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THE POLITICAL PHILOSOPHY OF SUPREME COURT JUSTICE DAVID J. BREWER

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David J. Brewer was born June 20, 1837, in Asia Minor, of missionary parents who returned to America the next year. Brewer later went to Wesleyan University and graduated from Yale with honors in 1856. His father was also a Yale graduate. The young man then studied law in the office of an uncle for a year. He next spent a year at the Albany Law School, graduating in 1858, and was admitted to the New York bar.¹ He spent a few months that fall in Kansas before going out to the Denver region. In June, 1859, he returned to eastern Kansas and settled at Leavenworth, his home until 1890.² The uncle under whom he had studied law was David Dudley Field, who was the father of the reformed penal and civil procedural codes in New York; Field also ran afoul of charges of professional misconduct in acting as counsel for Jay Gould and James Fisk in the Erie Railroad affairs in 1869.³ He was a brother of Cyrus West Field, the businessman of Atlantic Cable fame.⁴ All of this meant, no doubt, that the young Brewer was fully aware of the views of businessmen of this time.

Brewer was appointed United States Commissioner in 1861 and was elected judge of the probate and criminal court of Leavenworth County the next year. His election to the judgeship of the first judicial district of Kansas followed in 1864. He was city attorney of Leavenworth, 1869-1870, after leaving the office of district judge. He had been a member of the local school board and president of it, and, for a while, was superintendent of schools in Leavenworth. In 1868 he was the president of the Kansas State Teachers Association. In 1870, at the age of 33, he was elected to the Kansas State Supreme Court and was re-elected twice. After fourteen years there, he was elevated by President Arthur to the Federal Circuit Court for the Eighth Circuit.⁵

Then in 1889 Brewer was named to the United States Supreme Court by President Harrison. Here he was a colleague of his uncle, Justice Stephen J. Field, until 1898. Stephen J. Field was a brother of Brewer's mother as well as a brother of

¹Allen Johnson and Dumas Malone, eds. *Dictionary of American Biography* (21 volumes, New York: Scribner's, 1928-1937), III, 22.

²*Ibid.*: Hampton Carson, *The Supreme Court of the United States: Its History . . .* (two parts, Philadelphia: John Y. Huber Co., 1891), II, 538.

³DAB, IV, 359-360.

⁴DAB, VI, 357-359.

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the man under whom Brewer had read law. Field also had visited Turkey as a boy with the parental Brewer family. Another Justice, Henry B. Brown, was a classmate of Brewer at Yale. It is thought that Field tried to lead the new justice, who had a similar political, economic, and legal philosophy, but Brewer refused to follow blindly.⁶ However, as one would expect from their similar views, it appears that as time went along he came more nearly to reflect his uncle. While on the Supreme Court bench, Brewer wrote the court opinion in 526 cases, "70 of which involved constitutional problems." In 215 cases, Brewer dissented, writing a separate opinion in 53 of them. Brewer concurred 38 times, and wrote 8 separate concurring opinions.⁷ By the time of his death in March, 1910, Brewer ranked third in length of service on the Supreme Court. Justice Harlan outranked him by a dozen years. Incidentally, Harlan was the boon companion of Brewer.⁸

One editorial writer wrote after the death of Justice Brewer that, "Politically, Justice Brewer was a strict constructionist of the Constitution, so far as affected the reserved rights of the States. He feared the increased centralization of power in the hands of the President and Congress."⁹ Brewer had been hailed as a "much better states-rights man than his Southern Democratic colleague" when he joined the nation's highest court. This was judged from his decisions as Federal circuit judge. The South was pleased with Brewer's appointment according to the same writer.¹⁰

Brewer delivered the opinion of the court in *Keller v. U. S.*, 213 U. S. 138. Here, the Federal government was trying to punish the plaintiffs for harboring an alien in a house of prostitution as a violation of federal law regarding immigration of aliens into the United States. Brewer was opposed to allowing the national government a control over aliens that would come under police power, fearing the case might allow Congress to invade state control even more. "We should never forget," wrote Brewer, "the declaration in *Texas v. White*, . . . that 'the Constitution, in all its provisions, looks to an indestructible union, composed of indestructible states'." He also warned that exaggeration of Federal powers and restriction of state power will "tend to substitute one consolidated government for the

⁶DAB, III, 22; Carl Brent Swisher, Stephens J. Fields, Craftsman of the Law (Washington; Brookings Institution, 1930), 438.

⁷DAB, III, 24.

⁸New York Tribune, March 29, 1910, 1 (col. 4).

⁹"The Death of Justice Brewer" (editorial), *The Independent*, LXVIII (1910), 774.

