

3-1965

Justice Brewer and Substantive Due Process: A Conservative Court Revisited

Robert E. Gamer

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>



Part of the [Fourteenth Amendment Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Robert E. Gamer, Justice Brewer and Substantive Due Process: A Conservative Court Revisited, 18 *Vanderbilt Law Review* 615 (1965)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol18/iss2/8>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Justice Brewer and Substantive Due Process: A Conservative Court Revisited

*Robert E. Gamer**

Justice Brewer was a conservative Justice who served on what is thought to be the most conservative Supreme Court in history. The author here provides a balanced view of the Justice as one concerned with the protection of individual rights and as a critic of the capitalistic society of his time.

From the heat of ideological battle which has accompanied the emergence of America into the status of a capitalistic society, late nineteenth century conservatives have emerged in many circles with a reputation for being selfish, profit-hungry individuals attempting to hide their rapacity under a cloak of pleasant platitudes and private charity. In addition to falling under this less-than-favorable shadow, those of this breed who presumably came to cluster about the Supreme Court of the United States have been attacked by liberals for subverting the Constitution of the United States into an instrument to serve the acquisitive interests of the capitalists by changing the intent of an addition to the Constitution meant primarily to serve higher human values: the "due process" clause of the fourteenth amendment.

As the dust of battle begins to settle, it is perhaps well to take another look at this period and its men. Few men of the period serve this objective so well as Justice David Josiah Brewer—of patrician and Puritan stock, nephew of arch-conservative Stephen J. Field, Yale educated, frontier pioneer, and a leading conservative on what is often thought of as the most conservative Supreme Court in the history of the land.

The man discussed in the pages that follow is not like the men described above. He is an unselfish, religious man, deriving his humane individualistic values from many of the same sources as those liberals who criticize him, and applying them not only to the peripheral affairs of his life, but to his decisions as to the constitutionality of the most important economic questions of his day. He is a man with a hatred of acquisitive capitalism as profound as his support for the rights of working women. His changes in due process, rather than being a revolutionary upheaval in constitutional interpretation, appear as part of a gradual extension of the doctrine of vested rights to

* Assistant Lecturer, Department of Political Science, University of Singapore, Malaysia.

selected problems and as a balancing of economic liberty against other natural rights of man. As opposed to "corporate advantage over labor," "profit motives," or a vision of oligarchic government, the central theme of Justice Brewer is seen to be the protection of the conscientious, persevering free individual—rich or poor—in his right to reap the fruits of his labor and to develop his person and his character to their highest fruition. In short, he appears more as a critic of his capitalistic society than as a representative of it.

The success of this process of reconstruction the reader must, of course, judge for himself. The reader must also decide whether the Justice really understood the social forces of his age. And he might do well to keep in the back of his mind this account by Professor Clinton Rossiter on the temper of American conservatives at the turn of the century:

The right of these free-wheeling decades was a genuine right: it was led by the rich and well-placed; it was skeptical of popular government; it was opposed to parties, unions, and leagues, or other movements that sought to invade its positions of power and profit; it was politically, socially, culturally, and, in the most obvious sense, economically, antiradical.¹

"Three things differentiate the civilized man from the savage," the Justice told the New York Bar Association in 1893: "that which he knows, that which he is, and that which he has."² Here in stark outline was David J. Brewer's philosophy of man.

All ages pour their thoughts and wisdom into (man's) brain, and he stands possessor of all the beautiful, the true, and the good that the ages have wrought or accumulated, and in this he stands secure from human assault.³

One's mind travels back to the frontier life of Leavenworth, Kansas where the young man had begun his career on the bench. One remembers the Kansas of the 1850's—the Kansas of adventurers, railroad speculators, rugged homesteaders, of men born on the frontier and moving with the frontier—free-wheeling Kansas, "Bloody Kansas." One thinks of the law offices of Leavenworth—the place to "fix it up legal like" when other solutions seem inexpedient, the feet on the table, the nasty anecdotes, the squirt of tobacco juice in the fireplace. "It did not require much training to be a lawyer in Kansas at an early day," said the editor of a St. Louis law review on the occasion of Brewer's appointment to the United States Supreme Court, "and it only required the habits of a student to enable one to become a

1. ROSSITER, *CONSERVATISM IN AMERICA* 133 (1955).

2. Brewer, *The Nation's Safeguard*, 16 N.Y.S.B.A. REP. 37 (1893).

3. *Id.* at 37-38.

prominent and successful lawyer."⁴ This seemed hardly the place for the son of a Field and a Brewer . . . the grandson of the man who stood at the pulpit of Jonathan Edward's former church, the nephew of a man soon to become one of America's most famous Supreme Court Justices, of one of New York State's most prominent lawyers, and of the organizer of the Atlantic cable venture. The environs sound stark for a student fresh from the classical curriculum at Yale, "drilled . . . in Greek and Latin, and the higher math."⁵

One begins to understand his emphasis on that which a man is:

All passions riot in the savage. . . . Civilization lifts the soul above the body, and makes character the supreme possession. It reads into human history the glory and value of self-denial. It catches from the Divine one of Nazareth the nobility of helpfulness, and teaches that the externals are not the man That also which a man is, is not the subject of larceny; nor can it be wrested from him by king or mob.⁶

It was no accident that David "studied the law with diligence, and his learning and talents were soon recognized by his being elected to a seat on the Supreme Bench of the State"⁷ of Kansas. The editor of *Case and Comment*, memorializing the late Justice, wrote that "Justice Brewer's habits were Spartan. It was his practice for many years to rise at four o'clock in the morning to attack his work." "Even after he became a Supreme Court Justice," the editor hastened to add, "he still continued to rise at five."⁸

Brewer's family character training had much in common with that of his uncle, Stephen J. Field. David's mother, Stephen's sister,⁹ grew up in the impoverished home of an austere New England pastor. Her father was convinced of the majesty and immutability of the Biblical law and the reality of hell; the nine Field children were faced with the glories of perseverance and personal frugality. She ended these formative years abruptly in 1829 when her head was turned by a Reverend Josiah Brewer, fresh from divinity training at Yale. The nuptials were barely spoken when the couple, accompanied by brother Stephen, was headed for the Mediterranean Sea to staff a school for women recently established by the Ladies Greek Association of New Haven. Eight years later (June 20, 1837) in Smyrna, Asia Minor, David Josiah was born. There he spent his early years, de-

4. Note, 24 AM. L. REV. 138 (1890).

5. *Ibid.*

6. Brewer, *supra* note 2, at 38.

7. Note, *supra* note 4, at 138.

8. *David Josiah Brewer: An Ideal American*, 16 Case & Com. 363 (1910) [hereinafter cited as *An Ideal American*].

9. See SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 5, 6 (1930).

veloping an abiding concern for missions and the rights of women, and maturing in the Christian virtues.¹⁰

Returning to New England for his education, he entered Wesleyan College in Middletown, Connecticut, and later graduated from his father's alma mater, Yale, in the class of 1856—a class which contained such other successful conservatives as Henry Billings Brown (with whom Brewer later served on the United States Supreme Court) and Senator Chauncey M. Depew.¹¹ He soon went to read law in the law office of his eminent uncle David Dudley Field, and in 1858 graduated from Albany Law School.

Now, at the point of embarking on a career, David must have approached his next step with the same sweep of mind that characterized his later judicial decisions. He had behind him a good education "as American educations go."¹² His talents of mind were recognized by his peers. His personal affability, patience, and ability at handling people were such as to seldom fail to win the praise of his associates.¹³ And America was a growing land. Few avenues were closed to him. In fact, so fortunate was he that even the response of lethargy would have meant almost certain success. Already he was in a position any blossoming law graduate would have coveted: the law office of David Dudley Field.

