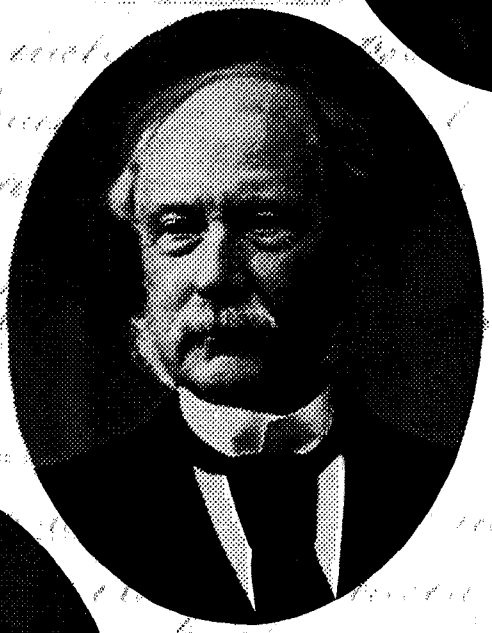
The Fields and the Law



Essays by
Philip J. Bergan
Owen M. Fiss
Charles W. McCurdy

David J. Brewer
The Judge as Missionary

Owen M. Fiss

History has not been kind to David Brewer. He served on the Supreme Court for twenty years (1890-1910) and helped set the intellectual agenda and direction for the Court at the turn of the century. Today he is largely forgotten. The cognoscenti might remember, but then only to vilify him, along with most of the decisions of that era; only recently Justice Brennan accused Brewer of arrogance for having proclaimed, as he did at every possible opportunity, that "this is a Christian nation."[1] Even now, we are honoring Brewer for a circumstance that hardly could be considered one of his accomplishments, namely, that he was the nephew of David Dudley Field and Stephen J. Field. In fact, he would probably cringe at being included in this volume. Brewer was brought up in the East, attended Wesleyan, Yale, Albany Law School, and read law in David Dudley's New York law office, but then set out for the West, determined to begin life and a career for himself.[2] As he put it: "I don't want to grow up to be my uncle's nephew."[3]

I

Part of the problem stems from the prominence of some of the justices with whom Brewer served. He was, historically speaking, completely overshadowed. Justice Harlan was on the Court when Brewer arrived and when he left (Harlan died a year after Brewer in 1911). Holmes joined the Court in 1902, and stayed for another thirty years. It was also Brewer's odd fortune to be appointed while his uncle Stephen was on the Court. They served together until Field resigned in 1897.

Brewer set out for the West in the late 1850s and settled in Kansas. His uncle Stephen had made a similar break with the East in the late 1840s and settled in California. In

Justice David J. Brewer. (Courtesy Supreme Court of the United States.)

1863 Lincoln appointed Field to the Supreme Court, and by the time Brewer took up his position in Washington in 1890, his uncle had been there for more than twenty-five years and earned a measure of notoriety for himself.

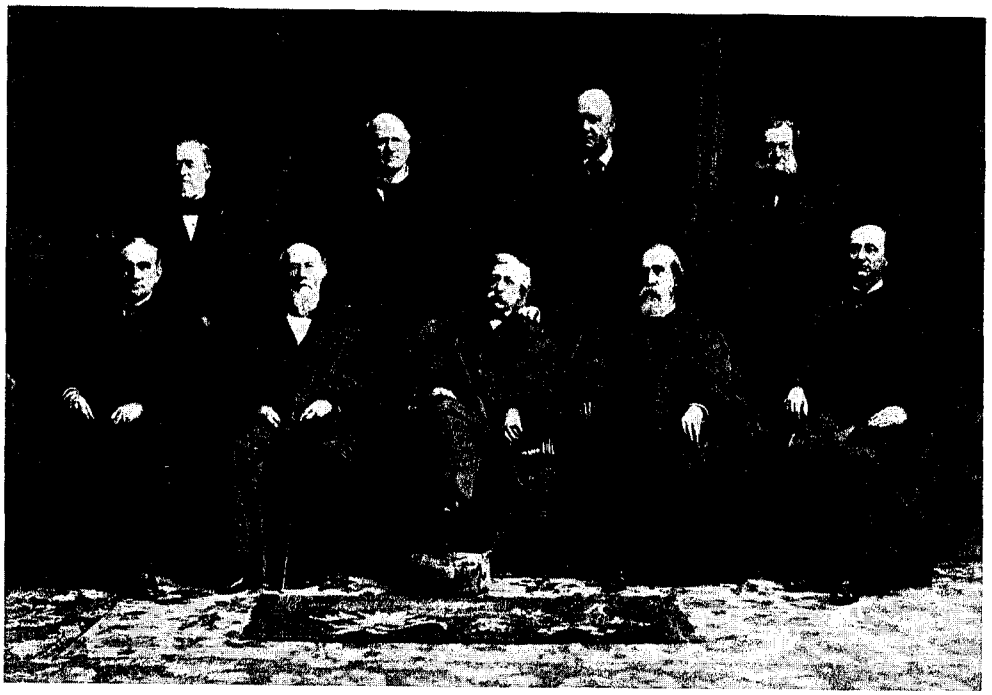
Field's fame was largely due to his dissents in two major decisions of the post-Civil War era, the *Slaughter-House Cases*[4] and *Munn v. Illinois*.[5] In both, Field sought to place limits on government regulation of business activity, and since Brewer looked upon government regulation with the same wariness, some have tended to trivialize Brewer's contribution to the work of the Court. Felix Frankfurter, for example, saw Brewer and

his colleagues, particularly Rufus Peckham, Brewer's constant ally and the author of *Lochner v. New York*,[6] as doing little more than writing into law Field's *Slaughter-House* dissent.[7] Brewer was, of course, influenced by Field's classic statements on behalf of limited government; any justice who sought to understand the implications of the constitutional commitment to liberty would have been. Indeed, Brewer's dissent in *Budd v. New York*[8] is a direct descendant of Field's dissent in *Munn*. But still, it is a mistake to view Brewer as little more than as a footnote to Field.