¹⁰"The Supreme Court" (editorial), *The Nation* XLIX (1889), 490.

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present Federal system."¹¹ However, was this protection of an individual stirred by ideas of protection of property rights?

He supported the Federal government against South Carolina's attempt to stop payment of national liquor taxes on liquor sold by the state of South Carolina. That state had state dispensaries with a legal monopoly of wholesale and retail liquor. These had federal permits and had paid federal taxes until April, 1901, when South Carolina protested the payment without making any request for a refund of previous payments. Dispensers had no interest nor profits in sales; profits went to the town and county with half going to the state treasury. The federal government had issued 371 stamps in 1901 with only 112 going to the state, and 260 to individuals who had no right to sell liquor. Brewer gave the opinion in *South Carolina v. U. S.*, 199 U. S. 437. Brewer admitted that the federal government could not hinder a state in its governmental function by taxation. However, he felt that if the state engaged in a business that is "of a private nature, that business is not withdrawn from the taxing power of the nation." He noted that South Carolina had a profit of over a half-million dollars from its liquor monopoly in 1901. He feared this profit might cause South Carolina to take over trade in tobacco, oleomargarine, etc. Then other states would follow, delivering a body blow to federal revenue tax collections. He feared that those wanting public ownership of public utilities, including the railroads, would gain by action like that of South Carolina. "Would the State," he asked, "by taking into possession these public utilities lose its republican form of government?" He pointed out that some people even wanted to take over and to manage all business.¹² Interestingly enough, the Justice had been in favor of transportation systems being owned and operated by the government just as was the postoffice.¹³

Justice Brewer was concerned with the centralization of authority in Washington, but he was careful to preserve the national government. A newspaper writer commented that the late Justice Brewer made the greatest impression as a U. S. Supreme Court Justice in helping to bring interstate commerce more directly under national control by interpretation of anti-trust and interstate commerce laws. At the same time he tried to preserve the powers of the states that were not "effectively exercised by them."¹⁴ He was not a strict constructionist for he upheld the power of a federal court to issue and enforce an in-

¹¹*Keller v. U. S.*, 213 U. S. 138, 139; 143; 148; 149.

¹²*South Carolina v. U. S.*, 199 U. S. 437, 438; 447; 454; 463.

¹³*Topeka State Journal*, Sept. 6, 1897.

¹⁴"David J. Brewer" (editorial), *New York Tribune*, March 30, 1910.

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junction in a labor dispute.¹⁵ But again is this a sense of property rights? He wrote this decision with no regard for a lack of a jury trial or a lack of Congressional legislation to protect such stoppage of interstate commerce.

Brewer on the Kansas Supreme Court had argued that the bill of rights clause in the Kansas Constitution for equal and inalienable natural rights and the statement that all political power is inherent in the people were limitations on legislative grant of power; therefore, legislative action in giving counties the right to issue railroad aid bonds was void in Brewer's opinion.¹⁶ Brewer held that a federal law prohibiting importation and migration of aliens under contract to labor in the United States did not apply to a church in contracting for a British minister to come to New York to be its pastor. Brewer, in the U. S. Supreme Court opinion, held that Congress in the law covering the case had used general terms to prevent loopholes. But he believed this case involving a church was not meant by Congress to be included; therefore, the Supreme Court refused to apply the law to this church in New York. Brewer argued that this was not the substitution of the will of the judge for that of the legislator.¹⁷ No doubt he was right in ruling that Congress only wanted to prohibit the importation of manual laborers. But Brewer did not rest here. Was it the son of a missionary speaking when he wrote that, "But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."¹⁸ He listed all sorts of religious establishment from the colonial beginnings including the Delaware test oath. This pious view becomes important even if mere dictum.

Brewer wrote in *Budd v. New York* that:

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 service, and the compensation to be paid for the use of all property? and if so 'Looking Backward' is nearer than a dream.¹⁹

He felt that the police power may not be used to limit labor hours if the work was "as free from all risk as any ordinary

¹⁵In *Re Debs*, 158 U. S. 564, 577; 599-600.

¹⁶W. F. Dodd, "The Function of a State Constitution," *Political Science Quarterly*, XXX (1915), 207; *State ex. rel. St. Joseph & Denver City R. Co. v. Commissioners of Nemaha Co.*, 7 Kans. 335 (Dassler).

¹⁷*Church of the Holy Trinity v. U. S.*, 143 U. S. 457, 457; 459; 472.

¹⁸*Ibid.*, 465.