But lethargy was not part of the nature of a Field or a Brewer, nor was this spirit to be entangled in coat tails. His graduation found him prepared to take the trail West. Some say he was following in the footsteps of Stephen Field; others see him joining the ranks of the soldiers of fortune or attempting to escape the rigid life of the East.¹⁴ A statement ascribed to his tongue seems more to the point: "I don't want to grow up to be my uncle's nephew."¹⁵

He visited the romantic spots about which the youth of his generation had often heard—St. Louis, Kansas City, Colorado. But in a few months he was ready to return to more serious pursuits. Arriving in Leavenworth, Kansas, "with just 65¢ and as he afterwards said, not wishing to appeal to his wealthy relatives he realized that it was time

10. *An Ideal American* at 361.

11. Another of his classmates, Judge Magruder, later observed: "Mr. Brewer, while at college, was noted for jumping up on the slightest provocation to make a speech, especially on political lines." Magruder, 42 *CHICAGO LEGAL NEWS* 273 (1910).

12. Note, *supra* note 4, at 138.

13. Even his most unfavorable commentator praised his personable nature: "He was a very pleasant man in private, but he had the itch for public speaking and writing and made me shudder many times. I had to remind myself that one should not allow taste to blind one to great qualities, as it is apt to." Justice Oliver Wendell Holmes, Jr., to Sir Frederick Pollock, quoted by Francis Bergan. Bergan, *Mr. Justice Brewer: Perspective of a Century*, 25 *ALBANY L. REV.* 192 (1961).

14. See, for instance, *Id.* at 195.

15. Magruder, *supra* note 11.

to settle down." He soon found a position as a United States Commissioner at five dollars a day "when there was work to do," and by 1862 was nominated judge of the probate and criminal courts of Leavenworth County, beginning his rapid rise in the judiciary.¹⁶ In 1865 he became United States District Judge, in 1869, county attorney, and by 1870 began twelve years in the Kansas Supreme Court. 1884 found him United States Circuit Judge for the Eighth Circuit; he began his twenty-year term on the United States Supreme Court in 1890.¹⁷

Though it was his unquestioned talents which sent him up the ladder of the judiciary, it was not entirely by choice, it seems, that he left the rough-and-tumble of politics at such an early juncture. "I want to be a legislator; I care nothing about a judicial career," he is reported to have often asserted.¹⁸ When the county Republican convention was held in Leavenworth in 1862, Brewer had made it clear he wanted to be a candidate for the legislature. Perhaps it was more than the 65 cents in the pocket which governed his choice of Leavenworth as the starting point of his career. The nomination did not go his way, however, and bitterly disappointed, he hurried from the convention hall and returned to his office. Some of his friends, knowing his feelings, thereupon succeeded in nominating him for probate judge. Confronted with this news after the meeting was over he at first refused, but later agreed to become a candidate rather than cause the trouble of calling another election.¹⁹

Once he was on the bench, it became clear that his Puritan training had not been wasted. His was not the ambition of the adventurer, but rather the diligence for labor which is the mark of Christian virtue. "[A]ny high-minded man, (and no other is fit for judicial office)", he later opined, "when elected to one, is impressed with a sense of his responsibility, becomes more careful in his words and actions and more keenly alive to the demands of justice. Still he is the same man that he was before election, and if then susceptible to improper influences, is in the danger of yielding to like influences after his elevation."²⁰

The statement is autobiographical. He saw character to lie at the base of the nation's strength, doubly so because of the democratic nature of the Republic. Countless times he repeated the assertion that this was a Christian nation—in pamphlet, speech, and court decision. Especially does this duty fall upon him who holds public office.

16. *Ibid.*

17. *An Ideal American* 362.

18. Magruder, *supra* note 11.

19. *Ibid.* *An Ideal American* also refers to his early political aspirations.

20. Brewer, *Organized Wealth and the Judiciary*, 37 CHICAGO LEGAL NEWS 16 (1904).

"Corruption in the President or venality in the Supreme Court would be a terrible blow to the nation's good name." But ultimately their good behavior rests on those below. "Indeed, how can we expect that they who occupy representative places will continue pure and honest if the great mass of the people are not?"²¹ This conviction expressed itself in a deep concern over the relation of the judge to politics, probably expressive of his personal value struggle during those early years on the bench:

[A]s a general rule, one accepting judicial office should be impressed with the conviction that thereby his political life is ended and that the possibility of distinction and success lies wholly in his devotion to judicial service and the character of the work he does therein. Over the judicial door should be written in fadeless letters: Who enters here leaves all political hopes behind.²²

Brewer's closed door to politics did not, however, prevent him from using his "rich, rotund voice" and ready wit and charm to advocate from the public platform causes dear to his heart.²³ The reduction of arms, international arbitration,²⁴ women's suffrage, Philippine independence (to prevent our "Anglo-Saxon stock" from being "submerged"),²⁵ high professional standards at the bar, and "Christian citizenship" won frequent platform support from him.²⁶ He was throughout his life an active member of the Congregational Church, both at the local and national level. On the day of his death he was Vice President of the American Missionary Association. He served on the board of a Washington school for the deaf and dumb, rarely missing a meeting and carefully carrying out his responsibilities.²⁷

"What a man is" was unquestionably important to the Justice, and his personal qualities were such as to be unimpeachable before mob or king.

We must return to the speech before the New York Bar Association and the three things which differentiate the civilized man from the savage. Any disciple of H. H. Tawney, having discovered something of what David J. Brewer knew and was, should have had little difficulty by now in perceiving what his attitude might be toward the

21. Brewer, *Personal Character as a Responsibility of Citizenship*, 10 YALE L.J. 233 (1901).

22. Brewer, *supra* note 20.

23. *An Ideal American* 363.

24. He and Chief Justice Fuller served as arbitrators in the Venezuela boundary disputes. See Butler, *Services of Justice Fuller and Brewer in Questions of International Law*, 4 AM. J. INT'L L. 909-21 (1910).

25. See Brewer, *supra* note 21, at 234-35.

26. 21 BENCH AND BAR 39 (1910).

27. 218 U.S. vii (1910 Memorial Service for Justice Brewer).

relationship between goods and civilization—"what a man has"—and his speech does not disappoint these conceptions:

It is the unvarying law, that the wealth of a community will be in the hands of a few; and the greater the general wealth, the greater the individual accumulations. 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 combinations and great financial results; and hence it always has been, and until human nature is remodeled always will be true, that the wealth of a nation is in the hands of a few, while the many subsist upon the proceeds of their daily toil.²⁸

The rewards reaped by the elect from "self-denial and saving" shine through this affirmation. And more than Calvinism presents itself here. Behind the words there seems to lurk something more immediate, something closer to the experience of the expanding, dynamic frontier society. Brewer paints the picture of "an American girl seated on a throne . . . Every part of the world is ransacked to please her fancy . . . the potency of civilization is that it accumulates all that the earth produces, and pours it round and into the homes of its children."²⁹ Then into this picture of plenty, Brewer introduces a fear. Experience has shown him that life cannot remove those two commodities so precious to him—his character and his learning.

