of government is to me odious. The utmost possible liberty to the individual, and the fullest possible protection to him and his property, is both the limitation and duty of government. If it may regulate the price of one service which is not a public service, or the compensation for the use of one kind of property which is

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<sup>11</sup>United States Reports, Vol. CLXXXIII, p. 84.

<sup>12</sup>United States Reports, Vol. CXCIX, pp. 448-9.

not devoted to a public use, why may it not with equal reason regulate the price of all services and the compensation to be paid for the use of all property?<sup>13</sup>

Justice Brewer believed in the federal system but condemned the growing habit of appealing to the National Government for relief against ills that should be borne, or when remedied should be corrected by the community immediately injured. He felt the Nation should be supreme in national affairs and in foreign relations, but should be powerless to control the purely local interests. He warned against further encroachments upon the powers and functions of the state by the Federal Government since this would render the individual citizen more and more helpless.

Brewer was genuinely troubled by this thought of increased centralization. He argued for less centralization and more states' rights, thereby giving individual Americans more liberty and freedom and more voice in the way they are to be governed. The following are Brewer's arguments against centralization as given in an address to the eighteenth annual meeting of the Virginia State Bar Association held at Hot Springs, Virginia, August, 1906:

1. "Did the candid, intelligent men who drafted this Constitution, and the people who adopted it, having just finished a seven-years war to free themselves from colonial subjection to Great Britain, intend to

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<sup>13</sup>United States Reports, Vol. CXLIII, p. 551.

vest in the government they were creating the power to hold other territory in like colonial subjection?"<sup>14</sup>

2. With Congress considering more and varied types of legislation it is absolutely impossible for the representatives of the people to fairly consider even a fraction of it. "It has to be distributed among committees, and the reports of committees become the basis of legislative action. So that it is essentially true that the Congressional legislation today is not legislation by the representatives of the people but by committees of such representatives."<sup>15</sup>
3. If this centralization trend continues, ". . . it will not be long before it will become impossible to say that this is a government of enumerated powers, but on the other hand, it will be a government with all the powers vested in the legislative and executive of the nation; and the Tenth Amendment, which reserves to the people what they have not in terms granted, will become a voiceless and unmeaning part of the Constitution."<sup>16</sup>
4. "Is there not a danger in this centralization, of building up the party machine and the party boss, and giving them a power such as has never been dreamed of in this country."<sup>17</sup>
5. In a highly centralized nation the individuals will become inattentive and careless when they feel that responsibility for the affairs of the community is not vested in the community but is located in Washington.
6. It is argued that centralization will make the nation much more powerful and thereby we can become the world's most powerful nation. "While I rejoice with all others in the magnificent position of this nation in the sight of the world, I rejoice far more in seeing the individual citizens of the separate communities so interested in

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<sup>14</sup>David J. Brewer, "Two Periods in the History of the Supreme Court," The Virginia Bar Association, (Richmond: Richmond Press, 1906), p. 15.

<sup>15</sup>Ibid., p. 17.

<sup>16</sup>Ibid., p. 18.

<sup>17</sup>Ibid., p. 20.

the public welfare that for their communities they are striving to maintain justice and righteousness."<sup>18</sup>

7. "The police power, never yet defined, is constantly broadening in its exercise, until it threatens to become an omniverous governmental mouth, swallowing individual rights and immunities."<sup>19</sup>

However, Brewer was not pessimistic about this tendency for increased centralization. He believed that in the future there would be a resurrection of a spirit of individuality and a sense of personal responsibility which would give this nation a great and glorious future.<sup>20</sup>

In an article by Brewer, entitled "The Supreme Court of the United States," he predicted that the future problems facing the Supreme Court and the United States would fall into five categories:

1. Labor-management disputes.
2. The tendency to increase and concentrate the power of the nation and to lessen the powers of the states.
3. Problems concerning our new possessions, Cuba, the Philippines, and Puerto Rico.
4. International relations, because our relations to all other nations have grown to be so close and surely will increase in intimacy.
5. The continuing problem of interpreting the Constitution to the present situations.<sup>21</sup>

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<sup>18</sup>Ibid., p. 21.

<sup>19</sup>Ibid., p. 23.

<sup>20</sup>Ibid., pp. 22-23.

