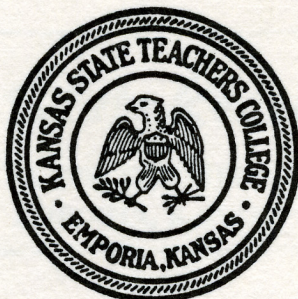


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A Kansan on the
United States Supreme Court

By

D. Stanley Eitzen

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The Emporia State Research Studies

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Editor's Note: In addition to Mr. Eitzen's study of Justice Brewer, the reader may be interested in the following studies concerning Kansas history and government which have been published in *The Emporia State Research Studies*. Those marked with an asterisk (*) are out of print. Requests for single copies of any of the other issues will be filled as long as the supply exists. W.H.S.

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

by

D. Stanley Eitzen*

INTRODUCTION

David J. Brewer is the only justice in the history of the United States Supreme Court to call Kansas his home. This is a study of Justice Brewer: his life and public career, the courts he served on, his beliefs, his influence and role in Kansas and American history. Here, too, it is hoped that the reader may learn something about Brewer as humanitarian, orator, educator, advocate of religious faith, and worker for international peace.

As far as the writer is able to determine, no comprehensive study of Justice Brewer exists. Available information concerning Brewer is found in encyclopedias, obituaries, memorials, articles appearing in the periodicals of his day, and in those books and articles about the Supreme Court of the United States and its members in the years 1890 to 1910.¹ Of course, multiple volumes record court decisions of the Kansas Supreme Court, United States Circuit Court, and the United States Supreme Court, with which Brewer was associated. Primarily, source materials for this study were found in the Kansas State Historical Society Library, Topeka; the Kansas Library, Law Division, Capitol Building, Topeka; the University of Kansas Law Library, Lawrence; the University of Kansas City Law Library, Kansas City, Missouri; and the William Allen White Library, Kansas State Teachers College, Emporia. Acknowledgment and thanks are extended to the helpful librarians in each of these places. To my wife, Florine, I owe a special debt of gratitude for her patience and understanding during the preparation of the thesis.

I. 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, the Reverend David Field of Stockbridge, Massachusetts. Three of her brothers were famous in American history. David Dudley Field, an eminent New York lawyer, was known as the father of the reformed code of judicial procedure and an expert on constitutional

* Mr. Eitzen teaches in the Department of Social Studies at Turner High School, Kansas City, Kansas. This study originated as a Master's thesis at Kansas State Teachers College of Emporia under the supervision of Dr. William H. Seiler.

1. The writer does not claim that this is a comprehensive study of David J. Brewer. It is an attempt to bring together the available published information about Brewer into a more complete account, to investigate in some detail many of the cases with which he was associated in his years on the Bench, and to make some evaluation of his work.

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 his nephew.¹

Paternally, Justice 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 American Colonies in 1690. His son, Lieutenant John 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 prominent lawyer of Lenox, Massachusetts. Eliah was Justice Brewer's grandfather. He was born in 1770, was graduated from Yale, and died in 1804. Eliah's second son, Justice Brewer's father, the Reverend Josiah Brewer, was born in 1796 in South Tyrningham, later Monterey, Massachusetts.²

Brewer's father was a graduate of Yale in 1821. In 1830 he was sent to Smyrna, Asia Minor, by the Congregational Church, becoming by this assignment the pioneer missionary to Asiatic Turkey. Rev. Brewer was accompanied by his wife and by his brother-in-law, Stephen J. Field, who was thirteen years old at that time. His main job was to establish schools for Greek women and girls, with the educational program modeled on American and European standards. During his stay, he also found time to establish a Greek newspaper. It was while the Brewers were in Asia Minor that David J. Brewer was born in Smyrna, June 20, 1837.

The family's strong associations with law and religion doubtlessly influenced Brewer's choice of vocation and his lifelong interest in the church, particularly in foreign missions. Shortly after his birth, his parents returned to the United States, locating in Connecticut. Later, Brewer received his higher education from Wesleyan University at Middletown, Connecticut, and Yale University, graduating from Yale in 1856 with highest honors. Following his graduation he began the study of law in the office of his uncle, David Dudley Field, and completed his law studies at the Albany Law School in 1858.