But that which he has lies within the reach of others. Given power and willingness on the part of those about him, and a man may be stripped of all his material possessions. Hence the eighth and tenth commandments: "Thou shalt not steal. Thou shalt not covet." Only under their sanction is society possible.³⁰

Nothing touched his soul more harshly than greed. His world was one of opportunity and prosperity which Anglo-Saxon conscience and Christian charity demanded be exploited in order that men of character might not be swallowed in an inferior mass—"the multitude, with whom is the power." Here is the threat he saw most vividly—a menace not only to property, but (of most urgent consequence) to the moral roots of the nation. The multitude is not undeserving; it merits the fruits of its own toil. But the multitude greedy for that which neither its character nor its training warrants its attaining is neither Anglo-Saxon nor Christian.

I do not propose to discuss the foot-pad or the burglar; they are vulgar and brutal criminals, in whose behalf there has as yet been organized

28. Brewer, *supra* note 2, at 39.

29. *Id.* at 38.

30. *Ibid.*

no political party. I wish rather to notice that movement which may be denominated the movement of "coercion," and which by the mere force of numbers seeks to diminish protection to private property. It is a movement which in spirit, if not in letter, violates both the eighth and tenth commandments; a movement which, seeking that which a man has, attempts to wrest it from him and transfer it to those who have not.³¹

Brewer takes no pains to conceal his reference to the Grangers and labor movements. Apparently they are his moral and political enemies. Yet his attack is not that simple. The problem must be viewed in the light of Brewer's conception of government.

It must not be supposed that the forms in which this movement (regulating railroads) expresses itself are in themselves bad. Indeed the great danger is in the fact that there is so much good in them . . . Labor organizations are the needed and proper complements of capital organizations. They often work wholesome restraints on the greed, the unscrupulous rapacity which dominates much of capital; and the fact that they bring together a multitude of tiny forces, each helpless in a solitary struggle with capital, enables labor to secure its just rights. So also, in regulating the charges of property which is appropriated to public use, the public is but exercising a legitimate function, and one which is often necessary to prevent extortion in respect to public uses.³²

Capital is not all-virtuous; Grangers and unionists have their merits. The common denominator of justification is justice. One must remember this while approaching his definition of the end of government:

[S]ecurity is the chief end of government; and other things being equal, that government is best which protects to the fullest extent each individual, rich or poor, high or low, in the possession of his property and the pursuit of his business.³³

The free individual stands highest on his list. This individual must be protected from whatever it is which seems to harm his liberty—whether corporation, union, government or the individual himself. He does not speak of that government governing best which governs least; neither, on the other hand, does he speak of the paternal protection of the individual's character or ability to advance in society. The power of the state is available to prevent excesses against property; people, corporation, union, government are all to be regulated by that principle. The all-important question rises of

31. *Ibid.* Note Rossiter: "Since the one real threat to their position was the demand of the new liberalism for government intervention, they were forced to argue for individual liberty and against communal activity." ROSSITER, *op. cit. supra* note 1, at 133.

32. Brewer, *supra* note 2, at 41-42.

33. *Id.* at 39.

what constitutes the boundaries of excess. But first it is necessary to discover what the limits are which government is to place upon each of these entities.

The people, Brewer trusts in a manner aptly described by Rossiter: Since the conservatives "were leading citizens in a country in which political democracy was now an established fact and holy faith, they were forced to talk, and even to think, in the language of Liberalism."³⁴ "I have an abiding faith in the judgment of the American people," Brewer once declared.³⁵ But he is probably more candid when he speaks of railroad rates and "those who have invested perhaps their all in that business" depending "wholly upon the whim and greed of that great majority of sixty millions who do not own a dollar."³⁶ "It may be said," he continues, "that the majority will not be so foolish, selfish, and cruel as to strip that property of its earning capacity. I say that so long as constitutional guarantees lift on American soil their buttresses and bulwarks against wrong, and so long as the American judiciary breathes the free air of courage, it cannot."

Here, in the judiciary, is the heart of the Justice's scheme of government—"The Nation's Safeguard," "The Nation's Anchor," "Protection to Property from Public Attack" as he labeled it in his three best-known speeches. This judiciary he deems compatible with democracy. "The wisdom of the government is not in protecting power, but weakness; the true end of government is the protection of the individual; the majority can take care of itself."³⁷ Like Mill, Brewer believed free discussion to have a positive value in society. "Let every individual thrust into the seething mass of public opinion his own views of what ought and what ought not to be done. Let the clamor go on."³⁸

He would have been far more comfortable were this discussion carried on within the confines of a Parliament. With Burke and the Whigs, he abhorred the unrestricted Crown.³⁹ In England the will of the people is expressed in Parliament's enactments, "the supreme and incontestable law." But where the British can put final faith in the legislature, we cannot. Britain is composed of "the conservative natures of the single homogeneous race—the Anglo-Saxon—which fills the land and controls the government"; our population is "heterogeneous" and a mixture of all types of "natures." Britain has "the

34. ROSSITER, *op. cit. supra* note 1, at 133-34.

35. Brewer, *The Nation's Anchor*, 30 CHICAGO LEGAL NEWS 222.

36. Brewer, *supra* note 2, at 41.

37. Brewer, *Protection of Private Property from Public Attack*, 10 RAILROAD AND CORPORATION LAW JOURNAL 281 (1891).

38. Brewer, *supra* note 35, at 222.

39. Brewer, *supra* note 2, at 39.

limited suffrage which restricts the power to the more conservative of even that race"; our suffrage is universal. Britain is blessed by "checks and counterchecks" from "the essentially different characteristics of her two legislative bodies"; here both bodies "represent the voters."⁴⁰ "An unrestricted and absolute legislative freedom would certainly sweep on to despotism of the mob, whose despotism is always followed by the man on horseback."

The American Congress still remained a safe enough haven for the great public debate; but the American Whig must look elsewhere for the "supreme and incontestable" decision. Justice Brewer found the latter readily available:

[W]hen the people framed the organic law they meant that it should be the measure of all rights and the limitations of all powers, and when they entrusted to the courts the duty of determining whether any single act conflicts with that organic law they meant that those courts should discharge that duty in the fear of God and according to their unbiased and deliberate judgment.⁴¹

Sovereignty in America lies neither with the crown nor the parliament; it rests on the head of the American judicial system. It is a benevolent sovereignty because it is guided by the organic law of the Constitution. The Court represents the people because it lets them experiment without harming themselves. Parliament's duties are split; its sovereignty is not. Constitutions are "rules prescribed by Phillip sober to control Phillip drunk."⁴² The Congress and the President governing under the Constitution are, like Parliament, the people carrying out the desires of the people. They are sometimes sober, sometimes drunk. The Court, guarding the Constitution, is always sober; it, like Parliament, is the people protecting the people. The citizens can "recognize in the judgments of that court either the voice of a Daniel or the braying of an ass."⁴³

[B]ut in the last analysis, the court largely reflects the popular judgment; not its hasty opinion, but that which is the result of deliberate and well-considered thought. And yet the power of the Supreme Court in incarnating into the constitutional life of the nation the thoughts and purposes of the people, sometimes indeed going in advance of popular recognition, makes its action not only reflex but also an indication of the development of popular government.⁴⁴

40. Brewer, *supra* note 35, at 221.

41. *Id.* at 222.

42. Brewer, *supra* note 2, at 45.

43. Brewer, *supra* note 35, at 222.

44. Brewer, "Two Periods in the History of the Supreme Court," Address to Virginia Bar Association, Richmond, 1906, p. 1 [Hereinafter cited as "Two Periods"].