<sup>21</sup>David J. Brewer, "The Supreme Court and the United States," Scribner's Magazine, XXXIII (March, 1903), pp. 273-84.

Concerning this last problem Brewer wrote:

In the judgment of not a few it [the Constitution] is without amendment adjustable to any conditions, social and political, that may arise. Indeed as one reads some of the propositions which are advanced, he is inclined to believe that the instrument possesses an elasticity which would make the manufacturers of india-rubber choke with envy. Fortunately and wisely, its grants, prohibitions, and guarantees were expressed tersely and yet in general terms, so that it has proved to be no cast-iron instrument applicable only to conditions then existing. But the question remains how far its general and comprehensive terms may be adjusted to the varying situations which the present and future days will present, and this matter of adjustability will bring before this Court some of the profoundest and most important questions ever presented to any tribunal.<sup>22</sup>

Brewer firmly believed that judges should be barred from political office following their tenure as judge. A judge who is concerned with his political future might be influenced by this in his decisions. Brewer thought there should be a constitutional amendment to the effect that Supreme Court Justices could not be elected to political office following their term as a judge.<sup>23</sup>

Justice Brewer was quite optimistic, however, about the moral calibre of judges. Many people feared that the corporations through their wealth might influence judges, but Brewer did not. He felt that, in general, judges are incorruptible.

We pride ourselves, and rightly, in this country upon the personal integrity of our judges. Singularly few

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<sup>22</sup>Ibid., p. 280.

<sup>23</sup>David J. Brewer, "Organized Wealth and the Judiciary," The Independent, LVII (August 11, 1904), p. 302.

are the instances in which the direct use of money is charged or even suspected, but it must be conceded that there are good citizens who are apprehensive that the same insidious influence which corporations sometimes exercise over legislators is also exerted over judges. We all know that electing one to judicial office does not change his character or increase his wisdom. . . . Somehow or other a community which may not think very highly of one as a practicing lawyer comes to look upon him with respect when elevated to the judicial office. It may not be wholly conscious of the change in sentiment; yet it exists. It is perhaps more a tribute to the office than to the man, though doubtless any high minded man (and no other is fit for a judicial office) when elected to one is impressed with a sense of his responsibility, becomes more careful of demands of justice.<sup>24</sup>

The following are some reasons why judges are not corruptible by wealth:

1. There is a general demand for judicial honesty.
2. Public sentiment exerts restraint.
3. Great publicity attends all official action.
4. Managers of corporations abhor a national disgrace.
5. Corporations hire great lawyers and a truly great lawyer is an honest man.<sup>25</sup>

In speaking of his profession, Brewer said, "Were I called upon to name the one element most important in the make-up of the ideal lawyer, I should unhesitatingly say, character."<sup>26</sup>

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<sup>24</sup>Ibid., p. 301.

<sup>25</sup>Ibid., pp. 301-4.

<sup>26</sup>David J. Brewer, "The Ideal Lawyer," The Atlantic Monthly, XCVIII (November, 1906), p. 591.

Justice Brewer called public attention to the danger of numerous court delays. He felt that the many appeals which courts permit on technicalities that do not affect the justice of the verdict are wrong. Brewer in an article entitled "The Right to Appeal" gave his arguments favoring the limiting of the right of appeal.

1. It would help to check lynching.
2. It is the right to two trials which is not a guarantee by the Constitution.
3. It is not a natural right but simply a statutory privilege that the state may give or take away.
4. If a second trial is needed, then so might a third, fourth, fifth, etc. What is the limit to be?
5. The lengthy delay is costly.
6. Justice delayed is often justice denied.

Brewer believed the appellate courts could review the judgments of trial courts, but he objected to the right of the party defeated in one court to compel such review in the other.<sup>27</sup>

Justice Brewer believed in the virtue and value of punishment.