Relatives urged Brewer to remain in the law office of his uncle in New York after his admission to the bar, but he wished to prove his own

1. Biographical material concerning Brewer and his family may be found in Robert E. Cushman, "David Josiah Brewer," *Dictionary of American Biography* (20 vols., New York, 1928-1936), III, 22-24; John D. Bright (ed.), *Kansas, The First Century* (4 vols., New York, 1956), III, 99-101; Frank W. Blackmar (ed.), *Kansas* (3 vols., Chicago, 1912) III, 48-50; "David J. Brewer," in *Eminent and Representative Men of Virginia and the District of Columbia of the Nineteenth Century* (Madison, 1893), pp. 58-59; "David J. Brewer," in *Portrait and Biographical Record of Leavenworth, Douglas, and Franklin Counties . . . Kansas* (Chicago, 1899), p. 592; Hill P. Wilson (comp.), *Eminent Men of Kansas* (Topeka, 1901), pp. 595-597; also see Edwin S. Corwin, "Stephen Johnson Field," *DAB*, VI, 372-376; Robert E. Cushman, "John Marshall Harlan," *DAB*, VIII, 269-272; "Memorial," *The Outlook*, XCIV (April 9, 1910), 785-786; "The Death of Justice Brewer," *The Independent*, LXVIII (April 7, 1910), 773-774.

2. *Eminent and Representative Men of Virginia and the District of Columbia . . .*, pp. 58-59.

worth, not to be known merely as his uncle's nephew. He went west, stopping first at St. Louis. From there he went to Kansas City, felt the effects of gold fever, and went to Pike's Peak in Colorado. Failing to find gold, he returned to Kansas City where he was unable to obtain employment. He finally located at Leavenworth, Kansas, on September 13, 1859.

In Leavenworth he entered the law office of Johnstone, Stinson, and Havens, where he remained 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.³

In 1861, when Brewer 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 was 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 served 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.

Brewer married Louise R. Landon of Burlington, Vermont, in 1861. She is described as "a charming girl with a fine character."⁴ Judge Brewer credits his wife with changing him from a restless youth to a more mature gentleman, 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, and in 1865 became superintendent of the Leavenworth schools, which position he occupied until 1868. He was 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 had been chairman of the executive committee, of a legislative committee, and contributed

3. Wm. E. Connelly (ed.), *Collections of the Kansas State Historical Society* (Topeka, 1915), XIII, 119.

4. Blackmar (ed.), *Kansas*, III, 48.

actively to the establishment of the Kansas school system. Later, while Supreme Court Justice, he was for several years a professor of corporation law at Columbian University (now George Washington University).

He was a brilliant orator and gave many public addresses. Two are of especial interest to Kansas State Teachers College: the first commencement address in 1867 and the dedicatory address for the Administration Building at the Normal in 1880.

Brewer was president of the Associated Charities in Washington for five years. Always interested in Christian 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."⁵

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, and a famous story teller."⁶ Although Brewer had a strong sense of duty, it was coupled with a kindly humor which put all whom he met 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.⁷

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.⁸

Brewer died from apoplexy in 1910 at his home in Washington. He was buried in Mt. Hope Cemetery, 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.

5. Editorial in *The Independent*, April 7, 1910.

6. Cushman, *DAB*, III, 23.

7. William H. Baldwin, "Justice Brewer and Organized Charity," *The Survey*, XXIV (April 16, 1910), 119.

8. Connelly (ed.), *Collections*, XIII, 119.

II. JUDICIAL CAREER IN KANSAS

I. LAWYER AND JUDGE IN LEAVENWORTH

Brewer was elected judge of the probate and criminal courts of Leavenworth County when he was twenty-four years old. A number of the older lawyers experienced dismay to learn that such a responsible position should go to the youthful aspirant. They appealed to the state legislature to take the appointment away from him. Before the legislature had taken any action, however, 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.¹ Very little information can be found to describe Brewer's early career. His judicial advancement suggests 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 attorney of Leavenworth. In 1870, at the age of thirty-three, he was elected to the Supreme Court of Kansas.²

II. MEMBER OF THE 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. They also furnish considerable information about his personal and legal views.

Some of his most important work 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. Noel 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 limitations 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.

Another of Brewer's opinions recognized and sustained 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.

1. *Portrait and Biographical Record of Leavenworth . . .*, p. 592.

2. 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.

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 the other judges 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.³

This is one of the landmark cases in Kansas legal history. It set a precedent often cited in similar cases. According to 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.⁴

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

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 por-

3. *Kansas Reports* (Vols. VII-XXI, LXXXIII, Topeka, 1870-1884, 1910), XXVI, 657-658.

4. *Kansas Reports*, LXXXIII, x.

5. *Kansas Reports*, LXXXIII, xi.

tion 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.⁶

In *Board of Education v. Tinnon*, 26 Kansas 1 (1881), Leslie Tinnon, a Negro 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.⁷

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 included 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, 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

6. *Kansas Reports*, VII, 554.

7. *Kansas Reports*, XXVI, 23-24.

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 *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 before the Court was whether or not the State has the right to tax land granted to the railroad 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.⁸

8. *Kansas Reports*, VIII, 543-544.

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. 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.⁹

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 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

9. *Kansas Reports*, XVIII, 75.

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.¹⁰

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

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 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.

10. *Kansas Reports*, XXIX, 518-519.

11. *Kansas Reports*, XXI, 723.