Brewer sees a Constitution adapting itself to new situations while protecting old rights. The job of interpreting the balance between the two is frankly not mechanical. As new situations occasion new experiments, it will be the Court's assessment of how they jibe with the old rights of the Constitution that takes precedence over all others. In its deliberation the Court can and must take notice of the sober opinion of contemporaries and the changing facts of social life; its task cannot be isolated from the world of affairs. But because of the important role it is intended to play, and the unique institutional factors making it the most impartial organ of American life,⁴⁵ in the end it can feel justified in giving the benefit of the doubt to its own better judgment. Even "justified" is too mild a word: it is compelled.

[W]hat factor in our national life speaks most emphatically for stability and justice . . . ? Magnifying, like the apostle of old, my office, I am firmly persuaded that the salvation of the nation, the permanence of government of and by the people, rests upon the independence and vigor of the judiciary . . . free from all influences and suggestions other than is compassed in the thought of justice.⁴⁶

Here is a Justice with an emphatic duty to protect the security and rights of the individual. That is his only certain call. At one moment he sees the protective duty as an expression of "the purposes of the people"; at another he finds himself "limited to seeing that popular action does not trespass upon right and justice as it exists in written constitutions and natural law";⁴⁷ in a third context he is saving men from the moral debilitation of modern corporate life. At other times it seems to be the founding fathers, or English common law, or American legal precedent, or—most important—the Declaration of Independence from which the duty springs. But no trifling considerations can hold it back. It is the supreme task of the court.

Since it is not "the individual" but rather individuals among whom the court must adjudicate, one wonders what rights and whose security will find the most protection under this summons. The judge's mission seems such that his "yeas" and "nays" can record nothing less than the innermost motivations of his character.

45. See, e.g., Brewer, *supra* note 20. He strongly upheld life tenure and fixed salaries. He advocated a law preventing judges from returning to the bench once they had left it. He demanded a constant watch on the character qualifications of judges.

46. Brewer, *supra* note 2, at 46. The passage is preceded by "Who does not see the wide unrest that fills the land; who does not feel that vast social changes are impending, and realize that those changes must be guided in justice to safety and peace or they will culminate in revolution?" He indicates that the court is "to stay the waves of popular feeling, to restrain the greedy hand of the many from filching from the few that which they have honestly acquired, and to protect in every man's possession and enjoyment, be he rich or poor, that which he hath. . . ."

47. *Ibid.*

Scholars of American constitutional law concerned with the period in which Justice Brewer served the United States Supreme Court⁴⁸ perhaps deal with one phenomenon above all others: the adaptation of "due process of law" to serve vested rights of property.

If there is any general agreement on this complicated process it could perhaps center around the statement that in the 1890's the Court began using broad conceptions of "life, liberty, and property" as a basis for striking down legislation. "The pith and marrow of the due process restriction on legislative power," stated Professor Andrew McLaughlin in 1935, "were protection of property and liberty, not the safeguarding of process, which was only ancillary."⁴⁹ Professor Benjamin F. Wright spoke of the period beginning in the 1890's: "Due process today means very much what earlier jurists understood by the various phrases used to express the concept of natural law. In other words, 'due process' means just what the majority thinks reasonable."⁵⁰ Professor Charles Grove Haines has characteristically asserted that due process "review manifestly was not inherent in any constitutional provision or a necessary concomitant of constitutional interpretation."⁵¹ Professor Robert E. Cushman, in discussing the fourteenth amendment, wrote that the attitude in the 1890's became "almost invariably one which placed upon the shoulders of those defending legislation the burden of proving it to be constitutional. The time-honored doctrine that laws are presumed to be valid until proven beyond all reasonable doubt to be otherwise seemed to be forgotten or ignored."⁵² Howard Jay Graham deems it "generally conceded" that "substantivized due process is essentially constitutionalized natural law."⁵³

48. 1890-1910.

49. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 745 (1935). "The court made some attempt to associate the principle announced with changes in the forms of procedure; but in reality it was not procedure which was under inspection (except for purposes of accepting an analogy) but the essential justice of the act." *Id.* at 751.

50. WRIGHT, *AMERICAN INTERPRETATIONS OF NATURAL LAW* 306 (1931).

51. HAINES, *The History of Due Process of Law After the Civil War*, in I *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 279 (1938). "It is coming to be better understood today than formerly that methods of thinking fostered by the common law, supported by the capitalists and industrial leaders of the country, and applied by conservative-minded judges rather than constitutional provisions have given the peculiar trend to judicial review of legislation in the United States." *Id.* at 299.

52. Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, in II *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 279 (1938).

53. Graham, *Procedure to Substance—Extra Judicial Rise of Due Process, 1830-60*, 40 *CALIF. L. REV.* 488 (1953). He continues by noting that the natural impact of due process on the mind has been "square deal" or "personal justice," and with people wrought up over issues perhaps there was more "due processing" than generally realized. He then points to "the ease . . . with which such elements in thinking and propaganda not only exploited prevalent Lockian natural rights interpretations of the key words 'life', 'liberty', and 'property' but also benefitted by the inherent tactical advantages

An examination of David J. Brewer's constitutional philosophy would seem to amply back any of these assertions. His view of the active role of the Supreme Court, his concern that the Court should guarantee justice, and above all his opinion that it was the duty of the Court to enforce the protection of personal "life, liberty, and property" in all its constitutional interpretation should indicate that "due process of law" was enforced by considerations far broader than any wording of the Constitution. Once more analysis makes it doubly clear that due process meant for Brewer the reading of natural rights concepts into the Constitution. But since this man is considered a leading spokesman for "substantized" due process, it is conspicuous that a perusal of the speeches and decisions covered in this study produced only two discussions by him of the fourteenth amendment. Quotation from the two will perhaps provide insight into the reason he said so little about it. One reference comes near the end of his most-quoted speech, "Protection of Private Property from Public Attack," delivered in 1891, shortly after he came to the Court:

[W]hile the government must be the judge of its own needs, and in the exercise of that judgment may take from every individual his service and his property, and in the interests of public health, morals, and welfare may regulate the individual's use of his property or the property itself, there remains to the individual the indestructible right of compensation To accomplish this we must recall some of our judicial decisions Perhaps we must even write a "clear" and "preemptory" addition to the constitution to this effect. I emphasize the words "clear" and "preemptory", for many of those who wrought into the Constitution the Fourteenth Amendment believed that they were placing therein a national guarantee against future state invasion of private rights; but judicial decisions have shorn it of strength, and left it nothing but a figure of speech.⁵⁴

The second quotation comes from a speech made near the end of his judicial career, in 1906:

It was early contended that it (the Fourteenth Amendment) vested in the Federal courts a supervision of practically all legislation and judicial action by the several states. But that sweeping claim was repudiated in the Slaughterhouse case (16 Wall. 36), and by that and many other cases national inquiry has been limited to the question whether any legislation or judicial action on the part of the States distinctly contravenes the provisions of that amendment, and operates to deny to any one the equal protection of the law or deprive him of life, liberty, or property without due process of law.⁵⁵

of the phrase 'due (i.e. just) process' as a means of 'constitutionalizing' their earlier natural rights arguments."

54. Brewer, *supra* note 37, at 283.

55. "Two Periods" 10.

The two statements seen side by side show some strange contradictions,⁵⁶ but they do both proclaim his major premise that the Court has a higher duty to protect private rights, conceived in natural rights terms, and independent of the existence of any written amendment.

While scholars may maintain a broad consensus about higher law origins of substantive due process, agreement ends at this point. Three major arguments form an important background to the discussion. One broad controversy concerns the status of vested rights and due process prior to the 1890's. Another concerns the motives which caused the judges to turn to the protection of these rights. A third involves the hierarchy of values by which the rights were protected.