It is wholesome for the individual and beneficial to society. The tintinnabulation of your mother's slipper on that part of the body in which the spinal column has, in the language of the railroad men, its "terminal facilities," may not have been music for the present, but was sweet song for the future. It was punishment for wrong done--inducement to coming right; and so I believe in the

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<sup>27</sup>David J. Brewer, "The Right of Appeal," The Independent, LV (October 29, 1903), pp. 2547-50.

value of a provision which tends to make the executive of any law directed against wrongdoing operative and forceful.<sup>28</sup>

How can honesty in the people and corruption in the government co-exist? Brewer raises this question in an article entitled "Preferential Voting." He says the answer lies in the fact that the people only reach the government through the machinery of party organization. The influence of the individual on government is lost. Brewer's solution to this problem is to bring the people as near to the government as possible, to break up the intermediate agencies, and to make the relation between people and government close and direct. He proposes to do this through Hare's system of preferential voting, the aim of which is to give to every voter a representation in the legislative body.<sup>29</sup>

In an address before the New York Bar Association, Brewer voices concern over two problems: (1) The improper use of labor organizations to destroy the freedom of the laborer, and control the uses of capital. He deplores the use of coercion by labor unions to force employer and employee; and (2) The governmental regulation of property subjected to public use. In regard to this he said:

This acts in two directions: One by extending the list of those things, charges for whose use the government may

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<sup>28</sup>David J. Brewer, "Libel," Bar Association of Kansas, (Topeka: George W. Crane and Company, 1886), p. 58.

<sup>29</sup>David J. Brewer, "Preferential Voting," Kansas Educational Journal, IX (August, 1872), pp. 105-7.

prescribe; until now we hear it affirmed that whenever property is devoted to a use in which the public has an interest, charges for that use may be fixed by law. And if there be any property in the use of which the public or some portion of the public of it has no interest, I hardly know what it is or where to find it. And second, in property, which in fact is subjected to the public use, that no compensation or income is received by those who have so invested their property. . . .<sup>30</sup>

An exception to this last concern was brought up by Brewer in the matter of public transportation. In the flood of litigation over railroad abuses, Brewer speculated that the transportation of individuals and merchandise would be better conducted on the same system as the post office instead of as a business.

He said that, as far as the question of power is concerned, transporting persons and property is as much a legitimate function of government as the carrying of letters and papers. This is evidenced by the fact that public property can lawfully be taken, against the will of the owner, for the use of the transportation industry.

Because the government assumed responsibility for the postal system, there was a uniform rate established, and equal facilities which multiplied and followed the people as the population was extended. The best interests of all the people were considered. The matter of transportation became a business, representing individuals and corporations who

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<sup>30</sup>David J. Brewer, "The Movement of Coercion," New York State Bar Association, (Chicago: Building Contractor's Council, 1893), p. 7.

invested large amounts of capital and were looking mainly for private gain.

The transition of the transportation system from a business to a governmental function would create many problems, but Brewer spoke of a growing conviction that the people would benefit.<sup>31</sup>

Brewer and his associates on the Court were not subservient to public opinion. Brewer expressed his idea on the relationship of judicial decisions and public opinion.

The purpose of the judicial office is, not to reflect the passing and changing thought of the populace, but to determine rights upon immutable principles of justice----principles which have passed into organic and permanent law.<sup>32</sup>

Although his opinions could not all be categorically grouped, in his beliefs Justice Brewer would be classified as a strict constructionist because he was so opposed to the idea of amending the Constitution by interpretation. His stand on Federal-State relations was that of a conservative, yet his belief of a governmental railroad replacing private railroads is definitely liberal. He was jealous of the encroachment of the Federal Courts upon the states' police powers. He was a staunch defender of the individual's rights, privileges, and liberties.

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<sup>31</sup>Article in the Topeka State Journal, September 6, 1897.

<sup>32</sup>David J. Brewer, "Organized Wealth and the Judiciary," The Independent, LVII (August 11, 1904), p. 302.

I glory in the fact that my father was an old-line abolitionist, and one thing which he instilled into my youthful soul was the conviction that liberty, personal and political, is the God-given right of every individual, and I expect to live and die in that faith.<sup>33</sup>

### III. EVALUATION OF BREWER

Among the authors who are critical of Brewer is William Allen White, who, in his Autobiography, gives circumstantial evidence that Brewer, while a trial judge in Kansas, was subject to influence through a relative. White gives an account of a letter received by an Emporia friend, a former associate of Senator Plumb. The letter, sent by Brewer, complained that the two receivers of the Katy Railroad, whom Brewer had appointed when he was a circuit judge, were not, since he had come to the Supreme Court, making their promised and agreed monthly payments to his sister.<sup>34</sup> This is the only account of any alleged corruption by Brewer. In his defense the writer quotes a statement by Brewer in his decision in Mercantile Trust Company of New York v. Missouri, Kansas and Texas Railway Company, 36 Federal 221, which concerned the method employed by Brewer to appoint receivers: "If parties agree upon a receiver, of course I shall appoint whoever you

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<sup>33</sup>David J. Brewer, "The Spanish War; A Prophecy or an Exception," Kansas Collected Speeches and Pamphlets (Topeka: Kansas Historical Society, XVI), pp. 16-17.