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.¹²

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

III. JUDGE OF THE UNITED STATES CIRCUIT COURT

When the vacancy occurred in the federal Eighth Circuit Court in 1884, the common practice was followed of choosing a member from the political party in power. 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 that their choice would be acceptable to the people of the Eighth Judicial District.¹³ 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 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 worthy in every respect of the high and honorable position."¹⁴ 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

12. 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.

13. 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.

14. H. Miles Moore, *Early History of Leavenworth City and County* (Leavenworth, 1906), p. 313.

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.

In the case of *United States v. Edwards*, 33 Federal 104, the United States attempted to reclaim land from an individual who they charged had defrauded the government in the sale of former Indian land. Brewer held that Edwards had not defrauded the government, and 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.¹⁵ 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 valid according to the laws and customs of the Republic of Mexico. Poor wording in the grant intensified the problem, because it left an uncertain status for certain lands claimed to be outside the grant. Agitation over the grant came particularly from the people 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 the land by running an incorrect line.

United States Circuit Judge Brewer rendered 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 lower court.¹⁶

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.

15. 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. See references in f.n. 16.

16. Among the works concerning the Maxwell Land Grant are Jim Berry Pearson, *The Maxwell Land Grant* (Norman, 1961); William A. Keleher, *Maxwell Land Grant* (Santa Fe, 1942); Erna Fergusson, *New Mexico* (New York, 1955); and *History of Arizona and New Mexico, 1530-1888*, Volume XVII of *The Works of Hubert Howe Bancroft* (San Francisco, 1899).

This period in Kansas and American history was marked by unprecedented railroad growth. By the 1880's the railroads controlled more than 10,000,000 acres of land in Kansas alone. There were strong demands for some form of regulation to check the railroads' growing power. Complaints against the railroads included:

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 considered that the possible solution might be to have public transportation conducted by the government on the same system as the post office.¹⁷

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 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 employee 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.

17. *Topeka State Journal*, September 6, 1897.

Another case involving the issue of interstate commerce concerned a requirement by the city of Topeka 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.

One of the 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 was 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 adopted. 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.¹⁸

Brewer's six years of service as a Circuit Court Judge gained national attention. In 1889 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 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 biographical sketch, 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."¹⁹ In this same address Brewer commended the Normal School and its lofty purpose of training teachers.

In another speech he showed deep admiration for the intelligence and determined fortitude of the "Yankee School Marm."²⁰

18. Tom W. Campbell, *Four Score Forgotten Men* (Little Rock, 1950), p. 288.

19. *Catalogue of the Officers and Students of the Kansas State Normal School* (Emporia, 1880), p. 27.

20. Review of an address in the *Topeka Commonwealth*, May 15, 1880.

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.²¹

Brewer outlined the way he believed 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 under what circumstances.²²

In a related article Brewer discussed the question, "Should teachers engage in politics?" He said first, that, 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."²³

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;²⁴ (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.²⁵

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. 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

21. David J. Brewer, "Politics in the School Room," *Kansas Educational Journal*, IV (December-January, 1867-1868), 173.

22. *Ibid.*, IV, 174.

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

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

25. David J. Brewer, "Constitutional Convention," *The Western Homestead*, III (November, 1880), 70-71.

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.²⁶

III. THE UNITED STATES SUPREME COURT DURING BREWER'S TENURE, 1889-1910

I. PERSONNEL OF THE COURT

Justice David J. Brewer served on the United States Supreme Court with fifteen other justices, eleven Republican and four Democrats at the time of their appointments. These men had an average of nineteen years on the Bench. Most commentators on the Court's history consider all but Justices Holmes, Moody, and perhaps Bradley as conservatives because of their strict construction of the Constitution.

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. Prior to his appointment, Fuller had been one of the busiest and best-paid corporation lawyers in Chicago. He was a strong Democrat, which helps explain his appointment at that time, and a firm believer in states' rights. He fully symbolized the strict constructionist dominance of the Court during his time as Chief Justice. Although not prominent for the quality of his opinions, according to scholars, his colleagues held him in high esteem. "As presiding officer

26. Review of an address in the *Kansas City Star*, January 30, 1910.

he was notable for dignity, and equally for tact, invariable good temper, simplicity, modesty, courtesy, and consideration for counsel."¹

Justice Harlan, a conservative Republican, was a former slave holder from Kentucky, who had supported the Union in the Civil War. In his thirty-three years on the Court he showed "an almost religious reverence for the Constitution." He "was a stern defender of civil liberty and believed that the constitutional guarantees in its behalf should be strictly construed." Supporting a balance between strong nationalism and states' rights, he was a firm advocate of the states' police powers. Compromise was difficult for him, as evidenced by his vigorous dissents in 316 cases. Harlan and Brewer were great personal friends.²

Justice Field, Brewer's uncle, was the last of Lincoln's appointees to the Court, a fact which Field pronounced at frequent intervals. He was appointed with the help of Leland Stanford, one of the four magnates who controlled the Central and Southern Pacific railroads. Some critics doubt that Field was completely unprejudiced in the many railroad cases coming before the Court. A strict constructionist, he was a consistent spokesman for free enterprise.