Whenever he borrowed his uncle's ideas, Brewer achieved an eloquence and coherence that eluded Field himself. He also added a touch of passion. In addition, Brewer must be credited with developing doctrines to cope with the threats to liberty that were unique to his time, such as those posed by the Sherman Act. The rule of reason of *Standard Oil* (1911)[9] can be traced to Brewer's separate concurrence in the famed *Northern Securities* case of 1904.[10] There were also significant differences between Field and Brewer in cases involving uses of state power beyond the economic sphere. An example would be the Chinese cases. Field was responsible for some decisions protecting the Chinese, especially when he rode circuit,[11] but he also played a principal role in lobbying for[12] and then legitimating laws that prevented Chinese aliens from entering the country (even when they sought to enter on a pass previously issued by the United States government).[13] Brewer, on the other hand, consistently spoke out in protest against the treatment of the Chinese and did so in the most forceful terms;[14] as he said when he denounced the pass-system established by the Geary Act of 1892, "In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius ask, why do they send missionaries here?"[15] Above all, the assessment of Brewer typified by the work of Frankfurter ignores the independent contribution Brewer made to the deliberations of the Court in the 1890s. The presence of his uncle in those deliberations must have been a liability, and perhaps even an embarrassment.

By the time Brewer joined him on the Court, Field had grown old and cantankerous. He was probably senile. The correspondence of the justices, such as it exists, mentions various strategies they employed to induce Field to resign. Even Harlan, not the most diplomatic of justices, unsuccessfully tried to get Field to give up his seat.[16] Field's separate opinion in the famous *Income Tax Cases* of 1895 was ill-tempered, and slightly beside the point: He complained of the statute because of its impact on judicial salaries.[17] In the early nineties Field once went so far as to mount a major battle against the Reporter and one of his headnotes.[18] On the Court together, Brewer wrote two architectonic decisions, *Reagan v. Farmers' Loan & Trust*[19] and *In re Debs*,[20] both unanimous, while Field did not write for the Court in any major case of the period. Field's contribution to the work of the Court then appears of another character altogether: By casting aspersions on the morals of a woman who appeared before him while riding circuit, Field became entangled in a scandal that ultimately led the Supreme Court to expand the jurisdiction of the federal trial courts.[21]

Field served on the Supreme Court for thirty-four years — a virtual guarantee of preeminence in the profession (even if the last decade of service was something of an embarrassment). Harlan and Holmes, the two other titans in whose shadow Brewer worked, had tenures almost as long as Field's, but their place in history has more to do with their ideas. We remember Harlan and Holmes as a way of paying tribute to their ideas. (Holmes also was a genius; surely that could not be said of Harlan, no more than it could be said of Brewer or of any other justice in the history of the Supreme Court.)



The United States Supreme Court in 1892. From left to right in the back row are Justices Samuel Blatchford, John Marshall Harlan, Horace Gray, and George Shiras, Jr. In the front row, left to right, are Justices Henry B. Brown and Stephen J. Field, Chief Justice Melville Weston Fuller, and Justices Lucius Q. C. Lamar and David J. Brewer. (Courtesy Supreme Court of the United States.)

Harlan is remembered because of his attempts to strengthen the national legislative power,[22] a position which the Court came increasingly to accept, and which is now conventional (though at this moment subject to a revisionist assault by Justice Rehnquist and his colleagues).[23] Even more, we remember Harlan for his dissent in *Plessy v. Ferguson*[24] and his warning that that case would become as infamous as the *Dred Scott* decision.[25] He was prophetic. So was Holmes. Many remember Holmes for his dissent in *Abrams* in 1919, and his peroration on behalf of free speech,[26] but in truth Holmes's fame as a justice had been secured some fifteen years earlier, when he dissented in *Lochner v. New York*.[27] There he laid the theoretical foundations for progressivism, and paved the way for the eventual constitutional vindication of the New Deal in 1937. He allowed the legislature the widest possible latitude in defining ends and choosing the methods for realizing those ends.

Although both Harlan and Holmes were prophetic, this should not obscure the fact that in their time — as they sat with Brewer — they were loners. Harlan and Holmes did not like one another,[28] and had little in common. They both dissented in *Lochner*, but neither joined the other's dissent. Harlan's dissent lay within the received framework, in as much as he found a "direct" connection between health and the maximum hour law.[29] Holmes had no taste for such an analysis. Nor were Harlan or Holmes part

Justices Brown and Brewer in Washington, D.C. (Courtesy Supreme Court of the United States.)

of any coalition on the Court at that time. They were isolated figures. Each secured his fame through a dissent that no other justice joined, Harlan in *Plessy*, Holmes in *Lochner*. Only in later years did Holmes have Brandeis.

Brewer's role in the collective life of the Court was markedly different. He was at the center of the controlling coalition of his Court — a coalition composed of justices who were appointed by two presidents whose politics were virtually indistinguishable, Grover Cleveland, a Democrat, and Benjamin Harrison, a Republican. This group included Melville Weston Fuller, the chief justice; Henry Billings Brown, a classmate of Brewer's at Yale (Brown and Brewer were considered together for the same vacancy, and the story is told that Harrison chose Brewer upon receiving a self-deprecating letter from him urging that Brown be appointed);[30] Rufus Peckham, a judge of the New York Court of Appeals;[31] George Shiras, a lawyer from Pittsburgh; and Edward White, a senator from Louisiana, who eventually succeeded Fuller as chief justice. On his death, Fuller described Brewer as "one of the most lovable of them all."[32]

Brewer's ideas were the ideas of the Court during his tenure, and, in contrast to Holmes and Harlan, he played a decisive role formulating and propounding the Supreme Court doctrine of the period. The problem, however, was that Brewer's ideas did not triumph in history. They were viewed as the constitutional impediment to the progressivism that was then taking hold of the nation; they have since been condemned in every possible way by a generation of lawyers committed to the New Deal. Brewer distrusted democracy and was prepared to use the judicial power to its utmost to protect against what he perceived as tyranny of the masses but what others perceived as a prerogative of the people.