<sup>34</sup>The Autobiography of William Allen White (New York: The Macmillan Company, 1946), p. 439.

agree upon. If not, I will hear any suggestions from any of the parties in interest, and reasons for or against any person to be named by one side or the other."<sup>35</sup>

In November, 1908, President Theodore Roosevelt wrote a letter to William Allen White. "Of course there are few judges who are actually corrupt. . . . But there are many who are entirely unfit to occupy the position they do. Brewer being a striking example of his kind. There is altogether too much power in the Bench."<sup>36</sup> Roosevelt, no doubt, was angry with Brewer and the Court because they were slow and conservative, and opposed many of his social reforms. However, as was mentioned previously, Brewer wrote the Court's opinion in Wilson v. Shaw, 204 United States 24, which upheld the Federal Government's right to build the Panama Canal, Roosevelt's pet project.

White made a concluding statement about Brewer:

I knew the justice. I had met him when he was a circuit judge. In Kansas he was known as our scholar in politics. He had been graduated from Yale. He was a man of wide reading and considerable culture. He believed in the divine right of the plutocracy to rule. He distrusted the people, and his decisions limited their power whenever the question of their power came before the Court. . . .<sup>37</sup>

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<sup>35</sup>Federal Reports, Vol. XXXVI, p. 227.

<sup>36</sup>White, op. cit., p. 440.

<sup>37</sup>Ibid.

Gustavus Myers, in his History of the United States Supreme Court, seemed to agree with this last statement of William Allen White. Myers felt that Brewer, in his decisions, favored the large corporations and the wealthy. He charged that Brewer's philosophy in the many cases concerning land titles, regardless of the amount of fraud, was dependent purely on the matter of legal title, and that it was immaterial how the owner acquired his property.<sup>38</sup> Myers' contention was correct, but Brewer felt that according to the law, this was the only just decision. In Ames v. Union Pacific Railroad Company, 64 Federal 176, Brewer gave such a ruling.

He may have made his fortune by dealing in slaves, as a lobbyist, or in any other way obnoxious to public condemnation; but, if he has acquired the legal title to his property, he is protected in its possession, and cannot be disturbed until the receipt of the actual cash value. The same rule controls if railroad property is to be appropriated. No inquiry is open as to whether the owner has received gifts from state or individuals, or whether he has, as owner, managed the property well or ill, or so as to acquire a large fortune therefrom. It is enough that he owns the property---has the legal title; and, if so owning, he must be paid the actual cash value of the property.<sup>39</sup>

Myers gives many other examples of how the Court, and Brewer in particular, gave corporations and especially railroads many advantages.

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<sup>38</sup>Myers, op. cit., p. 603.

<sup>39</sup>Federal Reports, Vol. LXIV, p. 176.

The question one faces is whether Justice Brewer had a sincere interest in individual rights, regardless of circumstances; did he place his entire judgment on his interpretation of the Constitution, or was he, while a Supreme Court Justice and before, a tool of the railroads, the wealthy, and the affluent. It is the contention of the writer<sup>40</sup> that while Justice Brewer may have made decisions favoring the wealthy, these decisions were not decided as they were because Brewer was corrupt. They were based on his interpretation of the Constitution.<sup>41</sup> The writer concedes the possibility that Brewer was dishonest, but having read the pious statements written by Brewer about judges being incorruptible, the rights and obligations of citizenship, etc., the writer finds the probability remote. Justice Brewer spent more than forty years of his life as a judge, professing to be a practicing Christian and doing many good works.

It is a fact that Justice Brewer lived within his modest income as a judge without any outward show of affluence. He died a man of modest wealth. If corrupt, the writer doubts this would have been the case.

The many glowing tributes given Justice Brewer, following his death, about his dedication to liberty and justice,

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<sup>40</sup>In a subjective evaluation.