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.³

Field served on the Court for thirty-four years, two months longer than Chief Justice John Marshall. The view has been expressed that Justice Field served on the Court too long. In 1895 he wrote only four brief opinions and in 1896 he wrote none. Justice Harlan was asked by the other justices to suggest to Field that he should resign. Field retired in 1897 at the age of eighty-one.⁴

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, one of the major issues before the Court during this period.⁵

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's "rather unusual practical experience in public life and his fundamental soundness as a lawyer promised to make Moody's service on the court one of much usefulness." His tenure on the court was limited to slightly less than four years, however, because of ill health which caused his resignation.⁶

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

1. Francis S. Philbrick, "Melville Weston Fuller, *DAB*, VII, 61.
2. Robert E. Cushman, "John Marshall Harlan," *DAB*, VIII, 269-272.
3. Jerre S. Williams, *The Supreme Court Speaks* (Austin, 1956), p. 106.
4. Edwin S. Corwin, "Stephen Johnson Field," *DAB*, VI, 372-376.
5. Francis S. Philbrick, "Joseph McKenna," *DAB*, XII, 87-88.
6. Charles P. Sisson, "William Henry Moody," *DAB*, XIII, 107-108.

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."⁷ Holmes was liberal in his views and interpreted the spirit of the Constitution rather than following strict 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.⁸

II. SIGNIFICANT DECISIONS OF THE COURT

Brewer served on the Court during a time of tremendous national growth, especially in transportation and business. Most of the cases to come before the 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 Brewer's service on the Court, with Fuller as Chief Justice, there was a significant development of national authority, but the centralization of power tended to concentrate in the Court as the arbiter and interpreter of the cases brought before it. For example, the Commerce Clause in particular was expanded through acts of Congress, but the Court assumed the major role because of its decisions and opinions concerning this legislation.

A summary of some of the important Supreme Court decisions during Brewer's tenure on the Court follows. These cases are included to give an idea of the Court's philosophy in a wide range of matters brought before it.

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. Justice Fuller, Field, and Brewer dissented. Brewer in his dissent held that this was giving the Federal Government an unlimited and arbitrary power which was inconsistent with the Constitution.

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* as the "most crushing blow against the rights of the states which has ever been dealt by that tribunal."⁹

The Court increased the power of the Federal Government over its territories in *Corporation of Latter Day Saints v. United States*, 136

7. William Henry Harbaugh, *Power and Responsibility: The Life and Times of Theodore Roosevelt* (New York, 1961), p. 162.

8. There is a vast volume of literature concerning Justice Holmes. Among basic works are Mark De Wolfe Howe, *Justice Oliver Wendell Holmes* (Cambridge, Mass., 1957); Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (Cambridge, Mass., 1938); Mark De Wolfe Howe (ed.), *Holmes-Laski Letters* (2 vols., Cambridge, Mass., 1953); Dorsey Richardson, *Constitutional Doctrines of Justice Oliver Wendell Holmes* (Baltimore, 1924). Catherine Drinker Bowen's *Yankee from Olympus, Justice Holmes and His Family* (Boston, 1944) has had wide popular appeal.

9. *American Law Review*, XXIV (1890), 474.

United States 1. The Court annulled the charter of the Mormon Church for some of its practices. The Court claimed jurisdiction, reasoning that 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 *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, *Reagen 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 mail.

The year 1895 was notable for decisions in three famous cases, all of which had important influences on United States history and contributed to the emphasis on judicial supremacy. 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 by saying that "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."¹⁰ The Fuller Court redeemed itself with its critics on anti-trust cases to some extent in subsequent decisions, as discussed later.

The second important case of 1895 was *Pollock v. Farmers' Loan and Trust Company*, 158 United States 601, which declared the 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

10. Fred Rodell, *Nine Men* (New York, 1955), p. 144.

direct tax and must be collected only by apportionment among the states according to population. This decision brought so much protest that it resulted eventually in the adoption of the Sixteenth Amendment.

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 deemed 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 it 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 executioners¹¹

According to Charles Warren,¹² 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.

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. Justice Brown in his opinion stated *inter alia* 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 had not been questioned.

Brewer did not hear the arguments nor participate in the decision in *Plessy v. Ferguson*. As noted earlier in this study, in a similar case in Kansas of *Board of Education v. Tinnon*, Brewer's thinking at that time was in agreement with the later decision of the Supreme Court.

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 some 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 United States 290, that railroad pools were

11. *American Law Review*, XXX (1896), 579.

12. Charles Warren, *The Supreme Court in United States History* (3 vols., Boston, 1923), III, 428.

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). This was the landmark Theodore Roosevelt anti-trust case.