II

Democracy puts the coercive power of the state in the hands of the majority, and at the same time recognizes limits on the exercise of this power. Today we acknowledge limits on the majority when it comes to protecting racial minorities, insuring procedural fairness in the administration of the criminal justice system, and allowing dissidents the right to criticize governmental policies. With respect to these limits, Brewer's record is mixed, as is true of all the justices of the period, including our heroes.

Brewer did not participate in *Plessy*;[33] he followed the *Civil Rights Cases*[34] in curtailing the power of the federal government to interfere with racial discrimination.[35] This distinguishes Brewer from Harlan, but not from Holmes. Holmes's performance in the race cases of the era was miserable, and indeed prompted a dissent from Brewer when Holmes wrote an opinion for the Court refusing to stop a transparent scheme to disenfranchise the blacks of Alabama.[36] Brewer also filed a technical objection to Holmes's 1909 opinion in *Patterson v. Colorado,* which allowed an editor of a newspaper to be punished for publishing cartoons critical of a state supreme court.[37] Moreover, Brewer's passionate protests of the treatment of the Chinese, on both substantive and procedural grounds, distinguish him from both Harlan and Holmes. Brewer sharply dissented from Holmes's well-known opinions in *Sing Tuck*[38] and *Ju Toy*,[39] which denied resident Chinese access to the federal courts to try their claim of citizenship. Brewer also dissented from Harlan's opinion in the *Japanese Immigrant Case*[40] which undermined a Japanese alien's claim for due process in deportation proceedings. And in a similar spirit, Brewer, like Harlan, spoke out against the colonialism that swept the nation in the years immediately following the Spanish-American War of 1898.[41] Brewer saw colonialism as incompatible with the ideals embodied in the Declaration of Independence. "To introduce government by force over any portion of the nation," he complained, "is to start the second quarter of the second century of our life upon principles which are the exact opposite of those upon which we have hitherto lived."[42]

It would be a mistake, however, to gauge Brewer's role on the Court by emphasizing his position on the issues that concern us. This would blur the profile. We should look at *his* issues, at Brewer's position on the great public issue of his day, and, with the exception of one brief period centering around the election of 1900, when the nation divided over imperialism, that issue was capitalism, and more particularly, the role of the state in regulating economic relationships. It is in this context that the true Brewer emerges and his relationship to our heroes is fixed, for Brewer's overriding purpose was to limit and structure state interventions into the economy and to affirm the idea of limited government. Harlan subscribed to the general intellectual structure developed to limit state interventions, although he applied it more permissively. Like Brewer, he used it to invalidate a federal law banning "yellow dog contracts" (prohibiting employers from requiring nonmembership in a union),[43] and to protect railroad investors from confiscation;[44] but in contrast to Brewer, Harlan approved all maximum hour statutes[45] and all manner of antitrust regulation.[46] Holmes simply repudiated the framework.

Brewer and his circle believed in capitalism and the system of liberties and rights that it implied. He openly marveled at the abundance that capitalism had produced ("the magnificence and luxuriousness which surround our lives"[47]), and defended inequalities in the distribution of wealth as inevitable and just. As he saw it:

The large majority of men are unwilling to endure that long self denial and saving

> which makes accumulation possible; they have not the business tact and sagacity which brings about large concentrations and great financial results.[48]

In this affirmation, Brewer was not simply expressing a technocratic view of the correct economic policy. He was instead drawing on every sacred text that he knew:

> From the time in earliest records, when Eve took loving possession of even the forbidden apple, the idea of property and the sacredness of the right of its possession has never departed from the race. Whatever dreams may exist of an ideal human nature . . . actual experience, from the dawn of history to the present hour declares that the love of acquirement, mingled with the joy of possession, is the real stimulus to human activity. When, among the affirmatives of the Declaration of Independence, it is asserted that the pursuit of happiness is one of the unalienable rights, it is meant that the acquisition, possession and enjoyment of property are matters which human government cannot forbid and which it cannot destroy.[49]

To follow this thought to its conclusion, one should note that Brewer did not draw a sharp distinction between the Declaration of Independence and the Constitution; they were both treated as part of the organic law of the nation.

Brewer's commitment to the capitalist system did not result in a blind support of businessmen, or an absolute protection of "property rights" and "liberty of contract." Brewer allowed the state the power necessary to curb entrepreneurial excesses that threatened the market. In 1895, the Supreme Court refused to allow the Sherman Act to be applied to an acquisition of a sugar refinery which had resulted in what Harlan (in dissent) called a "stupendous combination."[50] It controlled ninety-eight percent of the market, but the Court reasoned that the commerce power did not extend to manufacturing (as opposed to transportation). Brewer joined the majority. In 1897, however, the Court applied the statute to a price-fixing agreement among railroads,[51] and over the next several years laid the foundations for Theodore Roosevelt's "trust-busting" campaign. Brewer joined those decisions, and in the famed *Northern Securities* case provided the decisive vote — over the protests of some of his natural allies, White, Fuller and Peckham, and one of his antagonists, Holmes — to sustain the most famous of TR's enforcement ventures, an effort to set aside a deal between the two barons of the day, James Hill and J.P. Morgan.[52]