<sup>41</sup>It should be remembered that the majority of the Supreme Court Justices of this period interpreted the Constitution in the same manner as Justice Brewer.

to Christian principles and to humanity, support the writer's contention that Justice Brewer was not consciously a tool of the large, wealthy corporations.

Brewer, himself, recognized the fact that criticism of the Court and its Justices was wholesome and helpful.

It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death.<sup>42</sup>

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<sup>42</sup>William R. Barnes and A. W. Littlefield (ed.), The Supreme Court Issue and the Constitution (New York: Barnes and Noble, Incorporated, 1937), p. 27.

## CHAPTER VI

### PUBLIC LIFE IN WASHINGTON

#### I. BREWER'S INTEREST AND PARTICIPATION IN INTERNATIONAL LAW

Justice Brewer was a lifelong advocate of seeking peaceful solutions to problems between nations. One of the most interesting chapters in his life was his participation in the settling of the Venezuela-British Guinea boundary dispute.

For many years the unsettled area between Venezuela and British Guinea was claimed by both sides. The discovery of gold in this area of approximately 50,000 square miles heightened the dispute in the latter part of the nineteenth century. The area in question was of considerable value also because it guarded the mouth of the Orinoco River.

In 1895 President Cleveland's Secretary of State, Richard Olney, reminded Great Britain of the Monroe Doctrine, and said there was little logic in England having any colonies at all in Latin America. Great Britain rejected the idea that the Monroe Doctrine applied to its quarrel with Venezuela. President Cleveland called upon Congress to supply funds for a commission to determine the actual boundary line of British Guinea. He also declared that the United States was prepared to resist any attempt by Great Britain to occupy territory rightfully belonging to Venezuela. For a time a war spirit swept the country and in some quarters there was actually a

hope that England would challenge Cleveland's stand.<sup>1</sup>

Acting upon the Venezuela message of President Cleveland, Congress passed an act appointing a commission to investigate the boundary line in question. This was done in order that the United States might not demand for Venezuela any more than that country was entitled to.<sup>2</sup>

Justice Brewer was chosen president of the five man commission by President Cleveland, even though Brewer was a Republican. In a communication to both parties in the dispute Brewer said, "The purposes of the pending investigation are certainly hostile to none, nor can it be of advantage to any that the machinery devised by the government of the United States to secure the desired information should fail of its purpose."<sup>3</sup>

Before the investigation was completed, Great Britain decided to finally arbitrate the boundary question. It seems that Great Britain realized the United States was in earnest in its intention to resist all encroachments and to make a vigorous stand on behalf of Venezuela and the Monroe Doctrine. This, plus Great Britain's many other world involvements and

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<sup>1</sup>Foster Rhea Dulles, The United States Since 1865 (Ann Arbor: The University of Michigan Press, 1959), p. 162.

<sup>2</sup>Editorial in the American Journal of International Law, IV (1910), p. 912.

<sup>3</sup>John B. Moore, A Digest of International Law (Washington: Government Printing Office, 1906), VI, p. 583.

her desire to maintain peace with the United States, caused her to reach this decision. This agreement to settle the dispute by arbitration averted the danger of war.<sup>4</sup>

In February, 1897, a treaty of arbitration was entered into by Great Britain and Venezuela. An international tribunal was created consisting of five members: Justice Brewer and Chief Justice Fuller of the United States Supreme Court, Lord Chief Justice Russell of Killowen and Sir Richard Henn Collins chosen by the British High Court of Justice and the eminent Russian jurist Frederic de Martens was selected by the King of Norway and Sweden. The Russian was named chairman. The treaty provided for the submission of the dispute to the arbitral board, but exempted from arbitration those areas that had been held by either party over a fifty year period.

The Arbitration Tribunal handed down a unanimous award October 3, 1899. The award granted Great Britain almost ninety percent of the disputed territory, mostly in the interior. Venezuela received 5000 square miles, including the entire mouth of the Orinoco and a considerable portion of the Caribbean shoreline eastward. The decision, while not meeting the extreme demands of either side, appeared to be equally

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<sup>4</sup>Dulles, loc. cit.

satisfactory to each.<sup>5</sup> One important result of this whole controversy was the vast improvement in Anglo-American relations.