¹⁹*Budd v. New York*, 143 U. S. 517, 551.

employment."²⁰ Prohibiting one from using his property by a prohibition of liquor was taking property without compensation in Brewer's views. It was the power to use the property and not mere title that gave the owner value in the property. The legislative power did not cover this lowering of the value of property without compensation; the Fourteenth Amendment prevented the states from doing this. Denial of the use of property must be compensated. His views as a circuit judge were to be over-ruled by the United States Supreme Court in another case.²¹ Railroad rates that did not pay the cost of service were not enforceable in the power of the states.²² The fact that the owners of a business had made it a big one did not give the government more control over it according to Brewer. The public control over a business was not dependent upon the extent to which the public was benefited by the business.²³

Brewer, who upheld the Kansas prohibition amendment and laws (unanimous court decisions), was opposed to prohibition. "And I have yet to be convinced," he wrote, "that the legislature had the power to prescribe what a citizen shall eat or drink or what medicines he shall take or prevent him from growing or manufacturing that what his judgment approves for his own use as food, drink, or medicine."²⁴ Brewer dissented from the majority of the Supreme Court and supported a Massachusetts man who refused to be vaccinated for smallpox as required by Massachusetts law, claiming protection of the Fourteenth Amendment for his rights. The man claimed that he had suffered a reaction from a previous vaccination.²⁵

What Brewer considered arbitrary denial of personal rights was condemned by the dissenting justice in three cases involving Chinese who had run afoul of Federal immigration authorities. In *Fong Yue Ting v. U. S.*, 149 U. S. 689, Brewer protested that it was not due process to punish one for not having a certificate in his possession when one can get it only by arbitrary and unregulated discretion of any official. He did not think that it was just to take an alien without a certificate before any federal judge without limitation and without provisions for

²⁰*Ibid.*, 550; David J. Brewer, "The Legitimate Exercise of the Police Power in the Protection of Health," *Charities and the Commons*, XXI (1908), 238; 239; 240.

²¹*State v. Walruff*, 26 Fed. 178, 194; 196; 197; *Kansas v. Peter Mugler*, 29 Kans. 181 (Dassler), 194.

²²*C. & N. W. Ry. Co. v. Dey*, 35 Fed. 866, 880; *Chicago, St. P., M. & O. Ry. Co. v. Becker, et. al.* 35 Fed. 883, 885; 886.

²³*Budd v. New York*, 143 U. S. 517, 550.

²⁴*Kansas v. Peter Mugler*, 29 Kans. 181 (Dassler), 194; *Prohibitory Amendment Cases*, 24 Kans. 499, 503, 516; *Intoxicating Liquor Cases*, 25 Kans. 524 (Randolph), 529; 536.

²⁵*Jacobson v. Massachusetts*, 197 U. S. 11, 12; 13; 14; 17; 39.

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his getting the white witness he had to have at least to prove his innocence or to be punished by banishment. He feared that this technique as then applied against the widely disliked Chinese might be used later against other classes of people. Also he questioned if it were in line with the principles of Christianity.²⁶

In *U. S. v. Sing Tuck*, 194 U. S. 161, Brewer claimed that the Chinese detained when entering the United States from China by way of Canada had been wrongfully held. Five of these gave their names to immigration officials when they attempted to enter and stated that they were American-born. The rest remained silent. The inspector then had ruled against all of them and told them of their right to appeal to the Secretary of Commerce and Labor. No appeal was made. But they asked for a writ of *Habeas Corpus*. Brewer, dissenting, pointed out that these men had no provisions to compel attendance of needed witness—a rule not enforced against Anglo-Saxon American citizens. The worst outlaw, he observed, had this privilege. The Chinese were kept in quarters, not allowed a lawyer to begin with. Finally, after being denied entry, they were allowed to have a lawyer, who could examine but not copy testimony on which the excluding order was based. Written notice of appeal had to come within two days after the decision. In an appeal, no new evidence could be presented. The burden of proof rested upon the Chinese. This harsh and arbitrary treatment, in Brewer's opinion, was destroying traditional Chinese friendship for America.²⁷

The last case of these three was *U. S. v. Ju Toy*, 198 U. S. 253. Here also no provision was made for witnesses; the accused, if he had little money, could not afford the transfer to Washington. This was a star chamber proceeding according to Brewer. The Chinese had a court decision stating that he was a free-born American citizen. Therefore, the rules allowed the arrest and deportation of a citizen of the United States by action of an administrative official, thus overriding the court which certified as to his American citizenship. Brewer felt that Congress in giving control over Chinese persons to the immigration authorities meant only citizens of China. He thought the Supreme Court decision in this case made it refer to any Chinese, citizen or alien. This stripped a citizen of all right merely because of his race.²⁸

Brewer joined in 1892 with Justices Harlan and Field in *O'Neal v. Vermont*, 144 U. S. 323, in supporting the incorporation theory that the Fourteenth Amendment extended the en-

²⁶*Fong Yue Ting v. U. S.*, 149 U. S. 698, 732; 738; 739; 740; 741; 742-743.