Brewer also thought it appropriate for the state to intervene in labor markets when the collective power was used on behalf of those who were so systematically disadvantaged as to have become virtually wards of the state. He wrote the opinion for a unanimous Court sustaining a statute that established a sixty hour maximum week for women working in laundries or factories (*Muller v. Oregon*).[53] Some see this decision as laying the foundation for the ultimate constitutional triumph of progressivism,[54] especially since, in his opinion, Brewer mentioned and summarized the brief Louis Brandeis had filed on behalf of the National Consumers' League. But such an interpretation has little relation to the text of Brewer's opinion, and ignores the exceptional nature of the subject of the legislation — the protection of women in the labor market. It also ignores the fact that in *Muller* Brewer was careful to preserve *Lochner v. New York*, which had invalidated a maximum hour law for bakeries. That particular statute had not been restricted to women or any other group whose members could be regarded as wards

of the state. Brewer had joined Peckham's decision in *Lochner* and in fact the two of them dissented from an earlier decision that sustained a maximum hours law for miners.[55] And in the very same term as *Muller*, Brewer joined Harlan's opinion striking down, on liberty of contract grounds, the federal statute outlawing "yellow dog contracts."[56] In these cases, in contrast to *Muller v. Oregon*, Brewer concluded that the state had exceeded the constitutional bounds of its power. The statutes in question did not seek to protect an especially disadvantaged group or class, but rather tried to alter the balance of power between worker and employer. For Brewer this was tyranny. The majority was using the power of the state to further its own interests and doing so at the expense of the minority.

An even greater danger of tyranny arose for Brewer from the risk that the legislative power would be used to transfer the property of the few to the many. A case in point was the federal personal income tax of 1894. The statute was structured in such a manner as to place the entire burden of taxation on two percent of the population, the wealthy few who mostly resided in the Northeast. Brewer joined Fuller's opinion to invalidate the tax[57] and defended the decision on the lecture circuit.[58] He also saw a threat to property in the power *Munn v. Illinois* had allowed to the legislature to regulate the rates or prices of various businesses. Brewer did not deny the legislature the power to regulate rates altogether, but sought to place limits around it, first in terms of the industries to which it applied, and then by policing the actual rate imposed.

Brewer allowed rate regulation of railroads, but on a more limited theory than that of *Munn*. The regulation of rates was permissible, so Brewer reasoned, because, and only because, the railroad companies performed a function that properly belonged to the state, namely, the operation of the public highways. He did not allow the regulation to extend to rates of a business simply because it was affected with a public interest, and thus repudiated the *Munn* standard.[59] Brewer was also determined to see that rates were set at a level that insured investors a fair rate of return and, in contrast to the majority in *Munn*, expressed an unwillingness to leave this matter to the discretion of the legislature. In *Reagan v. Farmers' Loan & Trust*,[60] he set aside a rate that provided investors with no return at all. Speaking for a unanimous Court, he explained that he had taken this action to guard against confiscation and also to assure equal protection of the laws:

> The equal protection of the laws, which by the Fourteenth Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public.[61]

He was, in this assertion, evincing a concern with victimization, though of the wealthy few rather than of disadvantaged groups that today are seen as deserving the special protection of the Constitution.

III

In cases such as *Reagan*, Brewer stated not only his belief that the legislature had overstepped its bounds, but also that it was the province of the judiciary, particularly the federal judiciary, to call it to task. He believed that the federal judiciary was "the

nation's safeguard"[62] or, as he put it on another occasion, "the nation's anchor."[63] This view did not follow from some pretense of literalism: He did not parse clauses or try to defend his view of the judicial office by claiming that he was simply executing some specific command of the Constitution. His position was more structural: It was based on the fact that the federal judiciary was the only institution that was not vulnerable to the pressure of the many. To turn the conventional learning on its head,[64] countermajoritarianism was, for Brewer, not a difficulty, but a virtue. Countermajoritarianism was the source of the Court's strength: "I am firmly persuaded," Brewer declared, "that the salvation of the nation, the permanence of government of and by the people, rests upon the independence and vigor of the judiciary. . . ."[65]

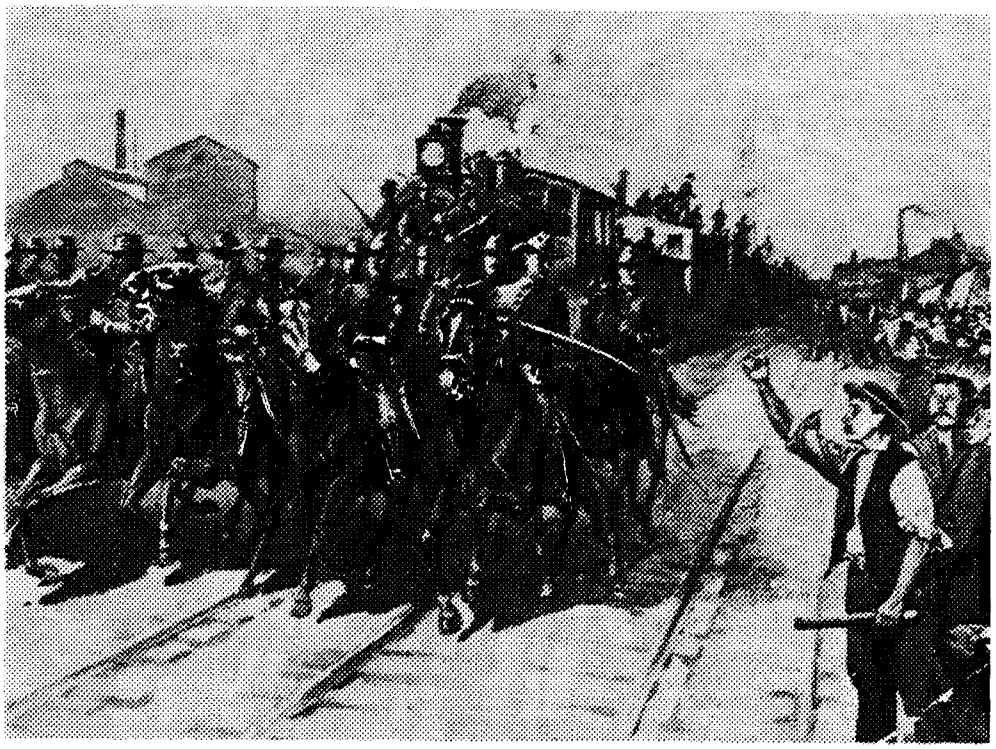
Brewer was no democrat, but then neither was our hero Holmes. While Brewer referred to the people as "the many," Holmes spoke of them as "the crowd."[66] Unlike Brewer, though, Holmes believed that it was the prerogative of the people to do as they pleased — not because they were likely to do what was right, but rather because he thought himself unable to prove them wrong, or because he felt that in the end they would have their way anyway. With only a bit of hyperbole, Holmes once said:

> I have been in a minority of one as to the proper administration of the Sherman Act. I hope and believe that I am not influenced by my opinion that it is a foolish law. I have little doubt that the country likes it and I always say, as you know, that if my fellow citizens want to go to Hell I will help them. It's my job."[67]

Brewer's view of his job was just the opposite. Brewer was not a relativist nor a fatalist. The judge was not to sit to one side and watch history unfold; he was not to be a spectator.[68] He was to be a player, or staying with Brewer's religious imagery, something of a missionary. The judge was to remind the people of their highest ideals. The judge was to act as "Philip sober to control Philip drunk,"[69] and to lead rather than acquiesce.[70]

Brewer understood that the people would ultimately have their way. Discussing the issue of colonialism shortly before the election of 1900, Brewer acknowledged the power of the people to pass new laws and amend the Constitution. He saw clearly that "whatever [the American] people determine to do they will do, and there is no power on earth that will or can stop them."[71] He recognized that there was nothing that a judge could do to stop the inevitable triumph of the many, but still, he believed that it was the obligation of the judge to try. In this Brewer was moved by a very deep idealism, and even a certain daring. He knew that he could not be removed from office for standing his ground against the many, or, to trivialize the matter somewhat, that his pay could not be reduced, but at the same time he must have sensed that the many would probably have the last word in history (though perhaps not in that celestial seat of judgment to which he often made reference).

Brewer's conception of the judicial office was implicit in his willingness to set aside statutes — the formal enactments of the many. It was given an even more explicit and more dramatic statement when the people took to the streets. The case I have in mind is *In re Debs*.[72] It arose out of the Pullman Strike of 1894, in which a sympathetic strike of the American Railway Union tied up the rail system of the nation. The President responded with the army and the courts with an injunction. The Supreme Court was confronted with the contempt conviction of the Union's president, Eugene Debs, and Brewer wrote the opinion sustaining the conviction and the underlying injunction. In that opinion Brewer made his views of the judicial office evident and in so doing pro-



Troops enforcing the court injunction during the 1894 railroad strike. The strike was led by Eugene Debs's American Railway Union in sympathy with the strike of Pullman workers against the railroad car manufacturing company. In In re Debs *(1895) Justice Brewer spoke for a unanimous Court in upholding the conviction of Debs for defying the court injunction to end the strike. The decision pointed the way for the use of court injunctions against strikes during the next three decades. (Drawing by G. W. Peters from a sketch by G. A. Coffin; courtesy Library of Congress.)*

voked the populist wrath. The very next year, when the Democratic Party broke from its past and moved toward populism, William Jennings Bryan ran for President on a platform that denounced *Debs* and more generally "government by injunction."[73] This campaign against the Court in fact got nowhere, and probably became something of a liability for Bryan in more genteel circles. But *Debs* and the reaction to it continue to haunt us. They have been memorialized by Felix Frankfurter and Nathan Greene who began their brief for the Norris-LaGuardia Act of 1932 by reminding the reader of the Democrats' reaction to Brewer's handiwork.[74]

Brewer was no friend of the mass strike. He was willing to admit that labor organizations had a useful role to play in avoiding the excesses of capitalism, but nevertheless condemned the mass strike for the same reason that he opposed certain exercises of the legislative power. It involved coercion and appropriation; "it is the effort of the many, by the mere weight of numbers to compel the one to do their bidding."[75] But what transpired in Chicago in 1894 was no ordinary strike — it was closer to an incipient revolution. The purpose of the *Debs* injunction was not to protect the property rights of the

railroad owners, or the liberties of those desiring to work, but to preserve the public order and quite possibly save the economic union. Some 2,000 regular troops of the United States Army and a total of 14,000 armed agents had to be deployed before order was restored.[76]

Judicial intervention in such a context might seem as "puerile and ridiculous," perhaps as much as it would have been to read "a writ of injunction to Lee's army."[77] In fact Debs's lawyer, Clarence Darrow, made such an argument. Brewer answered by pointing to some testimony by Debs (before a national commission) that supposedly demonstrated the efficacy of the injunction in breaking the strike and quelling the rebellion.[78] I think Brewer misread that testimony, but it nevertheless seems clear that Brewer attached no particular significance to the likelihood of success; for him, efficacy was not a condition of judicial intervention. Brewer's judge was supposed to do all that he could, even if his efforts later turned out to be "puerile and ridiculous." As Brewer explained in *Debs*, "If ever there was a special exigency, one which demanded that the court should do all that courts can do, it was disclosed by this bill, and we need not turn to the public history of the day, which only reaffirms with clearest emphasis all its allegations."[79]

IV

Brewer's detractors point to his elitist origins, and try to show how those origins were likely to color his substantive conception of justice, as manifested in cases such as *Debs*.[80] But the source of an idea does not necessarily impeach its validity, and in any event, this critique fails to acknowledge the fact that all of Brewer's positions were rooted in the then prevalent constitutional doctrine. Brewer's most famous or infamous decisions — *Debs*, *Reagan* and *Muller* — were unanimous. The realist critique also does not account for Brewer's economic decisions of a different character, such as *Northern Securities*, where state power was used against business, or for the full range of his views as expressed in cases involving the Chinese or imperialism. Nor does the realist critique distinguish Brewer from his brethren, including our hero Holmes, whose elitist origins were even more pronounced.