Justice Brewer said of the compromise decision:

Until the last moment I believed a decision would be quite impossible, and it was only by the greatest conciliation and mutual concession that a compromise was arrived at. If any of us had been asked to give an award, each would have given one differing in extent and character. The consequence of this was that we had to adjust our differing views, and finally draw a line running between what each thought was right.<sup>6</sup>

Justice Brewer believed firmly in the use of arbitration to settle international disputes. He felt that while there was no power to compel international arbitration like that which compels obedience to the decision of national courts, there is a power that is growing stronger and stronger---the power of public opinion. Within the nineteenth century over two hundred cases were decided by arbitration and no award was repudiated by any nation because of public opinion.<sup>7</sup>

Brewer's interest in the cause of peace is seen by his many articles and speeches on the subject. He attended and was one of the featured speakers at the Mohonk Conferences on international arbitration, disarmament and universal peace.

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<sup>5</sup>Moore, loc. cit.

<sup>6</sup>American Journal of International Law, XLIII (1949), p. 526.

<sup>7</sup>Edward Everett Hale and David J. Brewer, Mohonk Addresses (Boston: Ginn and Company, 1910), p. 104.

He addressed the New Jersey State Bar Association on "The Mission of the United States in the Cause of Peace." With Charles Henry Butler he wrote a treatise on international law in the Cyclopedia of Law and Procedure in 1906. Brewer presided over the Universal Congress of Lawyers and Jurists held at the Louisiana Purchase Exposition in St. Louis in 1904. He also was the vice-president and an ardent supporter of the American Society of International Law from its beginning.

In Brewer's address before the New Jersey State Bar Association, he gave an argument for disarmament.

There never yet was a nation which built up a maximum army and navy that did not get into a war, and the pretense current in certain circles that the best way to preserve peace is to build up an enormous navy shows an ignorance of the lessons of history and the conditions of genuine and enduring peace. . . . The only peace that can endure is that in which the equalities of the nations are recognized, and all disputes are settled by negotiations or submitted to an impartial tribunal for determination. Then all nations will be interested in maintaining peace, knowing that it is peace secured by choice and established in justice.<sup>8</sup>

Brewer felt strongly that the United States should take the lead in limiting armaments. He felt we were well qualified to lead in the cause of peace for the following reasons:

1. We are situated at a distance from the other powers.
2. Our resources in men and material are such as to almost guarantee against attacks.
3. We are in better financial condition than the other major nations.

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<sup>8</sup>David J. Brewer, "The Mission of the United States in the Cause of Peace," World Peace Foundation (Boston: World Peace Foundation, 1911), p. 3.

4. Throughout our history we have believed in justice and liberty for all.
5. We are a nation that is composed of members from all nationalities and races.
6. We are a Christian nation with a loyal devotion to Christ and his principles.<sup>9</sup>

Justice Brewer was totally opposed to colonial expansion by the United States. He was an early advocate of giving the Philippines their independence. He felt the colonial system was the opposite of the principles upon which America was founded.<sup>10</sup>

The Spanish-American War presented two real problems to the United States, according to Brewer. First, because we undertook to deliver the Cubans from Spanish oppression, were we then to assume the duty of forcibly emancipating all oppressed peoples, or was this an exception? Second, were we to extend our domination by force, purchase, or otherwise, over remote territory, or were we to stay within the continental boundaries of the United States, and be content to develop the United States?<sup>11</sup> These contemporary sounding problems were answered then, but not in a manner acceptable to Brewer.

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<sup>9</sup>Ibid., pp. 1-9, passim.

<sup>10</sup>David J. Brewer, "The Spanish War, A Prophecy or an Exception," Kansas Collected Speeches and Pamphlets (Topeka: Kansas Historical Society, XVI), p. 6.

<sup>11</sup>Ibid., pp. 4-5.

Brewer and Charles Henry Butler wrote a short (sixty-two pages) treatise on international law. It seems, in its limited space, to have been rather complete in its scope of this particular segment of international relations. What Brewer said of international law is true today.