A serious point of confusion in the first of these controversies is the problem of keeping separate the family trees of "due process" and "vested rights" before their marriage took place. Those concerned with proving that the Fuller Court made a major break with precedent like to show that due process had always been associated with criminal and civil court procedure in the earlier days and not with judicial review of legislation. If one wishes to defend the Court's continuity, on the other hand, he turns to the "vested rights" side of the partnership and demonstrates that vested rights had long been defended under one clause or another of the Constitution.⁵⁷ Those who prefer to stress the conspiratorial nature of the Court's use of the amendment to proclaim natural rights perhaps like to play down the existence of vested rights precedents and the extensive use of judicial review on state legislation. On the other hand, those who emphasize the continuity of vested rights are sometimes in danger of forgetting the manner in which the original intentions behind the fourteen amendment (protecting the Negro) fall by the wayside as it became used to read rights of another sort into the document.

The interesting paradox in the whole controversy is that many of the most furious participants blame the conservative judges for not having an intelligible mechanical explanation of judicial decision-making. They at the same time attack the mechanical theory of jurisprudence as being inadequate to explain judicial decision-making. And out of this they somehow derive the conclusion that these judges were wrong for not operating upon a mechanical theory of jurisprudence. The following quotation from Professor Cushman is illustrative:

56. A discussion of the 1906 speech near the end of this paper highlights these contradictions. In the early years he was fighting to overrule the *Slaughterhouse* and *Munn* cases; in later years, with the Court on his side, he had reason to appreciate the moderating aspects of these decisions.

57. Roscoe Pound uses this argument in reverse when he complains of the nineteenth century Court being wedded to stale precedent. See Pound, *Administrative Application of Legal Standards*, 44 A.B.A. REP. 451 (1919).

Now what does a court do when it has to "find" law where there is none? Naturally, but without undue publicity, it draws upon its own ideas as to what the absolute, eternal, and immutable principles of law ought to be with reference to the case in question. . . . Ruthlessly (they) overrode the determinations of the legislatures that social and economic conditions justified and demanded legislative regulation, and in so doing they relied almost exclusively upon abstract legal concepts and ruled out as irrelevant any consideration of social and economic facts.⁵⁸

This explanation falls into the trap mentioned above of ignoring important state and national precedents favoring judicial review and vested rights. Then it turns right back upon itself, after asserting that decisions cannot be made on the basis of abstract legal concepts, by assuming that the Court was actually basing its decisions upon abstract legal concepts anyway, and not on "social and economic facts." The paragraph is basically a moral condemnation of the judges of this period for turning to judicial activism, a condemnation replete with the insinuation that judges noting social and economic "facts" would have been forced to decide other than they did. This kind of criticism ignores its own major premise: that any judge draws on his own ideas in determining what principles are to be used. Justice Brewer's decisions say much less about "abstract legal concepts" (*e.g.*, due process, "liberty of contract") than about "immutable principles." Furthermore, the nature of judicial activism is such that it must itself apply these principles to fact situations (*i.e.*, it must draw upon its own ideas as to what the immutable principles ought to be in the case in question). In his application of the principle of "reasonableness" Brewer massed great quantities of "social and economic facts." His dissent in *Brass v. North Dakota (In re Stoesser)*⁵⁹ bristles with personal detail as to the harm done to North Dakota elevator owners by the application of an outmoded "principle"; his *Austin v. Tennessee*⁶⁰ dissent quotes medical authorities on the danger of cigarettes; his entire decision in *Chicago & Grand Trunk Ry. v. Wellman*⁶¹ turned on the fact that "social and economic facts" had not been presented to the court for decision. His expression of appreciation for the Brandeis brief in the *Muller*⁶² case was typical of his habit of exploring the facts behind the case and belies the "revolution" which that brief presumably brought to jurisprudence. It is simply false to say that some people are sensitive to facts and others are not. The underlying truth is that concepts like "vested rights"

58. Cushman, *supra* note 52, at 67.

59. 153 U.S. 391 (1894).

60. 179 U.S. 343 (1900).

61. 143 U.S. 339 (1892).

62. 208 U.S. 412 (1907).

and "due process," which were unimportant to Brewer, can be used to back almost any kind of position in hard cases like these. "Social and economic facts," which were highly important to Brewer, are necessary for making any kind of judicial decision. But exactly what kinds of facts will seem important to a judge, and the method in which he will incorporate them into decisions, depends chiefly upon his judicial philosophy.

This, then, raises the second area of controversy, so popular in the thirties, over the volitional roots of judicial decision. Max Lerner referred to the then-current criticism of the Court, "that the court's decisions can be better explained by economic bias than by judicial objectivity and that its bent has been to bolster the status quo."⁶³ Justice Holmes found this judgment to depend on "an intuition too subtle for any articulate major premise."⁶⁴ Roscoe Pound found the nineteenth century Court too prone to search the legal system and its rules, doctrines, and precedents in reaching its conclusions.⁶⁵ Perhaps the most profound analysis came in Justice Cardozo's *Nature of the Judicial Process* where he states the judge must:

[B]alance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right and all the rest, and, adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales.⁶⁶

Obviously Justice Holmes and Cardozo had much more difficulty "tipping the scales" than did Brewer. Justice Brewer had an "articulate major premise": the duty of the Court is to protect the economic and personal liberty of the persevering free individual. Moreover, his task was simplified because this was his only major premise; any paradoxes or contradictions in his judicial decisions lay replete in the premise itself. No other great premises came into general battle with this one. In short, "his philosophy, his logic, his analogies, his history, his customs, his sense of right" were all balanced together in this one maxim; they provided a ready-mix package ready to dump whole into each decision. Here was the basis for his "judicial objectivity." "Economic bias" on the one hand and stale precedent on the other could, at the most, furnish only two ingredients to the package.

Still, to imagine the package as a total jumble is to beg the question; some elements mean more than others. Brewer's economic back-

63. LERNER, *The Supreme Court and American Capitalism*, in 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW 158-59 (1938). Lerner's own views differ from this statement.

64. Pound, *supra* note 57, at 457.

65. See Pound, *supra* note 57.

66. CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 126 (1921).

ground gave him most contact with professional people, small businessmen, and independent farmers. It is from them that he made his observations about work, property, and value; it is their problems that he best understood; it is from them that he drew his vision of the ideal man. It is likely that his classical education at Yale gave him no formal training in economics; his "homespun economics"⁶⁷ had to develop primarily from the life he observed about him. In this sense there is a certain deterministic quality about his thinking—a determinism which cannot, however, be equated with self interest. Furthermore, his legal training, his classical education, his frontier experience where the only alternative to law seems to be anarchy, and—perhaps most important—his "Anglo-Saxon" bias, gave him a profound respect for legal tradition. If all precedent were obvious, Brewer would have been most careful about striking it down.

His frontier experience must have done much to formulate his feelings about the values and dangers of self-government. Charles Grove Haines states that substantive due process came "as a result of the fear of democratic control and of popular participation in the regulation of public utilities—the growing belief that private property could be made safe only through judicial review."⁶⁸ It is but a guess, though probably a safe one, to say that Brewer's philosophy of judicial protection first became articulate during his early years on the bench, and in response to experiments with economic regulation. It is likely that his sympathies lay more with those settlers who had taken up corporate or agricultural enterprise than with adventurers who (in his view) came late and lusty and hoped to do by means of the legislature what they had not done with their own backs. It is also likely that it was only around the courts that he met people whom he felt cultured enough to interpret intelligently the Anglo-Saxon legal tradition.⁶⁹

From what intellectual climate does a man like this gain the ideas about law, society, history, and ethics necessary to tie the string around his constitutional doctrine? He undoubtedly read Cooley, Tiedemann, and Dillon, and was duly influenced—though it might be

67. This expression is that of Breck P. McAllister: "The homespun economics of Mr. Justice Brewer served to rationalize a point of view of 1891." McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 771 (1930). Yale must have filled him with many *laissez faire* precepts, but it is not likely that his curriculum gave him any formal training in analyzing economic data.