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 one aspect of 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, although it is true that in the earlier case the regulation had been in the states. This particular case involved a railway company.

In 1908 the Court applied the Sherman Anti-Trust Act in reference to labor. It held unanimously in *Loewe v. Lawler*, 208 United States 274, that the use of primary and secondary boycotts by labor attempted to restrain interstate trade; hence, this was a violation of the Sherman act and could be enjoined.

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 because he was a citizen of the United States, despite the fact that his parents were aliens and incapable of naturalization. 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 constitutional rights concerning Puerto Rico and the Philippines, as well as other recently annexed overseas territories. 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.¹³ Finally, the Republican view became the final word of the Fuller Court, leading, of course, to the often-quoted remark of Finley Peter Dunne's Mr. Dooley about the Supreme Court following the election returns.

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 *Lochner v. New York*, 198 United States 45, the Court held that the New York bakers' ten-hour law was unconstitutional (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 pertaining 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 the State Railroad Rate Law in the state courts against the Northern Pacific Railroad, 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 that the Court was favoring the railroads.

13. The votes on these cases were as follows: *De Dima v. Bidwell*, 6-3; *Downes v. Bidwell*, 6-3; *Dooley v. United States*, 5-4. Brewer voted with the majority in each case.

III. EVALUATION OF THE COURT

Gustavus Myers consistently denounced the Fuller Court in his *History of the Supreme Court of the United States* published in 1918. For more than one hundred pages Myers systematically condemns the Court, decision by decision. His acrid critique reflects his reforming zeal, which also was expressed in his muckraking account of the *History of the Great American Fortunes*. A former Populist, he was a member of the Socialist Party when he wrote his book on the Court. Although infected with partisan zeal, his criticisms of the Fuller Court nevertheless express in extreme terms the basic objections of many Americans who had supported the reform movements of the Granger-Populist-Muckraker-Progressive era.

In summary these are Myers' criticisms of the Fuller Court:

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 implied 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.¹⁴

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 and 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.¹⁵

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

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

14. Gustavus Myers, *History of the Supreme Court of the United States* (Chicago, 1918), pp. 578-695.

15. *Ibid.*, p. 640.

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.¹⁶

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 that "Brewer and Harlan sleep almost through all the arguments."¹⁷

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.¹⁸ A staunchly-held interpretation describes the intention of the Founding Fathers as one which sought a slow judicial process, even though this might open the courts to criticism.

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.

1. It facilitated industrial progress.
2. It was the first Court to enforce the Sherman Anti-Trust Act.
3. It speeded National growth through its interpretation of the Commerce Clause.
3. 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 owners and managers. 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.

16. *Ibid.*, pp. 661-662.

17. John P. Frank, *Marble Palace* (New York, 1958), p. 255, who cites Henry F. Pringle, *Life and Times of William Howard Taft* (New York, 1939), I, 529-530.

18. Henry F. Pringle, *Theodore Roosevelt* (New York, 1931), p. 477.

- 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 297.¹⁹

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.
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."²⁰
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.

IV. ASSOCIATE JUSTICE DAVID J. BREWER OF THE UNITED STATES SUPREME 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 are slight discrepancies about the circumstances of Brewer's appointment to the Court, but most sources agree with the following account recorded by William Allen White in his autobiography. Influential Kansas Senator Preston B. Plumb had proposed Brewer's name to President Harrison for the appointment. Harrison "was going slowly, thoroughly investigating the qualifications of each candidate," and then reached his decision in favor of Brewer. He ordered Brewer's commission prepared for his signature and it lay on his desk when "Plumb burst into the President's office. He seemed to have heard some gossip about another candidate, and was raging like a bull." A situation had occurred in the Senate where Harrison needed Plumb's support. The

19. The specific items a. through e. of the eighth point in the list are in Charles Warren, *Congress, The Constitution and the Supreme Court* (Boston, 1925), pp. 150-151, where the names of the cases are supplied as a group in a footnote. The writer made the specific association of the pertinent case to the appropriate item.

20. *United States Reports*, CXLIII, 551.

Senator threatened to withdraw his favor unless Brewer was immediately appointed. 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 commission because of Plumb's insolent and arrogant attitude.¹

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. Rodell, certainly not partial to Brewer in his appraisal, notes that he was "far more influential on the Fuller Court than its Chief."² More enthusiastic in praise were the comments of a contemporary publication in 1899, "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."³

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 some insight into Justice Brewer's reasoning and philosophy.

One of Justice Brewer's most notable opinions was in *Kansas v. Colorado*, 206 United States 46. The Court had to decide the question of how far a state by instituting extensive irrigation works within its boundaries 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 that the time might come when it would have to intervene to protect the interests of Kansas.