International law has never been codified, either as it exists between states or as administered as a part of the municipal law by courts of the different countries. It corresponds more to the unwritten and customary law and the exact rule applicable to the case under consideration has to be determined by previous decisions, and what has been consented to and adopted by different nations; to ascertain this the court may refer not only to the statutes, treaties, and legislative acts and judicial decisions, but also to the customs and usages of civilized nations, to the work of jurists, and the opinions of commentators.<sup>12</sup>

## II. BREWER AS A PUBLIC SPEAKER

In his preface to The World's Best Orations Brewer said this of oratory:

Oratory is the masterful art. Poetry, painting, music, sculpture, architecture please, thrill, inspire; but oratory rules. The orator dominates those who hear him, convinces their reason, controls their judgment, compels their action. For the time being he is master. Through the clearness of his logic, the keenness of his wit, the power of his appeal, or that magnetic something which is felt and yet cannot be defined, or through all together, he sways his audience as the storm bends the branches of the forest. Hence it is that in all time this wonderful power has been something longed for and striven for.<sup>13</sup>

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<sup>12</sup>David J. Brewer and Charles Henry Butler, International Law (New York: The American Law Book Company, 1906), pp. 8-9.

<sup>13</sup>David J. Brewer (ed.), The World's Best Orations (Chicago: Ferd. P. Kaiser, 1899), I, p. ix.

The North American Review<sup>14</sup> and The Outlook<sup>15</sup> magazines praised Brewer as one of the most widely known and popular justices ever to serve on the United States Supreme Court. More than any other justice he has spoken before public audiences and expressed his opinions freely on popular questions. Primarily he spoke on the duties of his profession and the duties of citizenship. But on various occasions he spoke on the race problem, universal peace, preferential voting, national extravagance, anarchy, woman suffrage, restriction of immigration, Communism, and many other topics. It was said that while he spoke boldly on these subjects, he was discreet, for he avoided being partisan.<sup>16</sup>

He was an orator of distinction with a graceful yet forcible style which was very effective.<sup>17</sup> His speeches were filled with picturesque and descriptive language, and often had religious overtones, for he quoted frequently from The Bible. Chief Justice Fuller said of Brewer after his death, "He was a truly eloquent man. The fountain of tears and the fountain of laughter ran close together and carried the

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<sup>14</sup>George Harvey (ed.), "Great Minds of Great Men," The North American Review, CLXXXVII (January, 1908), p. 3.

<sup>15</sup>"Memorial," The Outlook, XCIV (April 9, 1910), p. 785.

<sup>16</sup>Ibid.

<sup>17</sup>"The Death of Justice Brewer," The Independent, LXVIII (April 7, 1910), p. 773.

hearer away upon the mingled current of their waters."<sup>18</sup> His passion for oratory is evidenced by the labor he put into editing the ten volumes of The World's Best Orations.

In May, 1900, William E. Dodge of New York made provisions for lectures before the students of Yale University to be known as the "Yale Lectures on the Responsibilities of Citizenship." Justice Brewer was selected to deliver the first series of those lectures. The book American Citizenship is a compilation of these lectures by Brewer.

These lectures on the general theme of citizenship led Brewer to discuss primarily the building of personal character. He felt that an obvious by-product of good character would be good citizenship.

I want with all the solemnity of a life that has been earnestly lived, with all that comes from years of experience in varied directions, to appeal to you, young gentlemen, lovers of your country, loyal to all its best interests, with unbounding faith in its future, willing to live and to serve, and to die if need be for its honor and glory, I want to press upon you this afternoon the thought that one grand way in which all can do abundantly for its glory and life is in building up within your selves that pure and lofty personal character which makes the individual loved, which gives him power, and causes his life to become a blessing to his community, his nation, and the world.<sup>19</sup>

Brewer believed in the initiative and referendum because this would bring the public closer to controlling public offices. Through the initiative and referendum a

<sup>18</sup>United States Reports, Vol. CCXVIII, p. xvi.

<sup>19</sup>David J. Brewer, American Citizenship (New York: Charles Scribner's Sons, 1902), p. 56.

truer government of the people is realized. This, of course, would require active citizens who vote intelligently. In speaking of voting Brewer said, "A man is about as guilty for not voting, as for voting on the Devil's side."<sup>20</sup>

In an address made in Chicago, March 30, 1904, Brewer spoke on curbing graft in municipal government. If all citizens would obey the law, and the local government concerned itself only with maintaining the peace and obedience of the law, then the disorderly elements would yield and peace and order would prevail.<sup>21</sup>

Justice Brewer spoke out against the use of polygamy as then practiced by the Mormons. "Today beyond the mountains there is growing and spreading a system which means lust for man, slavery for woman, and dishonor for the Republic."<sup>22</sup>

As early as 1883 Brewer voiced a concern about Communism. He was optimistic in the belief that Communism would never replace our free enterprise system.