68. Haines, *The History of Due Process of Law after the Civil War*, in 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW 279 (1938).

69. The reasoning of this paragraph, if valid, would tend to play down Arnold Paul's emphasis on the formative influence of the Homestead strikes and their companions, which in this case were but additional wood on a fire already burning. See PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW* (1960).

said these sources were less important as an influence on his thought than as providing the means to fill in the precedent for a course of action upon which he had already embarked. What of Herbert Spencer and William Graham Sumner, the two men usually credited with furnishing the conception about society for conservatives of this period? Social Darwinism's condemnation of public charity must have struck fertile soil in the young judge,⁷⁰ but conspicuously absent in his speeches is talk of "struggle," "natural selection," "self interest," "survival of the fittest," or other key phrases of the evolutionary philosophy. Social forces did not concern the Judge so much as his deep concern for his fellow men; this naked philosophy could not have taken deep root in his mind. Talk of a "Darwinian Court," or writing Herbert Spencer into the Constitution, must be carefully qualified. More basically, Brewer (and perhaps many of his fellow conservatives) was living in the contractual society of John Locke and natural rights and Thomas Jefferson; he was more of an Edmund Burke advocating the rights of man.⁷¹

What brought this agglomeration of ideas and influences to adhere in the pattern that they did? The catalyst of his constitutional theory can be conceived as the Calvinist ethic. Brewer's conception of the value of labor, the nature of the acquisitive instinct, the obligation to use one's talents to the fullest, the notion that diligent planning should be rewarded, that some are more deserving than others, run parallel to the type of religious training he must have received as a youth. His frequent expressions of concern for the individual man, his notion of Christian citizenship,⁷² his reiteration of the rule of love, and his frequent reference to Biblical themes point in this direction. The lack of evidence of his having experienced a period of serious religious crisis or questioning of the tenets of his faith adds further reason for giving high priority to the strength of Christian economic precepts in the development of his thought.

This leads into the third area of controversy. The most entangling of all arguments about substantive due process concerns the matter of the hierarchy of values which motivated its application. Here is where most of the discussions culminate, and it is here that the impetus for carrying on the discussion reveals itself most baldly. Rossiter states:

70. Brewer once said in illustration: "The philosophy of Plato and Herbert Spencer is (man's) wisdom." Brewer, *The Nation's Safeguard*, 37 N.Y.S.B.A. REP. 37-47 (1893).

71. A phenomenon causing Rossiter to classify these men as "The New Liberals."

72. This concept even became the basis for a Supreme Court decision: because we are a Christian nation we cannot deport a minister who had otherwise entered illegally under the immigration laws. *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

Progress, individualism, democracy . . .—the Right could never have embraced these essentially alien beliefs with convincing enthusiasm except for one decisive fact: the intellectual climate of the age was thoroughly materialistic. More and more Americans were coming to measure all things by the yardstick of economic fulfillment.⁷³

“They . . . wasted few thoughts on man. They ignored almost completely his nature and needs as social, religious, and political animal. The only man who seems to have counted in their thinking was *homo economicus*.”⁷⁴

Professor Robert Green McCloskey uses stronger language: “Locke furnished material and economic values”: Jefferson, “spiritual and humane.”⁷⁵

The one is primarily a humane doctrine, emphasizing the worth of the individual and assigning the rights of property to a subordinate, instrumental position; the other is not indifferent to these humane values, to be sure, but it elevates the property right to the same plane and thus saddles democratic theory with a paradox.⁷⁶

“[E]conomic freedom, which is properly speaking, a means to a subsidiary value in the democratic hierarchy, has assumed the status of an end in itself.”⁷⁷

Both men recognize the “spiritual” elements present, but see them only as an artificial cover for more callous motives. Professor Rossiter talks of their drawing “on the Puritan ethic for other (*i.e.*, noneconomic) moral excellencies: justice, temperance, courage, piety, patience, benevolence, and honesty.” These they claimed were the necessary path to success. Yet deep within themselves they knew that it was “industry and frugality” which would lead their way to fortune.⁷⁸ Professor McCloskey apparently expresses a similar sentiment when he states: “The age was prepared to adopt a materialistic standard of right but it was not prepared to admit that it had done so.” The “strong and wealthy” were favored over “the weak and the poor.”⁷⁹

Here, then, are two attempts to separate human values and economic values within the conservative mind. Probably no stronger basic criticism of the results of this kind of judicial conservatism can be

73. Rossiter, *supra* note 1.

74. *Id.* at 136.

75. McCLOSKEY, *AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE* 2 (1951).

76. *Id.* at 6.

77. *Id.* at 15.

78. Rossiter, *supra* note 1, at 137.

79. McCLOSKEY, *op. cit. supra* note 75, at 85.

made. But to what extent were the judges aware of the paradox? Would Justice Brewer ever consciously favor the strong over the weak, the wealthy over the poor? Was he consciously aware that success was not always the result of the higher virtues, and did he try to face up to the consequences this might bring? Most basically, was he prepared to place the "social, religious, or political" needs of man beneath those of *homo economicus*?

A quick survey of Brewer's chief Court decisions on three major economic issues may show his hand: rate regulation, monopolies, and state regulation under the police power.

A look at Brewer's important decisions and dissents concerning rate regulation makes one thing unquestionably clear: He takes it for granted that the states or the federal government have the right to regulate rates. In fact, he favors this regulation. But he wants it to be fair, and this means that no rate may be set that is not reviewable by the courts. The principle for determining fairness is that regulation should neither deprive the company of profits nor allow it unreasonable operating expenses. And regulation is limited to those who have received favors from the government and thus voluntarily incurred an obligation.

In 1892, a frankly collusive suit came to the Court in which a railroad challenged a Michigan rate law strictly on the grounds that such a law was unconstitutional under the "due process" clause.⁸⁰ Brewer's decision disposed of the railroad's argument in exactly one sentence:

If the contention be that the legislature has no power in the matter and that an act fixing rates, no matter how high they might be, is necessarily unconstitutional, it is enough to refer to the long series of cases in this court in which the contrary has been decided.⁸¹

Having thus written probably his shortest decision, he took the rest of the space to lecture the railroad on the proper way to bring such a case to court: they must not apply the method of turning to the Court by means of a collusive suit⁸² when they fail in the legislature, and they must show with facts that they have been harmed. Is it not possible that reduced rates will increase business and thus

80. *Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339 (1892).

81. *Id.* at 334. He then listed a series of precedents, including *Stone v. Farmers' Loan & Trust*, 116 U.S. 307 (1886), and *Chicago, Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418 (1890).