Another important aspect of this case (*Kansas v. Colorado*) was introduced by President Theodore Roosevelt's Attorney General in the interests of the "New Nationalism" program of the rough-riding Republican president. "In this suit the United States government sought to intervene as an interested party on the ground that it had the right to control the waters in question for the purpose of reclamation of arid lands, inasmuch as the projects of reclamation involved were geographically beyond the jurisdiction of any one state."⁴

In that part of his opinion concerning the Federal Government's attempt to intervene, Justice Brewer upheld strongly his states' rights viewpoint. Speaking for the Court, he defined the freedom of the states from the control of the Federal Government, relying heavily on Article X of the Constitution, and emphasizing a state's sovereignty over

1. *The Autobiography of William Allen White* (New York, 1946), pp. 358-359. White reports in interesting detail his conversation with President Harrison about the Brewer appointment. Also cf. *Ibid.*, pp. 439-440.

2. Rodell, *Nine Men*, p. 169.

3. *Portrait and Biographical Record of Leavenworth . . .*, p. 591.

4. Robert E. Cushman and Robert F. Cushman, *Cases in Constitutional Law* (New York, 1958), p. 172, and cf. pp. 171-174.

its own affairs. The petition of the United States as intervenor was dismissed. The opinion "may be regarded as the epitaph to the doctrine of the New Nationalism."⁵ The *North American Review* said that Brewer's opinion in *Kansas v. Colorado* was worthy of Chief Justice John Marshall.⁶

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 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 said 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 had 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 almost unlimited body of legislation."⁷

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 made no effort to unionize the other railroad workers. In 1891 Eugene V. Debs left his post as secretary of the Brotherhood of Locomotive Fireman and helped organize 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 avert obstruction of 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,

5. *Ibid.*, p. 172.

6. "Great Minds of Great Men," *North American Review*, CLXXXVII (January, 1908), 6.

7. *United States Reports*, CCXIII, 148.

it follows that the National Government may prevent any unlawful and forcible interference therewith"⁸

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 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 rates 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.⁹

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 unanimous Court's opinion in *Muller v. Oregon*, 208 United States 412, because he felt it was within the state's police powers to 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 Sonora, Mexico. Following this transaction, the land was sold to the United States by Santa Anna.¹⁰ Brewer, in his opinion for the Court, held that the land grant entitled Camou legally to the tract of land.

8. *United States Reports*, CLVIII, 581.

9. *United States Reports*, CLXX, 301-303.

10. The area in question is known as the Gadsden Purchase.

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 it 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 437, 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.¹¹

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

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 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 in keeping pace with the natural evolution of modern industrial development.

As Associate Justice of the United States Supreme Court, Brewer wrote the opinion of the Court in 526 cases, 70 of which involved constitutional problems. He dissented in 215 cases, and in 53 of these he wrote separate opinions, including 18 related to constitutional problems.

11. Robert Adam Maurer, *Cases on Constitutional Law* (Rochester, 1941), p. 955.

He concurred in 38 cases, writing eight separate concurring opinions.¹²

It is difficult to make any categorical statement about Justice Brewer's opinions. It can be said that he was unfailing 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. There is considerable evidence to show his support for personal liberty in many situations and that he was a defender of property rights. His classification on constitutional principles has been described as moderate conservative. He was very much concerned about the drift toward federal centralization, yet in some cases he actually condoned such centralization. He is consistently placed in the camp of the strict constructionists, yet some of his opinions upheld powers not expressed or implied in the Constitution. Brewer's opinions 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.¹³

In appraising the total service of Brewer on the Court, it can be said that his views coincided with those of the majority of his colleagues. His philosophy of the law was characteristic of learned jurists at the turn of the century. Whether he influenced his fellow-justices, or they him, can be a matter of conjecture, but this writer agrees with those who think that he was one of the most influential members of the Fuller Court.

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.¹⁴

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.¹⁵

12. Cushman, *DAB*, III, 24.

13. "Obituary," *The Outlook*, XCIV (April 9, 1910), 786.

14. *United States Reports*, CLXXXIII, 84.

15. *United States Reports*, CXCIX, 448-449.

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 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?¹⁶

Justice Brewer believed in the federal system but condemned the growing habit of appealing to the Federal Government for relief against ills that should be borne or remedied 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 states 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 vest in the government they were creating the power to hold other territory in like colonial subjection?"¹⁷
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."¹⁸
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

16. *United States Reports*, CXLIII, 551.

17. David J. Brewer, "Two Periods in the History of the Supreme Court," *The Virginia Bar Association* (Richmond, 1906), p. 15.

18. *Ibid.*, p. 17.

- people what they have not in terms granted, will become a voiceless and unmeaning part of the Constitution."¹⁹
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."²⁰
 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 the public welfare that for their communities they are striving to maintain justice and righteousness."²¹
 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."²²

However, Brewer was not pessimistic about this tendency toward 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.²³

In an article entitled "The Supreme Court of the United States," Brewer 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, e.g., 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 problems of interpreting the Constitution to the present situations.²⁴

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 guar-

19. *Ibid.*, p. 18.