Even now the night is wild with the fierce cry of the Communist, that property is crime and the accumulation of wealth robbery. We sneer at these cries as the mere shrieks of madmen, and indeed of themselves they are nothing and are to be heeded only as suggestive of what

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<sup>20</sup>David J. Brewer, "Should Teachers Engage in Politics; and Should They Teach It?" The Kansas Educational Journal, V (August, 1868), p. 84.

<sup>21</sup>Article in the Topeka Capital, March 30, 1904.

<sup>22</sup>Article in the Topeka Commonwealth, May 15, 1880.

lies beyond the back of them. . . . The wild dream of the Communist will of course never be realized. Property will always remain sacred, and each man will be permitted to enjoy without let or hindrance all that he has fairly earned.<sup>23</sup>

In this same speech to Washburn College, Brewer showed concern for the growing power of corporations. He felt there was an urgency to so organize the forces of society to somehow make these mighty organizations the helpful servants rather than the tyrannical masters of the future.<sup>24</sup>

Justice Brewer found time for many other outside activities. As we have seen he expressed himself often on all the important questions of the day. In Chapter II we noted his interest and participation in church activities. He was also active in charity work. He was president of the Associated Charities of Washington for five years. He was characterized by one of his co-workers in Associated Charities as ". . . un-failing in his devotion to the cause of the poor and helpless, which had its source in that deep and wide regard for the people which pervaded all that he said and did."<sup>25</sup>

<sup>23</sup>Article in Topeka Capital, June 13, 1883.

<sup>24</sup>Ibid.

<sup>25</sup>William H. Baldwin, "Justice Brewer and Organized Charity," The Survey, XXIV (April 16, 1910), p. 120.

## CHAPTER VII

### SUMMARY

David Josiah Brewer spent forty years in the highest courts of Kansas and the United States. This period in American history was turbulent, with national enlargement, advances in transportation and communication, the growth in wealth and power of the corporations, the new force of labor unions, and the clamor for social reforms.

Although Justice Brewer is generally overlooked by historians, his place in this period of our history is highly significant. His interpretation of the Constitution was in tune with the other learned jurists of his day, although somewhat behind public opinion and the voice of certain legislators and Presidents.

The writer of this paper has striven for objectivity in this study. All material that is available, whether highly critical or complimentary has been presented. The writer has become convinced through this study that Brewer was a sincere, dedicated man whose aim in life was the betterment of the country, the people, and the government. He unfailingly served his fellow men by interpreting the law and the Constitution not according to the whims of public opinion, but according to the changeless principles upon which he felt the law was based.

Justice Brewer was quite prophetic in some of his public pronouncements. He called attention to such problems as: Communism, colonialism, disarmament, labor-management relations, and the tendency of increased centralization of governmental power. All of these problems challenge contemporary America.

At Brewer's death many glowing tributes were made to him not only as a judge who had served his country well, but as a humanitarian, a Christian, and a force for international peace. Mr. Charles Curtis, Senior Senator from Kansas, in the memorial to Justice Brewer before the Supreme Court said of him:

His remarkable grasp of the underlying principles upon which our whole structure of government rests, his unswerving fidelity to the fixed rules of order and stability so essential and so often sorely tested, his strong, positive, upright, fearless character, his power of sustained intellectual effort, place him easily among the great judges of his day and time. No one ever doubted his purity of life, his integrity of purpose, and all who read and consider his legal opinions pay homage to his profound intellect.<sup>1</sup>

A poem entitled "What I Live For" by George Linnaeus Banks, which Brewer quoted many times seems to express his guiding principles:

I live for those who love me,  
 For those who know me true,  
 For the heaven that smiles above me  
 And awaits my spirit too.  
 For the cause that lacks assistance,  
 For the wrong that needs resistance,  
 For the future in the distance  
 And the good that I may do.

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<sup>1</sup>Charles Curtis, "Memorial," Proceedings of the Bar and Officers of the Supreme Court of the United States (Washington: United States Government Printing Office, 1910), p. 8.

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