Brewer's special gift was not his view of substantive justice, but rather his conception of the judge's role, which he both propounded and exemplified. To explain this aspect of the man, I would stress not Brewer's elitist origins or even the Field connection, but the fact that his parents were missionaries (he was born in Turkey in 1837, just before his parents were to return to the States), that he spent much of his youth protesting slavery, and that he moved to Kansas at a time when it was the scene of the bloody struggles that were soon to culminate in the Civil War.[81]

Today we are inclined to question Brewer's substantive values and also the ease with which he read those values into the Constitution; he did not draw sharp lines between the Constitution, the Declaration of Independence, Holy Scripture, and *The Wealth of Nations* (though, as far as I can ascertain, he had no interest whatsoever in Mr. Herbert Spencer's *Social Statics*). But it would be unfortunate to allow this questioning to turn into a cynicism about the place of ideals in the law and even worse, to make it the basis of rejecting Brewer's conception of the role of the judge in bringing those ideals to fruition. "It is one thing," he once said, "to fail of reaching your ideal; it is an entirely different thing to deliberately turn your back on it."[82]

49. H. Field, supra note 1, 51-52; Browne, The Lawyer's Easy Chair, 6 The Green Bag 246 (1894).
50. Browne, supra note 49, 245.
51. Id. at 245-46.
52. Id. at 246; Hall, Reminiscences of David Dudley Field, 6 The Green Bag 210-11 (1894).

David J. Brewer The Judge as Missionary

1. Lynch v. Donnelly, 104 S. Ct. 1355, 1382 (1984) (Brennan, J., dissenting) (quoting Church of Holy Trinity v. United States, 143 U.S. 457, 471 (1892)).
2. L. Lardner, The Constitutional Doctrines of David J. Brewer 6-7 (1938) (unpublished Ph.D. dissertation submitted to the Department of Philosophy and accepted by the Department of Politics of Princeton University, available at the Yale Law School Library). See also Gamer, Justice Brewer and Substantive Due Process: A Conservative Court Revisited, 18 Vand. L. Rev. 615 (1965); Paul, David J. Brewer, in L. Friedman and F. Israel, 2 The Justices of the Supreme Court of the United States of America 1789-1969: Their Lives and Major Opinions 1515 (1969).
3. This statement is reported at 42 Chi. Legal News 273 (1910), prefatory to remarks and reminiscences by a friend and Yale classmate, Judge Magruder.
4. 83 U.S. (16 Wall.) 36, 83 (1873).
5. 94 U.S. 113, 136 (1877).
6. 198 U.S. 45 (1905).
7. Frankfurter, Mr. Justice Holmes and The Constitution, 41 Harv. L. Rev. 121, 141-143 (1927). This seems to have been a favorite theme of Frankfurter. For earlier statements, see Frankfurter, The Constitutional Opinions of Mr. Justice Holmes, 29 Harv. L. Rev. 683 (1916); Frankfurter, Twenty Years of Mr. Justice Holmes' Constitutional Opinions, 36 Harv. L. Rev. 909 (1923).
8. 143 U.S. 517, 548 (1892). See text accompanying n. 59 infra.
9. Standard Oil v. United States, 221 U.S. 1 (1911).
10. Northern Securities Co. v. United States, 193 U.S. 197, 360 (1904).
11. See, e.g., Ho Ah Kow v. Nunan, 12 Fed. Cas. 252 (5 Sawyer 552 (1879)) (No. 6,546) (cutting the hair of Chinese prisoners is a denial of equal protection); In re Quong Woo, 13 F. 229 (1882) (overruling an ordinance forbidding laundries in certain parts of San Francisco on due process grounds). Compare Barbier v. Connolly, 113 U.S. 27 (1885) (upholding a laundry ordinance).
12. In 1879 Field lobbied actively for the ratification of a treaty with China restricting immigration. During the course of that lobbying he was acutely aware of both his California constituency and the fact that he was being considered as a candidate for President. C.B. Swisher, Stephen J. Field, Craftsman of the Law 223-224 (1930). He gave an interview on this subject saying:

> We are alarmed upon this coast at the incursion of Chinese. It is not avarice, greed, or cowardice that prompts us, and all classes of our society, to say to the law-makers and opinion-makers of the East that we have a serious apprehension of the consequences of Chinese immigration. . . . We declare that it is our conviction 'that the practical issue is, whether the civilization of this coast, its society, morals, and industry shall be of American or Asiatic type.' It is to us a question of property, civilization and existence. We are in earnest, we are compelled to be, and what we now demand is that the American people shall consider this question.

Id. at 221.
13. Chae Chan Ping v. United States, 130 U.S. 581 (1889). See also Quock Ting v. United States, 140 U.S. 417 (1891).