²⁷*U. S. v. Sing Tuck*, 194 U. S. 161, 166; 170; 177; 178; 182.

²⁸*U. S. v. Ju Toy*, 198 U. S. 253, 264; 268; 269; 274; 279; 280.

tire national Bill of Rights against the states. This had never received a majority vote of the Court. But Justice Black agreed in this view in his dissent, supported by three others in 1947.³⁰

Brewer in a Kansas case commented that *stare decisis* is used by many legislatures, executives, and courts, but "accumulating wrong will never be disturbed in its illegally acquired power if *stare decisis* continues in power." He complained that the Kansas Court had used *obiter dictum* on which to base *stare decisis*.³¹

Brewer did not think that judges were placed in office to carry out the popular will—not to reflect the passing will of the masses but to render justice and to determine rights.³² Neither did he think corporation lawyers would be any less disinterested judges because of their former employments. Cases involving corporations, he said, were usually between corporations; also heads of corporations disliked dishonest judges and had the welfare of the Republic at heart. The best lawyers, according to Justice Brewer, were employed by corporations.³³ He felt that it would be a blessing if half of the lawyers were to quit law; standards should be raised to prevent the unfit from over-crowding the profession.³⁴ Brewer's ideal lawyer would be honest with the public and with individuals, constantly studious, having both brains and common sense; and he would be one who never forgot his citizenship.³⁵ He predicted that the lawyer by 800 years would be settling many things in international affairs by law instead of by force as at present; thus the lawyer would be of ever growing importance in our society.³⁶

The Supreme Court in Brewer's opinion must be watched and criticized by the citizens. He wrote:

It is a mistake to suppose that the Supreme Court is either honored or helped by being beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a ped-

²⁹O'Neil v. Vermont, 144 U. S. 323, 332; 469.

³⁰Adamson v. California, 332 U. S. 46, 71-72.

³¹State ex. re. St. Joseph & Denver City R. Co. v. Commissioners of Nemaha Co., 7 Kans. 335 (Dassler), 339-340.

³²David J. Brewer, "Organized Wealth and the Judiciary," *The Independent*, LVII (1904), 302.

³³Ibid., 303.

³⁴Brewer, "Justice Brewer on Training for the Law," *The Review of Reviews*, XII (1895) 584, 585.

³⁵Brewer, "The Ideal Lawyer," *The Atlantic Monthly*, XCVIII (1906), 598.

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estal 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.³⁷

One judicial reform Brewer wished to promote was the elimination of the unrestricted right of appeal which caused delay, allowing the trial court to shift responsibility to the appellate courts which prevented them from working at their best. Also, too many corporations were appealing every case, forcing weaker opponents to compromise what was justly theirs to avoid costly delay. He would have prevented the defeated party from appealing at will; the appellate court would decide whether to entertain an appeal or not. The elimination of this privilege, he believed, would check the habit of lynching.³⁸

"The surest guarantee of the permanency of republican institutions," wrote Brewer in August, 1904, "is the stability, the long tenure of judicial office." Election of judges did not reform a man's character or increase his wisdom. He admitted that a high-minded judge did not leave politics behind him when he entered the judgeship; political questions are apt to be labeled as such where appearing in a case and refused judicial support. He approved the tendency of the American people to refuse to transfer one from judicial to political life as wise; he wrote, "I firmly believe in its wisdom, and should not regret even a constitutional amendment forbidding any such transfer."³⁹ An editorial in the same issue of the magazine in which Brewer's article calling for the elimination of politics from the judiciary appeared, admits that Brewer's plan would be practically impossible when judges of lower courts are elected to short terms of office. Also the editorial stated that Brewer wrote against political careers for judges when he knew that Judge Alton B. Parker was apt to obtain (or had already been selected) the Democratic nomination for the Presidency.⁴⁰

Brewer had been mentioned for the United States senatorship in his home state of Kansas, but he had not been willing to try for that honor.⁴¹ Perhaps this principle of separating the political career from the judicial career was the reason? Probably not.

³⁷Brewer, "Government by Injunction," *National Corporation Reporter*, XV, 848.

³⁸Brewer, "Right of Appeal," *The Independent*, LV (1903), 2547, 2548, 2549.

³⁹Brewer, "Organized Wealth and the Judiciary," *The Independent*, LVII (1904), 301, 302.