82. Brewer's belief that the Court's function is to correct actual abuses and not merely hypothetical ones made him bitterly hostile to collusive suits. This feeling went so far that in *Bracton County Court v. West Virginia*, 208 U.S. 192 (1908), he threw out the case on the grounds that the county commissioners had only an official and not a personal interest in the suit.

earnings? How does the Court know your operating expenses are not made up partially "of extravagant salaries: \$50,000 to \$100,000 to the President. . . ."83

While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings to what it is pleased to call "operating expenses."⁸⁴

So concerned was he that public utilities and railroads not use their special legal privileges to block free competition that in *Western Union Telegraph Co. v. Call Publishing Co.*, he argued that the court could regulate on the basis of federal common law in the absence of legislation. The telegraph company had charged the publisher in question drastically discriminatory rates. "We should be loath," Justice Brewer asserted, "to hold that in the absence of congressional action there are no restrictions on the power of interstate carriers to charge for their services."⁸⁵

But Brewer assumed that when no privileges granted by the government or monopoly backed by law were involved, men should be able to take care of themselves and need not be coddled by protection in matters their own initiative can handle. Hence his extreme apprehension at allowing grain elevators to be controlled. Both his *Budd v. New York*⁸⁶ and his *Brass v. North Dakota (In re Stoesser)*⁸⁷ dissents devote much space to pointing up the absurdity of the Court's definition of the public interest when carried to its extreme. His alternative definition of public interest follows Tiedeman's "*sic utere tuo ut alienum non laedas*" a step further:

That property which a man has honestly acquired he retains full control of, subject to these limitations: First, that he shall not use it to his neighbor's injury, and that does not mean he must use it for his neighbor's benefit; second, that if he devotes it to a public use, he gives the public a right to control that use; and, third, that whenever the public needs require the public may take it upon payment of due compensation.⁸⁸

The thought that the mere opening of one's doors for business should give the government the right to step in and regulate made

83. *Chicago & Grand Trunk Ry. v. Wellman*, *supra* note 80, at 345. *IGC v. Cincinnati, New Orleans, & Tex. Pac. Ry.*, 167 U.S. 479 (1897). There must be regulation but with review by the Court.

84. *Chicago & Grand Trunk Ry. v. Wellman*, *supra* note 80, at 346.

85. 181 U.S. 92, 94 (1901).

86. 143 U.S. 517 (1892).

87. 153 U.S. 391 (1894).

88. 143 U.S. 517, 550. (Emphasis added.)

Brewer's blood boil.⁸⁹ If a man wishes to hire out to the government or accept privileges, that is a different matter. Or, if there is a real public need for the land, then the long-established principle of compensation in eminent domain will apply. To expect land without compensation would be bad enough; to expect service without compensation is unbearable. And that is precisely what this kind of regulation forebodes. The *Stoeser* case furnished just such an instance, and his dissent went to great lengths in showing that Stoeser was being forced to take on business he did not want, buy insurance he did not need, and fill his elevator with other people's grain at the moment when he most needed the space for his own buying and selling. Simply because he had decided to help out a few friends by taking their grain during slack season, his business was suddenly labeled with the "public interest" and his profits from buying and selling ruined. And meanwhile 150 dollars would build any farmer his own storage crib. Monopoly? In *Budd* he said that "a monopoly of fact (vs. established by law) any one can break, and there is no necessity for legislative interference."⁹⁰ Here there is not even a monopoly of fact.

When it came to the biggest monopolies of his age—the trusts and holding companies—Brewer's apprehension of the corporation came to the fore. In *United States v. Trans-Missouri Freight Ass'n*,⁹¹ *United States Joint Traffic Ass'n*,⁹² *Addyston Pipe and Steel Co. v. United States*,⁹³ and *Montague & Co. v. Lowry*,⁹⁴ he held consistently with the majority to uphold regulation. The great furor surrounding the *Northern Securities* case⁹⁵ caused him to speak his mind more explicitly in a concurring decision largely overshadowed in discussion by the Holmes dissent which follows it on the record. It is "unreasonable" and not "reasonable" combinations which Congress intended should be regulated. And a distinction must be made between a corporation and its investors. "[E]ach individual has [the right] to manage his own property and determine the place and manner of its investment."⁹⁶ "Just because Mr. Hill happens to own controlling interest" in Great Northern he cannot be prevented from buying Northern Pacific stock.

89. One is reminded of his comment that he would like to go to heaven, but if St. Peter said he *had* to go "there is something in my Anglo-Saxon spirit which would stiffen my spinal column until it was like an iron ram-rod, and force from my lips the reply, 'I won't.'" "Two Periods" 24.

90. *Budd v. New York*, *supra* note 86, at 550-51.

91. 166 U.S. 290 (1897).

92. 171 U.S. 505 (1898).

93. 175 U.S. 211 (1899).

94. 193 U.S. 38 (1904).

95. *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

96. *Id.* at 361.

But a corporation does not have the same "inalienable rights of a natural person," and when several men get together with intent to control they can be stopped.⁹⁷ Thus the Justice hoped to square the rights of a free investment and competition with governmental control of modern corporate society. Regardless of its inconsistencies, the opinion attempted to draw a sharp line between corporations and the protection of due process.⁹⁸ Regardless of the effect that the "rule of reason" may have had when later adopted by the Court, Brewer hardly intended more than his closing sentence indicates:

I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesale business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation.⁹⁹

It was the police power which gave Brewer's constitutional principles the most difficulty. He had no objection to the state regulating bad goods; he took it for granted that the power to regulate means the power to destroy; but he did ask that compensation be paid for all values destroyed by the regulation—including devaluation of property and unsold goods.¹⁰⁰ Since this was from a practical sense impossible, he tended to quiz the substantive reasons for regulation with a critical eye. If he felt the commodity in question to be harmful enough, he would support regulation.¹⁰¹ In later years he came to feel that Congress could be better relied upon to be sensitive both to the desires of the states and to the demands of economic freedom, and broadened the commerce power accordingly. His dissent in *Austin v. Tennessee*¹⁰² questions whether the product being there regulated (tobacco) is harmful enough to warrant the abridgement of the right

97. *Ibid.* This distinction might be kept in mind in approaching attacks on the *Debs* decision, *In re Debs*, 158 U.S. 564 (1895), for refusing to call a union a "person" while the courts do call corporations "persons."

98. See note 97 *supra*.

99. *Northern Securities Co. v. United States*, *supra* note 95, at 364.

100. He developed this doctrine in a case before the Kansas Supreme Court where his concurring comments brought him to nationwide attention: *Kansas v. Mugler*, 29 Kan. 181 (1883). Mugler had been convicted for selling and manufacturing beer after the passage of a prohibition law. Brewer agreed on the conviction for selling. But he suggested that the manufacture had been for personal use and "I have yet to be convinced that the legislature has the power to prescribe what a citizen shall eat or drink . . ." Further, the man should be compensated for the \$7500 the business property has depreciated because of the prohibition.

101. He joined Justice Grey's dissent in *Leisy v. Hardin*, 135 U.S. 100 (1890). "But an intention is not lightly to be imputed to the framers of the Constitution, or the Congress of the United States, to subordinate the protection of the safety, health and morals of the people to the promotion of trade and commerce." *Id.* at 158.