14. Quock Ting v. United States, 140 U.S. 417, 422 (1891); Fong Yue Ting v. United States, 149 U.S. 698, 732 (1893); United States v. Sing Tuck, 194 U.S. 161, 170 (1904); United States v. Ju Toy, 198 U.S. 254, 264 (1905). He also joined the majority in United States v. Wong Kim Ark, 169 U.S. 649 (1898) and Chin Yow v. United States, 208 U.S. 8 (1908), which were favorable to the Chinese.
15. Fong Yue Ting v. United States, 149 U.S. 698, 732 (1893). My hunch is that Brewer's strong dissents in *Quock Ting* and *Fong Yue Ting* provoked Field to switch sides. But once provoked, Field even considered a Court-packing scheme in order to have *Fong Yue Ting* reversed. Indeed, the rhetoric he used to criticize one particular sentence in Gray's opinion was so extreme that Gray removed the sentence in an attempt to moot Field's objection. Westin, Stephen J. Field and the Headnote to O'Neil v. Vermont: A Snapshot of the Fuller Court at Work, 67 Yale L.J. 363, 381-82 (1958).
16. In doing so Harlan reminded Field of the time, years before, when Field had been sent on a similar mission to deal with the aging Justice Grier. Field, never one to make the job easy, reportedly answered, "and a dirtier day's work I never did in my life." C. B. Swisher, supra note 12, at 444. See also, C. E. Hughes, The Supreme Court of The United States 75-76 (1928). Harlan's mission failed. Ultimately it was Brewer who engineered Field's resignation, arranging that he, Field, would have a role in choosing his own successor, who turned out to be McKenna, McKinley's Attorney General and conveniently also from California. C. B. Swisher, supra note 12, at 444.
17. Pollock v. Farmers' Loan & Trust, 157 U.S. 429, 586 (1895).
18. Westin, supra note 15.
19. 154 U.S. 362 (1894).
20. 158 U.S. 564 (1895).
21. Field was assigned a marshal to protect him from the threats of the woman's husband (who was, of all things, a former chief justice of the Supreme Court of California). In defending Field the marshal killed the woman's husband, and then the Supreme Court had to decide whether the state court prosecution that had been brought against the marshal could be removed to federal court. Cunningham v. Neagle, 135 U.S. 1 (1890). See also C.B. Swisher, supra note 12, at 331-361.
22. See, e.g., The Civil Rights Cases, 109 U.S. 3, 26 (1883) (Harlan, J. dissenting); United States v. E.C. Knight, 156 U.S. 1, 18 (1895) (Harlan, J. dissenting); The Lottery Case, 188 U.S. 321 (1903).
23. See, e.g., National League of Cities v. Usery, 426 U.S. 833 (1976); Fiss and Krauthammer, The Rehnquist Court, The New Republic, Mar. 10, 1982, p. 14. But see Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 10005 (1985).
24. 163 U.S. 537, 552 (1896).
25. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
26. United States v. Abrams, 250 U.S. 616, 624 (1919). Roscoe Pound, then Dean of the Harvard Law School, wrote to Holmes of his *Abrams* dissent: "It is worthy to stand with your opinion in the *Lochner* case as one of the classics — yes one of the landmarks — of our law. May it come to its own as quickly as did the position you took in [that] case!" Letter from Roscoe Pound to Oliver Wendell Holmes, Jr. (November 26, 1919) (on file in the Harvard Law Library).
27. 198 U.S. 45, 74 (1905).
28. Indeed, Holmes once said of Harlan, "That sage, although a man of real power, did not shine either in analysis or generalization and I never troubled myself when he shied. I used to say that [his mind was] a powerful vise, the jaws of which couldn't be got nearer than two inches to each other." Letter of April 5, 1919, to Frederick Pollock, in 2 Holmes-Pollock Letters 7-8 (M. Howe ed. 1942). Fuller once narrowly averted a fight between Holmes and Harlan. When Holmes interrupted Harlan, saying "That just won't wash," Fuller chimed in, "But I keep scrubbing away." W. King, Melville Weston Fuller, Chief Justice of the United States 1888-1910, 290 (1950).
29. 198 U.S. 45, 65 (1905). See also Adair v. United States, 208 U.S. 161 (1908).

30. L. Lardner, supra note 2, at 15.
31. Brewer and Brown also had prior judicial experience. Brown served in the federal court in Detroit before being appointed to the Supreme Court, and Brewer served on both the Kansas and federal courts.
32. Proceedings on the Death of Mr. Justice Brewer, 218 U.S. xv (1910).
33. 163 U.S. 537 (1896). While on the Supreme Court of Kansas, Brewer upheld a law involving separate facilities for Negroes, Board of Education v. Tinnon, 26 Kan. 1 (1881). See also note 35 infra.
34. 109 U.S. 3 (1883).
35. Hodges v. United States, 203 U.S. 1 (1906). In Berea College v. Kentucky, 211 U.S. 45 (1908), Brewer wrote for the Court (over Harlan's dissent, but with Holmes's concurrence) upholding a state law that prohibited a corporation from conducting its instructional activities on a racially integrated basis. He reserved the question as to whether such a law was valid as applied to individuals. Brewer made a similar distinction between the rights of individuals and the rights of state-created organizations in his concurrence in Northern Securities v. United States, 193 U.S. 197, 360 (1904). Justice Rehnquist now appears attracted to this distinction. See First National Bank of Boston v. Bellotti, 435 U.S. 765, 822 (1978).
36. Giles v. Harris, 189 U.S. 475, 488 (1903). See also Giles v. Teasley, 193 U.S. 146 (1904). For an analysis of Holmes's performance in civil rights, see Rogat, Mr. Justice Holmes: A Dissenting Opinion (Part 1), 15 Stan. L. Rev. 3 (1962); Rogat, Mr. Justice Holmes: A Dissenting Opinion (Part 2), 15 Stan. L. Rev. 254 (1963).
37. 205 U.S. 454, 465 (1907). Harlan dissented on more robust grounds, id. at 463.
38. United States v. Sing Tuck, 194 U.S. 161, 170 (1904). In dissenting Brewer achieved a measure of eloquence that was reminiscent of his dissent in *Fong Yue Ting*:

> Let me say that the time has been when many young men from China came to our educational institutions to pursue their studies. . . , and when China looked upon this country as her best friend. If all this be reversed and the most populous nation on earth become the great antagonist of this republic, the careful student of history will recall the words of Scripture, "They have sown the wind, and they shall reap the whirlwind," and for cause of such antagonism need look no further than the treatment accorded during the last twenty years by this country to the people of that nation.