⁴⁰"Justice Brewer's Suggested Constitutional Amendment." (editorial), *The Independent*, LVII (1904), 340.

⁴¹*New York Tribune*, March 29, 1910, p. 4, col. 7.

Yet Brewer did not hesitate to discuss current problems. Justice Brewer was the best known of the Supreme Court justices,⁴² being in almost constant demand as an after-dinner speaker and as a lecturer.⁴³ He was the only justice who had proof copies of his opinions ready for the press, and he only briefly announced his conclusion in the court session.⁴⁴ Brewer must not have shunned the public limelight merely because he was a judge. Furthermore, Brewer was faithful to his religious duties as well as to his civil ones. Deeply interested in Christian missions, he was for years vice-president of the American Missionary Association as well as a loyal church member. He was president of the Associated Charities in the National Capital for five years prior to his death.⁴⁵ He was greatly interested in international peace and wrote on international law; he was president of the commission set up by Congress in 1895 to determine the facts in the Venezuela boundary dispute with Great Britain. He was one of the representatives on the arbitral tribunal which made the award in 1898, settling that dispute.⁴⁶

His last years on the bench must have seen a decay of his usefulness. President Taft wrote in a letter that "The condition of the Supreme Court is pitiable, and those old fools hold on with a tenacity that is most discouraging." He was referring to Justices Fuller, Harlan, and Brewer. He reported that "Brewer is so deaf that he can not hear and has got beyond the point of the commonest accuracy in writing his opinion; Brewer and Harlan sleep almost through all the arguments." It was "most discouraging to the active men on the bench," according to Taft.⁴⁷ William Allen White reports that Theodore Roosevelt wrote to him in November, 1908, that Brewer was a striking example of a judge entirely unfit to occupy the position.⁴⁸ White reports that he knew Brewer as a circuit judge and says Brewer "believed in the divine right of plutocracy to rule. He distrusted the people, and his decisions limited their power whenever the question of their power came before the court."⁴⁹ Brewer worked according to White with the methods and morals and

⁴²Ibid., March 30, 1910, p. 6, col. 3; "The Death of Justice Brewer" (editorial), *The Independent*, LXVIII (1910), 773.

⁴³*New York Tribune*, March 29, 1910, p. 1, col. 4.

⁴⁴Ibid.

⁴⁵"The Death of Justice Brewer," loc. cit., 773; DAB, III, 23.

⁴⁶DAB, III, 23.

⁴⁷Henry F. Pringle, *The Life and Times of William Howard Taft, a Biography* (two volumes, New York: Farrar & Rinehart, 1939), I, 529.

⁴⁸William Allen White, *Autobiography* (New York: MacMillan, 1946) 440.

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manners of his time which leaves something less than desirable.⁵⁰ Another writer labeled "Brewer and Peckham, the tough-minded twins of ultra-conservatism."⁵¹

In summary, Brewer believed strongly that the reserved power of the states must be preserved to prevent a completely centralized government in Washington having full police power. Neither would he approve of state action that could hamstring the national government. Legislative grant of power, he believed, was not unlimited. He believed that the enforcement of law should be based on the spirit of the law rather than the letter of it; if necessary, the judge should consider the intent of the legislature in marginal cases.

His property sense was acute. Title was more important than how one obtained title. He was opposed to governmental regulation of a business which had no governmental privilege granted to it. He felt that if a legislature takes the use of property from its owner, society should repay the economic loss to that owner. Brewer did not believe that a business should be regulated merely because of its size or because of its public service.

Brewer refused to follow majority decisions that took possible rights to a just and fair trial from helpless Chinese by the whims of bureaucrats. Discrimination on account of race or lack of means was not the American way as visualized by Brewer. Also, Brewer insisted that stare decisis was used too often and was freezing bad decisions into a permanent system. The judge was not the mirror of popular will but of justice. Corporation lawyers should not be eliminated from judicial careers for they numbered some of the best lawyers and would not reflect their former employers. Brewer wanted fewer, but more capable and better trained lawyers.

Critics were beneficial to the Supreme Court in Brewer's views. He would have eliminated free use of appeal as too often delaying justice.

The long tenure of judicial office was a safeguard of the nation and justice. There was no place for a political career for the judge. Brewer himself apparently avoided a political career except as a judge. This did not mean that he was not active in civil and religious life.

He seemed to see the religious organizations of Christianity and of the secular government as having a common bond which leads to a question of his attitude towards the separation of church and state.

⁵⁰Fred Rodell, *Nine Men, a Political History of the Supreme Court from 1790 to 1955* (New York: Random House, c. 1955), 187.