102. 179 U.S. 343 (1900).

to sell, and suggests the problem be decided by Congress under this rule of federalism:

And here is the limit between the sovereign power of the State and the Federal power, that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States.¹⁰³

At the same time he feared the growing power of the federal government in other regards. While he liked the value of Congress in preventing local minorities from controlling majorities, and as a counterpoise to those two rising threats to the individual—corporations and unions—he also feared that this government would itself be used as an instrument by minorities to block the initiative of the great mass of the people. His frustration and inability to cope with these great problems was admirably expressed in a speech he gave before the Virginia Bar Association in 1906: “Two Periods in the History of the Supreme Court”:

His general theme is to trace the process by which the Supreme Court has raised the power of the nation at the expense of the states and the new necessity to slow the process. He begins by extolling the national policy of the Marshall and Taney Courts. He then observes that the general tendency of the Court has been in “restraint of the transfer by virtue of (the thirteenth, fourteenth, and fifteenth amendments) of the entire sovereignty of the State,” but cites approvingly a number of areas in which post-Civil War Court decisions have helped increase national power: Preventing the impairment of obligations of contracts, stopping property damage in the Pullman strike, preventing states from ruining the value of manufactured liquor,¹⁰⁴ and prohibiting the movement of lottery tickets.¹⁰⁵ He then expresses concern that national power will be extended too far, and in the name of the tenth amendment attacks the use of national power to deport aliens, administer colonies, supervise corporations, inspect factories, or regulate divorce and insurance.

He finds that people whose “shoes pinch their feet” are now running to the state legislature and then Congress for protection, making the “never yet defined” police power into an “omnivorous governmental mouth, swallowing individual rights and immunities,” and, failing to get satisfaction from the “star chamber action of a

103. *Id.* at 377.

104. Via the *Leisy* decision in which he had dissented (see note 101 *supra*). He noted in *Austin* that the congressional enabling acts passed consequent to that decision satisfied him; they were probably factors in turning him toward his view expressed in *Austin*. *Austin v. Tennessee*, *supra* note 102, at 387.

105. See “Two Periods” 10-12.

ministerial officer," turn to ask the courts to be "statesmen" and enlarge the powers of Congress. "Never," he replies, "let the courts attempt to change the laws or Constitution to meet what they think present conditions require. When they do this they clearly usurp powers belonging to the legislature and the people."¹⁰⁶

The Justice plays into the hands of his critics. When the states do what you like, uphold their power, he seems to say. When the Congress does what you like, uphold theirs. When it is necessary to assert new Court powers, uphold a flexible Constitution; when it is embarrassing to use Court power, support a rigid interpretation of the Constitution.

After having earlier maintained that the fourteenth amendment gives the Court the right to review state actions against "life, liberty and property," he warns the Court against using its power to enlarge the power of Congress to impair these liberties. Whose liberties? So far it sounds as though he means the Rockefellers and Carnegies, the Hills and the Morgans. All the more surprising comes the last page of the speech with its parody on Patrick Henry's cry for liberty:

Give any combination of capital liberty to take my business into its hands or to destroy that business if I refuse to surrender it. Give to any organization of labor liberty to enroll me in its membership or furnish me work at prices and places which it fixes or if I dare to act independently to denounce me as a scab and pursue me with physical violence.¹⁰⁷

It is not the legislature, after all, which receives the final lance blow, but his old enemies—corporations and unions. If compulsion must be applied, let it hit these giants. As to the individual: "In short, I believe in the liberty of the soul, subject to no restraint but the law of love, and in the liberty of the individual, limited only by the equal rights of his neighbor."¹⁰⁸

Individual rights are best protected by the individual himself; government must intervene only when it sees the small businessman, the artisan, the householder attacked by forces obviously too big for him to handle alone in fair battle. Thus the free individual lives the life of initiative, governed in his relations with his fellows only by the golden rule, and protected in this relationship by the power of the government. The public receives fair rates from the railroads, and the small investors a fair return on their investment. But the right of the majority to make itself strong by putting the railroad

106. *Id.* at 18.

107. *Id.* at 24.

108. *Ibid.*

out of business, or of the railroad to strengthen itself by taking privileges while escaping regulation is strictly denied. The elevator owner, asking no favors and injuring no neighbors, finds a friend in Brewer; the majority, attempting to use its power to extort privileges from this weak minority, is chastened. The millionaire is strengthened in his exercise of the right to freely and honestly invest; he is stopped at the point of dishonest conniving. He upholds the right of the worker to join a union and the employer to form a corporation; he stops short when a corporation attempts to receive the same inalienable rights as an individual, or a union tries to compel membership¹⁰⁹ or ruin property. He upholds the state when it attempts to protect citizens against harmful goods, or women from harm to their morals and the home; but his indignation is aroused when a state uses the pretext of controlling harmful goods to stop free commerce or coddles men who should be able to bargain on their own initiative.

If his age is to be represented as the time of failure for *laissez faire* economics, perhaps it must equally be seen as a time of failure of the rights of man. In trying desperately to defend man's qualities of initiative and honesty, moderation and justice, courage and benevolence from the deadening onslaughts of big business, big labor, and big government, men like Brewer¹¹⁰ were giving graphic demonstration of the extent to which free man was being engulfed in the entangling meshes of mass society. If they had any success, it was perhaps that of forcing men for a few more years to turn within themselves to meet these new challenges with moral stamina and a religious vigor. If they demonstrated any vision, it was in seeing that these personal qualities were being challenged to the core by the state legislature and Congress, labor and business of the 1890's. If they suffered any error, it lay in the assumption that their economic theory was still adequate to preserve the values they hoped to protect. If they failed, it was partly because they provided no alternative vision of society to substitute for that which they criticized; in attacking the capitalist society they accepted its precepts and its social heroes—wishing "precept" and "hero" existed in Calvin's Geneva or Burke's Britain. But "Christian citizenship" could not substitute for the English Constitution.

Professor McCloskey makes the following observation as to the mixing of vested rights and due process:

In the 1870's constitutional protection of property seemed inadequate
They had forbidden the taking of private property for public use without

109. Brewer supported Harlan's decision in *Adair v. United States*, 208 U.S. 161 (1908).

110. There were probably many of his generation who shared his values.

compensation; they had enjoined the states from impairing the obligation of contracts; they had guaranteed the property holder a certain vague procedural protection of laws affecting him. But with these exceptions, as the Constitution stood, the rights of the man or property were subsidiary to the higher considerations of the public interest.¹¹¹

David Josiah Brewer's part in the great upheaval which McCloskey saw to follow the 1870's consisted of the extension of protection of vested rights in two areas. He made the rule against arbitrary seizure without compensation in eminent domain apply also to state regulation of sale and manufacture under the police power. And he extended the rights to sell at a reasonable profit and bargain for wages into liberties protected by the procedure of the courts. As strongly as he felt about the active role of the Court and the individualistic principles of the Declaration of Independence, these two extensions marked the essence of his renewal of judicial activism. They are consistent with Professor Corwin's analysis of the expanding definition of vested rights and due process developing in ante-bellum state courts.¹¹² And they are the type of response which might be expected from one like Brewer with a deep concern for human values and a judicial concern to protect the free, responsible individual from attack by any combination, public or private, on his right to develop and prosper. Since the problems comprised under these two extensions were vast, it is inevitable that the decisions rendered under them should have come under strong attack. Yet, whether later perspective can render them mistaken or not, it is reasonable to conclude that they were consistent, rational, humane, and above all sincere adaptations to the social forces in America at the turn of the twentieth century.

This was an age of conservatism, and Brewer was a conservative in his age. It was also a period of ascendent capitalism. But this did not mean that capitalist values ruled. The roots of business "control" over government are seldom deep.

111. McCLOSKEY, *op. cit. supra* note 75, at 73.

112. See Corwin, *The Doctrine of Due Process of Law Before the Civil War*, in 1 *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 203-35 (1938). He notes especially the continuing acceptance of the doctrine of vested rights in all courts; the tendency of New York, Tennessee, and Massachusetts courts to broaden the definition of property; the infringement of police power in state courts by "reasonable"; the tendency of the "law of the land clause" to take on the meaning of general law, containing the notion of legislative power as inherently limited.