Id. at 182.
39. United States v. Ju Toy, 198 U.S. 254, 264 (1905).
40. Yamataya v. Fisher, 189 U.S. 86, 102 (1903).
41. Brewer, The Spanish War, an address before the Liberal Club of Buffalo, New York (Feb. 16, 1899) (pamphlet available in the Yale Law School Library). He also joined Fuller's dissenting opinions in Downes v. Bidwell, 182 U.S. 244, 347 (1901), and Dooley v. United States, 183 U.S. 151, 166 (1901). Later, perhaps because the imperialist impulse was spent, he, Fuller and Peckham abandoned their strong objections and joined White's incorporation doctrine. Rassmussen v. United States, 197 U.S. 516 (1905). Holmes was not on the Court when it first confronted these issues in *Downes*, but seems to have favored incorporation from the outset of his tenure. Hawaii v. Mankichi, 190 U.S. 197 (1903).
42. Brewer, The Spanish War, supra note 41, at 11.
43. Adair v. United States, 208 U.S. 161 (1908).
44. Smyth v. Ames, 169 U.S. 466 (1897).
45. Holden v. Hardy, 169 U.S. 366 (1878); Lochner v. New York, 198 U.S. 45, 65 (1905); Muller v. Oregon, 208 U.S. 413 (1908).
46. Harlan voted with the Court each time it upheld an antitrust action. See United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint Traffic, 171 U.S. 505 (1898); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); Northern Securities

Co. v. United States, 193 U.S. 197 (1904). Three times he was the lone dissenter when the Court refused to apply the Sherman Act. See United States v. E.C. Knight, 156 U.S. 1, 18 (1895); Hopkins v. United States, 171 U.S. 578 (1898); Anderson v. United States, 171 U.S. 604 (1898). After Brewer died, and shortly before his own death, Harlan protested the adoption of the rule of reason. See Standard Oil v. United States, 221 U.S. 1, 82 (1911); United States v. American Tobacco, 221 U.S. 106, 189 (1911). See note 50 infra.

47. D. Brewer, The Nation's Safeguard, 16 N.Y.S.B.A, Rep. 37, 38 (1893).

48. Id. at 39.

49. Brewer, Protection of Private Property from Public Attack, an address to the Yale Law School (1891) (available at the Yale Law School Library).

50. United States v. E.C. Knight, 156 U.S. 1 (1895).

51. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). The framework of the ban on price fixing was given added depth in United States v. Joint Traffic, 171 U.S. 505 (1898). In two companion cases, Hopkins v. United States, 171 U.S. 578 (1898) and Anderson v. United States, 171 U.S. 604 (1898), the Court refused to apply the statute to stockyards. The Sherman Act was first applied to manufacturing industries in Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), which virtually overruled *E.C. Knight* by including a cartel among pipe manufacturers within the scope of the act. All these opinions were written by Peckham and joined by Brewer.

52. Northern Securities v. United States, 193 U.S. 197, 360 (1904).

53. 208 U.S. 412 (1908).

54. Paul, supra note 2, at 1532.

55. Holden v. Hardy, 169 U.S. 366 (1898).

56. See supra note 42.

57. Pollock v. Farmers' Loan & Trust, 158 U.S. 601 (1895).

58. Brewer, The Income Tax Cases and Some Comments Thereon, an address to the graduating class of the Iowa Law School (June 8, 1898) (pamphlet available in Yale Law School Library).

59. *Munn* explicitly placed grain elevators within the scope of the phrase "property clothed with a public interest," but on his theory, Brewer refused to extend rate regulations so far and dissented in two cases allowing rate regulation of grain elevators, Budd v. New York, 143 U.S. 517, 548 (1892), and Brass v. North Dakota, 153 U.S. 391, 405 (1894).

60. 154 U.S. 362 (1894).

61. *Id.* at 410.

62. Brewer, The Nation's Safeguard, supra note 47.

63. Brewer, The Nation's Anchor, 30 Chi. Legal News 222 (1898).

64. The conventional learning is best stated in A. Bickel, The Least Dangerous Branch (1962), an intergenerational book that seeks to reconcile two commitments — one to the New Deal, and the other to Brown v. Board of Education, 347 U.S. 483 (1954); 349 U.S. 294 (1955).

65. Brewer, The Nation's Safeguard, supra note 47, at 47.

66. In a letter to Harold J. Laski of January 8, 1917, he wrote:

> I am mighty skeptical of hours of labor and minimum wages regulation. . . . [I]t only means shifting the burden to a different point of incidence. . . . If the people who can't get the minimum are to be supported you take out of one pocket to put into the other. I think the courageous thing to say to the crowd, though perhaps the Brandeis school don't believe it, is, you now have all there is — and you'd better face it instead of trying to lift yourself by the slack of your breaches.

1 Holmes-Laski Letters 51-52 (M. Howe ed. 1953).

67. Letter of March 4, 1920 in id. at 248-249.

68. I have in mind Yosal Rogat's classic appellation of Holmes, see Rogat, The Judge as Spectator, 31 U. Chi. L. Rev. 213 (1964). See also, E. Wilson, Justice Holmes, in Patriotic Gore (1962).

69. Brewer, The Nation's Safeguard, supra note 47, at 45.
70. Brewer, Two Periods in the History of the Supreme Court 1, an address to the Virginia Bar Association, Richmond, 1906.
71. Brewer, The Spanish War, supra note 41, at 9.
72. 158 U.S. 564 (1895).
73. D.B. Johnson, 1 National Party Platforms 1840-1956, at 99 (rev. ed. 1978).
74. F. Frankfurter and N. Greene, The Labor Injunction 1 (1930).
75. Brewer, The Nation's Safeguard, supra note 47, at 40.
76. A. Lindsey, The Pullman Strike: The Story of a Unique Experiment and of a Great Labor Upheaval 174, 234 (1932).
77. 158 U.S. at 597 (1895).
78. *Id.*
79. *Id.* at 592.
80. Paul, supra note 2, at 1526.
81. Lardner, supra note 2, at 1-28.
82. Brewer, The Spanish War, supra note 41, at 11.