20. *Ibid.*, p. 20.

21. *Ibid.*, p. 21.

22. *Ibid.*, p. 23.

23. *Ibid.*, pp. 22-23.

24. David J. Brewer, "The Supreme Court and the United States," *Scribner's Magazine*, XXXIII (March, 1903), 273-284.

antees 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.²⁵

Brewer firmly believed that judges should be barred from political office following their tenure on the Bench. 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 a Supreme Court Justice could not be elected to political office following his term.²⁶

Justice Brewer was quite optimistic, however, about the moral caliber 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 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.²⁷

The following are some reasons why judges are not corruptible by wealth, according to Brewer:

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.²⁸

In speaking of his profession, Brewer said, "Were I called upon to name the one element most important in the makeup of the ideal lawyer, I should unhesitatingly say, character."²⁹

25. *Ibid.*, XXXIII, 280.

26. David J. Brewer, "Organized Wealth and the Judiciary," *The Independent*, LVII (August 11, 1904), 302.

27. *Ibid.*, LVII, 301.

28. *Ibid.*, LVII, 301-304.

29. David J. Brewer, "The Ideal Lawyer," *The Atlantic Monthly*, XCVIII (November, 1906), 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. The right to two trials is not guaranteed 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.³⁰

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 value of a provision which tends to make the executive of any law directed against wrongdoing operative and forceful.³¹

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.³²

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 reference to this he said:

30. David J. Brewer, "The Right of Appeal," *The Independent*, LV (October 29, 1903), 2547-2550.

31. David J. Brewer, "Libel," *Bar Association of Kansas* (Topeka, 1886), p. 58.

32. David J. Brewer, "Preferential Voting," *Kansas Educational Journal*, IX (August, 1872), 105-107.

This acts in two directions: One by extending the list of those things, charges for whose use the government may 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. . . .³³

An important 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 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.³⁴

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.³⁵

Although, as noted before, Brewer's opinions could not be completely categorized, it is clear that in his beliefs he would be classified as a strict constructionist. He was strongly opposed to the idea of amending the Constitution by interpretation. Still, as discussed, his opinions did contribute to interpretation because of the circumstances of certain cases. His stand on Federal-State relations was that of a conservative. He was a spokesman for states' rights and was jealous of the encroachment of the Federal Courts upon the states' police

33. David J. Brewer, "The Movement of Coercion," *New York State Bar Association* (Chicago, 1893), p. 7.

34. Article in the *Topeka State Journal*, September 6, 1897.

35. David J. Brewer, "Organized Wealth and the Judiciary," *The Independent*, LVII (August 11, 1904), 302.

powers, doing what he could to deter that encroachment. He was a firm supporter of economic laissez faire, but interestingly enough was long an advocate for a government-owned and operated railroad system to replace private ownership. He considered himself, and was in many situations, a staunch defender of the individual's rights, privileges, and liberties.

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.³⁶

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 circuit judge, 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 Kathy Railroad, whom the writer [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. The justice complained that she was a poor woman and needed the money."³⁷ This is the only account of any alleged corruption by Brewer. In this connection a statement by Brewer in his opinion in *Mercantile Trust Company of New York v. Missouri, Kansas and Texas Railway Company*, 36 Federal 221, which concerned the method employed by Brewer in appointing receivers should be noted: "If parties agree upon a receiver, of course I shall appoint whoever you 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."³⁸

In November, 1908, President Theodore Roosevelt wrote a letter to W. A. White in which he said, "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."³⁹ 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, a pet project of Roosevelt's.

White, the great and good friend of T. R., 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

36. David J. Brewer, "The Spanish War; A Prophecy or an Exception," *Kansas Collected Speeches and Pamphlets*, XVI (Topeka, n. d.), 16-17.

37. White, *Autobiography*, p. 439.

38. *Federal Reports*, XXXVI, 227.

39. White, *Autobiography*, p. 440.

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.⁴⁰

Gustavus Myers, in his *History of the United States Supreme Court*, agrees 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.⁴¹ Myers' contention was correct, but Brewer believed 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.⁴²

The issue is whether Justice Brewer had a sincere interest in individual rights, regardless of circumstances; did he place his entire judgement on a Constitutional basis as he understood the Constitution, or was he, while a Supreme Court Justice and before, subservient to the railroads, the rich, and the affluent corporate giants? It is the contention of the writer that Justice Brewer did indeed give his decision many times in favor of what the Progressives called the plutocracy or malefactors of great wealth. He was not consciously their tool, was not corrupt, and his decisions conformed with his own personal philosophy, a philosophy similar to that held by a majority of his colleagues.

It is a fact that Justice Brewer lived within his modest income as a judge without any outward ostentation. He died a man of moderate wealth. He spent more than forty years of life on the Bench, professing to be a practicing Christian and doing many good works. Following his death there were many glowing tributes to Justice Brewer concerning his dedication to liberty and justice, to Christian principles, and to humanity.

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

40. *Ibid.*

41. Myers, *Supreme Court*, p. 603.

42. *Federal Reports*, LXIV, 176.

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.⁴³

V. 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's 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.¹

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 its legitimate claim.²

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."³

Before the investigation was completed, Great Britain decided to arbitrate the boundary question. It seems that Great Britain realized the United States was in earnest in its intention to resist all encroachments

43. William R. Barnes and A. W. Littlefield (eds.), *The Supreme Court Issue and the Constitution* (New York, 1937), p. 27.

1. Foster Rhea Dulles, *The United States Since 1865* (Ann Arbor, 1959), p. 162.

2. Editorial in the *American Journal of International Law*, IV (1910), 912.

3. John B. Moore, *A Digest of International Law* (Washington, 1906), VI, 583.

and to make a vigorous stand on behalf of Venezuela and the Monroe Doctrine. This, plus Great Britain's many other world involvements and her desire to maintain peace with the United States, caused her to reach this decision. The agreement to settle the dispute by arbitration averted the danger of war.⁴

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 satisfactory to each.⁵ 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.⁶

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.⁷

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. 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

4. Dulles, *United States Since 1865*, p. 162.

5. Moore, *International Law*, VI, 583.

6. *American Journal of International Law*, XLIII (1949), 526.

7. Edward Everett Hale and David J. Brewer, *Mohonk Addresses* (Boston, 1910), p. 104.

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.⁸

Brewer felt strongly that the United States should take the lead in limiting armaments. He asserted 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.
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.⁹

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

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?¹¹ These contemporary sounding problems were answered then, but not in a manner acceptable to Brewer.

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

9. *Ibid.*, pp. 1-9, *passim*.

10. Brewer, "The Spanish War," *Kansas Collected Speeches*, XVI, 6.

11. *Ibid.*, XVI, 4-5.

Brewer and Charles Henry Butler wrote a short (sixty-two pages) treatise on international law. 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.¹²

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.¹³

*The North American Review*¹⁴ and *The Outlook*¹⁵ magazines praised Brewer as one of the most widely known and popular justices ever to serve on the United States Supreme Court. He spoke before public audiences more than any other justice and expressed his opinions freely on popular questions. Primarily, he discussed 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.¹⁶

He was an orator of distinction with a graceful yet forcible style which was very effective.¹⁷ 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 hearer

12. David J. Brewer and Charles Henry Butler, *International Law* (New York, 1906), pp. 8-9.

13. David J. Brewer (ed.), *The World's Best Orations* (Chicago, 1899), I, ix.

14. George Harvey (ed.), "Great Minds of Great Men," *The North American Review*, CLXXXVII (January, 1908), 3.

15. "Memorial," *The Outlook*, XCIV (April 9, 1910), 785.

16. *Ibid.*

17. "The Death of Justice Brewer," *The Independent*, LXVIII (April 7, 1910), 773.

away upon the mingled current of their waters."¹⁸ 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 was convinced 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 yourselves 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.¹⁹

Brewer believed in the initiative and referendum because this would bring the public closer to controlling public offices. Through the initiative and referendum a 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."²⁰

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.²¹

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."²²

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

18. *United States Reports*, CCXVIII, xvi.

19. David J. Brewer, *American Citizenship* (New York, 1902), p. 56.

20. Brewer, "Should Teachers Engage in Politics," *Kansas Educational Journal*, V (August, 1868), 84.

21. Article in the *Topeka Capital*, March 30, 1904.

22. Article in the *Topeka Commonwealth*, May 15, 1880.

themselves they are nothing and are to be heeded only as suggestive of what 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.²³

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.²⁴

Justice Brewer found time for many other outside activities. As mentioned, he expressed himself often on all the important questions of the day. In Section I, 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 ". . . unflinching 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."²⁵

VI. 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 reform.

Although Justice Brewer is generally overlooked by historians, his place in this period of our history is highly significant. He was an influential leader of the Fuller Court. His interpretation of the Constitution was in tune with the majority of other learned jurists of his day, although somewhat behind public opinion and the voices of certain legislators and presidents.

The writer of this study has striven for objectivity. Representation has been given to all available material, whether highly critical or complimentary. 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 unflinchingly served his fellow men by interpreting the law and 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 issues confront contemporary America.

23. Article in the *Topeka Capital*, June 13, 1883.

24. *Ibid.*

25. Baldwin, "Justice Brewer and Organized Charity," *The Survey*, XXIV (April 16, 1910), 120.

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.¹

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.

1. Charles Curtis, "Memorial," *Proceedings of the Bar and Officers of the Supreme Court of the United States* (Washington, 1910), p. 8.